(2015) 07 MEG CK 0017

In the Meghalaya High Court

Case No : WP(C) No. 143 of 2010

State of Meghalaya and Others — APPELLANT

Vs

Bimol Deb and Others — RESPONDENT

Date of Decision : 31-07-2015

Acts Referred:

Constitution of India, 1950 — Article 246
Meghalaya Interpretation and General Clauses Act, 1972 — Section 6
Stamp Act, 1899 — Section 2(10)
Succession Act, 1925 — Section 2, 2(d), 2(h), 276, 3
Transfer of Property Act, 1882 — Section 5, 53A

Citation : AIR 2015 Meghalaya 48 : (2016) 1 GLT 58

Hon'ble Judges : S.R. Sen, J

Bench : Single Bench

Advocate : K.S. Kynjing, Advocate General and Y. Shylla, GA, for the Appellant; A. Khan, Advocates for the Respondent

Final Decision : Disposed off

Judgement

S.R. Sen, J—The brief fact of the case in a nutshell is that:

"A plot of land bearing No. 4 with an area of 0.221 acres at G.C. Phukan''s Land, New Colony, Laitumkhrah was allotted by the Government of Assam on 09.02.1954 to one Shri Prabhat Chandra Deka. The said piece of land was subsequently settled in favour of Shri Prabhat Chandra Deka by the Deputy Commissioner, Khasi & Jaintia Hills, Shillong on 02.02.1970 vide Lease Agreement dated 12.01.1970."

That during his lifetime, Shri Prabhat Chandra Deka wanted to sell the plot of land to Shri Indrajit Dutta from whom he took financial assistance regularly and could not repay. Considering their long friendship and mutual love and affection, Shri Prabhat Chandra Deka made a ''WILL'' bequeathing the said property to Shri Indrajit Dutta and in the alternative to Shri Bimol Deb (Respondent No. 1). On execution of the said Will, the said Shri Prabhat Chandra Deka handed over physical possession of the land to Shri Indrajit Dutta alongwith all the title documents and the said Shri Prabhat Chandra Deka died on 22.07.1989 and Shri Indrajit Dutta died on 21.04.2007 without probating the said Will in question.

The respondent No. 1 on 11th November, 2008 filed an application Under Section 276 of the Indian Succession Act, 1925 praying for probate of the Will. The learned Additional Deputy Commissioner, Shillong granted probate in favour of the respondent No. 1 (Shri Bimol Deb) vide order dated 24.02.2009. After obtaining the probate, the respondent No. 1 on 15.07.2009 filed an application for mutation of the said land in his name, but the same was rejected by the Additional Deputy Commissioner (Revenue), Shillong vide order dated 07.08.2009.

The respondent No. 2 who is the only son of (L) Prabhat Chandra Deka filed an application for mutation of the said plot of land in his name in the year 1999 i.e. during the lifetime of (L) Indrajit Dutta, and since no objection was filed against the proposed mutation from the side of the said Shri Indrajit Dutta or the respondent No. 1 or by any other persons, the mutation was granted in favour of the respondent No. 2.

Being aggrieved by the order dated 07.08.2009 passed by the learned Additional Deputy Commissioner (Revenue), Shillong rejecting the application for mutation, the respondent No. 1 preferred an appeal Under Section 147 of the Assam and Revenue Regulation, 1886 before the Meghalaya Board of Revenue.

After hearing the parties, the Meghalaya Board of Revenue vide order dated 20.01.2010 allowed the appeal and set aside the order dated 07.08.2009 on the ground that the learned Additional Deputy Commissioner (Revenue), Shillong has not taken due note of the evidentiary value of the probate order in deciding the ownership of the said property while passing the impugned order dated 07.08.2009 rejecting the mutation application of the respondent No. 1.

Being aggrieved by the order dated 20.01.2010 passed by the Meghalaya Board of Revenue; the petitioner (State of Meghalaya) filed this instant writ petition challenging the said impugned order on the different grounds.

2. Mr. K.S. Kynjing, learned Advocate General appearing for and on behalf of the petitioner submitted that, as per the Meghalaya Transfer of Land (Regulation) Amendment Act, 2010 (Act No. 11 of 2012) no one can make a Will to transfer the property from one living person to another living person. He also submitted that, the present Will in question is not a Will at all, but it was made for the purpose of transfer of land by the testator of the Will. The learned Advocate General also raised a question that, the matter is barred by limitation because Shri Indrajit Dutta the Executor of the said Will did not take any step to obtain the probate during his lifetime. It is almost after 18(eighteen) years of the death of the testator, the probate was obtained by the respondent No. 1 (Shri Bimol Deb) and prayed that the impugned order passed by the Meghalaya Board of Revenue vide order dated 20.01.2010 is bad in law and needs to be quashed. Mr.

K.S. Kyning, learned Advocate General in support to his submission relied on:

"(i) (2011) 8 AIR S.C.W. 6385

(ii) Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others, AIR 2008 SC 2058 : (2008) 2 CTC 850 : (2008) 6 SCALE 112 : (2008) 8 SCC 463 : (2008) AIRSCW 2726

(iii) (1994) 2 AIR SC 1653"

3. On the other hand, Mr. A. Khan, learned counsel appearing for and on behalf of the respondents relied on Para 14, 15, 16, 18 and 19 of the counter affidavit. He also referred to section 6 of the Meghalaya Interpretation and General Clauses Act, 1972 and to support his submission relied on:

"(i) (1989) 2 GLR 125,

(ii) (1984) 71 AIR SC 1866

(iii) (1984) 71 AIR SC 87 Para 17

(iv) (2010) 2 GLT 726 Para 36

(v) (2012) 4 AIR SC 3167 Para 30, 32, 36, 37 and 38

(vi) (2008) 2 AIR SC 2058 Para 16.

(vii) (1992) 79 AIR SC 522 Para 17"

4. To answer these questions raised by the learned counsels, let me look back to the definition of the "WILL". Under Section 2 Clause (h) of the Indian Succession Act, 1925 "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". On bare reading of the definition of the Will, it appears that, a living person makes a declaration pertaining to his property by way of bequeathing to another living person only after his death.

5. The Hon''ble Supreme Court in the case of Mathai Samuel and Others Vs. Eapen Eapen (dead) by LRs. and Others, AIR 2013 SC 532 : (2013) 1 RCR(Civil) 829 : (2012) 11 SCALE 167 at Para 12 and 13 was pleased to observe that:

"12. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:

(1) It must be a legal declaration of the testator''s intention;

(2) That declaration must be with respect to his property; and

(3) The desire of the testator that the said declaration should be effectuated after his death.

13. The essential quality of a testamentary disposition is ambulatoriness of

revocability during the executant''s lifetime. Such a document is dependent upon the executant''s death for its vigour and effect".

6. The Hon''ble Supreme Court in the case of M.B. Ramesh (D) by L.Rs. Vs. K.M. Veeraje Urs (D) by L.Rs. and Others, (2013) 6 AD 488 : AIR 2013 SC 2088 : (2013) 3 CTC 650 : (2013) 7 JT 94 : (2013) 2 RCR(Civil) 932 : (2013) 6 SCALE 534 : (2013) 7 SCC 490 : (2013) AIRSCW 2732 held that:

"A valid and enforceable Will shall be attested by two or more witnesses, each of whom has seen testator sign or affix his mark to the Will, and each of the witnesses has signed the said Will in presence of testator. However, held, court cannot disregard evidence of attendant circumstances which are brought on record and it must satisfy itself as to totality of circumstances".

7. So, after examining the definition of the Will on different angle, I am of the view that, the Will is not a sale at all. It is a legal declaration of the testator to carry out his property after his death.

8. Section 5 of the Transfer of Property Act, 1882 reads as follows:

"5. Transfer of property defined. - 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, and one or more living other living persons; and "to transfer property" is to perform such act. [In this section "living person" includes a company or association or body of individuals, whether 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, associations or bodies of individuals]".

9. The Hon''ble Supreme Court in the case of Smti Rukmani Devi and others versus Narendra Lal Gupta: AIR (1984) SC 1866 held that:

"It is well settled that the decision of the probate court is a judgment in rem. A probate granted by a competent court is conclusive of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. Where the citation has been issued to the interested persons and has been served upon them, their failure to enter a caveat to contest the proceedings would preclude them from contesting the validity of the will in other proceedings".

10. The Hon''ble Supreme Court in the case of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, (2011) 10 AD 365 : AIR 2012 SC 206 : (2012) 169 CompCas 133 : (2011) 6 CTC 90 : (2012) 340 ITR 1 : (2011) 4 RCR(Civil) 669 : (2011) 11 SCALE 438 : (2012) 1 SCC 656 : (2011) 11 SCR 848 : (2011) 202 TAXMAN 607 was pleased to discuss in details the scope of Will, which is reproduced herein as under for ready reference:

"14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain Vs. The Canara Bank and Others, (2001) 94 DLT 841 : (2002) 61 DRJ 101 , that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of ''GPA sales'' or ''SA/GPA/WILL transfers'' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

17. It has been submitted that making declaration that GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer is likely to create hardship to a large number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship.

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not ''transfers'' or ''sales'' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents

affected parties from getting registered Deeds of Conveyance to complete their title. The said ''SA/GPA/WILL transactions'' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to ''SA/GPA/WILL transactions'' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision".

11. On bare perusal of the observation made by the Hon''ble Supreme Court, it is understood and clear that, the Will never come within the parameter of transfer. A Will is a testament of the testator.

12. The Hon''ble Gauhati High Court in the case of S.H.K. Nongrum versus Shri Bimalendu Das Gupta: (1989) 2 GLR 125 was pleased to observe that:

"7. ''Will'' has been defined under clause (h) of section 2 of the Indian Succession Act, 1925 and it reads as follows: --

"''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."

8. At this stage it will be helpful to consider the meaning of "succession". ''Succession'' means the passing of property on the death of a person to a living person or persons under the law of descent and distribution. Therefore, transfer inter vivos, or from one living person to one or more living persons, has no application to the succession. In such a situation, ''will'' may aptly be called "testamentary succession". For these reasons, "any mode of transfer" under section 3 of the Act does not include ''will''."

13. As per the limitation is concerned, in my considered view, Article 137 of the Limitation Act, 1963 does not strictly apply for granting probate.

14. The Hon''ble Supreme Court in the case of Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others, AIR 2008 SC 2058 : (2008) 2 CTC 850 : (2008) 6 SCALE 112 : (2008) 8 SCC 463 : (2008) AIRSCW 2726 was pleased to observe that:

"16. Rejecting Mr. Dalapatrai''s contention, I summarise my conclusions thus:--

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the Court''s permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased''s death.

(e) delay beyond 3 years after the deceased''s death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates".

17. The conclusion ''b'' is not correct while the conclusion ''c'' is the correct position of law."

15. Further, after scanning of the record and argument advanced by the learned counsels for the parties and considering the facts and circumstances of the case, I am of the view that, the Meghalaya Land Transfer Act, 1971 is a law passed by the State legislature. There is no definition that, "transfer of property" shall also include within its meaning "WILL" under the Transfer of Property Act, 1882. Section 5 of the Transfer of Property Act, 1882 defines "transfer of property" as 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".

16. The definition of "WILL" can be found only in the Indian Succession Act, 1925 in Section 2(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."

17. Now, the word "Convey" in section 5 has been further defined in the Indian Stamp Act, 1899 in section 2(10). "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos (between living persons) and which is not specifically provided for by Schedule I".

The upshot of the above legal position is that, ''transfer of property'' will include only between living person and the same is the meaning of conveyance also which will include only between living persons. However, Will is a testament by a legal declaration bequeathing the right of property to a living person in future. A Will becomes effective only after the death of the testator. A Will is a last wish of a dead person.

18. Now, let me see the definition of "Transfer" under the Meghalaya Land Transfer Act, 1971 prior to 2012 amendment.

Section 2(d) "Transfer" means conveyance of land of one person to another and includes gift, sale, exchange, mortgage, lease, surrender or any other mode of transfer. So far as the first part is concerned, it is very apparent from the above definitions that, it has to be done between the living persons only. The problem is with the second part i.e. "or any other mode of transfer". The question that needs to be answered would be, whether "any other mode of transfer" will include within its meaning transfer between living person and living person and also between dead person to another living person. The emphatic answer as per the above definition of law will have to be "any other mode of transfer" will only mean between living persons and a dead person. Conveyance like oral sale, permissive possession, benami transaction, etc and by not stretch of any absurd interpretation shall include transfer of land between dead person and a living person. The reason why "any other mode of transfer" shall not include between dead person and living person is because:

"I. "Will" is succession in property where the principle by devolution of property by inheritance becomes automatically active by operation of law only on the death of the testator. This operation of law is further guided by the personal law of the testator or by the Indian Succession Act, 1925.

II. "Will" has a specific definition under the Indian Succession Act, 1925, but there is no definition of ''Transfer'' under the Transfer of Property Act, 1882 or Meghalaya Land Transfer Act, 1971. The only definition we have is "transfer of property" under the Transfer of Property Act, 1882. State legislature has got no locus standi to amend and modify or restrict the meaning of Will, whose power to define rest solely with the parliament and the parliament has already defined. State has got no legal authority to give any expanded or restricted meaning of "WILL"."

19. The Meghalaya Transfer of Land (Regulation) Amendment Act, 2010 (Meghalaya Act No. 11 of 2012) at Section 2(d) "Transfer" means the conveyance of land of one person to another and includes, gifts, sale, exchange, mortgage, lease, surrender other than will covered by clause (c) of sub-section (1) of section 3A.

20. If we read the definition of "Transfer of property" and "Conveyance" quoted and discussed above, it becomes very apparent that, by including "WILL" within the meaning of "Conveyance", the State legislature has rewritten the definition of "conveyance" which is illegal exercise of power; but the State legislature in the first place has no power to alter the definition of conveyance legislated by the parliament. The inclusion of "WILL" has to be struck down as illegal since the State legislature cannot overstep in the field of Union list while legislating law. The issue of succession is solely in the field of the Union list and not in concurrent list. Safe legal inference can be drawn that the insertion of WILL in clause 2(d) of the Meghalaya Land Transfer Amendment Act, 2012 quoted above is blatant case of illegal legislation and is liable to be struck out. The subsequent amendment in section 3A restricting the devolution of property only to

immediate family members will have to meet the same date and to be struck down.

21. It is admitted position of law that, "Transfer of Property" as defined in the Transfer of Property Act, 1882 is between living person. State legislature by including "WILL" within the parameter of transfer of property and conveyance has overstepped its constitutional limitation and legislated in the field of List 1 Article 246 of the Constitution of India (88), which gives power to the parliament only to legislate law on succession of property. The power to legislate law on succession of property is not in the domain in the concurrent list. State legislature has no constitutional authority to legislate law in serial 88 of List 1 Article 246 of the Constitution of India.

22. For the reasons discussed above, it is also admitted and apparent that, "WILL" does not come within the parameter of any other mode of transfer. Therefore, I am of the considered view that, the Meghalaya Land Transfer Amendment Act No. 11 of 2012 has been wrongly legislated by bringing the "WILL" within the meaning of transfer of any other mode of transfer of property. Insertion of "WILL" at 2(d) of the Meghalaya Land Transfer Amendment Act No. 11 of 2012 is illegal and blatant case of overstepping legislative competence laid down under the Constitution of India.

23. On perusal of the Impugned order dated 20.01.2010 at Annexure-IV, I agree with the observation made by the Meghalaya Board of Revenue that, the Additional Deputy Commissioner (Revenue), Shillong has acted like a appellate court against the probate order for which, she does not have the jurisdiction. Therefore, I do not find any ground to interfere with the Impugned order dated 20.01.2010 passed by the Meghalaya Board of Revenue. We must remember that, as per the Indian Succession Act, 1925 "WILL" cannot be restricted in favour of family members only, otherwise, the sanctity and basic purpose of "WILL" is bound to be defeated. The petitioner (State of Meghalaya) is also directed to take immediate steps to delete the word "WILL" from section 2(d) and 3(A) from Meghalaya Act No. 11 of 2012.

24. With these observations and directions, the instant writ petition stands dismissed and stands disposed of.

