

(1998) 12 CAL CK 0020
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction C.O. No. 20041 (W) of 1995

Smt. Kanta Devi Agarwal and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Succession Act, 1925 — Section 2
Transfer of Property Act, 1882 — Section 5

Citation : (1999) 1 CALLT 345

Hon'ble Judges : Nirendra Krishna Mitra, J

Bench : Single Bench

Advocate : Mr. Pratap Chatterjee and Mr. Shiv Ratan Kakrania, for the Appellant;

Judgement

N.K. Mitra, J.—The short point involved in this Civil Order is, whether the State Government could refuse to mutata the name of the writ petitioners who were the legatees under the Will executed by the original lessee Shri Anil Kumar Bhattacharjee in respect of a plot of land in the Bidhannagar, Salt Lake City, and which was duly probated.

2. In short, the facts of this case as stated in the writ application, Inter alia, are that one Shri Anil kumar Bhattacharjee, since deceased, was granted a lease in respect of Plot No. 147, measuring about 5.4344 Kathas. In Block-EC, in Sector-1 of Bidhannagar. Salt Lake City for 999 years by the Government of West Bengal. The lease was duly accepted and registered on 6th of March, 1986 and the lessee duly got possession of the above lease hold property and was all long in possession and occupation thereof. The said lessee knew the writ petitioners from their childhood who were like his family members. The writ petitioners used to respect the said lessee like their own father who also used to love them like his own daughters. The said lessee on or about 27th July, 1992 executed a Will and Testament wherein he made a bequest of the said lease-hold premises in favour of the writ petitioners and thereafter the said lessee died on 4th October,

1992. The executor to the said Will obtained probate of the said Will in probate Case No. 21 of 1993 from this Hon'ble Court and the natural legal heirs of the deceased, namely, his widow and his son, duly gave their consent to the grant of probate of the said Will.

3. After grant of probate, the writ petitioners obtained possession of the demised premises from the Executor to the above Will, and since then, they are in peaceful possession thereof. After the grant of probate, the Executor of the said Will made an application on or about 15th March, 1993 before the respondent No. 2 for mutation of the said lease-hold premises in the name of the writ petitioners annexing therewith a copy of the order granting probate to the said Will.

4. In spite of repeated reminders, however, no action was taken by the respondents to mutate the said premises in the name of the writ petitioners as lessees in place and stead of the deceased Anil Kumar Bhattacharjee and as such, finding no other alternative, the writ petitioners on or about 29th September, 1993 filed a writ petition, inter alia, praying for an issuance of writ of Mandamus commanding the respondent/authorities to mutate the name of writ petitioners as Joint Lessees in respect of the aforesaid leasehold premises in place of the deceased lessee Anil Kumar Bhattacharjee by virtue of the probate granted as aforesaid. The said writ application was disposed of by me on 27th June, 1995 directing the respondent/authorities to dispose of the aforesaid application for mutation within a period of 12 weeks from the date of communication of the order and an Interim order of status-quo in respect of the said property was also passed, till the disposal of the application for mutation. The said order was duly communicated by the writ petitioner to the respondent No. 2. The writ petitioners were then asked to appear before the authority concerned to represent their case which they did. Ultimately, on 29th September, 1995 the respondent authority rejected the said application for mutation made by the writ petitioners for mutating their names in place and stead of the deceased lessee Anil Kumar Bhattacharjee in respect of the said premises holding, inter alia, as follows :

"In the present case which is lease hold property there are several restrictions in transferring any right of title in Clause 2 (8) and 2(12), though there is also a provision of Clause 2(12) for making will of the lease property. In my view the Clause 2 of the lease deed forms are single scheme of operation of the terms of lease and as such Clause 2(12) is subordinate to Clause 2(8) and Clause 2(7) of the lease deed as they should be read Inclusive of each other. In the Instant case the petitioner or the original lessee did not take any permission from the Govt. for making any will in favour of the person not related to him. No order of any competent court of law or Hon'ble High Court was produced before me by the applicant to the contrary of the above interpretation of law."

5. The said rejection order being annexure "F" to the writ application is being challenged before this court by the writ petitioners in the present writ

application, inter alia, on the ground that a bequest made under a Will is not a transfer as envisaged under the said Deed of Lease and/or under the Transfer of Property Act, 1882 in as much as, all transfers mentioned in the respective clause of 2(7) of the disputed lease deed are all transfer intervivos, but a will and/or testamentary document is not a transfer intervivos, it is not even a transfer of any right to any property as envisaged under the Transfer of Property Act, 1882.

6. Heard Mr. Chatterjee, learned senior counsel on behalf of the writ petitioners and Mr. Pal, learned Advocate on behalf of the State-respondents.

7. Mr. Chatterjee contends, inter alia, that the will is not a transfer as envisaged under the provisions of Clauses 2(7) and 2(8) of the disputed lease deed (P-4) and as such, question of taking prior permission before the will was executed by the erstwhile lessee, did not arise at all. In support of his contention, Mr. Chatterjee also relied upon an unreported Appeal Bench decision of this Hon'ble Court, in the case of State of West Bengal Anr. v. Shri Kailsh Chandra Kapur & Ors. (Matter No. 1329 of 1995/ Appeal No. 183 of 1995). The facts of the above appeal are similar to these of the present case. In as much as, the writ application, out of which the above appeal had arisen, was moved by the legatees of a Will executed by the lessee of a property in Salt Lake. The legatees after getting probate of the said will applied for mutation and that was rejected by the Salt Lake Authority. The writ application, was allowed by the trial court directing the respondents to mutate all the names of the legatees. The State of West Bengal and the other State-respondents preferred the above appeal. The Appeal Bench dismissed the appeal holding, inter alia, that upon reading all the clauses 7, 8 and 12 of the lease deed it was abundantly clear that a distinction had been made between the cases of assignments and transfer of the leasehold property in one hand and the cases of testamentary dispositions on the other. There was a pre-condition for seeking previous permission of the Government in writing in cases of assignments or transfers Of the leasehold property, but there was none in the case of testamentary disposition. Such being the position, the State Government could not turn round and contend that testamentary disposition would be treated like an assignment and/or transfer in terms of the lease and no testamentary disposition should be made without previous sanction in writing by the State Government,

8. Let us now examine the legal, aspect of the matter, section 5 of the Transfer of Property Act has defined "Transfer of Property" as follows :

"In the following sections" 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, or to himself and one or more other living person: and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of Individuals, where incorporated or not, but nothing herein contained shall affect

any law for the time being in force relating to transfer of property to or by companies, association or bodies of individuals."

9. The words "living person" as figured in the said definition excludes disposition by will, in as much 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 intervivos 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 otherhand, is not a form of the transfer and the Deed of Transfer operates as instant, 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 in 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 carried into effect after his death."

(Emphasis is mine)

10. Therefore it is quite clear that "Will" does not come within the perview 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 Lala Devi Dass v. Parma 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.

11. The above discussions, therefore, would make it quite clear that the action of the respondent concerned in refusing to mutate the names of the writ petitioners in respect of the disputed property as per the Original Probated Will of the original deceased lessee/testator cannot be sustained In law and as such, the impugned order being annexure "F to the writ application stands quashed.

I, accordingly, direct the respondent concerned to mutate the names of the writ petitioners in respect of the disputed property within 8(eight) weeks from the date of communication of this order and the time limit so fixed is peremptory and mandatory.

The civil order is thus allowed without any order as to costs.

12. Petition allowed