

(1997) 10 KAR CK 0019
In the Karnataka High Court
Case No : Writ Petition No. 35525 of 1992

Koragappa Gowda

APPELLANT

Vs

Jinnappa Gowda and Others

RESPONDENT

Date of Decision : 21-10-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Karnataka Land Reforms Act, 1961 — Section 45, 61
Karnataka Land Revenue Act, 1964 — Section 129, 135, 136 (2), 136 (3)
Transfer of Property Act, 1882 — Section 5

Citation : (1998) ILR (Kar) 436 : (1998) 1 KarLJ 402

Hon'ble Judges : H.N. Narayan, J

Bench : Single Bench

Advocate : Sri A. Keshava Bhat, for the Appellant; Sri M. Rambhat, for the Respondent

Judgement

1. This writ petition is filed under Articles 226 and 227 of the Constitution of India praying to issue a writ of certiorari or any other appropriate writ, order or direction to set aside the order of the Assistant Commissioner, Puttur, Dakshina Kannada, dated 2-9-1992, allowing the appeal filed by the respondents herein, thereby, directing the Tahsildar to enter the name of the 2nd respondent along with the petitioner in the Revenue Records.

2. Brief facts leading to this filing of writ petition, are as follows:--

Petitioner's father was a tenant of the schedule lands and upon his application in Form 7 to the Land Tribunal, the Land Tribunal has registered him as an occupant of the land in conformity with Section 45 of the Karnataka Land Reforms Act ("the Act" for short). Petitioner's father died on 3-10-1982, leaving behind him a Will, bequeathing the schedule lands in the name of the petitioner. After the death of his father, petitioner filed an application before the Deputy Tahsildar for changing the katha of the lands in his name and as per the Will, the Deputy Tahsildar has passed an order directing to change the katha in the name of the

petitioner as per Annexure-B.

3. It is the case of the petitioner that after the death of his father he continued to be in possession of the property and cultivating the lands. The petitioner has two sisters who are married long prior to the date of death of his father and are staying with their husbands. They were never in possession and enjoyment of the lands. The 1st respondent is the son of the petitioner's deceased sister, the 2nd respondent is another sister. They have no interest in the property. The objection for entering their names has been overruled by the Deputy Tahsildar, but the appeal preferred by the respondents before the Assistant Commissioner was not properly defended by him for the reasons stated in the writ petition and that the Assistant Commissioner. Puttur-the 3rd respondent however allowed the appeal and directed the Deputy Tahsildar to enter the name of the 2nd respondent also jointly with the petitioner in all the Revenue Records.

4. It is contended that the Assistant Commissioner has clearly erred in passing the impugned order in spite of the fact that the petitioner is the owner of the property by virtue of the Will left behind by his father. It is further contended that the Assistant Commissioner has committed an error directing him to approach the Civil Court as there is a dispute regarding the title of the property.

5. Reiterating the said grounds of writ petition, the learned Counsel for the petitioner has submitted that the 3rd respondent has committed an error in passing the impugned order even though they have no subsisting interest in the property and the order does not stand to reason as there is a direction to enter the name of the 2nd respondent only and not the 1st respondent.

6. Sri M. Rambhat learned Counsel for the respondents has raised two important contentions for consideration. The first contention is that the writ petition is not maintainable against the final order of the Assistant Commissioner and secondly that the tenant who is conferred with occupancy rights cannot transfer by Will the property as there is a prohibition u/s 61 of the Karnataka Land Reforms Act. Therefore, the alleged Will, left behind by the deceased has no validity in law. Even otherwise the order of the Assistant Commissioner does not suffer from any illegality which requires to be quashed.

7. In support of the first contention the learned Counsel has relied on the decision of a Division Bench of this Court in Srimanmaharaja Niranjana Jagadguru Mallikarjuna Murugarajendra Mahaswamy Vs. Deputy Commissioner, . The Division Bench has considered the scope and the ambit of Section 136(2) and (3) of the Karnataka Land Revenue Act, 1964 and held that the Deputy Commissioner has no power under sub-section (3) to revise the appellate order under sub-section (2). It is further held that sub-section (2) is attracted only when the order u/s 129 is not appealed against. The only relief against the appellate order is a suit u/s 135 of the Act. The judgment of the Division Bench is distinguishable to the extent of holding that the proviso to Section 136 is not attracted and a suit is not the only remedy. The legality of the order of the

Assistant Commissioner directing the Tahsildar to enter the name of the 2nd respondent only in the Revenue Records is in challenge in this writ petition. Therefore, in my opinion, the writ petition is perfectly justifiable under Articles 226 and 227 of the Constitution of India.

8. The next question that is raised by the learned Counsel for the 2nd respondent as his second contention is that since there is a bar u/s 61 of the Karnataka Land Reforms Act for transfer of the property, the Will made by the deceased in favour of the present petitioner is not valid in law and therefore the petitioner is not entitled to be the sole owner of the property. Section 61 provides for restriction for transfer of land of which the tenant has become the occupant. The relevant provision of Section 61 of the Karnataka Land Reforms Act, 1961 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 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 the condition that no fragment shall be created by any such partition.

(2) Notwithstanding anything contained in sub-section (1), it shall be lawful for the occupant registered as such or his successor-in-title to take a loan and mortgage or create a charge on his interest, in the land in favour of the State Government, (a financial institution, a Co-operative Land Development Bank, a Co-operative Society) or a Company as defined in Section 3 of the Companies Act, 1956 in which not less than 51% of the paid up share capital is held by the State Government or a Corporation owned or controlled by the Central Government or the State Government or both for development of land or improvement of agricultural practices; and without prejudice to any other remedy provided by any law, in the event of his making default in payment of such loan in accordance with the terms and conditions on which such loan was granted, it shall be lawful to cause his interest in the land to be attached and sold and the proceeds to be utilised in the payment of such loan.

(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 encumbrances and shall be disposed in accordance with the Rules relating to grant of Government lands".

Any transfer or partition of land in contravention of sub-section is invalid. Therefore, there is no impediment for partition of the property among the members of the holders of the joint family. The only condition is that the partition shall not create fragment. Since the Fragmentation Act is no longer in force in the State, even this condition is invalid.

9. The question is whether the transfer of land by Will comes within the ambit of

Section 61 of the Act. The transfer of property more specifically stated in Section 61 is by sale, gift, exchange, mortgage, lease or assignment. The words "any transfer" found in clause (3) of Section 61 refers to all transfers. The question is whether a person in whose favour the occupancy has been granted has "transferred the property" by deed or Will.

10. Section 5 of the Transfer of Property Act defines transfer of property as follows:

"Transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and "to transfer property" is to perform such act".

The word "transfer" is defined with the reference to the word "convey". This word in English Law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance inter vivos. The definition in Section 205(I)(ii) of the Law of Property Act is - "Conveyance includes a mortgage, charge, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a Will. The word "conveys" in Section 5 of the Indian Act is obviously used in the wider sense referred to above. "A transfer of property" as defined in the present section does not necessarily involve the execution of an instrument of transfer or a conveyance. In the case of moveables and generally in the case of immovable property of a value of less than Rs. 100/-. A transfer may be effected by delivery of possession. The words "living person" exclude transfers by Will, for a Will operates from the death of the testator.

Disposal of Immovable property by Will would not amount to a transfer within the meaning of Section 5 of the Transfer of Property Act. This question came up before a Division Bench of the Madras High Court in Mahaboob Sirfraz Vanth Sri Rajah Parihasarathy Appa Rao Zamindar of Bhadrackalam v Sri Raja Venkatadri Appa Rao and Others. That was a case of the right of the testatrix to make a Will of a fund in Court to which she had laid a claim. Commenting upon the nature of rights under the Will vis-a-vis, Transfer of Property Act, it is held that:

"The Transfer of Property Act applies only to alienations inter vivos and has no application to disposal of property by Will".

This question also indirectly cropped up in the case of AIR 1944 65 (Oudh) . At page 70 of the judgment, it is held by the Court as follows:

"The Transfer of Property Act does not relate to Wills, and "transfer" is defined in the Oudh Estates Act as an alienation inter vivos. A Will on the other hand is not in form, a transfer, but means "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". (vide the definition in the Succession Act)

This question also came up before the Full Bench of Jammu and Kashmir High

Court in *Lala Devi Dass v Panna Lal*, wherein it is stated as under in paras 15 and 16 of the judgment:

"15. As bequest is specifically included in "permanent alienation" which is synonymous to the term "transfer", so the permanent alienation of land as defined in the Land Alienation Act by bequest is prohibited under the provisions of the Land Alienation Act. But there is no law prohibiting disposal of immovable property other than land as defined in the Land Acquisition Act by Will in favour of a non-State subject. The mere fact that transfer by sale or mortgage of immovable property in favour of non-State subject is prohibited, cannot be considered to be a bar to the disposal of immovable property other than land as defined in the Land Alienation Act by Will. There must be a clear and unambiguous provision of law prohibiting the disposal of all kinds of immovable property by Will and in the absence of such a provision the Courts, will not interpret the latent intention of the Legislature which is not embodied in the expression provisions of law.

16. 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. In my opinion, therefore, there is no specific provisions in law prohibiting the disposal of immovable property other than the land as defined in the Land Alienation Act, by Will in favour of a non-State Subject and such a Will cannot be held to be invalid. The reference is answered accordingly".

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 Edition, 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. In other words, the language is very clear and

unambiguous, there is no prohibition for 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 fully fortify my view from the expression found in the judgments of Madras, Oudh and Jammu and Kashmir High Courts cited supra.

13. A Will is definitely an obstruction to the natural succession. The party who claims a share in the property has necessarily to claim it at an appropriate forum viz., by filing a suit for partition and where in such a suit the defendant sets up the defence of exclusive right in the property under the Will left behind by the testator-the original owner, it is for him to prove the Will and to clear the doubt, if any, surrounding the said Will.

14. In the case on hand, the Revenue Authorities have discarded the Will produced by the 1st respondent on the ground that it was an unregistered document. It must be remembered that a Will is not compulsorily registerable document. The authorities have clearly committed an error in directing to effect mutation in the name of the 2nd respondent along with the petitioner jointly. Therefore, the impugned orders are liable to be quashed.

15. In the result, the writ petition is allowed. The orders of the Deputy Tahsildar and the Assistant Commissioner-respondents 3 and 5 are set aside.