IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF DECEMBER, 2024

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PRESENT

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

AND

THE HON'BLE MR JUSTICE C M JOSHI

ORIGINAL SIDE APPEAL NO. 9 OF 2024

BETWEEN:

SRI.NANJAVUDOOTHA SWAMIJI,
AGED ABOUT 45 YEARS,
PEETHADHIPATHI OF GURUGUNDA
BRAMHESHWARA SWAMY MUTT,
PATTANAYAKANA HALLI, SIRA TALUK,
TUMKUR DISTRICT – 572 135.

...APPELLANT

(BY SRI.MANMOHAN P N, ADVOCATE)

AND:

1. SRI.S LINGANNA,
   S/O LATE SOMELINGANNA,
   AGED ABOUT 74 YEARS,
   R/AT SIDIYANNANAPALYA, PATTANAYAKANAHALLI,
   SIRA TALUK, TUMAKURU DISTRICT - 572 135.

2. SRI.S KUMARASWAMY S/O LATE SOMALINGANNA,
   AGED ABOUT 65 YEARS,
   R/AT SIDIYANNANAPALYA, PATTANAYAKANAHALLI,
   SIRA TALUK, TUMAKURU DISTRICT - 572 135.

3. JAIPRAKASH S/O LATE P L RAMACHANDRAPPA,
   AGED ABOUT 50 YEARS,
   R/AT NEAR POLICE STATION, PATTANAYAKANAHALLI,
   SIRA TALUK, TUMAKURU DISTRICT - 572 135.

4. SRI. BEERALINGAIAH K S/O KAPINAPPA,
   AGED ABOUT 82 YEARS,
   R/AT KAMAGONDANAHALLI,SIRA TALUK,
   TUMKUR DISTRICT – 572 135.

5. S SOMESHAIAH S/O LATE SOMALINGAPPA,
   AGED ABOUT 77 YEARS,
   R/AT SIDIYANNANAPALYA, PATTANAYAKANAHALLI – 572 135
   GOWDAGERE HOBLI, SIRA TALUK, TUMAKURU DISTRICT.

...RESPONDENTS

(BY SRI. D NAGARAJ., ADVOCATE FOR C/R3, R1 & R2)

THIS OSA IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, PRAYING TO A) ALLOW THIS APPEAL AND SET-ASIDE THE ORDER DATED 21.03.2024 PASSED ON I.A.NO.2/2023 IN TESTAMENTARY ORIGINAL SUIT NO.1/2023 PASSED BY THE LEARNED SINGLE JUDGE; AND CONSEQUENTLY DISMISS I.A.NO.2/2023 FILED BY THE RESPONDENTS; AND ETC.,

THIS OSA HAVING BEEN RESERVED FOR ORDER, COMING ON FOR PRONOUNCEMENT THIS DAY, **KRISHNA S. DIXIT.J.,** DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE KRISHNA S DIXIT
and
HON'BLE MR JUSTICE C M JOSHI

CAV JUDGEMENT

(PER: HON'BLE MR JUSTICE KRISHNA S DIXIT)

'Where there is a will, there is a way' said an English writer Mr.George Herbert (1593-1633) in his Book 'Jacula Prudentusm'. Going by the rough statistical data relating to testamentary disputes, what Herbert said centuries ago can be restated with pun as: **'Where there is a will, there is a way** *to court*'.

1. This Original Side Appeal calls in question the order dated 21.03.2024 made by a learned Single Judge of this court whereby, Respondents' Application in I.A.No.2/2023 having been favoured, the Testamentary Original Suit No.1/2023 filed by the appellant herein has been dismissed as '*barred by limitation*'.

2. FOUNDATIONAL FACT MATRIX OF THE CASE:

(a) Appellant is the seventh successive Peethaadhipati (Pontiff) of Gurugunda Bramheshwara Swamy Mutt, also

known as Nanjappaiah Mutt in Pattanayakanahalli of Tumkur District. It is the case of Appellant that in the Mutt tradition, the sitting Pontiff chooses a suitable person as his disciple (shishya) who can possibly become his successor-in-office, if the Pontiff executes a Will to that effect and breathes his last.

(b) Appellant instituted proceedings in Probate C.P.No.3/2017 in respect of a registered WILL dated 3.8.1989 allegedly executed by one Sri.Gurukumara Avadhoota Swamiji who happened to be the erstwhile fifth Pontiff of the Mutt, in succession. The Respondents herein came to be impleaded as the Defendants vide order dated 27.02.2020 and they having resisted the probate proceedings, the same came to be registered as Testamentary Original Suit No.1/2023. Respondent Nos.3 to 5 filed application in I.A.No.2/2023 under Order VII Rule 11(d) of Civil Procedure Code, 1908 seeking dismissal of the said proceeding on the ground that it was time barred. The learned Single Judge having favoured the same, aggrieved thereby appellant has preferred this Appeal.

3. Learned counsel appearing for the Appellant vehemently submitted that a Hindu Will which does not comprise property situate in any Presidency Towns, requires no probate; no such WILL becomes invalid by the mere run of time; right to seek probate can be exercised at any time; therefore probate proceedings cannot be resisted on the ground of delay & limitation; another reason is that they involve elements of continuing cause of action. So arguing, he sought for the invalidation of impugned order and remand of the matter for due adjudication on merits. In support of this submission, he pressed into service certain Rulings.

4. Per contra, learned counsel appearing for the contesting Respondents on Caveat, resisted the Appeal with his usual vehemence contending that Article 137 of the Schedule to The Limitation Act, 1963 is applicable to probate proceedings also; even when there is a recurring cause of action, once such cause accrues, limitation becomes applicable; such a cause accrued to the Appellant when his application in I.A.No.4 filed under Order XXII Rules 2 & 4 of Civil Procedure Code, 1908 was rejected on

14.07.1995 inasmuch as the said application was founded on subject WILL. Appellant unsuccessfully tried to secure the stead of deceased Plaintiff in O.S.No.98/1988 on the basis of the *Will* allegedly executed by the said Plaintiff. He too relied upon certain decisions in support of his contentions.

5. Having heard the learned counsel for the parties and having perused the Appeal Papers, we are inclined to grant indulgence in the matter for the following reasons:

5.1. **AS TO LIMITATION PERIOD BEING APPLICABLE TO PROBATE PROCEEDINGS ALSO**:

(a) Learned counsel for the Appellant argued that there being no legal requirement of a probate for a Hindu Will, that does not comprise property situate in Presidency Towns, the question of any limitation period becoming applicable for instituting probate proceedings, would not arise. He added that even otherwise, it is a matter of continuing cause of action and therefore, a legatee can knock at the doors of Probate Court whenever he wants to effectuate the bequest, that too if the validity of *Will* is disputed. On the contrary, learned counsel appearing for

the contesting respondents submitted that for every legal action, whether optional or otherwise, as a matter of legislative policy, limitation period is prescribed under various Articles of the Schedule to 1963 Act in species and where no specific period is prescribed, limitation of three years becomes applicable by virtue of residuary clause of the Schedule namely Article 137.

(b) The consideration above two extreme positions, taken at the Bar need not detain us for long. WILLs by their very nature are ambulatory and therefore, they can be rescinded or codicilled by their Maker at any time and any number of times too. WILLs, be they executed by persons to whom personal laws apply, be they privileged or unprivileged, do not commit legal suicide by efflux of time, *per se*. It has been well settled that neither they attract levy of stamp duty nor compulsory registration, in the State of Karnataka. It is not that all WILLs need to be compulsorily probated either. A Hindu Will, not comprising any property situate in any of the Presidency Towns, is optionally probatable vide ***CLARENCE PAIS vs. UNION***

OF INDIA[1]*.* The WILL in question admittedly does not comprise any such property and therefore, probating it is not compulsory. All this is not disputed at the Bar.

(c) WILLs do not die on their own due to mere lapse of time, as already mentioned above, although testators do, cannot be disputed. The intention of testators should remain to be fulfilled *ad infinitum,* appears to be too farfetched a proposition. Appreciably, that is not canvassed in this case. The moot question arising in this Appeal is: "*Whether probate proceedings do attract law of limitation, even if they involve continuing cause of action…?*". This question is no longer *res integra*, having already been answered by the Apex Court affirmatively vide ***SAMEER KAPOOR vs. STATE THROUGH SUB-DIVISION MAGISTRATE***[2]***.*** The Limitation Act, 1963 applies to the proceedings founded on WILLs as it does, to other proceedings, subject to all just exceptions. There being no specific Article in the Schedule to the said Act that prescribes any limitation period for instituting probate

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1 AIR 2001 SC 1151

2 (2020) 12 SCC 480

proceedings, the residuary provision i.e., Article 137 would become applicable. It provides that for any application for which no specific period of limitation is prescribed, three years would be the limitation, and this period has to be reckoned from the date when the right to apply accrues. However, this is not end of the discussion.

5.2. **AS TO WHEN THE CAUSE OF ACTION ACCRUED TO THE APPELLANT**:

(a) At the outset, we say that there is no much dispute on the essential fact matrix of the case: The testator Sri.Gurukumara Avadhoota Swamiji had filed a title suit in O.S.No.98/1988 against 3rd Respondent's father Sri.P.L.Ramachandrappa; suit was in respect of 232 acres of lands that allegedly belonged to the Mutt in question. He having passed away *pendente lite,* Appellant's LR application founded on the subject WILL came to be dismissed on 14.07.1995. Learned Munisiff while dismissing it, specifically entered a finding that the WILL was invalid. This was put in challenge by the appellant herein in CRP No.2871/1995. A learned Single Judge of this Court vide order dated 20.09.1996 dismissed the CRP,

is true. It is in this context, the fervently debated question as to when the limitation period for the probate proceeding started to run, needs to be examined. The learned Munisiff's finding as to invalidity of the WILL was liquidated by the learned Single Judge in the subject CRP by observing as under:

> *"On the other hand, whatever view has been expressed by the trial Court is neither conclusive nor would it bar any further proceeding on principles of res judicata and such a decision is only for the purpose of continuing the suit as held by this Court in 1975(1) Karnataka Law Journal, Short Notes Item No.39 (RAJAMMA vs. CHANDRASEKHARIAH – C.R.P.No.602/74). It is certainly open to the petitioner to initiate appropriate proceedings to get his rights settled… I do not think part of the order will affect the rights of the parties in any manner."*

(b) The above order of the learned Single Judge, arguably be it right or wrong, has attained finality as between the parties, no further challenge thereto having been mounted. In ***SMITH vs. EAST ELLORE RURAL DISTRICT COUNCIL***[3], Lord Redcliffe observed:

> *"An order even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it*

[3] [1956] AC 736 at 769

> *quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

Prof. Wade[4] (1918-2004) a great jurist of yester decades goes one step further and writes:

> *"…the principle must be equally true even where the 'brand' of invalidity' is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the Court… The truth of the matter is that the court will invalidate an order only if 'the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid…"*

This view came to be reiterated by the Apex Court in ***PRAHLAD RAUT vs. AIIMS***[5].

(c) The learned Single Judge has specifically recorded a finding that the observation of the learned Munisiff as to the validity of the WILL in question are *'neither conclusive nor would it bar any further proceeding on principles of res judicata… It is certainly open to the petitioner to initiate appropriate proceedings to get his right settled…'.* It hardly needs to be mentioned that the doctrine of *res judicata*

[4] Administrative Law 6th Ed. p. 352
[5] (2021) 14 SCC 472

has something to do with identity of causes of action and of parties to the proceedings, subject to all just exceptions. Added, the proceedings in O.S.No.98/1988 were not probate proceedings as would have culminated into a decree in *rem*. As a corollary of this, it can be said that an L.R. application founded on a testament had also no trappings of probate proceedings. This view coupled with the observation of the learned Single Judge would lend credence to the submission of learned counsel appearing for the Appellant that no choate cause of action accrued for instituting the probate proceeding, merely because his L.R. application in the said suit was rejected.

5.3. AS TO DISCOUNTING OF PERIOD SPENT DURING PENDENCY OF OTHER LITIGATIONS, BY VIRTUE OF SECTION 14 OF 1963 ACT:

(a) There is yet another aspect to this long drawn legal battle: As already observed above, the testator of the WILL in question had filed O.S.No.98/1988 and died *pendente lite.* Appellant's L.R. application founded on the WILL in question came to be negatived on 14.07.1995. Matter was carried in CRP No.2871/1995 which came to be disposed off on 20.09.1996 liquidating the finding as to

the invalidity of WILL recorded by the learned Munisiff. In the meanwhile, suit in O.S.No.1/1996 was filed on 3.1.1996 in which issue No.9 related to validity of the same WILL. The same reads as under:

> "*Whether the defendants prove that Sri.Kumaravadhootha Swamiji left a registered Will and under that Will Sri.Nanjavadhootha Swamiji, namely the first defendant succeeded to the peeta of the Mutt?*"

Thus, the issue as to validity of the WILL in question was kept very much alive and that it was being examined too.

(b) The above suit came to be dismissed on 28.07.2016, of course with a hefty cost of Rs.25,000/-, only on the finding on issue No.7 which related to its maintainability under section 92 of CPC, which prescribes a special procedure for a class of suits involving public charitable trusts. The issue No.7 as framed by the Court had the following text:

> "*Whether there is a religious and charitable trust in existence and the suit is maintainable under Sec.92 CPC?*"

There were as many as thirteen issues in which as already mentioned above, issue No.9 related to validity of the WILL in question. The Trial Court dismissed the said suit

vide, judgement & order dated 28.07.2016 answering this issue in the negative. What it observed at para 36 being relevant, is reproduced below:

> *"**Issue No.1 to 6, 8 to 12:** In view of findings on Issue No.7 in the negative these issues do not survive for consideration. Once plaintiffs failed to prove suit is maintainable question of considering other issues which are raised by my learned predecessor in office does not survive for consideration. Hence, I answer these issues accordingly."*

Only thereafter, the cause of action, we repeat, for applying for the grant of probate became choate; in other words, the right to apply for probate substantively accrued to the appellant only then.

(c) Let us see what followed after the dismissal of above suit: The appellant instituted Probate CP No.3/2017 on 14.02.2017, the suit having been dismissed on 28.07.2016. This proceeding came to be registered as TOS No.1/2023, on being contested by the Respondents herein who were subsequently impleaded. Appellant was entitled to have the period spent during the pendency of subject two suits i.e., O.S.No.98/1988 dismissed on 14.07.1995 & & O.S.No.1/1996 dismissed on 28.07.2016 discounted

consistent with the rule enacted in section 14 of the 1963 Act. The relevant part of this section reads as under:

> *"**14. Exclusion of time of proceeding bona fide in court without jurisdiction. —***
>
> *(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it…"*

The Apex Court having liberally construed this provision in ***SESH NATH SINGH V. BAIDYABATI SHEORAPHULI COOP. BANK LTD.,***[6] has at page 342 observed comes to the aid of Appellant:

> *"75. Section 14 of the Limitation Act is to be read as a whole. A conjoint and careful reading of sub-sections (1), (2) and (3) of Section 14 makes it clear that an applicant who has prosecuted*

[6] (2021) 7 SCC 313

> *another civil proceeding with due diligence, before a forum which is unable to entertain the same on account of defect of jurisdiction or any other cause of like nature, is entitled to exclusion of the time during which the applicant had been prosecuting such proceeding, in computing the period of limitation. The substantive provisions of sub-sections (1), (2) and (3) of Section 14 do not say that Section 14 can only be invoked on termination of the earlier proceedings, prosecuted in good faith."*

Had discount as mentioned above been given, the proceedings for the grant of probate have to be treated as having been instituted within the period of limitation prescribed in residuary Article 137 of 1963 Act.

In the above circumstances, this Appeal succeeds; the impugned judgement & order of the learned Single Judge are set aside; contesting Respondents' Application in I.A.No.2/2023 filed under Order VII Rule 11(d) of CPC, is dismissed. As a consequence, Appellant's suit in TOS No.1/2023 having been revived, matter is remanded for being tried & disposed off on merits, in accordance with law.

Costs made easy.

Sd/-
(KRISHNA S DIXIT)
JUDGE

Sd/-
(C M JOSHI)
JUDGE

Snb/cbc