



Shubhada S Kadam

5-wp-3637-2024 (judgment).doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3637 OF 2024

1 Nandkishor Shivdin Sahu
Age – 44 years, Occu-Service

2 Urga Nandkishor Sahu
Age 42 years, Occu – Service,
Both R/a. 106, Mikasa Kesnand Road,
Wagholi, Pune.

Petitioners

Versus

1 Sanjeevani Naresh Patil,
Age -73 years, Occu – Household,
R/a. Plot No.103, A Ward, R.S. 869/1,2
Prathamik Shikshakanchi CHS Ltd.,
Kolhapur.

2 Ella Shridhar Sawant,
Age – 40 years, Occu-Household,
R/a. 27/2/21, Omkar CHS Ltd.,
Plot No.2, Part 2, Kondva Road,
Katraj Pune.

3 State of Maharashtra,
Through Sub-Divisional Magistrate,
Karveer Division, Kolhapur.

Respondents

Mr. R.P. Walvekar i/b. Mr. Sangramsinhh Yadav, Advocate for the
Petitioners.

Mr. Sanjeev Sawant along with Mr. Abhishek Deshmukh and Ms.
Bhakti Wast i/b. Mr. Samir Suryawanshi, Advocate for Respondent
No.1.

Mr. A. A. Nadkarni, AGP for Respondent No.3- State.

CORAM : R. M. JOSHI, J.

DATE : 29th AUGUST, 2024.

Judgment :

1. The issue arises in this petition is as to whether it is within the jurisdiction of the Tribunal under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (for short "the Act") to decide the issue about a gift or any document being obtained from senior citizen by fraud and whether the proceeding under Section 23 of the Act, can be used to seek declaration of any document/transfer as cancelled bypassing process of adjudication of real dispute regarding validity of transaction.

2. The petitioners herein are challenging the order dated 12th December 2022 passed by the Tribunal under the Act whereby the gift deed in respect of the subject property executed by respondent No.1 in favour of the petitioners was cancelled and this order was upheld by the appellate authority by passing the order dated 9th October 2023.

3. The facts, which led to filing of this petition, can be narrated in brief as under :

(i) Petitioner No.1 is the son-in-law of respondent No.1 and petitioner No.2 is her daughter. It is the case of the petitioners that respondent No.1 was residing with them at the relevant time

and had voluntarily and out of love and affection executed a registered gift deed bearing 4976 of 2016 dated 3rd August 2016 in favour of petitioner No.1 in respect of property bearing plot No.103, R.S.No.869/1, 2, 876 and 877 situated at Shree Prathamik Shikshakanchi Co-operative Housing Society Ltd., Kolhapur.

(ii) As per case of petitioners, husband of respondent No.1 instituted suit being R.C.S. No.415 of 2017 against petitioner No.1 and respondent No.1 for declaration and injunction. In the said suit, respondent No.1 filed a written statement denying allegations therein and categorically admitting the fact of execution of gift deed on her own free will and out of love and affection. It is further case of the petitioners that when respondent No.2, who is the sister of the petitioner No.2, learnt about execution of gift deed, she instigated respondent No.1 to file complaint under the provisions of the Act. It is on such instigation, a complaint came to be filed being case No. MAG/SR/MATAPITA/17/2022 before the Tribunal under the Act against petitioners as well as respondent No.2. In the said complaint, it is contended by respondent No.1 that she is getting monthly pension of Rs.30,000/-. It is alleged in the said complaint that the petitioners have obtained gift deed in respect of the subject property by playing fraud upon her. The Tribunal passed order dated 12th December 2022 whereby the gift deed in question was

cancelled for the reason that the petitioners are not maintaining respondent No.1. This order was unsuccessfully challenged before the appellate authority. Hence, this petition.

4. Learned counsel for the petitioners, at the outset, makes a statement that, on instructions, that the petitioners do not wish to challenge the direction issued by the Tribunal of granting maintenance of Rs.2,000/- to be paid to respondent No.1. The challenge to the order is restricted to cancellation of gift deed executed by respondent No.1 in favour of petitioner No.1. It is the contention of learned counsel for the petitioners that it is not within the jurisdiction of the Tribunal to decide the issue as to whether the impugned gift deed has been executed by respondent No.1 by fraud or misrepresentation caused to her by the petitioners. According to him, in absence of any covenant in the gift deed about transferee agreeing to maintain senior citizen, such document is not open for cancellation. To support this submission, he placed reliance on judgment of the Hon'ble Supreme Court in case of **Suresh Chhikara versus Ramti Devi and anr. reported in 2022 SCC Online SC 1684.** It is submitted that in the summary procedure to be adopted in the proceedings before the Tribunal, the issue of fraud and validity of registered document cannot be gone into and this issue can only be decided by the competent civil court. On merits, it is submitted that even otherwise, there is no reason or justification

for the Tribunal to pass order of cancellation of gift as respondent No.1 herself has categorically stated before Tribunal about she being receiving sum of Rs.30,000/- by way of pension. It is his submission that in absence of any specific averments as to the basic requirements of respondent No.1 in view of receipt of pension and the same not been met with by the petitioners, it was not open for the Tribunal to pass any order in exercise of Section 23 of the Act. On instructions, a further statement is made before this Court that the petitioners do not desire to evict respondent No.1 from the subject property and they undertake that during lifetime of respondent No.1, she would be permitted to stay in subject property.

5. Learned counsel for respondent No.1, at the outset, raised objection with regard to the suppression of the facts by the petitioners while filing the petition. It is his submission that the petitioners ought to have placed on record the entire complaint, filed before the Maintenance Tribunal, however, conveniently, the entire complaint has not been placed before this Court and the petitioners have sought to misrepresent before the Court. It is his submission that on this ground itself, the petition deserves to be dismissed. As far as this submission is concerned, this Court does not find any deliberate suppression of facts on the part of petitioners. It is disclosed that complaint is filed before Tribunal and since the same is a part of record before the said Authority, it cannot be said that

this is a case of dismissal at threshold for suppression of material facts to gain any undue advantage over the other side.

On merits, it is his submission that the order passed by the Tribunal is just, legal and proper and well within the jurisdiction entrusted upon the said authority under the provisions of the Act. It is his submission that the Aim and Object of the Act is to ensure that the senior citizens are maintained and welfare of the parent is seen to have been maintained by the children. According to him, the Tribunal has powers of the civil court for the purpose of taking evidence on oath, for enforcing attendance of witness, so also compelling discovery and production of documents and, in view of this, the Tribunal is deemed to be civil court for all purpose under Section 195 and Chapter 26 of the Cr.PC., it cannot be said that the Tribunal has no authority to declare a document as null and void and issue direction of cancellation thereof. It is his submission that Section 23 of the Act specifically provides for transfer of the property be deemed to have been made by fraud or coercion or under undue influence, if the transferee fails to provide basic amenities and basic physical needs of the transferor. It is his submission that in the application filed before the Tribunal, there is specific averment of respondent No.1 herein of not being maintained by the petitioners and since it is being held so, there is no reason or justification for causing interference in the impugned order. To

support his submissions, reliance is placed on judgment of this Court in case of **Nitin Rajendra Gupta versus Deputy Collector, Mumbai and ors. Manu/MH/2298/2024.**

6. At the outset, submissions made by both sides on the basis of judgments cited supra are considered. The Hon'ble Supreme Court in the case of **Sudesh Chhikara (supra)** has in paragraphs 11 to 15 has observed as under :

"11. We have given careful consideration to the submissions. Before dealing with the factual aspects, it is necessary to advert to the legal aspects. The Sub-Divisional Magistrate acting as the Maintenance Tribunal under the 2007 Act has invoked the power under Section 23 to declare that the subject release deed was void. The 2007 Act has been enacted for the purposes of making effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognized under the Constitution of India. The Maintenance Tribunal has been established under Section 7 to exercise various powers under the 2007 Act. Section 8 provides that the Maintenance Tribunal, subject to any rules which may be framed by the Government, has to adopt such summary procedure while holding inquiry, as it deems fit. Apart from the power to grant maintenance, the Tribunal exercises important jurisdiction under Section 23 of the 2007 Act which reads thus:

*"23. Transfer of property to be void in certain circumstances.—
(1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property*

shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.(3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organisation referred to in Explanation to sub-section (1) of section 5."

(emphasis added)

12. Sub-section (1) of Section 23 covers all kinds of transfers as is clear from the use of the expression "by way of gift or otherwise". For attracting sub-section (1) of Section 23, the following two conditions must be fulfilled:

a. The transfer must have been made subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor; and

b. the transferee refuses or fails to provide such amenities and physical needs to the transferor.

13. If both the aforesaid conditions are satisfied, by a legal fiction, the transfer shall be deemed to have been made by fraud or coercion or undue influence. Such a transfer then becomes voidable at the instance of the transferor and the Maintenance Tribunal gets jurisdiction to declare the transfer as void.

14. When a senior citizen parts with his or her property by executing a gift or a release or otherwise in favour of his or her near and dear ones, a condition of looking after the senior citizen is not necessarily attached to it. On the contrary, very often, such transfers are made out of love and affection

without any expectation in return. Therefore, when it is alleged that the conditions mentioned in sub-section (1) of Section 23 are attached to a transfer, existence of such conditions must be established before the Tribunal.

15. Careful perusal of the petition under Section 23 filed by respondent no. 1 shows that it is not even pleaded that the release deed was executed subject to a condition that the transferees (the daughters of respondent no. 1) would provide the basic amenities and basic physical needs to respondent no. 1. Even in the impugned order dated 22d May 2018 passed by the Maintenance Tribunal, no such finding has been recorded. It seems that oral evidence was not adduced by the parties. As can be seen from the impugned judgment of the Tribunal, immediately after a reply was filed by the appellant that the petition was fixed for arguments. Effecting transfer subject to a condition of providing the basic amenities and basic physical needs to the transferor - senior citizen is sine qua non for applicability of subsection (1) of Section 23. In the present case, as stated earlier, it is not even pleaded by respondent no. 1 that the release deed was executed subject to such a condition."

7. A Co-ordinate Bench of this Court (Sandeep Marne, J.) in case of **Ashwin Bharat Khater and ors. Versus Urvashi Bharat Khater and ors. in MANU/MH/3569/2023** has after considering the judgment in case of **Sudesh Chhikara (supra)** has held in paragraphs Nos.26 and 27 as under :

"26. In fact Mr. Purohit has rightly drawn my attention to the following finding recorded by the Apex Court in Sudesh Chhikara (supra) in Paragraph 14 of the Judgment which reads thus:

"14. When a senior citizen parts with his or her property by executing a gift or a release or otherwise in favour of his or her near and dear ones, a condition of looking after the senior citizen is not necessarily attached to it. On the contrary, very often, such transfers are made out of love and affection without any expectation in return.

Therefore, when it is alleged that the conditions mentioned in sub-section (1) of Section 23 are attached to a transfer, existence of such conditions must be established before the Tribunal."

27. The Apex Court has thus held that the existence of condition can even be established before the Tribunal. This would in fact indicate that the existence of such condition need not be reflected in the Deed itself in the form of a covenant or a recital and the same can be established before the Tribunal."

8. In this regard, it would be relevant to take into consideration aims and object of the enactment. Statement of objects and reasons indicates that a need was found to bring this statute in view of withering of joint family system and large number of elderly are not being looked after by their family. Section 23 is also brought into statute book with an object to make sure that senior citizens are not deprived of basic amenities and physical needs, after transfer of the property is effected and, in such case, transfer is deemed to have been obtained by fraud etc and the same can be restored to the senior citizen.

9. The legislature found that though parents can be maintained under the Cr.PC., the procedure is time consuming as well as expensive, hence, a need was felt to have simple, inexpensive and speedy provision to claim maintenance for parents. It is thus clear that the entire endeavour of the enactment is to ensure that the senior citizens are maintained and such claim of maintenance is speedy, simple and inexpensive. In order to attain

the said goal, the Tribunals are formed, before whom, it is open for the senior citizens to make an application for maintenance under Section 4 of the Act. Even the Tribunal is permitted to take suo moto cognizance of non-maintenance of any senior citizen. Section 6 of the Act provides for jurisdiction and procedure.

6. Jurisdiction and procedure.— (1) *The proceedings under section 5 may be taken against any children or relative in any district—*

(a) where he resides or last resided; or

(b) where children or relative resides.

(2) On receipt of the application under section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed

(3) For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner prescribed for summons cases:

Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case ex parte.

(5) Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(6) The Tribunal before hearing an application under section 5 may, refer the same to a Conciliation Officer and such

Conciliation Officer shall submit his findings within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

10. Section 8 of the Act provides for summary procedure in case of inquiry. In holding an inquiry under Section 5, the Tribunal, subject to any Rules that may be prescribed by the State Government, is required to follow summary procedure at it deems fit. Though all the powers of civil court for the purpose of taking evidence on oath, for enforcement of attendance of witness, compelling the discovery and production of documents etc. are provided, however, by no stretch of imagination, it can be said that full fledged trial is contemplated before the the Tribunal. To hold so, would be contrary to the Aims and Objects of the Act, which aims at speedy remedy for senior citizens. It is thus clear that the procedure of the inquiry to be held by the Tribunal is summary procedure. Now in the light of powers of the Tribunal, the provisions of Section 23 are required to be considered. For the sake of convenience, the said provision is reproduced which reads thus :

“23. Transfer of property to be void in certain circumstances.—(1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or

coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

(3) If, any senior citizen is incapable of enforcing the rights under subsections (1) and (2), action may be taken on his behalf by any of the organisation referred to in Explanation to sub-section (1) of section 5.”

A bare perusal of the said provision indicates that where any senior citizen, after commencement of this Act, has transferred by way of gift or otherwise his property, subject to the condition that the transferee shall provide basic amenities and basic physical needs to the transferor and such transferee refuses and fails to provide such amenities and physical needs of the senior citizen, deeming provision has been made that in such cases, the transfer made would be considered to have been made by fraud or coercion or undue influence. In order to succeed in getting order of cancellation of transfer of property, it needs to be pleaded that transferee does not provide basic amenities and physical need, to transferor. It would, therefore, be relevant to see whether in the instant case, any such case is sought to be made out before Tribunal.

11. In the instant case, as per the copy of the complaint placed on record by respondent No.1 before this Court, it is clear that it was a case of respondent No.1 before the Tribunal that the petitioners were administering some pills to her, due to which, she was not in a position to understand anything. It is alleged that the petitioners have insisted respondent No.1 for gifting the subject property to petitioner No.1. It was undertaken by the petitioners that in case such gift deed is executed, the petitioners would take care and maintain respondent No.1 during her lifetime. It is alleged that because of administration of the pills, she was unable to understand anything and, therefore, under influence thereof, by playing fraud, registered gift deed came to be obtained by petitioner No.1 from respondent No.1. It is alleged that after the execution of gift deed, petitioners started causing harassment to respondent No.1. It is further stated in the application that father of respondent No.2 filed civil suit No.415 of 2017 before the Civil Court Kolhapur. The above complaint therefore clearly indicates that respondent No.1 does not admit execution of gift in favour of petitioner No.1 as per her own free will. It is her case that the gift deed has been obtained by playing fraud upon her. It is vaguely without particulars, stated that she is not maintained.

12. Apart from this, she does not state specifically as to basic amenities and basic physical needs were refused or failed to have

been provided by the petitioners. This is a basic requirement of Section 23, for its application that there must be a case of failure on the part of transferee to provide basic amenities and basic physical needs of the transferor. Now question arises as to whether it would be permissible for cancellation of a transfer, when validity of the same is challenged on ground of fraud, on a vague and unsubstantiated statement made about for citizen being not maintained by transferee.

13. Reverting back to the submissions made by counsel for petitioners with regard to there being no recital in the gift deed about maintaining respondent No.1 is concerned, owing to the aim and object of the act as well as in view of the provisions of Section 3 which gives overriding effect to any other inconsistent law/enactment for the time being in force or any instrument having effect of any enactment other than this act, this Court is in complete agreement with the view taken by the Co-ordinate Bench of this Court in case of **Ashwin B Khater and Nitin R. Gupta (Supra)**. It is, therefore, held that merely because there is no recital/covenant in the document of gift with regard to maintaining of respondent No.1 by petitioner No.1, the case filed under Section 23 need not be dismissed. It is open for respondent No.1 to plead and prove that she has not been maintained though such was a condition agreed though not supported by the document executed. Though the

complaint/application under Section 23 for the cancellation of gift deed is held to be maintainable, but question arises as to whether a case is made out by respondent No.1 herein for such cancellation. As noted hereinabove, there is no specific case sought to be made out by respondent No.1 before the Tribunal that she was denied basic amenities and physical need by petitioner No.1.

14. In order to appreciate the manner in which the Tribunal has considered the case of respondent No.1, impugned order in entirety needs to be taken into account and not the final decision arrived at. The Tribunal, while passing order, directing cancellation of the gift deed has mainly relied upon the grounds for challenge to the validity of the execution of the document. It is only incidentally a passing reference has been made about the senior citizen not being maintained by the petitioners. In absence of specific ground being raised as contemplated by Section 23 of the Act of not being provided with basic amenities and physical need, on vague averment and without recording any finding to that effect, it would not be open for the Maintenance Tribunal to cancel the gift deed executed by respondent No.1. This Court, therefore, finds substance in the contention of the petitioners that this application is filed under Section 23 of the Act in order to seek cancellation of the gift bypassing the procedure of adjudication for such declaration before the competent Civil Court, which is wholly impermissible in

law. If such circumvention of the due procedure for challenging validity of any document is allowed, the same will lead to injustice, as without adjudication of such issue of challenge to the document, same would stand cancelled.

15. It is, therefore, held that dispute with regard to validity of execution of document cannot be gone into in the proceeding under Section 23 even indirectly/incidentally and that this proceeding can never be allowed to become an alternative/bypass to the challenge of validity of document before a civil Court. The consequence of the above discussion is that the orders impugned cannot be sustained and hence, same is quashed and set-aside to the extent of cancellation of gift deed dated 3rd August 2016 executed by respondent No.1 in favour of petitioner No.1.

16. As recorded above, learned counsel for the petitioners, on instructions, has made statement that respondent No.1 has a right to reside in the subject property during her lifetime and that she will not be evicted therefrom for any reason whatsoever. This statement is accepted as an undertaking. In order to implement this undertaking in true spirit, petitioners are hereby restrained from creating any third party interest in the subject property in any manner whatsoever, during lifetime of respondent No.1.

17. It is clarified that, though the order passed by the Tribunal is set-aside, it is open for respondent No.1 to challenge the

execution of the gift deed on every permissible ground available in law before the competent court. Passing of this order will not become an impediment in prosecuting such claim, in any manner whatsoever.

18. The observations made by this Court shall be restricted to the decision of this petition and, in case, any proceeding is filed before any competent court of law taking exception to the gift deed, in question, the same would not bound that court.

19. The petition stands partly allowed in above terms.

(R. M. JOSHI, J.)