

(1998) 02 KAR CK 0064
In the Karnataka High Court
Case No : Writ Petition No. 2290 of 1992

C.C. Devasia

APPELLANT

Vs

The Karnataka Appellate Tribunal, Bangalore and Others

RESPONDENT

Date of Decision : 19-02-1998

Acts Referred:

Karnataka Land Reforms Act, 1961 — Section 21, 48 A, 61, 83

Citation : (1998) ILR (Kar) 2473 : (1998) 3 KarLJ 427

Hon'ble Judges : A.F. Farooq, J

Bench : Single Bench

Advocate : Sri A. Krishna Bhat, for the Appellant; Sri S.S. Guttal, High Court Government Pleader, for the Respondent

Judgement

1. In this writ petition, the petitioner has challenged the orders passed by the first and third respondents and has prayed for quashing of those orders.
2. The brief facts necessary for the disposal of this writ petition is that an extent of 1-12 acres in Sy. No. 26/1C and 1-69 acres in Sy. No. 26/1B situated in Bilinele village were granted in favour of one Sri Devadanam Upadeshi u/s 48-A of the Karnataka Land Reforms Act, hereinafter referred to as the Act. The petitioner claims to be a legatee under a Will dated 27-11-1985 executed by late Devadanam Upadeshi, who secured the occupancy right from the Land Tribunal. The Tahsildar made a report to the third respondent about the petitioner being in possession of the land as a legatee under the Will and recommended forfeiture of the land for violation of the conditions provided u/s 61 of the Act. The Assistant Commissioner, after hearing the petitioner, passed the order forfeiting the lands to the state under the power vested in him u/s 83 of the Act.
3. Petitioner challenged the said order before the Karnataka Appellate Tribunal and contended that the Will is neither a transfer nor an assignment and therefore, there is no contravention of the provisions of Section 61 of the Act and there is no question of any illegal transaction having come into existence, which gives jurisdiction to the Assistant Commissioner to declare the transaction illegal.

The Appellate Tribunal did not accept these contentions and dismissed the appeal.

4. Sri A. Krishna Bhat, learned Counsel appearing for the petitioner contended that the impugned orders passed by the Karnataka Appellate Tribunal and the Assistant Commissioner are without jurisdiction and contrary to the provisions of the Act. It is submitted by the learned Counsel that a Will is not a transaction as provided u/s 83 of the Act and hence the Assistant Commissioner has no jurisdiction to declare the Will as an illegal transaction. He further contended that the petitioner is a legatee under the Will and he steps into the shoes of the grantee and his becoming the owner by virtue of the Will is neither by way of an assignment or transfer as provided u/s 61 of the Act. He also submitted that Section 21 of the Act also is not attracted.

5. On the other hand, Sri S.S. Guttal, learned High Court Government Pleader contended that the Will is a transaction and also an assignment and hence the original grantee has violated the provisions of Section 61 of the Act and the Assistant Commissioner had, therefore, jurisdiction to declare the transaction as illegal.

6. After considering the arguments addressed on both the sides, the only question to be considered in this writ petition is, whether the Will is a transfer or an assignment u/s 21 or Section 61 of the Act. This Court in Koragappa Gowda Vs. Jinnappa Gowda and Others, , has held in paras 11 and 12 as follows:

"11. A Will includes a codicil and every writing making a voluntary posthumous disposition of property. A Will or testament is the declaration in a prescribed manner of the intention of the person making it, with regard to the matter which he wishes to take effect upon or after his death. (Halsbury's Laws of English, 4th Edn., Vol. 50, para 201). A Will differs from a deed in the following respects: (i) a deed operates eo instanti, i.e., from the date of its execution; a Will comes into operation on the death of the testator; (ii) a deed is ordinarily irrevocable, unless there is an express power of revocation; a Will can be revoked at any time by the testator during his life time. It is ambulatory and it becomes effective and irrevocable on the death of the testator; (iii) in case of mistake in a deed, the Court has power to rectify it; a Will cannot be rectified by any Court of law. No consideration is required for making a Will.

Thus disposition of property takes place posthumously after the death of the testator. Therefore, there is no transfer eo instanti as in case of any other deed like a sale deed, gift, exchange, mortgage, lease or assignment.

12. Careful perusal of the language used in Section 61 of the Karnataka Land Reforms Act, 1961 discloses that the Legislature has guardedly omitted transfer by Will viz., by bequeath. Therefore, it cannot be said that the provision is not clear and unambiguous. There is no prohibition transfer of land, occupancy of which has been granted to a tenant by Will. Therefore, bequest of land under the Will does not amount to transfer. Having regard to this discussion made by me, I am fully fortified my view from the expression found in the judgments of Madras,

Oudh and Jammu and Kashmir High Courts cited, *supra*".

In the above cited case, the facts were that the petitioner's father was the tenant of the schedule land and on his application, he was registered as an occupant by the Land reforms Tribunal. The grantee died leaving behind him a Will bequeathing the property to the petitioner. After the death of his father, petitioner sought for change of khata on the strength of the Will, which was granted by the Tahsildar. But on appeal preferred by the objectors before the Assistant Commissioner was allowed and the Tahsildar directed names of the other legal heirs of the deceased shall be entered in the records alongwith the petitioner. Therefore, this Court held in the writ petition challenging the order passed by the Assistant Commissioner that the Will by which the petitioner claimed the rights in the property is neither a transfer nor an assignment and accordingly allowed the writ petition setting aside the order passed by the Assistant Commissioner and restoring the order of the Tahsildar.

7. In *Dhareppa v State of Karnataka and Others* , this Court has held that Section 21 of the Act does not prohibit a testamentary succession and it does not amount to an assignment of interest by a tenant and therefore, the legatee under a Will can claim occupancy rights under the Act.

8. In the above cited case, the applicant, who filed the application for grant of occupancy rights died during the pendency of the proceedings before the Land Tribunal and the petitioner claiming to be a legatee under a Will sought to continue the proceedings. The Tribunal allowed the application. That order was challenged in the writ petition. The question arose before this Court was, whether the legatee under the Will can claim occupancy rights in place of the original tenant in view of the prohibition contained u/s 21 of the Act. This Court has held that the legatee under the Will is entitled to continue the proceedings and the Will is not prohibited u/s 21 of the Act.

9. In *State of West Bengal and another Vs. Kailash Chandra Kapur and others* , the Hon'ble Supreme Court has held that a transfer connotes normally between the two living persons during life and a Will takes effect after demise of the testator and transfer in that perspective becomes incongruous. It was further held that though an assignment may be prohibited and bequest in favour of a stranger by way of testamentary disposition does not appear to be intended under the prohibition clause of the lease considered in the said case. Section 61 of the Act reads as follows:

"61. Restriction on transfer of land of which tenant has become occupant.--(1) Notwithstanding anything contained in any law, no land of which the occupancy has been granted to any person under this Chapter shall, within fifteen years from the date of the certificate u/s 55 is issued be transferred by sale, gift, exchange, mortgage, lease or assignment; but the land may be partitioned among members of the holder's joint family subject to condition that no fragment shall be created by any such partition.

(2).....

(3) Any transfer or partition of land in contravention of sub-section (1) shall be invalid, and such land shall vest in the state Government free from all encumbrances and shall be disposed in accordance with the rules relating to grant of Government lands".

From a reading of Section 61 of the Act, it is clear that what is restricted or prohibited is a transfer by sale, gift, exchange, mortgage, lease or assignment. As held by the Hon"ble Supreme Court and this Court in the above cited judgments, a Will cannot be said to be a transfer or an assignment since on the execution of a Will nothing passes on to the legatee and the testator can always revoke a Will and the Will comes into force only after the death of the testator. Therefore, there is no question of the testator, who in this case, is the grantee assigning or transferring the land during his lifetime. If that is so, then there is no question of any illegal transaction coming into existence on the execution of the Will by the late testator. The Assistant Commissioner gets jurisdiction to pass an order u/s 83 only when there is any illegal transaction. When no such illegal transaction has come into existence, the Assistant Commissioner has no jurisdiction to declare the Will, which is not a transaction at all, as illegal.

10. For the above reasons, this writ petition is allowed and the impugned order passed by the Assistant Commissioner and confirmed by the Karnataka Appellate Tribunal are quashed.