

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

**HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE**

&

HON'BLE SHRI JUSTICE VISHAL MISHRA

ON THE 31st OF OCTOBER, 2022

WRIT APPEAL No. 1085 of 2022

BETWEEN:-

1. **SUNIL SHARAN DIXIT S/O SHAMBHU SHARAN DIXIT, AGED ABOUT 64 YEARS, OCCUPATION: UNEMPLOYED R/o IN FRONT OF KHELGRAM, SAGAR ROAD, CHHATARPUR (M.P.) CURRENTLY RESIDING IN GRAM BIDOKHAR, DISTRICT HAMIRPUR (U.P.)**
2. **SHRIMATI PRATIBHA W/O SUNIL SHARAN DIXIT, AGED ABOUT 58 YEARS, OCCUPATION: HOUSE WIFE R/O IN FRONT OF KHELGRAM, SAGAR ROAD, CHHATARPUR (M.P.) CURRENTLY RESIDING IN GRAM BIDOKHAR DISTRICT HAMIRPUR (U.P.)**
3. **PIYUSH @ ANKUR DIXIT S/O SUNIL SHARAN DIXIT, AGED ABOUT 36 YEARS, OCCUPATION: UNEMPLOYED R/O IN FRONT OF KHELGRAM, SAGAR ROAD, CHHATARPUR (M.P.) CURRENTLY RESIDING IN GRAM BIDOKHAR, DISTRICT HAMIRPUR (U.P.)**
4. **VARUN @ AKASH DIXIT S/O SUNIL SHARAN DIXIT, AGED ABOUT 20 YEARS, OCCUPATION: STUDENT R/O IN FRONT OF KHELGRAM, SAGAR ROAD, CHHATARPUR (M.P.) CURRENTLY RESIDING IN GRAM BIDOKHAR, DISTRICT HAMIRPUR (U.P.)**

.....APPELLANTS

(BY SHRI MANOJ SHARMA - SENIOR ADVOCATE ASSISTED BY SHRI BHAVIL PANDEY – ADVOCATE)

AND

**SHRIMATI URMILA DIXIT W/O SHAMBHU SHARAN
DIXIT R/o IN FRONT OF KHELGRAM, SAGAR ROAD
CHHATARPUR (M.P.)**

.....RESPONDENT

(BY SHRI M. L. JAISWAL - SENIOR ADVOCATE ASSISTED BY MS. RAJSHREE JAISWAL AND SHRI K. K. GAUTAM - ADVOCATES)

.....

*This appeal coming on for admission this day, **Hon'ble Shri Justice Ravi Malimath, Chief Justice** passed the following:*

ORDER

Aggrieved by the order dated 02.08.2022 passed by the learned Single Judge in dismissing the Writ Petition No.11796 of 2022, the petitioners are in appeal. The parties will be referred to as per the rank before the learned Single Judge.

2. The respondent filed a petition under Section 22 read with Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (for short “the Act”) before the Sub Divisional Magistrate, Chhatarpur. It was registered as Case No.98/B-121/2021-22. The application was allowed and in terms whereof the gift deed dated 09.09.2019 executed by the respondent in favour of the writ petitioners was declared to be *null and void*. Challenging the same, an appeal was filed by the writ petitioners before the Collector, Chhatarpur which was rejected vide order dated 25.04.2022. Questioning the same, the instant writ petition was filed.

3. The learned Single Judge came to the view that Section 23 of the Act gives ample authority to the Tribunal to declare transfer of the property as null and void to the circumstances mentioned in Sub-section (1) of Section 23. It was also held that the writ petitioners having chosen to remain absent was indicative of the fact that they had no interest in hearing of the case. Hence, on both these grounds the writ petition was dismissed. Questioning the same, the instant appeal is filed.

4. Shri Manoj Sharma, learned senior counsel appearing for the appellants' counsel contends that the provisions of Section 22 r/w Section 23 of the Act do not postulate any right to the authority to annul a deed of gift or otherwise. When there is absence of any condition that the transferee shall provide the basic amenities and basic physical needs as stated therein, the exercise of power under Section 23 of the Act is beyond the scope of the said section. Therefore, the authority had no authority to pass the said order.

5. The same is disputed by Shri M.L. Jaiswal, learned senior counsel appearing for the counsel representing the respondent. He contends that there is no error committed by the SDM in passing the impugned order. That two days prior to the execution of the gift deed, an affidavit was given by the writ petitioners dated 07.09.2019 to the effect that they will maintain the respondent. It is on that basis that the gift deed was executed. Since the writ petitioners have not maintained the respondent, the authority was justified in passing the order under Section 23 of the Act. He further pleads that this is an order passed under Article 227 of the Constitution of India and hence a writ appeal is not maintainable. He relies on the Full Bench judgment of Rajasthan High Court reported in

AIR 2022 Rajasthan 7 in the case of Mahendar Kumar Jain Vs. Appellate Rent Tribunal, Ajmer. Hence, he pleads that the appeal be dismissed.

6. The same is disputed by the learned counsel for the appellants who contends that the power exercised by the Court is not under Article 227 but under Article 226 of the Constitution of India. Since it is an order passed by the SDM, therefore, the exercise of power is under Article 226. Therefore, the very basis of the contention is ill-founded.

7. Heard learned counsels.

8. So far as the maintainability is concerned, we are of the view that the contention of the respondent herein cannot be accepted. It cannot be said that the exercise of the power by the learned Single Judge is under Article 227. It is the order of the SDM that has been challenged and hence the exercise of the power is not under Article 227 but under Article 226. Hence, the contention of maintainability is overruled.

9. Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 reads as follows:

“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 organization referred to in Explanation to sub-section (1) of section 5.”

The same postulates that the authority has the power to declare a document to be void provided the condition in the document provides for basic amenities and basic physical needs of the transferor. That only if the deed of gift or otherwise mentions a clause that the gift deed or otherwise is being executed on the condition that the transferor would be maintained for his basic amenities and basic physical needs by the transferee and such maintenance is not done by the transferee, it is only then on that limited ground the document may be declared to be null and void.

10. Any document executed between two parties falls within the jurisdiction of the concerned Civil Court to declare it as null and void or otherwise. Matters relating to title of immovable properties can be dealt with only by a Civil Court. These issues cannot be decided by an executive order or in a summary inquiry as held by the Hon’ble Supreme Court in the case of *Government of Andhra Pradesh vs. Thummala Krishan Rao*, reported in (1982) 2 SCC 134. However, Section 23 being a standalone provision has to be considered as such. The function of the Tribunal is only to find out as to whether the condition in the gift deed or otherwise contains a clause providing for basic amenities and basic physical needs and consequently whether the transferee has refused or failed to provide them. There is no other jurisdiction vested with the Tribunal.

11. Even so far as Section 23 is concerned, the power has to be exercised only by the Tribunal at the option of the transferor. Here too, we have our own doubts as to whether the Tribunal is empowered to pass such an order at all. The Tribunal is constituted under Section 7 of the Act, which reads as follows:-

“7. Constitution of Maintenance Tribunal.—(1) The State Government shall within a period of six months from the date of the commencement of this Act may, by notification in the Official Gazette, constitute for each Sub-Division one or more Tribunals as may be specified in the notification for the purpose of adjudicating and deciding upon the order for maintenance under section 5.

(2) The Tribunal shall be presided over by an officer not below the rank of Sub-Divisional Officer of a State.

(3) Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.”

In terms whereof, the Tribunal can be constituted only for the purposes of adjudicating and deciding upon the order for maintenance under Section 5. Therefore, until and unless a Tribunal is constituted to decide questions arising out of Section 23 of the Act, the Tribunal could not have exercised such a power. Furthermore, the Act does not even contemplate a format of an application to be filed under Section 23. On the other hand, Section 8 refers to the summary procedure in the case of an inquiry under Section 5 of the Act. No such corresponding provision is to be found with reference to Section 23 of the Act.

12. It can also be seen that in terms of Section 23 of the Act, assuming that the gift deed or otherwise is held to be void by the Tribunal, there is no provision for recovery of possession. Therefore, assuming that possession has already been handed over in terms of the gift deed, the Act

does not state as to how such a possession is to be taken by the transferor. However, Section 23 is a standalone provision which refers only to the declaration of the gift deed or otherwise to be void. Beyond that, there is no scope for the Tribunal to pass any order. Therefore, the transferor would necessarily have to go to the Civil Court in order to get possession of the property transferred under the gift deed. However, such contentions have not been raised before us. Therefore, we leave it to be adjudicated in an appropriate forum.

13. The Preamble of the Act indicates that it is intended to provide for the more effective provisions for the maintenance and welfare of parents and senior citizens. The same reads as follows:-

“An Act to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto.”

Therefore, the entire scope of the Act is intended only with reference to maintenance and welfare of parents and senior citizens. Section 23, under these circumstances, has to be construed as a standalone provision under the Act. The various sections of the Act are all focused on the issue regarding the maintenance and welfare of the senior citizens. However, Section 23 refers to interference into the property rights of transferee. Therefore, even though Section 23 is not in consonance with the Preamble of the Act, even then the same has to be construed as a standalone provision intended for the benefit to the senior citizens.

14. So far as the gift deed is concerned, no such condition is to be found in the gift deed dated 09.09.2019. On a specific question being asked to the learned counsel for the respondent, he fairly admits that there is no condition for maintenance at all in the gift deed. However, he adds

that the gift deed has been made only because of the affidavit given by the writ petitioners two days prior to the execution of the gift deed. That the affidavit was to the extent of providing basic amenities and physical needs to the respondent. It is only on that basis that the document of gift was executed. However, we find that it has remained as a mere argument. We do not find that such a clause exists in the gift deed dated 09.09.2019. If at all the contention of the respondent is to be accepted then such a clause should have been a part and parcel of the gift deed. In the absence of such a clause being part of the gift deed, we are of the view that the authority would have no authority to pass an order under Section 23 of the Act.

15. The application filed before the SDM is an application under Section 22 and Section 23 of the Act. It is not an application seeking maintenance. On being questioned, the learned counsel for the respondent clarifies the issue to the extent that the question of maintenance would not arise at all. That she has not filed an application under Section 5 or otherwise but an application only under Section 22 or 23 to set aside the gift deed. The learned Single Judge while considering the provisions of Section 23 of the Act did not refer to the absence of a clause in the gift deed with regard to maintenance. Therefore, we are of the view that the order of the learned Single Judge calls for interference.

16. Learned counsel for the respondent further pleads that a suit has already been filed seeking for cancellation of the gift deed in case No.98/B-121/2021-22. If that be so, the respondent is always at liberty to pursue her rights before the concerned Court. Suffice for us to notice that the authority has no power to pass the impugned order under Section 23 of the Act in the absence of any clause regarding maintenance.

17. So far as a non-appearance of the writ petitioners is concerned, we do not think that it is appropriate to deny them the right only because they did not participate before the lower authority. When there is an absence of power in passing the impugned order, it is a question of law and jurisdiction and, therefore, the same becomes unsustainable.

18. Hence, for all the aforesaid reasons, the writ appeal is allowed. The order dated 02.08.2022 (Annexure A-1) passed by the learned Single Judge in Writ Petition No.11796 of 2022 is set aside. Consequently, the writ petition is allowed. The order of the Collector dated 25.04.2022 (Annexure P-9) and the order of the Sub Divisional Magistrate dated 27.09.2021 (Annexure P-8) are set aside.

19. The respondent herein is at liberty to pursue such remedy as available in law.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

AT