Lynette Fernandes vs Gertie Mithias (D) By Lrs. on 8 November, 2017

Equivalent citations: AIR 2017 SUPREME COURT 5453, 2018 (1) SCC 271, 2018 (1) AKR 77, AIR 2018 SC (CIVIL) 433, (2017) 6 ANDHLD 127, (2017) 13 SCALE 319, (2017) 180 ALLINDCAS 37 (SC), (2018) 1 KCCR 641, (2018) 1 CAL HN 165, (2018) 2 CIVLJ 393, (2017) 4 CURCC 444, (2018) 138 REVDEC 492, (2018) 1 MAD LW 723, (2018) 2 RECCIVR 724, (2018) 1 CAL LJ 126, (2017) 125 ALL LR 913, (2018) 2 BOM CR 117

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Bench: Mohan M. Shantanagoudar, Arun Mishra

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[Non-Reportable]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2933 OF 2010

Mrs. Lynette Fernandes ..Appellant

Versus

Mrs. Gertie Mathias since Deceased
by Lrs. ..Respondents

JUDGMENT

MOHAN M. SHANTANAGOUDAR, J.

This appeal arises out of Judgment dated 30 th November, 2006, passed by High Court of Karnataka, Bangalore, in Miscellaneous First Appeal No. 2744/00 (ISA). Facts leading to this appeal are as under:-

1. Mrs. Lynette Fernandes (appellant) is one of the three daughters of Mr. Richard P. Mathias and Mrs. Gertie Mathias (original respondent). After the demise of Mrs.

Gertie Mathias, her other two children were brought on record as respondents. Mr. Richard P. Mathias died at Mangalore on 05.11.1959, leaving behind a Will executed by him on 11.08.1959 bequeathing all his assets to his wife Mrs. Gertie Mathias. Mrs. Gertie Mathias (original respondent) filed an application for grant of probate which was granted to her by the Trial Court on 09.09.1960, in O.P. No. 26/1960. As on that date, all the three children of Mrs. Gertie Mathias were minors, and the appellant attained majority on 09.09.1965. She filed a suit for partition on 06.07.1995, claiming 1/4th share of the properties referred to in the Will of the deceased Mr. Richard P. Mathias. The same is said to be still pending. The appellant herein did not initiate any action either against her mother or against her other siblings in respect of the Will and the probate in question till the year 1996. The appellant filed P & SC No. 23 of 1996 under Section 263 of Indian Succession Act, before the District Court, Bangalore, seeking revocation of probate granted to Mrs. Mathias on 09.09.1960. It means that the appellant approached the jurisdictional Court for cancellation of probate after about 36 years from the date of grant of probate. The learned District Judge dismissed the application both on merits as well as on grounds of limitation. The High Court in M.F.A. NO. 2744/00 (ISA) upheld the findings of the District Judge, and consequentially dismissed the appeal filed by the appellant herein. The judgments of the District Court and the High Court are called in question in this appeal.

2. It would be relevant to note that the counsel for the appellant mainly contended that the citation ought to have been issued in the District of Chikmagalur where the immovable property of the testator was situated; the application for grant of probate did not disclose the names of the appellant and her other two siblings; Mrs. Mathias ought to have arrayed all the three children as respondents in the application for grant of probate. The appellant also argued that the grant of probate in favour of Mrs. Mathias i.e. mother of the appellant was as a result of fraud played by her on the Court.

3. Per contra, the advocate for the respondent argued in support of the Judgment of the Trial Court as well as the High Court. He contended that the Courts have rightly dismissed the application filed by the appellant for revocation of probate, inasmuch as such prayer was made after a long period of 36 years; neither the allegation of fraud nor the evidence in that regard was let in by the appellant; since Mrs. Mathias was the sole beneficiary under the Will, there is no reason for her to make her minor children as party respondents in the application praying for grant of probate; and as the parties were permanently residing at Mangalore, no prejudice whatsoever was caused to the parties, including the appellant for not issuing citation at Chikmagalur, and even if citation were to be issued at Chikmagalur the appellant would not have been benefitted, as she was residing at Mangalore, along with her mother and other siblings since childhood.

4. Before proceeding further, it would be relevant to note that neither of the parties led oral evidence before the District Judge, which means that when the application was being heard before the District Judge for seeking revocation of probate under Section 263 of Indian Succession Act, the appellant did not choose to lead any evidence in support of her case.

5. It is necessary to note the provisions of Section 263 of Indian Succession Act, which reads thus:-

> "263. Revocation or annulment for just cause. —The grant of probate or letters of administration may be revoked or annulled for just cause.
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> Explanation. —Just cause shall be deemed to exist where—
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> (a) the proceedings to obtain the grant were defective in substance; or
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> (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
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> (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
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> (d) the grant has become useless and inoperative through circumstances; or
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> (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect." The aforementioned provision allows revocation of grant of probate of the Will on the existence of 'just cause'. The appellant seeks to bring her case within explanations (a) &
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> (b) to this Section, as she claims that the proceedings were defective and that the grant was fraudulently obtained.

6. With respect to the first ground, we are unable to accept the contention that not taking out a citation at Chikmagalur is a substantial defect for the grant of probate. It is a finding of fact by the Trial Court and the High Court that the appellant and her entire family lived in the 'Highlands' house at Mangalore. As a matter of fact, the appellant was a minor and lived with her mother when Mrs. Mathias applied for probate. The appellant has not adduced any evidence to prove that the Will was not genuine. She has not initiated any proceedings to question the validity of the Will. The Will executed by Mr. Richard P. Mathias in favour of Mrs. Gertie Mathias has remained unquestioned. Section 263 of the Indian Succession Act, makes it very clear as to what 'just cause' means and includes. As mentioned supra, the grant of probate may be revoked or annulled for 'just cause' only. The explanation to this Section further clarifies that 'just cause' shall be deemed to exist where the proceedings to obtain the grant were defective in substance. In our opinion, a mere non-issuance of citation at Chikmagalur where the property is situated does not amount to rendering the proceedings defective in substance under the facts and circumstances of this case. It may be procedural irregularity in this case inasmuch as though the property existed at Chikmagalur, all the parties including the owner of the property resided at Mangalore. Mr. Richard P. Mathias left behind his Will at Mangalore. Mr. Richard P. Mathias, who bequeathed the property in favour of his

wife, also lived in Mangalore till his death. The beneficiary under the Will, namely, Mrs. Gertie Mathias also lived in Mangalore along with her husband and children, including the appellant. It is also not in dispute that the appellant lived in Mangalore till the initiation of these proceedings. Even if it is assumed that the citation had been issued at Chikmagalur, the appellant would not have got any benefit out of the same. The appellant wanted the citation to be issued at Chikmagalur on the assumption that she would have had the knowledge of the Will and the proceedings. As mentioned supra, since the appellant was residing at Mangalore, she would not have been benefitted, had the citation been issued at Chikmagalur. Section 263 of the Indian Succession Act vests a judicial discretion in the Court to revoke or annul a grant for 'just cause'. Defective in substance must mean that defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. The very fact that the appellant kept quiet for 36 long years would clearly reveal that she was not interested in filing a caveat or in opposing grant of probate. In this regard, it would be relevant to note the observations by this Court, in the case of Anil Behari Ghoshe v. Smt. Latika Bala Dassi & Others, AIR 1955 SC 566, which reads thus:-

> "It was further argued on behalf of the appellant that the appeal should be allowed and the grant revoked on the simple ground, apart from any other considerations, that there had been no citation issued to Girish. In our opinion, this proposition also is, much too widely stated. Section 263 of the Act vests a judicial discretion in the court to revoke or annul a grant for just cause. The explanation has indicated the circumstances in which the court can come to the conclusion that "just cause" had been made out. In this connection the appellant relied upon clause (a) quoted above which requires that the proceedings resulting in the grant sought to be revoked should have been "defective in substance". We are not inclined to hold that they were "defective in substance". "Defective in substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. If there were any suggestions in the present proceedings or any circumstances were pointed out to show that if Girish had been cited he would have been able to enter a caveat, the absence of citation would have rendered those proceedings "defective in substance". It may be that Girish having been found to have been the next reversioner to the testator's estate in case of intestacy and on the assumption that Charu had murdered the testator, Girish might have been entitled to a revocation of the grant if he (1) 10 C.L.J. 263 at p. 273. (2) I.L.R. 33 Cal. 1001, had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him. The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. But in the present case we are not satisfied in all the circumstances of the case that just cause within the meaning of section 263 had been made out. We cannot ignore the facts that about 27 years had elapsed after the grant of probate in 1921, that Girish in spite of the knowledge of the grant at the latest in

> 1933 did not take any steps in his lifetime to have the grant revoked, that there was no suggestion that the will was a forgery or was otherwise invalid and that the will was a registered one and had been executed eight years before the testator's unnatural death. Hence the omission of citations to Girish which ordinarily may have been sufficient for a revocation of the grant was not in the special circumstances of this case sufficient to justify the court to revoke the grant." Moreover, as mentioned supra, Mrs. Gertie Mathias was the only beneficiary under the Will, and the Will remained unquestioned till the filing of the application seeking revocation for grant of probate. There is nothing on record to show that the grant of probate would not have been made, had the children of Mr, Richard P. Mathias been arrayed.

Moreover, the other two children of Mrs. Mathias have not questioned the grant of probate. On the other hand, they are opposing the appellant throughout.

7. The appellant relied upon the judgment in the case of Mt. Sheopati Kuer v. Ramakant Dikshit and Ors., AIR 1947 Patna 434, where it was held that any interested party, including the minor daughter of the person seeking revocation of the probate, ought to be served with a citation. However, the appellant has omitted to note the following paragraph in the very judgment which reads thus:-

> "9. Now, comes the main question whether in the circumstances mentioned above, there is just cause for revoking the grant, It has been very strenuously contended on behalf of the appellant that absence of citation on her at once brings her case within illustration (ii) of the section and it must be held that the proceedings to obtain the grant were defective in substance, once that is held, the grant must be revoked. Learned Counsel for the appellant has placed very great reliance on the decision of their Lordships of the Judicial Committee in RamanandiKuer v. Mt. KalawatiKuer A.I.R. 1928 P.C. 2 and also on HaimabutiMitra v. Kunja Mohan Das AIR1931Cal713. I shall presently consider these decisions in detail. On behalf of the respondents, it has been contended with equal vehemence that the mother was the natural guardian of the appellant at the time; she appeared in the case and contested the grant right up to the High Court; there is nothing in the record to show that she acted injuriously to the appellant or that her interest was adverse to that of the minor; therefore, she effectively represented the appellant in the probate proceedings, and it cannot be said that the defect arising out of the absence of citation was a defect of substance, which alone can be a ground for revocation. Apart from authority, which I shall presently discuss and which also (in my opinion) is in favour of the view I am about to express, I fail to see how a proceeding can be said to be defective in substance, when the natural guardian of the minor has appeared and has contested the grant right up to the High Court. The position, no doubt, will be different if the natural guardian is under the influence of the propounder of the will or puts up a nominal contest or does not appear at all or her interest is adverse to that of the minor. In those and other like circumstances, the absence of citation on a person, who ought to have been cited, will no doubt be a defect of substance which shall be deemed to be a just cause as is mentioned in the explanation to Section

> 268. In a case, however, where the person, who could under the law appear on behalf of the minor, did appear and contest the grant as hard as she could, right "up to this Court, it cannot be said that the proceedings were defective in substance, and the grant should be revoked."

8. The appellant also relied upon in the case of Dwijendra Nath Sarma Purkayastha v. Golok Nath Sarma Purkayastha, AIR 1915 Calcutta 393, wherein the notice in probate proceedings was improperly served on the minor. In the said matter, the mother of the minor was also a minor and in that context the Court concluded that the service was improper and hence grant of probate was bad in law. In the case of Walter Rebells v. Maria Rebells, 2 CWN 100 and Haimati Bati Mitra v. Kunja Mohan Das, 35 CWN 387, the Courts had held that the minors should be represented by guardians when their interests are at stake. In both of these matters, minors were named as beneficiaries in this Will and hence their interest was at stake. Consequently service on them was essential. In the present matter, as mentioned supra, no benefit accrued from the Will of Mr. Mathias in favour of the appellant. The appellant also sought to rely on the case of Sachindra Narain Sah v. Hironmoyee Dasi, 24 CWN 538. The aforementioned case does not help the appellant as it did not deal with the necessity of appointing a guardian while serving notice, but instead dealt with the consent of the guardian so appointed.

9. The appellant further contended that the probate was granted to Mrs. Gertie Mathias in 'common form' and not in 'solemn form' and thus, it is open to challenge such a grant of probate. Such argument may not arise in this matter. In England, common form of grant of probate is a matter of right in the absence of all other interested parties, but there is no such right for any applicant who seeks a grant of probate in India. A party seeking the revocation of grant of probate cannot later resort to English law and contend as mentioned supra. The Calcutta High Court in Southern Bank Ltd. v. Kesardeo Ganeriwalla, AIR 1958 Cal 377 observed that there is no system in India like the English common form procedure, as the system of grant of probate in India does not contain 'the reason which fortifies the existence of the English rule', namely that in England there is no judicial determination of the right to probate. In India, judicial determination is a matter of course. Thus, we agree that there cannot be a common form of probate in India. Be that as it may, since the evidence of Mrs. Mathias was recorded at the time of grant of probate by the competent Court of law, it is clear that the probate was granted in favour of Mrs. Mathias after publishing Citation at Mangalore and after due application of mind by the Court. Hence it was solemn form only. Since the provisions of Section 263 of the Indian Succession Act state that a probate can be revoked on grounds of just cause, it was open for the appellant to approach the Court of law by filing an application under Section 263 of the Indian Succession Act, seeking revocation. As the appellant has approached the Court of law, and her application is being dealt with by a rigorous process of adjudication upto this Court, there is no question of common form being an obstacle to her ability to challenge the probate. The question raised by the appellant on the distinction between common form and solemn form is academic.

10. Coming to the second ground for just cause, re-allegation that the grant of probate was obtained by the appellant in fraudulent manner, as mentioned supra, the appellant has not come forward to adduce any evidence to prove the so called allegation of fraud. The signature of Mr. Richard P.

Mathias on the Will has not been challenged. The Trial Court as well as the High Court has recorded the finding that the genuineness of the Will was not challenged by the appellant. Moreover, the particulars of fraud are neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient. Merely because the appellant has made bald allegations in the revocation application that the Will executed by the deceased is void because the same has been brought out by Mrs. Mathias and the same is constituted by fraud and undue influence, it will not absolve her from providing specifically the particulars of fraud and undue influence. Mere bald pleading will not help her in the absence of proof.

In the absence of any evidence on record showing prejudice because of non issuance of citation at Chikmagalur, and in the absence of any evidence - much less cogent evidence - to prove fraud and undue influence, we conclude that the Trial Court as well as the High Court is justified in concluding that there is no just cause for revocation of grant of probate under Section 263 of the Indian Succession Act.

11. To crown all the aforementioned, the appellant's application for revocation of grant of probate was highly belated. The District Court as well as the High Court is correct in holding that the appellant's application for revocation of grant of probate is hopelessly barred by limitation. As there is no provision under the Limitation Act specifying the period of limitation for an application seeking revocation of grant of probate, Article 137 of Limitation Act will apply to the case in hand. Article 137 reads thus:-

Article	Description of application	Period of Limitation	Time from which period begins to run
137.	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues

This Court in Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, AIR 1997 SC 282 has held that any application under any Act, including a Writ Petition under any Special Act will fall under within Article 137 of the Limitation Act and have a limitation period of three years.

"22. The changed definition of the words "applicant" and "application" contained in Section 2(a) and 2(b) of the 1963 Limitation Act indicates the object of the Limitation Act to include petitions, original or otherwise, under special laws. The interpretation which was given to Article 181 of the 1908 Limitation Act on the principle of ejusdem generis is not applicable with regard to Article 137 of the 1963 Limitation Act. Article 137 stands in isolation from all other Articles in Part I of the third division. This Court in Nityanada Joshi's case (supra) has rightly thrown doubt on the two Judge Bench decision of this Court in Athani Municipal Council case (supra) where this Court construed Article 137 to be referable to applications under the Civil Procedure Code. Article 137 includes petitions within the word "applications." These petitions and applications can be under any special Act as in the present case.

23. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two Judge Bench of this Court in Athani Municipal Council case (supra) and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the CPC. The petition in the present case was to the District Judge as a court.

The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act." The aforementioned dictum is reiterated in the case of Krishna Kumar Sharma v. Rajesh Kumar Sharma, (2009) 11 SCC 537. The Indian Succession Act is a special law and the ratio of the above judgment is squarely applicable to the present case.

12. However, the appellant relied upon the judgment B. Manjunath Prabhu & Others v. C. G. Srinivas & Others, AIR 2005 Kant 136, to argue that Article 137 does not apply to application for grant of probate and sought to apply it to the present case of application for revocation of grant. The High Court of Karnataka while passing the aforementioned judgment relied upon the judgment of Madras High Court in the case of S. Krishnaswamy v. E. Devarajan, AIR 1991 Mad

214. In these judgments, the High Courts have observed that in the application filed for grant of probate or Letters of Administration, no right is asserted or claimed by the appellant. The applicant only seeks recognition of the Court to perform a duty. By the proceedings filed for grant of probate or Letters of Administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast a duty with regard to the administration of his estate, and the applicant for probate only seeks the permission of the Court to perform that duty. The duty is only moral and not legal. There is no law which compels the applicant to file the proceedings for probate or letters of administration. Based on these observations, the Courts have ruled that it would be very difficult to hold that the proceedings for grant of probate come within the meaning of an application under Article 137 of the Limitation Act, 1963. The Judgment of the Madras High Court, mentioned supra, is considered by this Court in Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, AIR 1997 SC 282, cited supra. In our considered opinion, in view of the judgments of this Court in the case of both Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, AIR 1997 SC 282 and Kunvarjeet Singh Khandpur v. Kirandeep Kaur, (2008) 8 SCC 463, the judgments of the High Court's cannot be pressed by the appellant.

13. One must keep in mind that the grant of probate by a Competent Court operates as a judgment in rem and once the probate to the Will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate. In this matter, as mentioned supra, the appellant was a minor at the time of grant of probate. She attained majority on 09.09.1965. She got married on 27.10.1965. In our considered opinion, three years limitation as prescribed under Article 137 runs from the date of the appellant attaining the age of majority i.e. three years from 09.09.1965. The appellant did not choose to initiate any proceedings till the year 25.01.1996 i.e., a good 31 years after she attained majority. No explanation worthy of acceptance has been offered by

the appellant to show as to why she did not approach the Court of law within the period of limitation. At the cost of repetition, we observe that the appellant failed to produce any evidence to prove that the Will was a result of fraud or undue influence. The same Will has remained un-challenged until the date of filing of application for revocation. No acceptable explanation is offered for such a huge delay of 31 years in approaching the Court for cancellation or revocation of grant of probate.

14. Under these circumstances, the District Court as well as the High Court is justified in dismissing the application of the appellant for revocation of grant of probate. The judgments of the District Court and the High Court are hereby confirmed. Accordingly, this appeal stands dismissed.

.....J. [Arun Mishra] .....J. [Mohan M. Shantanagoudar]
NEW DELHI;

November 08, 2017.