

JAYAMMA

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v.

MARIA BAI DEAD BY PROPOSED LRS. AND ANR.

JULY 28, 2004

[S.B. SINHA AND S.H. KAPADIA, JJ.]

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*Karnataka Land Reforms Act, 1961; Sections 2(12),(17), 21 and 61:*

*Execution of Will by testator in favour of his relative—Application for grant of letters of administration filed by holder of the Will—Factum of execution of Will denied by the wife and children of the testator—Trial Court holding that the testator executed the Will with full knowledge, in sound state of mind—Appeal allowed by High Court holding that the Will was not maintainable as the subject matter of testament is agricultural land and occupancy rights thereof could not be assigned—On appeal, Held: A Court empowered to grant a letter of administration generally may not go into the question of title of property sought to be bequeathed—However, when a statutory embargo exists on the execution of a Will, Court could determine the question—In view of the provisions of the Act, Legislature intends that the land should not be allowed to go into the hands of a stranger—Any assignment made in contravention of the Act would invalidate such assignment—Assignment made within prohibited period—Having regard to the provisions of the Act, transfer of agricultural land within occupancy right permissible only in favour of one of the heirs and not to other—Interpretation of Statutes—Indian Succession Act, 1925—Sections 276 and 299.*

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*Words and Phrases :*

*'Family', 'joint family—Meaning of the context of Karnataka Land Reforms Act.*

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*Appellant, holder of a Will, filed an application for grant of letters of administration enclosing therewith a copy of the Will purported to have been executed by testator, husband of one of the respondents. The factum of the execution of the Will was denied by the respondent and children of the testator. Trial Court decreed the suit holding that the*

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- A testator executed the Will with full knowledge, in sound state of mind and it was not obtained fraudulently by the appellant, the holder. High Court held that the application for grant of letters of administration was not maintainable in terms of Section 61 of the Karnataka Land Reforms Act since the subject matter of testament was agricultural land and occupancy rights thereof could not have been assigned. Hence the present appeal.
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It was contended by the appellant that the trial Court had no jurisdiction to go into the question as to the title of the property while disposing of an application under Section 276 of the Indian Succession

- C Act; and that the expression 'family' was used in Section 61 of Karnataka Land Reforms Act must be given extended meaning so as to include the persons related to the testator by legitimate kinship in it.

- D Respondents submitted that the appellant was not a family member of the testator.

#### **Dismissing the appeal, the Court**

- E HELD : 1.1. *Sine qua non* for obtaining the status of occupancy of tenancy is that the person concerned must be a tenant on the appointed day. [181-F]

- F 1.2. The Court empowered to grant a letter of administration although ordinarily may not go into the question of title in respect of property sought to be bequeathed by the testator the situation would be different where the authority of the testator to execute a Will in relation to the subject matter thereof is in question. When a statutory embargo exists on execution of a Will, the Court shall not refuse to determine the question as regard validity thereof, as in terms of the provisions of a statute, the same would be void *ab initio*. [181-H; 182-A-B]
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- H 1.3. Sub-section (3) of Section 61 of the Karnataka Land Reforms Act lays down that any transfer of land in contravention of sub-section (1) shall be invalid whereupon the same shall vest in the State Government free from all encumbrances. The legislative intent that the land should not be allowed to go to the hands of a stranger to the family is, therefore,

manifest. Whereas in terms of Section 21 of the Act, strangers to the A family of the tenant to come upon the land is not allowed, the tenor of Section 61 is that except partition amongst the co-sharers, no transfer of the property, in any manner, is permissible. [182-F-G]

1.4. When an assignment or transfer is made in contravention of B statutory provisions, the consequence whereof would be that same is invalid, being opposed to public policy the same shall attract the provisions of Section 23 of the Indian Contract Act. [182-H; 183-A]

2.2. In the instant case, the transfer of agricultural land by way C of the Will has been made within a period of fifteen years from the date of grant, which is prohibited in law. Appellant, therefore, was not having any legitimate kinship with the testator of the Will. On a fair construction of Section 61 of the Act, a transfer of agricultural land with occupancy right is permissible only in favour of one of the heirs who would be entitled to claim partition of land and not others having D regard to the definition of 'family' as contained in Section 2(12) and 'joint family' as contained in Section 2(17) of the said Act. [183-G-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5637 of 2002. E

From the Judgment and Order dated 25.5.1999 of the Karnataka High Court in Misc. First Appeal No. 2353 of 1990.

S.N. Bhat for the Appellant.

Hetu Arora and Shiv Kumar Suri for the Respondent. F

The Judgment of the Court was delivered by

S.B. SINHA, J. : Interpretation of Section 61 of the Karnataka Land Reforms Act, 1961 (for short, "the said Act") falls for consideration in this appeal which arises out of a judgment and order dated 25.5.1999 passed by a Division Bench of the High Court of Karnataka in Misc. First Appeal No. 2353 of 1990. G

Before advertising to the issue involved in this appeal, the factual matrix of the matter may be noticed. H

A The appellant herein filed an application purported to be under Section 276 of the Indian Succession Act, 1925 for grant of letters of administration with a copy of the Will dated 20.2.1984 annexed purported to have been executed by one Anthony Rebello. The respondents herein are the wife and children of the testator. The *factum* of the execution of the Will having been denied and disputed by the notices, the said application was converted into a suit and marked as O.S. No. 66 of 1986.

The Trial Court decreed the suit holding *inter alia* that the testator executed the Will with full knowledge, having sound state of mind and it was not obtained by practising fraud, misrepresentation or duress.

C On an appeal preferred thereagainst the High Court while exercising its appellate jurisdiction under Section 299 of the Indian Succession Act, allowed the same holding that the application for grant of letters of administration with a copy of the Will was not maintainable in view of Section 61 of the said Act, inasmuch as the subject-matter of testament being agricultural land with occupancy right could not have been assigned. The High Court also rejected the contention raised on behalf of the appellant herein that a disputed question of title cannot be gone into in an application for grant of Letters of Administration.

E Before us Mr. Bhat, learned counsel appearing for the appellant herein raised the following contentions : (i) that the Trial Court had no jurisdiction to go into the question as regard the title of the property inasmuch as while disposing of an application under Section 276 of the Indian Succession Act, the Court is only concerned with genuineness or otherwise of the Will and in the event there exists a dispute with regard to title, a separate suit may be filed. It was pointed out that the impugned judgment wherein a contrary finding had been arrived at has since been overruled by a Full Bench of the High Court of Karnataka in *Smt. Severine D'Souza and Anr. v. Felix Ambrose D'Souza*, [II.R. 2003 Kar 194] (ii) that the expression 'family' used in Section 61 of the said Act must be given an extended meaning of so as to include the persons related to the testator by legitimate kinship or otherwise and in that view of the matter the appellant being the cousin's daughter of the testator would come within the purview thereof. Reliance in this behalf has been placed on *Sangappa Kalyanapa Bangi (Dead) through L.Rs. v. Land Tribunal, Jamkhandi and Ors.*, [1998] 7 SCC 294.

Ms. Arora, learned counsel appearing on behalf of the respondents A on the other hand, would contend that the appellant was mere a neighbour and has not been proved to be a member of the testator's family. Our attention, in this behalf, has been drawn to the statement of the appellant herein made by her in examination in chief before the Trial Court.

B The said Act was enacted for the purpose of enacting a uniform law relating to land reforms in the State of Karnataka. The expressions 'family' and 'joint family' have been defined in Sections 2(12) and 2(17) of the said Act to mean:

C "2(12) "Family" means –

(a) in the case of an individual who has a spouse or spouses, such individual, the spouse or spouses and their minor sons and unmarried daughters, if any;

(b) in the case of an individual who has no spouse such individual and his or her minor sons and unmarried daughters;

(c) in the case of an individual who is a divorced person and who has not remarried, such individual and his minor sons and unmarried daughters, whether in his custody or not; and E

(d) where an individual and his or her spouse are both dead, their minor sons and unmarried daughters,"

F "2(17) "Joint family" means in the case of person governed by Hindu Law, an undivided Hindu family, and in the case of other persons, a group or unit the members of which are by custom joint in estate or residence."

G Various restrictions have been imposed as regard sub-division or sub-letting of the land held by a tenant or assignment of any interest therein. G

Sections 21(1), 61(1) and 61(3) of the said Act impose such restrictions which read as under :

H "21. Sub-division, sub-letting and assignment prohibited.—(1) No sub-division or sub-letting of the land held by a tenant or H

**A** assignment of any interest therein shall be valid :

Provided that nothing in this sub-section shall affect the rights, if any, of a permanent tenant.

**B** Provided further that if the tenant dies. –

(i) if he is a member of joint family the surviving members of the said family, and

(ii) if he is not a member of a joint family, his heirs shall be entitled to partition and sub-divide the land leased subject to

**C** the following conditions :-

(a) each sharer shall hold his share as a separate tenant;

(b) the rent payable in respect of the land leased shall be apportioned among the shares as the case may be according to the share allotted to them;

(c) the area allotted to each sharer shall not be less than a fragment;

**E** (d) if such area is less than a fragment the sharers shall be entitled to enjoy the income jointly, but the land shall not be divided by metes and bounds;

**F** (e) if any question arises regarding the apportionment of the rent payable by the sharer it shall be decided by the Tahsildar.

Provided that if any question of law is involved the Tahsildar shall refer it to the court. On receipt of such reference the court, shall, after giving notice to the parties concerned, try the question as expeditiously as possible and record finding thereon and send the same to the Tahsildar. The Tahsildar shall then give the decision in accordance with the said finding.

**H** “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 A under this Chapter shall within fifteen years from the date of the final order passed by the Tribunal under sub-section (4) of sub-section (5) or sub-section (5-A) of Section 48-A be transferred by sale, gift, exchange, mortgage lease or assignment; but the land may be partitioned among members of the holder's joint family. B

(2) ... ... ... ... ...

(3) Any transfer or partition of land in contravention of sub-section (1) shall be invalid and such land shall vest in the State Government free from all encumbrances, and shall be disposed in C accordance with the provisions of Section 77."

On a bare perusal of the aforementioned provisions it would appear that whereas Section 21 refers to sub-division, sub-letting of the land held by a tenant or assignment of any interest therein, Section 61 imposes a stricter restriction on transfer of land of which tenant has become occupant. D

The said provisions are further required to be read with the expressions 'family' and 'joint family' as contained in Section 2(12) and 2(17) of the Act.

It is not in dispute that a tenant who has become an occupant cannot except on the grounds stated in the said Act, be evicted therefrom. Section 61 contains a non obstante clause. It is also not in dispute that although tenancy would be a heritable interest, the right of occupancy can be granted to an heir only if he is qualified therefor, that is there must be a cultivable land on the appointed day. However, all heirs cannot become occupant. Even a married daughter of the deceased tenant would not be granted such a right. The *sine qua non* for obtaining the status of occupancy of tenancy is that the person concerned must be a tenant on the appointed day. E F

Section 213 of the Indian Succession Act provides that no right as G executor or legatee can be established in any Court of Justice, unless a Court of Competent jurisdiction *inter alia*, grants a letters of administration with a copy of the Will annexed.

The Court empowered to grant a letter of administration although H ordinarily may not go into the question of title in respect of property sought

A to be bequeathed by the testator the situation would be different where the authority of the testator to execute a Will in relation to the subject matter thereof is in question. When a statutory embargo exists on execution of a Will, the court shall not refuse to determine the question as regard validity thereof, as in terms of the provisions of a statute, the same would be void

B *ab initio*.

We would discuss the construction of the provision of Section 61 of the said Act, a little later, but we have no hesitation in holding that in the event if it be held that the testator could not have executed the Will in favour of a person who could not be declared to be a tenant having

C occupancy right such a Will would be void *ab initio* and, therefore, *non est* in the eye of law. The court in such an event would not be determining a disputed question of title but would be considering the effect of the statute *vis-à-vis* the Will in question.

D The submission of Mr. Bhat for the forgoing reason cannot be accepted.

As we have noticed hereinbefore that the statutory embargo on transfer of land is stricter in a case where the tenant has become occupant

E than a land held by a tenant simpliciter. We have also noticed that the embargo on transfer is not only by way of sale, gift, exchange, mortgage, lease but also by assignment. What is permitted under the law is partition of the land amongst the members of the family. Section 61 of the Act is to be read in its entirety.

F Sub-section (3) of Section 61 lays down that any transfer of land in contravention of sub-section (1) shall be invalid whereupon the same shall vest in the State Government free from all encumbrances. The legislative intent that the land should not be allowed to go to the bands of a stranger to the family is, therefore, manifest. Whereas in terms of Section 21, G strangers to the family of the tenant to come upon the land is not allowed, the tenor of Section 61 is that except partition amongst the co-sharers, no transfer of the property, in any manner, is permissible.

H When an assignment or transfer is made in contravention of statutory provisions, the consequence whereof would be that same is invalid and

thus, being opposed to public policy the same shall attract the provisions A of Section 23 of the Indian Contract Act.

It is not disputed that in view the purport and object the Legislature sought to achieve by enacting the said provision the expression 'assignment' would include a Will. B

In this case, there is also no dispute that grant of agricultural land with occupancy right in terms of the provisions of the said Act was made on 14.10.1981. The will in question having been executed on 20.2.1984; the transfer has been made within a period of fifteen years from the date of grant which is prohibited in law. C

In *Sangappa Kalyanappa Bangi* (supra), whereupon Mr. Bhat placed strong reliance, a Division Bench of this Court held :

"...We have to read Section 21 with Section 24 to understand the full purport of the provisions. Section 24 is enacted only for the purpose of making it clear that the tenancy continues notwithstanding the death of the tenant and such tenancy is held by the heir of such tenant on the same terms and conditions on which he had held prior to his death. The heirs who can take the property are those who are referable to in Section 21. If he is a member of the joint family, then the surviving members of the joint family and if he is not such a member of a joint family, his heirs would be entitled to partition. Again, as to who his heirs are will have to be determined not with reference to the Act, but with reference to the personal law on the matter. The assignment of any interest in the tenanted land will not be valid. A devise or a bequest under a Will cannot be stated to fall outside the scope of the said provisions inasmuch as such assignment disposes of or deals with the lease. When there is a disposition of rights under a Will, though it operates posthumously is nevertheless a recognition of the right of the legatee thereunder as to his rights of the tenanted land. In that event there is an assignment of the tenanted land but that right will come into effect after the death of the testator. Therefore, though it can be said in general terms that the devise simpliciter will not amount to an assignment, in a special case of this nature, interpretation will have to be H

A otherwise."

Having held so, the Bench however, having regard to the phraseology used in Section 21 of the said Act proceeded to observe that the object of the law is not to allow strangers to the family of the tenant to come upon B the land stating :

C "...We must take into consideration that when it is possible for the tenant to pass the property to those who may not necessarily be the heirs under the ordinary law and who become heirs only by reason of a bequest under a Will in which event he would be a stranger to the family and imported on the land thus to the detriment of the landlord. In that event, it must be taken that a devise under a Will will also amount to a assignment and, therefore, be not valid for the purpose of Section 21 of the Act.

D If Section 24 is read along with Section 21 it would only mean that the land can pass by succession to the heirs of a deceased tenant but subject to the conditions prescribed in Section 21 of the Act. Therefore, we are of the view that the broad statement made by the High Court in the two decisions in *Shivanna*, (1977) 1 Kant LJ 146 (Short Notes Item 160) and *Dhareppa v. State of Karnataka*, (1979) 1 Kant LJ 18 would not promote the object and purpose of the law. Therefore, the better view appears to us is as stated by the High Court in *Timmakka Kom Venkanna Naik v. Land Tribunal*, (1987) 2 Kant (J 337).

E F It was further observed :

G "...It is no doubt true that the meaning attributed to an heir could be as suggested by the learned counsel for the appellants so as to include the descendant and other persons related by legitimate kinship or otherwise who may be covered by a Will, but the true question to be decided in this case is if a devise of that nature is hit by Section 21 of the Act or not. The object and purpose of Section 21 being to continue the rights of tenancy only to those known under law as heirs and therefore, assignment to strangers H is barred..."

Apart from the fact that the interpretation was rendered having regard to the language used in Section 21 of the said Act which would not *ipso facto* apply to Section 61 thereof, as thereby a stricter statutory embargo has been imposed on transfer or assignment, the contention of Mr. Bhat to the effect that the appellant was a relation to the testator also does not appear to be correct. In her examination in chief itself, the appellant stated:

“I am the Plaintiff PW 3 Richard D’Souza is my son-in-law. He was residing at Kinnigoli and after marriage he is residing at Kateel. He was living in a house within a distance about  $\frac{1}{4}$  meter from the house of the deceased Anthony Rebello. I was living in the house of my son-in-law. Anthony Rebello was living alone in his house. He is no more. I knew him for a period of about 1 year and 9 months prior to his death. I came to know him as I was living in the house of my son-in-law. Anthony Rebello came to my son-in-law’s house and told him that he has no one to look after him and he is aged 82 years. During this 1 year and 9 months his wife or children had not come to see him. Anthony Rebello requested my son-in-law for assistance and therefore, I, my son-in-law looking after him.”

The appellant, therefore, in view of the aforementioned statement was not having any legitimate kinship with the testator of the Will.

On a fair construction of Section 61 of the Act, in our opinion a transfer of agricultural land with occupancy right is permissible only in favour of *one of the heirs* who would be entitled to claim partition of land and not others having regard to the definition of ‘family’ as contained in Section 2(12) and ‘joint family’ as contained in Section 2(17) of the said Act:

We, therefore, find no force also in the second submission of Mr. Bhat.

For the reasons aforementioned. We do not find any merit in this appeal, which is dismissed accordingly. No costs.

S.K.S.

Appeal dismissed.