

(2008) 08 CAL CK 0070
In the Calcutta High Court
Case No : F.M.A. No. 1188 of 2007

Asansol Durgapur Development Authority and Another APPELLANT
Vs
Tapas Banerjee and Others RESPONDENT

Date of Decision : 19-08-2008

Acts Referred:

Succession Act, 1925 — Section 2
West Bengal Government Land (Regulation of Transfer) Act, 1993 — Section 10, 13(1), 13(3A), 2, 2(1)

Citation : (2009) 1 CALLT 59 : (2008) 4 CHN 297 : (2009) 1 ILR (Cal) 451

Hon'ble Judges : Surinder Singh Nijjar, C.J; Pinaki Chandra Ghosh, J

Bench : Division Bench

Advocate : S.N. Mitra, Raja Basu Chowdhury and Susanta Bose, for the Appellant; Abhijit Basu, Subhrajit Basu and Sumiti Sengupta, for the Respondent

Judgement

Pinaki Chandra Ghosh, J.—This appeal is directed against an order dated 14th February, 2006 passed by the Hon'ble First Court whereby His Lordship was pleased to allow the writ petition and came to the conclusion that the expression "Transfer" used in the West Bengal Government Land (Regulation of Transfer) Act, 1993 (hereinafter referred to as the "said Act") read with the Clause contained in the Deed of Lease is not intended to be used in the wider connotation so as to include a testamentary succession. His Lordship further held that a testamentary succession does not take effect immediately and is not an immediate transfer and the beneficiary under the Will does not get any right during the lifetime of the testator. Accordingly, His Lordship came to the conclusion that Section 10 would apply in case where a person intends to transfer the land for pecuniary or other compelling reasons. A bequeath is not made under compelling circumstances. Therefore, on the said facts His Lordship held that the action on the part of the authorities is illegal and an impugned notice dated 20th September, 2005 was set aside.

2. The facts revealed that by a deed of lease in the early part of year 1982 the appellant authority introduced a Housing Scheme and under the said Housing

Scheme lands were leased out for 999 years. The uncle of the writ petitioners, Subhas Chandra Banerjee, since deceased, applied for allotment of 5 cottahs under the said Housing Scheme on 4th October, 1982. In pursuance of the said application dated 4th October, 1982, the authority, respondent No. 1, appellant herein allotted a plot of 5 cottahs in his favour after due payment of entire land premium amount to Rs. 27,500/-.

3. The authorities executed a Deed of Lease dated 11th of July, 1986 in favour of one Subhas Chandra Banerjee and leased out a piece of land being Plot No. A/7/ABW under the said Scheme at City Centre, Durgapur.

4. Subhas Chandra Banerjee subsequently died on 25th June, 1992 leaving a registered Will dated 18th January, 1989 whereby the plot along with the structures thereon was bequeathed in favour of the writ petitioners equally and jointly. The probate of the said Will was granted in Probate Case No. 166 of 1993 by an order dated 22nd of March, 2000 by the Learned District Delegate at Durgapur.

5. After such probate the writ petitioners requested the authorities to mutate the property in favour of the writ petitioners. The authorities by a letter dated 7th September, 2000 informed the writ petitioners that the executors of the Will need to execute a deed of transfer of the plot in favour of the writ petitioners. According to the writ petitioners, a bequest made under a Will is not a "transfer". Therefore, the said authorities are bound to mutate the name in favour of the writ petitioners. Subsequently, the writ petitioners were asked by the respondent authorities to deposit a sum of Rs. 1,82,500/- as difference of land premium as on that date along with a sum of Rs. 5,000/- as transfer fee so far the mutation effected by a registered deed.

6. The writ petitioners raised an objection in respect of the said letter on the ground that a bequest made under a Will is not a "transfer" as envisaged neither under the Non-company's Housing Scheme nor under the Deed of Lease and further it also cannot attract the provisions of the Transfer of Property Act, 1882.

7. It is also the case of the writ petitioners that under Clause VII of the said Deed of Lease, there is no bar to transfer the said plot. The said Clause is reproduced hereunder:

vii) The leasehold interest of the lessee can be assigned, mortgaged, or otherwise transferred with prior consent of the lessor, i.e., Asansol Durgapur Development Authority.

8. It further appears from the Clause XII of the said Deed of Lease that the heirs shall have the right in respect of the said plot. The said Clause is reproduced hereunder:

xii) Should the lessee die after having made a bequest of the leasehold premises and building to be erected thereof in favour of the then one person or dies intestate leaving more than one heir then in such case the persons to whom the

leasehold premises with the buildings thereon be so bequested or the heirs of the deceased lessee as the case may be shall hold the said property jointly without having any right to have partition of the same by metes and bounds or they shall nominate one person amongst their number in whom the same shall vest.

9. Therefore, it was contended before the Hon'ble First Court on behalf of the writ petitioners that the leasehold premises can be transferred to the heirs of the deceased lessee who shall hold the said property jointly without having any right to have partition of the same by metes and bounds or it can be transferred in favour of only one person to be nominated by the legatees.

10. Mr. Surajit Nath Mitra, learned Counsel appearing on behalf of the appellant authorities contended that the West Bengal Government Land (Regulation of Transfer) Act came into force in the year 1993. Admittedly, the probate of the Will was granted in the year 2000. By that time the said 1993 Act came into operation.

11. He drew our attention to Section 2(1) and Section 2(m) of the said Act which are set out hereunder:

2(1). "relation" means,-

(A) in the case of an individual or family,-

(a) any of the two persons who are said to be related to each other so as one is the father, mother, brother or sister of the other, or

(b) any of the two persons who are said to be related to each other by marriage, such as husband and wife, but does not include-

(i) any of the two persons who are said to be related to each other by half blood when they are descended from a common ancestor but by different wives, or

(ii) any of the two persons who are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands, or

(iii) any of the two persons who are said to be related to each other so as one is the stepfather or stepmother of the other;

(B) in the case of firm, company or association or body of individuals, whether incorporated or not, any other body corporate under any law for the time being in force or registered or established under any law for the time being in force and compatible with such firm, company or association or body of individuals.

Explanation.- In this clause, "ancestor" includes the father and "ancestress" the mother.

2(m). "transfer of Government land" includes the transfer of any right, title, interest or possession in such land, either in whole or in part, and also includes

the transfer to a tenant or licensee of the right of enjoyment of such land or the transfer of management of such land by an instrument creating a power-of-attorney within the meaning of the Powers-of-Attorney Act, 1882, or by any other instrument having effect by virtue of any law other than this Act.

Explanation.- "Tenant" shall have the same meaning as in the West Bengal Premises Tenancy Act, 1956.

12. Mr. Mitra further drew out attention to Sections 6, 7 and 10 of the said Act which are set out hereunder:

6. Bar to transfer of Government land,- (1) Save as otherwise provided in this Act, no transfer of Government land held on lease by any lessee shall be made in favour of any person, not being the State Government or a Government undertaking.

(2) Any transfer of Government land made by any lessee shall be subject to the provisions of this Act.

7. Transfer of Government land to relation.- (1) Notwithstanding anything contained in this Act, lessee may, for the purpose of transfer of Government land held by him on lease to his relation, make an application to the competent authority in such manner as may be prescribed.

(2) The competent authority shall, on receipt of the application under Sub-section (1), cause such enquiry as it thinks fit and shall, after being satisfied that the transfer of such Government land is intended to be made by the lessee in favour of his relation eligible for allotment of such Government land under any scheme of allotment by the State Government land for the time being in force, grant permission for such transfer on such condition and in such form as may be prescribed.

10. Disposal of Government land by lessee.- (1) Notwithstanding anything contained in this Act, a lessee, who intends to dispose of any Government land held by him on lease for pecuniary or other compelling reasons but who is unable to dispose of such Government land in favour of his relation, may make an application to the competent authority for permission for disposal of such Government land in favour of any person named in the application, not" being a relation, in such manner as may be prescribed. A copy of every such application shall be sent by the lessee to the Secretary to the Government of West Bengal, Urban Development Department.

(2) On receipt of the application under Sub-section (1), the competent authority may, if it is satisfied after such enquiry as it thinks fit that the reasons stated by the lessee for the disposal of such Government land are cogent and that the person named in the application is eligible for allotment of such Government land under any scheme of allotment by the State Government of such Government land for the time being in force, and if the State Government does not give any notice to the competent authority within a period of sixty days from the date of

the application under Sub-section (1) of its intention to exercise the right of pre-emption within a period of one hundred and twenty days from the date of the notice, grant permission for the disposal of such Government land in favour of the person named in the application under Sub-section (1) on such condition and in such form as may be prescribed:

Provided that if the State Government exercises the right of pre-emption within the period of one hundred and twenty days as aforesaid,-

(a) the building, if any, constructed by the lessee on such Government land shall be taken over by the State Government at such valuation as may be made by the competent authority on the basis of the cost of construction of such building less depreciation at the rate in vogue or at the market value of such building, whichever is less, and

(b) the lease of Government land shall determine upon payment to the lessee the value of such Government land which shall be the amount of salami of premium paid by him to the State Government in consideration of the price thereof and an interest at the admissible to the deposit in the savings bank account current at any nationalised bank:

Provided further that in the case of any dispute between the parties in respect of the valuation of the building, such dispute shall be decided by the competent authority and the decision of the competent authority and the decision of the competent authority shall be final and binding on both the parties.

13. Mr. Mitra further contended that Section 2(1) would show even a Will cannot be given effect to if the bequeath is made to some other persons who do not come within the meaning of "relation" stated in Section 2(1)(A) of the said Act.

14. He also drew our attention to a decision reported in Sri Sangappa Kalyanappa Bangi (D) Through Lrs. Vs. Land Tribunal, Jamkhandi and Others, , where the Hon"ble Supreme Court held as follows:

5. This case gives rise to a difficult and doubtful question, whether a devise under a Will would amount to an assignment of interest in the lands and, therefore, would be invalid under the provisions of Section 21 of the Land Reforms Act. What is prohibited u/s 21 of the Act is that there cannot be any sub-division or sub-letting of the land held by a tenant or assignment of any interest thereunder. Exceptions thereto are when the tenant dies, the surviving members of the joint family and if he is not a member of the joint family, his heirs shall be entitled to partition and sub-divide the land leased subject to certain conditions. Section 24 of the Act declares that when a tenant dies, the landlord is deemed to continue the tenancy to the heirs of such tenant on the same terms and conditions on which the tenant was holding at the time of his death. We have to read Section 21 with Section 24 to understand the full purport of the provisions. Section 24 is enacted only for the purpose of making it clear that the tenancy continues notwithstanding the death of the tenant and such tenancy is held by

the heirs of such tenant on the same terms and conditions on which he had held prior to his death. The heirs who can take the property are those who are referable to in Section 21. If he is a member of the joint family, then the surviving members of the joint family and if he is not such a member of a joint family, his heirs would be entitled to partition. Again, as to who his heirs are will have to be determined not with reference to the Act, but with reference to the personal law on the matter. The assignment of any interest in the tenanted land will not be valid. A devise or a bequest under a Will cannot be stated to fall outside the scope of the said provisions inasmuch as such assignment disposes of or deals with the lease. When there is a disposition of rights under a Will, though it operates posthumously is nevertheless a recognition of the right of the legatee thereunder as to his rights of the tenanted land. In that event, there is an assignment of the tenanted land, but that right will come into effect after the death of the testator. Therefore, though it can be said in general terms that the devise simpliciter will not amount to an assignment, in a special case of this nature, interpretation will have to be otherwise.

6. If we bear in mind the purpose behind Section 21, it becomes clear that the object of the law is not to allow strangers to the family of the tenant to come upon the land. The tenanted land is not allowed to be sub-let, i.e. to pass to the hands of a stranger nor any kind of assignment taking place in respect of the lease held. If the tenant could assign his interest, strangers can come upon the land, and therefore, the expression "assignment" will have to be given such meaning as to promote the object of the enactment. Therefore, the deceased tenant can assign his rights only to the heirs noticed in the provision and such heirs could only be the spouse or any descendants or one who is related to the deceased tenant by legitimate kinship: We must take into consideration that when it is possible for the tenant to pass the property to those who may not necessarily be the heirs under the ordinary law and who become heirs only by reason of a bequest under a Will in which event, he would be a stranger to the family and imported on the land thus to the detriment of the landlord. In that event, it must be taken that a devise under a Will will also amount to an assignment and, therefore, be not valid for the purpose of Section 21 of the Act. If Section 24 is read along with Section 21, it would only mean that the land can pass by succession to the heirs-of a deceased tenant, but subject to the conditions prescribed in Section 21 of the Act. Therefore, we are of the view that the broad statement made by the High Court in the two decisions in Shivanna and Dhareppa v. State of Karnataka would not promote the object and purpose of the law. Therefore, the better view appears to us is as stated by the High Court in Timmakka Kom Venkanna Naik v. Land Tribunal.

7. However, Shri Kulkarni drew our attention to a decision of this Court in Angurbala Mullick v. Debabrata Mullick to contend that an heir need not necessarily be a natural descendant or one who is related by legitimate kinship, but others also and therefore if any interest in a property is devised to them, the same would not amount to assignment barred u/s 21 of the Act. It is no doubt

true that the meaning attributed to an heir could be as suggested by the learned Counsel for the appellants so as to include the descendant and other persons related by legitimate kinship or otherwise who may be covered by a Will, but the true question to be decided in this case is if a devise of that nature is hit by Section of the Act or not. The object and purpose of Section 21 being to confine the rights of tenancy only to those known under law as heirs and therefore, assignment to strangers is barred. Thus it can be seen that a broad definition of an heir would not be of much help. Hence, the learned Counsel for the appellant cannot derive any assistance from the decision.

15. He further drew our attention to another decision reported in *Indian Oil Corporation Vs. Himangshu Kumar Ghosh*, where the Hon'ble Division Bench of this High Court held as follows:

...We, therefore, feel inclined to agree with the learned Additional District Judge that the term "transfer" in Sub-section (3A) was not intended to mean and does not mean transfer in its wider connotation. It means a transfer inter vivos between an existing landlord and a transfer to use his requirement which is not in existence so far as the existing landlord is concerned for obtaining a decree of eviction within the sanction of Section 13(1) of the said Act. A learned Single Judge of this Court in the case of *Gora Chand Dey Vs. Chhaya Bagchi*, took the view that partition is not a transfer within the meaning of Sub-section (3A) of the said Act. The view we take is well supported by an earlier decision of this Court vide 85 CWN 635. We are, therefore, of the opinion that the term "transfer" in Sub-section (3A), does not mean and include testamentary succession under a will as in the present case so that the suit as instituted cannot be said to be barred on the date of its institution under the provision of Sub-section (3A) of Section 13 of the said Act....

16. He further drew our attention in the decision reported in 1999(1) CLT 49, *Ruby General Hospital Ltd. v. Chandmaku Construction Private Ltd.*, where the Court held as follows:

9. The words "living person" as figured in the said definition excludes disposition by Will, inasmuch as, a Will operates only on the death of the testator. I find support on this point from the Full Bench decision of the Madras High Court in the case of *M. Vasudeva Muthu Shastry Vs. M. Vittal Shastry and Others*, , wherein it has been held at page 468 of the judgment that the transfer of property applies only to alienations inter vivos and has no application regarding disposal of property by Will. The reason is, that transfer is an alienation inter vivos but a Will on the other hand, is not a form of the transfer and the Deed of Transfer operates as instanti, i.e. from the date of its execution; a Will comes into operation on the death of the testator. Reference may also be made to the definition of "Will" as given Clause (h) of Section 2 of the Indian Succession Act, 1925 which is quoted below:

(h) "Will" means the legal declaration of the intention of a testator with respect

to his property which he desires to be earned into effect after his death.

10. Therefore it is quite clear that "Will" does not come within the purview of "transfer" as it takes effect only with the death of the testator. Reference may be made to the decision in the case of AIR 1944 65 (Oudh) . The Full Bench decision of the Jammu & Kashmir Higher Court in the case of Lola Devi Dass v. Panna Lal AIR 1959 J & K 62, also held on the same line relying upon the above two reported decisions. In paragraph 16 of the said Judgment, it has been observed, inter alia, that disposal of immovable property by will would not amount to a transfer inasmuch as, the property does not pass on to the donee at the time the Will is executed. It is merely an intention expressed by the testator with respect to his property that after his death it should devolve on the donee.

17. He also submitted that the writ petitioners did not challenge the said West Bengal Act of 1993 in the writ petition. According to him, the Will was probated subsequently after the Act came into operation and furthermore, in a similar case the Hon''ble Supreme Court held that the object of the law is not to allow strangers to the family of the tenant to come upon the land (See: Sangappa Kalyanappa Bangi v. Land Tribunal, Jamkhandi and Ors.). Therefore, the transfer through the Will in respect of the said land also cannot be valid. Hence, he submitted that the order so passed by the Hon''ble First Court should be set aside.

18. The learned Counsel appearing on behalf of the respondent-writ petitioners submitted that the right in favour of the said lessee accrued before the Act came into operation and such right, according to the respondent-writ petitioners, cannot be taken away by virtue of the said Act of 1993 and he relied upon a decision reported in Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, ., where it was held that the accrued rights of such persons by making amendment of the rules with retrospective effect by adding provision cannot be taken away.

19. He also relied on a decision reported in Zile Singh Vs. State of Haryana and Others, where the Court held that there is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. In the instant case, Learned Counsel appearing on behalf of the writ petitioners contended that under the Deed of Lease the right was conferred on the deceased and the property was handed over under the said Deed of Lease on 11th of July, 1986. It was also contended, that at that point of time the said 1993 Act has not come into operation.

20. Therefore, the right of the writ petitioners to dispose of the said property in question through Will was made clear in terms of the Clauses of the said Deed of Lease. It is the contention of the learned Counsel appearing on behalf of the writ petitioners that such right subsequently, after the enactment of the said 1993 Act, cannot be taken away by the appellants and he relied upon the decision of

Zile Singh (*supra*) on the ground that the said Act is applicable prospectively and cannot have any right to be applied in any manner retrospectively to the rights which were subsisting at that point of time when the Deed of Lease was executed in favour of the deceased.

21. In support of such contention he also relied upon a decision reported in *State of Madhya Pradesh and others Vs. Rameshwar Rathod*, where the Court held that Section 4 of the Amendment Act, 1974 is only prospective and not retrospective. Not only that, there are no specific words to indicate the provisions of retrospective effect.

22. After considering the facts and circumstances of this case and after hearing the learned Counsel appearing for the parties, it appears to us that the writ petitioners-respondent herein did not challenge the Act of 1993 in the writ petition. Therefore, this Court has no jurisdiction to decide the question whether the said Act is a valid piece of legislation or not. Therefore, the writ petitioner cannot challenge the action of the authorities without having declared the said law as *ultra vires* which has been enacted and given effect to in the year 1993.

23. In our opinion, no order can be passed in favour of the writ petitioners. In our considered opinion, the said point has been escaped from the mind of His Lordship while His Lordship was deciding the question. The question in this matter whether even after the enactment of the said Act of 1993, the transfer can be made for the Government land by the lessee. Admittedly, lessee died after executing a registered Will in favour of the writ petitioners. But at the same time, it has to be taken into account that in a similar situation, the assignment of any interest of transfer in respect of the said land will not be valid after the said Act of 1993 came into force. The heirs who can take the property, are those who are specifically referred in Section 2(1) of the said Act of 1993. A devise or a bequest under a Will cannot be stated to fall outside the scope of the said provisions inasmuch as such assignment disposes of or deals with the lease. When there is a disposition of rights under a Will, though it operates posthumously is nevertheless recognition of the right of the legatee thereunder as to his rights of the leased land. In that event, there is an assignment of the said land, but that right will come into effect after the death of the testator.

24. In a similar situation, the Hon'ble Supreme Court in the case of *Sangappa Kalyanappa Bangi (supra)* held that it is true that the meaning of the heir and other persons related by legitimate kinship or otherwise who may be covered by a Will, but the true question in deciding this case is if a devise of that nature is hit by Section of the Act or not. In the instant case, the object and purpose of Section 2(1) is to confine the rights of the relations only to those known under the said law as heirs/relatives and therefore, assignment to strangers is barred under the said provisions of 1993 Act.

25. Accordingly, we find that there is substance in submission made by Mr. Mitra, learned Counsel appearing on behalf of the appellants in the matter and

accordingly, we hold that the said Act has created only a reasonable restriction to transfer the property in question, which also includes a "Will" by the deceased and is hit by the Act of 1993.

26. In the said decision of Sangappa (supra) the Hon"ble Supreme Court held as follows:

We must take into consideration that when it is possible for the tenant to pass the property to those who may not necessarily be the heirs under the ordinary law and who become heirs only by reason of a bequest under a Will in which event, he would be a stranger to the family and imported on the land thus to the detriment of the landlord. In that event, it must be taken that a devise under a Will will also amount to an assignment and, therefore, be not valid for the purpose of. Section 21 of the Act. If Section 24 is read along with Section 21, it would only mean that the land can pass by succession to the heirs of a deceased tenant, but subject to the conditions prescribed in Section 21 of the Act.

27. Therefore, in our considered opinion, Section 2(1) of the said Act could stand in the way of the writ petitioner to have any benefit under the said Will since it is hit by the said section. Accordingly, the order so passed by His Lordship is set aside.

28. For the reasons stated hereinabove, the appeal is allowed and the writ petition is dismissed.

Surinder Singh Nijjar, C.J.

29. I agree.