

(1997) 12 KAR CK 0017
In the Karnataka High Court
Case No : M.F.A. No. 2080 of 1990

Mrs. Flora Chandrabai

APPELLANT

Vs

Mrs. Navaneetha Suganthamani and Others

RESPONDENT

Date of Decision : 12-12-1997

Acts Referred:

Limitation Act, 1963 — Section 137, 4, 5
Succession Act, 1925 — Section 273, 276

Citation : (1998) ILR (Kar) 3685

Hon'ble Judges : H. Rangavittalachar, J; Ashok Bhan, J

Bench : Division Bench

Advocate : N.S. Sanjaya Gowda, for N.S. Srinivasan, for the Appellant; B.N. Dayananda, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

H. Rangavittalachar, J.—This is an appeal against the orders passed by the District Judge, Kolar, in P & SC.No. 5/86 dated 19th September 1990 granting Probate of the will dated 23.8.1966 u/s 276 of the Indian Succession Act.

2. Briefly stated the facts are as under :

The appellant herein claims to be the daughter of on Benjamin since deceased. The respondents herein are the sisters of the appellant.

The said late Benjamin was owning several movable and immovable properties including M/s Imperial Press at Kolar Gold Fields, He died in the year 1959 leaving behind his wife Mrs. Ethel Shepherd Gnanarathinam and three daughters one of them, being the appellant herein. After the death of the said Benjamin, the appellant filed a suit for partition in O.S.No. 91/62 on the file of the District Judge, Bangalore which was later on transferred to the file of the Civil Judge K.G.F. and renumbered as O.S.No. 33/64. A preliminary decree was passed by a judgment dated 30.9.1965 ordering partition of the properties and also declaring the shares of the daughters and the wife of Benjamin. According to the

preliminary decree the appellant's share was declared at 1/6th share. So also the share of the other heirs. So far as the share of the wife of Benjamin is concerned it was declared that she has 1/3rd share in the property. On 14.2.1967 Mrs. Ethel Shepherd Gnanarathinam W/o late Benjamin died. Thereafter an application was filed to treat the parties already on record as her legal representatives. On 19.4.1967 I.A.VII was filed by respondent No. 1 to this appeal to treat her as the only legal heir of Mrs. Ethel Shepherd Gnanarathinam on the basis that the latter had executed a will bequeathing all her estate to her to the exclusion of other sisters. This I.A.VII was allowed subject to the observation that the first respondent herein can workout her claim in the proper forum at the time of working the equities if it is shown that she is entitled to the estate of the deceased. Subsequently the appellant herein filed an application to draw the final decree before the Court which has been numbered as FDP 1 of 1985 which it appears still now pending. Meanwhile the appellant herein aggrieved by the fact that her share was not enlarged on account of the death of her mother i.e., Mrs. Benjamin, filed an appeal before this Court in R.F.A.146/74. This Court by an order dated 20th August 1984 allowed the appeal in the following terms:

"Therefore, we allow this appeal, set aside the decree dated 29.6.1974 and hold that the plaintiff-appellant is entitled to an enhanced share which she is legally entitled to on the death of defendant-1 who was declared, as per the preliminary decree, to have 1/3rd share in the estate of Mr. Benjamin, we, therefore, direct that a final decree be drawn up in the above terms. No costs."

3. Subsequent to the decision of this Court in R.F.A. referred to above the first respondent herein filed an application before the Principal District Judge on 15.12.86 u/s 273 read with Section 276 of the Indian Succession Act, praying that she may be granted probate for the will executed by her mother. Since this was contested, an enquiry was conducted. Parties led evidence on this question. The learned District Judge after appreciating the evidence and the contentions raised has allowed the application and ordered:

"Probate be granted to the petitioner herein with a copy of the Will dated 23.8.1966 (Ex.P.5) attached subject to the petitioner complying with all the legal requirements including the filing of the administration bond."

In other words the learned District Judge ordered Probate be granted to the petitioner.

4. Aggrieved by the said order the third respondent Flora Chandra Bai, who is the appellant herein has filed this appeal.

5. Sri N.S. Sanjaya Gowda, learned Counsel appearing for the appellant contended that the District Judge erred in law in entertaining the application. According to him the said application was barred by limitation. In other words his contention is that limitation of three years is fixed for making an application for the grant of probate and the applicant respondent No. 1 having not filed within

three years from the date of death of Mrs. Benjamin, the Court below had no jurisdiction. On this ground the appeal has to be allowed. He however did not seriously challenge the genuineness of the will.

6. Elaborating the said contention it was submitted that there is no specific article under the Limitation Act prescribing limitation for making application for the grant of probate. Therefore in this case Article 137 of the Limitation Act, 1963, the residuary article, has to be applied. If that is applied, according to him the "right to apply" for grant of probate has to be construed to mean that the right accrues immediately on the date of the death of the testator and that is the starting point of limitation. The application for probate must be made within three years. Admittedly in this case Mrs. Benjamin died on 14.2.1967, and the application for probate being filed on 15.12.86 is far beyond the period of three years and therefore it was barred by time. He relied in support of his contention the decision of the Punjab and Haryana High Court reported in HARI NARAIN BY LRS. LALIT KUMAR SHARMA AND ORS. v. SUBHASH CHANDER AND ORS AIR 1987 P & H 122 and in the matter of Hari Narain and Others Vs. Subhash Chander and Others, .

7. Per contra Sri B.N. Dayananda, learned Counsel for the respondents contended that Article 137 does not apply to this case. He submitted that the Indian Succession Act is a self contained Code; the said Act does not prescribe limitation for making application for grant of Probate. Until the will is probated it is open to the executor or the legatee to apply for probate at any time. He also submitted Article 137 of the Limitation Act has no application to cases which are filed under other statutes other than the Code of Civil Procedure. Hence the Court below was justified in entertaining the application and prayed for dismissal of the appeal.

8. Having regard to the rival contentions taken by the parties the following point arises for consideration:

Whether a party seeking to obtain probate of a will is governed by Limitation Act and obliged to apply within any prescribed time?

9. In order to answer the point formulated above; briefly stated the relevant provisions of the Indian Succession Act, governing the grant of probate are: Section 2(h) which defines a probate, as the copy of the "will" certified under the seal of a Court with a grant of Administration to the estate of testator. A will is defined by Section 2(h). Whereunder the testator regulates succession to his estate after his death; though in part IX of the Indian Succession Act an elaborate procedure is prescribed for obtaining the probate, significantly no period is prescribed within which the application has to be filed. In the Limitation Act there is no Article specifically dealing with the period of limitation for obtaining probate. Under the situation as contended whether the Residuary Article 137 applies, providing for three years time. Article 137 reads as under:

____ Description of suit Period of Time from which
Limitation period begins to run. _____

____ 137. Any
other application Three Years When the right to apply for which no accrues.
period of limitation is provided elsewhere in this Division. _____

Though some High Courts took the view that Article 137 has application to only proceedings before a Civil Court and not to applications filed, under Special enactments but it is no longer *Res integra* inasmuch as the Supreme Court has held in the case of *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, as follows:

"The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other application as in the 1963 Limitation Act. The words "any other application" under Article 137 cannot be said on the principle of *ejusdem generis* to be applications under the CPC other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a Court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when Court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period. Article 137 will apply to any petition or application filed under any Act to a Civil Court. It is not confined to applications contemplated by or under the Code of Civil Procedure."

10. It cannot be said as contended by the Learned Counsel Sri B.N. Dayananda, that applications filed under special enactments including one field for grant of probate to the Civil Courts are not governed by Article 137 of the Limitation Act; but then whether the period of 3 years mentioned in the said Article can be held to be the limitation prescribed for filing an application for grant of probate. By reading of Article 137 a limitation of three years is provided to applications from the time "when the Right to apply" accrues; In granting probate to a will the Courts give effect to the intention or desire of the testator; on the reasoning that "that the application of probate is in the nature of application to perform a duty created by a will or for recognition as a testamentary trustee and the right to apply continues so long as the object of the trust exists" and adopting this reasoning it has been held by the Madras High Court in *GNANAMUTHU UPADESI v. VANA KOILPILLAI NADAN* ILR (1894) Mad 379 that no limitation applies for obtaining probate. The Madhya Pradesh High Court in *Smt. Shobha Kshirsagar*

Vs. Smt. Janki Kshirsagar and Another, Bombay High Court in Vasudev Daulatram Sadarangani Vs. Sajni Prem Lalwani, and the Calcutta High Court and Punjab and Haryana High Court in State of Punjab Vs. Vishwajit Singh and Others, . have also taken the view that Limitation Act, 1963 including Article 137, has no application for grant of probate. We are in respectful agreement with the reasonings of the said decisions.

11. However the appellant referred to the decision of Punjab & Haryana High Court in the case of "In the matter of estate of Gurcharan Dass Puri" reported in AIR 1987 P & H 122, and contended Article 137 has application for grant of probate. The said decision itself makes a distinction between obtaining probate and obtaining "letters of administration" and it has been held therein that Article 137 applies for obtaining letters of Administration though not for "probating a will". Besides the same Court in a later decision i.e., in STATE OF PUNJAB referred to supra has distinguished the said case and has held, Article 137 has no application for "obtaining probate".

12. The next decision relied on by the appellant in Hari Narain (deceased) by L.Rs Lalit Kumar Sharma v. Subhash Chander (supra) it is held that a person seeking cancellation of probate should file the application within three years under Article 137 of the Limitation Act. The reasoning was based on the ground that in view of the decision of Supreme court in Kerala Electricity Board's (supra) case Article 137 governs applications filed under Special enactments. Hence an application for revocation of probate is also governed by Article 137. It has also been stated therein the right to apply for "revocation of probate" stated in the Article commences from the time "probate" is granted. But this is not case of "Revocation of Probate" already granted but a case for "granting to probate". In our view the said decision has no application to the facts of this case,

13. For the reasons stated above we hold that "there is no limitation prescribed for an application seeking for "grant of a probate to a will" and Article 137 of the Limitation Act does not apply to such cases and answer the point formulated above accordingly, though in such cases delay may be taken into consideration for other purposes.

14. In so far as the other contentions raised about the genuineness of the will (though not seriously disputed), the Learned District Judge relying on the basis of the evidence of the contesting parties, has come to the conclusion that the will has been proved. Nothing is shown as to how the said finding is incorrect nor there is any thing to suggest about that the will is not genuine. We have no reason to disagree with the finding of the learned District Judge.

15. The other ground taken by the learned Counsel for the appellant that the grant of a probate by a District Judge under the Indian Succession Act by itself cannot have the effect of affecting a decree for partition already made by the Competent Court. We refrain from answering this question as it is not germane to this appeal. The said contention on this behalf is left open to be agitated at an

appropriate time in a proper proceedings.

16. For the reasons stated we find no merit in the appeal. Appeal is dismissed. Under the circumstances we make no order as to costs.