

(2013) 09 CAL CK 0070
In the Calcutta High Court
Case No : Writ Petition No. 17025 (W) of 2013

Sri Pawan Kumar Agarwal and Another APPELLANT
Vs
The State of West Bengal and Others RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 CALLT 239 : (2014) 1 CHN 83

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : L.C. Bihani, Mr. N.C. Bihani and Ms. Papiya Banerjee Bihani, for the Appellant; Bimal Kumar Chatterjee, Ld. Advocate General, Mr. Amitesh Banerjee and Ms. Munmum Tewary, for the Respondent

Final Decision : Disposed Off

Judgement

Jyotirmay Bhattacharya, J.—A plot of rent-free land measuring about 5.1834 Cottah being identified as plot No. 54 in Block-CA, Salt Lake City, Kolkata-700064 was leased out by the State of West Bengal in favour of one Mr. Anil Kumar Kundu for a period of 999 years on the terms and conditions as mentioned in the registered lease deed dated 8th May, 1997. The said lease deed imposes restriction on the lessee's right to assign and/or transfer the demised land or any part of it and/or the structure erected thereon, without the previous permission of the Government in writing. The consequence of assignment and/or transfer of the demised property without obtaining the previous permission of the Government in writing, is also provided in the said lease deed. However, bequest of the leasehold property and building thereon by the lessee by way of will in favour of a stranger is not prohibited in the said lease deed. The lease deed does not provide that in case the lessee intends to bequeath his leasehold interest in the demised property in favour of any stranger by will, he is required to obtain prior permission from the Government. On the contrary it is provided in the said lease deed that if the lessee dies after having made a bequest of the leasehold premises and the building thereon in favour of more than one person, then the

persons to whom the leasehold premises with building thereon is so bequeathed, shall hold the said property jointly without having any interest to have a partition of the same by metes and bounds or they shall nominate one person amongst their number in whom the same shall vest. Here is the case where the said lessee namely, Anil Kumar Kundu, died after having made a bequest of his leasehold interest in the demised property in favour of the petitioners herein. After the demise of the said testator, the petitioner No. 1 applied for grant of probate to the last testamentary will left by the said testator before this Hon''ble court, in its testamentary and intestate jurisdiction, on 11th February, 1991. The said proceeding was registered as PLA No. 141 of 2012. Probate was granted by the court to the said will in favour of the petitioner No. 1, viz., Shri Pawan Kumar Agarwal who applied for grant of probate as an executor appointed in the said will. After obtaining probate, the petitioners herein submitted an application before the land Manager, Bidhannagar Urban Development Department, Government of West Bengal seeking mutation of their names as lessees in respect of the said plot No. 54, Block-CA, Salt Lake City. The petitioners'' said application for mutation remains unattended. Hence the instant writ petition was filed by the petitioners, seeking issuance of direction upon the State Authority for mutating their names as joint lessees in respect of the said plot of land on the basis of the said probated will.

2. The State respondents contested the said writ petition by filing an affidavit in opposition, alleging therein that the transfer of the said premises by way of will left by Anil Kumar Kundu is nothing but a fraudulent transfer and as such the names of the petitioners cannot be mutated unless a fresh deed of transfer is executed by the heirs of the original lessee in favour of the petitioners after obtaining permission from the Government and on payment of permission fees as provided in the notification dated 22nd June, 2012. In fact, the State Respondents made their stand very clear in their said affidavit that they would not process the petitioners'' application for mutation unless transfer fees as provided in the notification dated 22nd June, 2012 is paid by them.

3. In this context, this court is required to consider as to how far the State Respondents were justified in taking such a stand for refusing to mutate the petitioners'' name as lessee in place of original lessee viz., Anil Kumar Kundu, in their official records. Mr. Bihani, Learned Senior counsel appearing for the petitioner, submitted that the issue regarding the legality of such transfer of the leasehold right of the lessee in the demised property by way of bequest in favour of the legatee, is no longer a res integra as the said issue has already been decided by the Hon''ble Supreme Court as well as by this court repeatedly in the following cases.

(i) In the case of State of West Bengal and another Vs. Kailash Chandra Kapur and others,

(ii) In the case of Smt. Kanta Devi Agarwal and Others Vs. State of West Bengal and Others,

(iii) In the case of Pankaj Madhogarhia Vs. State of W.B. and Others,

4. Mr. Bihani, further contended that when probate has been granted by this Hon''ble court in its testamentary and intestate jurisdiction, the genuineness of the will cannot be disputed as while granting such probate to the said will, this Hon''ble court had to consider not only the genuineness of the will but also all suspicious circumstances surrounding the execution of the said will, in terms of Section 63(c) of the Succession Act and Section 68 of the Evidence Act. He further submitted that the judgment passed in the probate proceeding operates in rem and as such declaration as to the genuineness of such will made by the Probate Court, cannot be challenged by any member of the public including the State Respondent, as they are bound by the declaration of the probate court regarding genuineness of the said will. In support of his submission he has also relied upon a decision of the Hon''ble Supreme Court in the case of Syed Askari Hadi Ali Augustine Imam and Another Vs. State (Delhi Admn.) and Another,

5. Mr. Bihani further submitted that since bequest of the leasehold interest of the lessee by way of will in favour of a stranger is not prohibited in any of the terms of the lease deed and further since the said lease deed also does not impose any condition upon the lessee either for seeking permission from the State authority for bequeathing his leasehold interest in favour of a stranger or for payment of any permission fees for bequeathing his leasehold interest in the demised property, the State Respondents can neither insist upon the petitioners for seeking permission from the State authority nor can it demand any transfer fees from the petitioners for recognizing them as lessees under the State authority.

6. Relying upon the aforesaid decision of the Hon''ble Supreme Court as well as of this Hon''ble Court, Mr. Bihani ultimately submitted that this is a fit case where directions should be passed upon the State Authority to mutate the names of the petitioners as lessee in respect of the said plot of land for the residuary period.

7. In reply Learned Advocate General, appearing for the State Respondents submitted that transfer of leasehold interest by the lessee by executing a will in favour of a stranger amounts to transfer and/or assignment of his leasehold interest in the demised property. Thus he contended that transfer of leasehold right by way of will is prohibited under the lease deed.

8. He relied upon a decision of the Hon''ble Supreme Court in the case of Sri Sangappa Kalyanappa Bangi (D) Through Lrs. Vs. Land Tribunal, Jamkhandi and Others, , to support his submission that testamentary disposition to a stranger to the family of the lessee would amount to assignment of the lessee''s interest.

9. Learned Advocate General also referred to a Division Bench decision of this Hon''ble court in the case of Asansol Durgapur Development Authority and Another Vs. Tapas Banerjee and Others, wherein this Hon''ble Court, by borrowing the principle laid down by the Hon''ble Supreme Court, in the aforesaid decision held that the bequest of leasehold interest by the lessee by way of will is also hit by the restrictive Clause on Transfer contained in the lease deed and as

such the transferee could not acquire any right in the demised property by virtue of the probated will left by the lessee.

10. Thus the Learned Advocate General submitted that since transfer of leasehold interest by way of will also amounts to assignment of leasehold interest of the lessee, the restriction imposed on transfer without prior permission of the State authority as contained in clause 2 (8) of the said lease deed is attracted in case of transfer of leasehold interest by will. He thus, submitted that since prior permission was not obtained before transferring such leasehold interest by the lessee by will, the transferees cannot be recognized as lessees.

11. He further submitted that though it is true that will is a posthumous disposition of the estate of the testator and his interest in his estate vests upon the legatee on his death but a will cannot be regarded as a mere declaration of a testator's interest on paper, as upon his death such declaration is converted into an instrument securing money and other property of the testator amounting to a testamentary disposition by a Hindu in the form of a gift and as such, upon the death of the testator, the will stands substantially on the same footing as a gift.

12. In support of such submission Learned Advocate General relied upon the following decisions of the Allahabad High Court:-

(i) In the case of Smt. Bishun Shri Vs. Smt. Suraj Mukhi and others,

(ii) In the case of Udai Pratap Gir and Another Vs. Shanta Devi and Others,

13. Learned Advocate General further submitted that recently the Hon''ble Supreme Court, depreciated the transactions such as General Power of Attorney sales (GPA Sales) or sale agreement/General Power of Attorney/will transfers while testator is alive (SA/GPA/living will transfers), after considering every pros and cons of such transactions with all anxieties. The Hon''ble Supreme Court held that such documents are very often created by the lessees having restrictive right on transfer of their leasehold interest for avoiding payment of stamp duty and registration charges on deed of conveyance and/or for avoiding payment of capital gains on transfer and also for avoiding undergoing the cumbersome process of obtaining permission from the State Respondents for such transfer. The Hon''ble Supreme Court also held that unless such transactions are discouraged, not only the State Exchequer will be affected but also such transactions will encourage generation of unaccounted black money affecting the economy of the State. The Hon''ble Supreme Court further held that in such circumstances, for ascertaining the real nature of such transaction, the State Authority is required to ascertain the real purport of such transaction i.e., as to whether such transfer was made for circumventing the restrictive clause on transfer contained in the lease deed with a motive to avoid payment of stamp duty and/or registration fees or not.

14. Learned Advocate General referred to the following decisions of the Hon''ble

Supreme Court to support his above contention:-

(i) In the case of Delhi Development Authority Vs. Mrs. Vijaya C. Gurshaney and Another,

(ii) In the case of Suraj Lamp and Industries (P) Ltd. thru. DIR Vs. State of Haryana and Another,

(iii) In the case of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another,

15. By relying upon the aforesaid decisions of the Hon"ble Supreme Court, the Learned Advocate General submitted that the State Authority has the competence to enquire into the real purport of such will transaction and if it is found on such enquiry that the said transaction was made either for avoiding the restrictive Clause on transfer contained in Clause 2 (8) of the said lease deed or for evading payment of stamp duty and/or registration fees or for entering into transaction with unaccounted money of the transferee, then the said authority is within its right to declare such transaction as invalid and ultimately may refuse to recognize such transaction and/or mutate the petitioners' names as lessees under the State for the residuary period.

16. The Learned Advocate General further submitted that recently it has come to the notice of the State Authority that in many cases possession of such plots in Salt Lake City was transferred to third parties by various documents such as General Power of Attorney (GPA), agreement of lease/tenancy and will without obtaining permission from the Government as contemplated in those lease agreement. Though the State Respondents were of the view that such transfer of the leasehold interest of the lessee without Government permission is not binding on the Government still then since the State has no such machinery to plug such illegalities at the time of creation of such document, the State Authorities, instead of nullifying the effect of such transfer, evolved a modality for regularizing such unauthorized transfer by the lessee with a view to augmenting the income of the State Revenue. Accordingly, the Government issued a notification on 22 June, 2012 for allowing the lessees to transfer their leasehold interest in the residential plots and buildings of Bidhannagar to others for un-expired period of lease term, inter alia, by imposing transfer fees at the rate of 5 lakhs per Cottah for the time being and on such other terms and conditions as may be fixed from time to time. The modalities for seeking permission for such transfer have also been prescribed in the said notification. It was further provided therein that in case of transfer of leasehold interest by the lessee in favour of close blood relation namely, father-mother, husband-wife, brother-sister, son-daughter, son's son, daughter's son and daughter's daughter, only nominal amount of processing fees on account of transfer fees will be fixed by the Government from time to time. By referring to the said notification, the learned Advocate General submitted that if the petitioners intend to get their names mutated as lessees in respect of the demised property for the residuary

period, they will have to complete the formalities as mentioned in the said notification dated 22nd June, 2012 appearing at page 40 of the writ petition; otherwise their application for mutation cannot be processed.

17. Let me now consider the substance of the submission made by the Learned Counsel appearing for the respective parties in the facts of the instant case. For proper appreciation of the argument made by the counsel of the respective parties, this court is of the view that the clause imposing restriction on transfer and the clause permitting the lessee to bequest contained in the lease deed executed by the Governor of West Bengal in favour of the original lessee, are required to be considered very minutely. Accordingly, the relevant clause of the lease deed being Clause 2 (8) wherein such restriction on transfer was imposed and the other Clause being Clause 2 (12) of the said lease deed where unrestricted right of transfer of leasehold right of the lessees to a stranger by bequest was recognized are set out here under:-

Clause 2 (8):-"The lessee shall not assign or transfer the demised land or any part of the demised land and/or the structure erected thereon without the previous permission of the Government in writing. In case of transfer or assignment of the lease the Lessor shall have the right of pre-emption and upon the exercise of this right the building constructed by the Lessee on the land shall be taken over by the Lessor at a valuation of the building made by the Lessor on the basis of the costs of construction of the building less depreciation at the usual rate or the market value thereof, whichever is less. The value of the land will be the amount of the salami or premium paid by the lessee. In the event of difference between the parties as to the value of building, the matters in dispute shall be referred to the arbitration of an arbitrator if the parties can agree upon one or otherwise to two arbitrators, one to be appointed by each party with an Umpire. The award of the arbitrator or arbitrators or the Umpire, as the case may be, shall be final and binding on both the parties.

Provided however that in case the Lessee transfers or assigns the lease hold interest in the land and/or structure standing thereon in favour of L.I.C. or Nationalized Bank or Government or Semi-Government Organization, or Registered Housing Co-operative Society, or Statutory Body by creating mortgage for repayment of loan for house building purpose, Life Insurance Corporation of India or Nationalized Bank or Government or Semi-Government Organization, or registered Housing Co-operative Society, or Statutory Body, as the case may be, it may claim priority over of the Government of West Bengal in respect of the right of pre-emption on the demised land and/or structure standing thereon subject to the condition that all the dues of the Government as provided herein shall be payable and recoverable to the Government of West Bengal either from the Lessee or from the Life Insurance Corporation of India, or Nationalized Bank or Government or Semi-Government Organization, or registered Housing Cooperative Society, or Statutory Body, as the case may be. Provided however such charge if created shall be subject to the terms and

conditions of the lease.

Clause 2 (12):-"If the Lessee dies after having made a bequest of the lease-hold premises and the building thereon, if any, in favour of more than one person or die intestate having more than one heir, then in such case the persons to whom the lease-hold premises with the building thereon be so bequeathed or the heirs of the deceased Lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same by metes and bounds or they shall nominate one person amongst their number in whom the same shall vest.

18. If these two clauses are analyzed properly then this court finds that though some restrictions were imposed in case of transfer of leasehold interest by the lessee by way of assignment and/or transfer in clause 2 (8) of the said lease deed, no such restriction was imposed for bequeathing the leasehold interest of the lessee by way of bequest in the form of a will in favour of the legatees and/or beneficiary under the will. Though Clause 2 (8) of the said lease deed provides that such assignment and transfer of leasehold interest by the lessee without prior permission from the State Authority in writing, is not a valid transfer and in case such transaction is made without prior permission of the State authority, the State authority will retain its jurisdiction to pre-empt such legal transaction subject to the right of pre-emption of the LIC or the Nationalized Bank or the Government or Semi-Government organization or the Registered Housing Co-operative Society or the Statutory Body with whom the demised property was mortgaged by the lessee for securing re-payment of loan taken for house building purpose. On the contrary Clause 2 (12) of the said lease deed, neither imposes any condition upon the lessee for seeking prior permission from the State authority for bequeathing his leasehold interest by will nor it deals with consequences of vesting of the lessee's interest in the demised property by virtue of such will. The said clause simply prohibits sub-division of the plot and/or partition, in case bequest is made in favour of more than one stranger. As a matter of fact, in an identical situation the effect of bequest of leasehold interest by the lessee by will in favour of a stranger to the family was considered by the Hon"ble Supreme court in the case of State of West Bengal & Anr.-Vs-Kailash Chadra Kapur & Ors. (supra) wherein the Hon"ble Supreme Court after considering the effect of the provision contained in clause 2 (7), (8) and (12) of the said lease deed ultimately held in clear terms that though restriction was imposed on transfer of the demised premises or building erected thereon by the lessee without prior permission in writing of the Government in Clause 2 (8) of the said lease deed but clause 2 (12) of the lease deed which deals with the case of a lessee dying after executing a will, does not impose any restriction on bequest in favour of a stranger. The Hon"ble Supreme Court also held therein that though assignment without permission of State authority was prohibited under Clause 2 (8) of the said lease deed but bequest in favour of a stranger by way of testamentary disposition was not intended to be prohibited by the Government in view of the permissive language used in Clause 2 (12) of the said

lessee. The relevant part of the discussion of the Hon"ble Supreme Court with regard to the interpretation of Clause 2 (8) and Clause 2 (12) of the said lease deed is set out hereunder:-

Para 12:-"In view of the above-settled legal position, the question is whether the bequest made by Mullick in favour of the respondent is valid in law and whether the Governor is bound to recognize him. It is seen that clauses (7), (8) and (12) are independent and each deals with separate situation. Clause (7) prohibits sub-lease of the demised land or the building erected thereon without prior consent in writing of the Government. Similarly, clause (8) deals with transfer of the demised premises or the building erected thereon without prior permission in writing of the Government. Thereunder, the restricted covenants have been incorporated by granting or refusing to grant permission with right of pre-emption. Similarly, clause (12) deals with the case of lessee dying after executing a will. Thereunder, there is no such restrictive covenant contained for bequeath in favour of a stranger. The word "person" has not been expressly specified whether it relates to the heirs of the lessee. On the other hand, it postulates that if the bequest is in favour of more than one person, then such persons to whom the leasehold right has been bequeathed or the heirs of the deceased lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same and one among them should alone be answerable to and the Government would recognize only one such person. In the light of the language used therein, it is difficult to accept the contention of Shri V.R. Reddy, that the word "person" should be construed with reference to the heirs or bequest should be considered to be a transfer. Transfer connotes, normally, between two living persons during life; Will takes effect after demise of the testator and transfer in that perspective becomes incongruous. Though, as indicated earlier, the assignment may be prohibited and the Government intended to be so, a bequest in favour of a stranger by way of testamentary disposition does not appear to be intended, in view of the permissive language used in clause (12) of the covenants. We find no express prohibition as at present under the terms of the lease. Unless the Government amends the rules or imposes appropriate restrictive covenants prohibiting the bequest in favour of the strangers or by enacting appropriate law, there would be no statutory power to impose such restrictions prohibiting such bequest in favour of the strangers. It is seen that the object of assignment of the Government land in favour of the lessee is to provide him a right to residence. If any such transfer is made contrary to that policy, obviously, it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long as that is not done and in the light of the permissive language used in clause (12) of the lease deed, it cannot be said that the bequest in favour of strangers, inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf. However,

the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees.

19. In fact the effect of bequest by way of will was also considered by this Hon''ble Court in the case of Smt. Kanta Devi Agarwal and Others Vs. State of West Bengal and Others, wherein it was held that there was a precondition for seeking previous permission of the Government in writing, in case of assignment or transfer of leasehold property, but there was none in case of testamentary disposition. It was further held therein that such being the position, the State Government could not turn around and contend that testamentary disposition would be treated like an assignment and transfer in terms of the lease and no testamentary disposition should be made without previous sanction in writing by the State.

20. In fact, by relying upon the aforesaid decisions of the Hon''ble Supreme Court as well as of this Court, another Learned Single Judge of this court also expressed an identical view with regard to the effect of bequest by way of will in the case of Pankaj Madhogarhia Vs. State of W.B. and Others, His Lordship held that a transaction by way of bequest is essentially different from the transaction made by way of transfer and/or assignment. All these three decisions which were relied upon by Mr. Bihani are very relevant on the point in issue in this proceeding, as the Hon''ble Supreme Court as well as this Hon''ble Court came to the aforesaid conclusion by interpreting different clauses of identical Lease Instruments. As such the principles laid down in those decisions are binding upon this court as judicial precedent.

21. The other observation made by the Hon''ble Supreme Court in the case of State of West Bengal-Vs-Kailash Chadra Kapur, cannot be overlooked, as Hon''ble Supreme Court held therein in clear and unequivocal term that no express prohibition on bequest by way of will under Clause 2 (12) of the said lease deed was imposed at present and unless the Government amends the Rules or imposes proper restrictive covenants prohibiting bequeath in favour of the stranger or by enacting proper law, there would be no statutory power to impose such restriction prohibiting such bequest in favour of a stranger. In this regard it may be mentioned that the State Government enacted an Act namely the West Bengal Government Land (Regulation of Transfer) Act, 1993 imposing restriction on transfer of any Government land without prior permission of the State Government throughout West Bengal. The said Act came into operation on 4th March, 1997 but subsequently by issuing a Government order on 20th March, 1998, operation of the said Act was kept in abeyance temporarily and the said Government order is still in operation. Subsequently an ordinance being West Bengal Ordinance No. 2009 was published in the Calcutta Gazette on 27th January, 2009 by amending the said Act, inter alia, to the effect that the said Act shall come into force on such date and in such area as the State Government may by notification, appoint and different dates may be appointed for different areas. Thereafter West Bengal Government Land (Regulation and Transfer) Act

was amended in 2009 and the amended Act was published in the Calcutta Gazette after it received the assent of the Governor. By the said amendment it was introduced that the West Bengal Government Land (Regulation and Transfer) Act, 1993 shall come into force on such date and in such area as the State Government may, by notification appoint and different dates may be appointed for different areas.

22. Mr. Bihani, Learned Senior Counsel appearing for the petitioner submitted that no such notification was subsequently issued by the State Government for making the said Act operative. As such he contended that the said Act still remains inoperative and therefore the provisions of the said Act cannot be referred to, for nullifying the effect of the will of Anil Kumar Kundu by which the interest of the said testator in the leasehold right in the plot in question stood vested with the petitioners by virtue of the said probated will.

23. The Learned Advocate General drew my attention to various provisions of the said Act and the Division Bench decision of this Court in the case of Asansol Durgapur Development Authority & Anr.-Vs-Tapas Banerjee & Ors. reported in AIR 2009 Cal. 41, wherein this Hon''ble Court after interpreting various provisions of the said Act, came to the conclusion that the transfer by way of bequest also amounts to assignment of leasehold interest and the bequest also attracts the restrictive clause contained in the lease deed. The Division Bench also held that such transfer by way of will is also hit by such restrictive clause, making such transaction invalid. Though initially the Learned Advocate General, by referring to the various provisions of the said Act and the aforesaid Division Bench decision of this Hon''ble High Court, invited me to draw identical conclusion in the instant case but ultimately he submitted that the said Act remains inoperative for want of notification. He however submitted that though the decision which was taken by the Division Bench of this Hon''ble Court in the said case has no binding effect upon this court as a law of precedence but the discussion which was made therein on the effect of such transfer by way of will can be considered by this court, while deciding an identical issue involved in this proceeding.

24. At the very outset I would like to mention here that since the said decision was arrived at by interpreting certain provisions of the Act which were inoperative at the relevant time, the decision which was taken in the said case by the Division Bench of this Hon''ble court is not binding upon this court as a judicial precedent. It is really unfortunate to note that even the State authority did not hesitate to mislead the Division Bench of this Hon''ble Court by inviting it to decide the issue involved in the said case with reference to various provisions of an Act which remained inoperative at the relevant time.

25. Be that as it may, even assuming that the principle laid down therein as to the effect of bequest by way of will, without seeking prior permission of the Government, can be taken help of, by this court to resolve the present dispute in this case, still then I hold that the principle which was laid down in the said

decision relating to the effect of such bequest by way of will has no application in the present case as the restriction on transfer of leasehold interest by the lessee which was imposed in the lease which was under consideration before the Division Bench of this Hon"ble Court, was essentially different from the restrictive clauses contained in the lease deed under consideration before this court. The restriction which was imposed in clause-VII in the lease deed which was before the Division Bench of this Hon"ble Court, is reproduced herein:-

VII the leasehold interest of the lessee can be assigned, mortgaged or otherwise transferred with prior consent of the lessor, i.e., Assansol Durgapur Development Authority.

26. The said restrictive clause puts a restriction on transfer of leasehold interest by assignment, mortgage and/or transfer of any description without prior consent of the lessor. The use of the expression transfer of any description in the said restrictive Clause is very significant as not only the assignment and mortgage without permission of the Government was prohibited under the said restrictive clause but also transfer of any description without permission of the Government was also prohibited under the said restrictive clause. Such restriction, in the present case is conspicuously absent as I have already indicated above that clause 2 (8) of the lease deed under consideration before me, prohibits only assignment and transfer, without prior permission of the Government, and clause 2 (12) thereof recognizes the lessee's right of bequeathing her interest by way of will even in favour of a stranger. As such this court holds that the principle as laid down in the aforesaid Division Bench decision of this court cannot be applied in the facts of the instant case. For similar reason, the decision of the Hon"ble Supreme Court in the case of Sangappa Kalyanappa Bangi-Vs-Land Tribunal, Jamkhandi & Ors. (supra) cannot be applied in the instant case as I find that the restriction on sub-division and/or sub-letting which was imposed u/s 21 of Karnataka Land Reforms Act, 1961 was complete and exhaustive, but restriction on the lessee's right of assignment and/or transfer was not complete and exhaustive in the lease under consideration before me, as bequest by will even to a stranger was permitted in clause 2 (12) of the said lease deed.

27. For proper understanding the principle laid down by the Hon"ble Supreme Court in the said decision the prohibition which was in fact imposed u/s 21 of the said Act is required to be taken note of. Paragraph 5 of the said decision of the Hon"ble Supreme Court may be considered in this regard, as Hon"ble Supreme Court recorded therein the exact term in which such prohibition was imposed therein. It was recorded therein that "what is prohibited u/s 21 of the said Act is that there cannot be any sub-division or sub-letting of the land held by a tenant by assignment of any interest thereunder" with a rider that "exceptions are there, when a 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 said Act

was also taken note by the Hon''ble Supreme court wherein it was declared that when a tenant dies, the tenancy devolves upon the heirs of such tenant on the same terms and conditions on which the tenant was holding at the time of his death. In this regard the Hon''ble Supreme Court held that assignment of any interest of the tenanted land by way of device or a bequest under a will cannot be stated to be left beyond the scope of the said provision inasmuch as assignment disposes of the rights of the lessee in the leasehold property. The Hon''ble Supreme Court further held that when there is a disposition of right under a will, though it operates posthumously, is nevertheless a recognition of the legatee therein as to his right in the tenanted land and in that event deposition by will is also an assignment of the tenanted land even though the legatee's right will come into effect after the death of the testator. It was thus, held that though it can be stated in general terms that device simplicitor will not amount to assignment but in a special case of this nature, interpretation will have to be otherwise.

28. Thus, if the restriction as contained in Section 21 is considered in the light of the aforesaid judgment of the Hon''ble Supreme Court, then this court has no hesitation to hold that the restriction on sub-division and sub-letting of the land by the tenant by assignment of his interest therein, is total and comprehensive. Such restriction, in my view, also applies to a bequest of tenancy right by will.

29. Reading the said judgment of the Hon''ble Supreme Court, this court has no hesitation to hold that the principle laid down therein cannot be applied in the instant case because of the provision contained in Clause 2 (12) of the lease deed which permits the lessee to bequeath his leasehold interest by way of will in favour of a stranger. As such this court cannot agree with the submission of the Learned Advocate General that the dispute involved in the present case can be decided by following the principle laid down by the Hon''ble Supreme Court in the aforesaid decision.

30. No doubt the learned advocate general was correct in submitting that in suitable cases, the State authority may inquire into the nature of the deal to find out as to whether transfer by will is in actuality a sale, or in other words, sale or assignment was in fact made in the garb of will, in total disregard of the policy decision of the authority. He further submitted that merely because probate or letters of administration were granted, such grant would not preclude the State authority from enquiring into the real intention of the parties to such transaction. In fact, it was held by the Hon''ble Supreme Court in *Delhi Development Authority-Vs-Vijaya C. Gurshaney (Mrs.) & Anr. (supra)* in the case of *Suraj Lamp & Industries Pvt. Ltd.-Vs-State of Haryana & Anr. (supra)*, that such enquiry is necessary as the dishonest transferor very often to defraud the State Exchequer enter into property deal with the dishonest transferee in the guise of Power of Attorney Sale, Agreement for sale with a General Power of Attorney or living will transfer. On perusal of these judgments it appears to me that such an inquiry in the present case will result in futility as the state respondent never intended to

put any restriction on transfer by way of bequest in the lease which is under consideration before me unlike the cases which were before the Hon''ble Supreme Court wherein transfer of any description, without permission of the authority was totally prohibited.

31. When unrestricted right to bequeath the leasehold interest of the lessee by will was given in the present lease to the lessee, no fruitful purpose will be served by enquiring into the real purpose of such transaction. When the lease itself does not provide for obtaining prior permission from the Government for execution of the will neither the State Respondent can declare the vesting of the testators'' leasehold interest in the land upon the legatees, as invalid nor can it demand transfer fees by treating such transaction as irregular and/or for giving a legal safe to it.

32. This conclusion I arrive at, as I cannot agree with the submission of the Ld. Advocate General that will is an instrument of transfer in the form of gift having its deferred effect posthumously. I have considered the decisions of Allahabad High court which were relied upon by the Learned Advocate General in support of his such submission. It is no doubt true that it is an instrument securing money or other property having such value and as such in a case where the will is sought to be declared as invalid and inoperative the plaintiff is no doubt required to pay court fees as per Section 7 (IV-A) of the court fees Act. I accept this part of the proposition laid down by the Hon''ble Allahabad High Court in those two decisions cited by the Learned Advocate General, but I cannot agree with the finding of the Allahabad High Court that will is an instrument in the form of a gift. In order to find out the distinction between gift and will, I will have to consider the various provisions of the Transfer of Property Act and the Indian Succession Act. Section 123 of the Transfer of Property Act defines Gift. It says that "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor to another, called the donee and accepted by or on behalf of the donee and such acceptance must be made during the life time of the donor and while he is still capable of giving whereas as per Indian Succession Act, will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of estate upon his death. Unlike gift, it is not a transfer inter vivos. The essential characteristics of the will are that it is intended to come into effect after the death of the testator and is revocable at any time during the life time of the testator at his sweet will. It is said that so long as the testator is alive, a will is not worth more than a piece of paper on which it is written, as the testator can revoke it at any time. If the testator is not married, at the time of execution of the will, but he marries subsequently, the will stands revoked by operation of law. Registration of the will is not compulsory but in order to make a gift effective, the instrument of gift must be registered. Gift can only be made in respect of an existing moveable or immovable property while will can be made even in respect of any property which the testator may acquire prior to his death. Gift takes effect immediately upon its acceptance by the donee and such

acceptance must be made during the life time of the donor and when he is capable of giving the property. These ingredients are absent in case of will. In case of gift right of the donor is transferred by the acts of the parties with immediate effect, but chapter VI and VII of the Indian Succession Act give clear indication that right of the testator vests with the legatee, on the death of the testator. Use of the expression of "vesting of the right of the testator upon the legatee" in Indian Succession Act is very significant as vesting is made always by operation of law, but in case of gift right of the donor is transferred to the donee by acts of the parties. For all these reasons I cannot accept that will is an instrument of transfer in the form of a gift. I thus hold that will cannot be treated as gift for the present purpose.

33. Of course the Hon'ble Supreme Court in some of the decisions cited by the Learned Advocate General held that inquiry in some occasions may be necessary for ascertaining the real intention of the parties to the transactions, where the parties enter into any transaction with an intention to transfer the transferor's right in favour of the transferee with immediate effect and for monetary consideration by developing a new concept of describing such document of conveyance as power of Attorney Sale, Agreement sale and will sale. In fact, nomenclature of the deed i.e., the deed, how it is described, is not the decisive factor for determining the nature of transaction under a deed. The nature of the deed can be determined only by considering the text and/or purports of the deed. As such enquiry was felt necessary by the Hon'ble Supreme Court in cases where title to the property passed from the transferor to the transferee with immediate effect and for consideration (emphasis is laid on the underlying portion). In this context the Hon'ble Supreme court referred to the General Power of Attorney Sale (GPA Sales) or sale agreement/General Power of Attorney Sales/will transfers, while the testator is alive i.e., living will. Thus, when any property is transferred even by a will with immediate effect, then no doubt, such document cannot be treated as a will under the Indian Succession Act. Living will is really an instrument where right of the transferor is transferred with immediate effect to the transferee but in case of bequest as per Indian Succession Act, will takes effect after the death of testator. Thus if it is found that a will bears all the ingredients of a valid will as per the Indian Succession Act, it cannot be treated as an instrument of assignment and/or gift... etc. As such enquiry as suggested by the State, will not result any fruitful purpose in the present case as I find that the Lessee's interest in the demised property vested with the petitioner by operation of law as per the said probated will and it is nobody's case that such transfer was effected during the life time of the testator by a living will. That apart, there is no reason to think that State Exchequer may be defrauded in case of transfer by will, as Probate/Letters of administration cannot be obtained without payment of court fees and stamp duties which ultimately flow to the State Exchequer.

34. As such this court concludes by holding that since lease does not prohibit bequest by will, the vesting of testator's right with the legatee on the basis of

the probated will cannot be declared invalid by the State and since such vesting is made by operation of law under the Indian Succession Act, the State Authority cannot declare such vesting of leasehold right of the original lessee upon the petitioners, as illegal and as such I hold that no permission of the State authority for such transfer is necessary to legalize such transfer by will inasmuch as such concept of grant of post facto permission by the State to legalize such will is unknown to Indian Succession Act, and for similar reason I hold that State authority cannot demand permission fees in terms of the impugned notification dated 22nd June 2012 for effecting mutation of the names of the petitioners in the official records of the State Authority.

35. I conclude by observing that contractual rights of the parties cannot be altered unilaterally; even by notification. Such contractual right of the parties affecting rights of the parties can only be altered by enactment through legislative process. Though an Act was enacted dealing with this subject, the said Act is still in limbo, due to want of notification. As such the right of the parties are still regulated by contract which cannot be affected by any notification issued by the State Authority in its administrative capacity.

36. Accordingly, this court disposes of the writ petition by directing the concerned State respondents to mutate the names of the petitioners as lessees for the said plot of land together with the construction made thereon in respect of the residuary period of the said lease by recognizing the vesting of the lessee's interest with the petitioners by virtue of such probated will. Such exercise should be completed within 15th November, 2013.

37. Thus the writ petition is, thus, disposed of Urgent xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.

Later

After delivery of the judgment Mr. Banerjee, Learned Advocate appearing for the State respondent prays for stay of operation of the judgment for enabling his client to decide the next course of action.

39. Such prayer of Mr. Banerjee is opposed by Mr. Bihani, Learned Advocate appearing for the petitioners.

40. Since sufficient time has been given to the State respondents for compliance of this order and/or for deciding the next course of action, this court does not feel any necessity to stay the operation of the order.

Accordingly, the prayer for stay made by Mr. Banerjee stands rejected.