

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10792 OF 2023

Ateeq Ahmed Rafiq Ahmed

...Petitioner

V/s.

Akhtarunnisa Rafiq Ahmed & Ors.

...Respondents

Mr. N. R. Bubna, for the Petitioner.

Mr. P. G. Sawant, AGP, for the Respondent-State.

CORAM : MADHAV J. JAMDAR, J.

DATED : OCTOBER 13, 2023

JUDGMENT:

1. Heard Mr. Bubna, learned counsel appearing for the Petitioner and Mr. Sawant, learned AGP for the Respondent-State.

2. The challenge in the present Writ Petition is to the legality and validity of the Order dated 12th June 2023 passed by the learned Presiding Officer, Senior Citizens Maintenance Tribunal @ Sub-Divisional Officer, Malegaon (for short “**the Tribunal**”) under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (“**said Act**”).

3. By the impugned Order dated 12th June 2023 of the learned Tribunal, *inter alia*, Petitioner and his three brothers have been directed to pay an amount of Rs.2,000/- per month to

Respondent No.1-mother, and also by the said Order, Gift Deeds dated 17th December 2018, 10th August 2018 executed by deceased husband of the Respondent No.1 were directed to be cancelled and name of the Respondent No.1 was directed to be entered into the record of said plots.

4. In the present Writ Petition, challenge is only to Clause Nos.4 and 5 of the impugned Order dated 12th June 2023 passed by the learned Tribunal. It is significant to note that the said direction to pay monthly maintenance of Rs.2,000/- is not challenged in the present Writ Petition. The learned Presiding Officer has held that the Gift Deeds were executed by the father on the condition that the Petitioner would maintain the mother and, therefore, passed the impugned direction.

5. It is the contention of Mr. Bubna, learned counsel appearing for the Petitioner that the Respondent No.1-mother is residing with him and he is maintaining her and, therefore, the learned Tribunal has committed the jurisdictional error.

6. The Supreme Court, in the decision of *Sudesh Chhikara v. Ramti Devi & Anr*¹ has *inter alia* held that when a senior citizen parts with his or her property executing a gift deed or a release deed, a condition of looking after the senior citizen is not necessarily attached to it. On the contrary, very often, such

1 2022 SCC OnLine SC 1684

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, the existence of such conditions must be established before the Tribunal. The relevant discussion is to be found in paragraphs 11 to 16, which read as follows :

“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 22nd 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 sub-section (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.*

16. We have perused the counter affidavit filed by respondent no.1. Even in the counter, it is not pleaded that the release was subject to such a condition. It is merely pleaded that the appellant had no intention to take care of her mother. Thus, the order of the Maintenance Tribunal cannot be sustained as the twin conditions incorporated in sub-Section (1) of Section 23 were not satisfied. Unfortunately, the High Court has not adverted to the merits of the case at all.”

(Emphasis added)

Thus, it is clear that the Supreme Court has clearly held that the condition that the transferees shall provide the basic amenities and basic physical needs to the transferor need not be expressly stated in the transfer deed and the same can be established by the senior citizen.

7. In the present case, in paragraphs 3, 6, 7 and 8 of the Application filed before the Tribunal, it is specifically stated that

the Petitioner and other sons are not looking after the Respondent No.1-mother, who is a senior citizen of 85 years. The said relevant paragraphs 3, 6, 7 and 8 are set out herein below :-

“३. गैरअर्जदार यांनी अर्जदाराचे पतीचा आजारपणाचा गैरफायदा घेऊन दि.१५. १०.२०१९ चे अगोदर वृद्धापकाळात आजारी असतांना त्या काळात सर्व मिळकती गैरअर्जदार अतिक अहेमद रफिक अहेमद व गैरअर्जदार नं.३ ते ४ यांनी वडीलोपार्जीत मिळकत हडप केलेली आहे त्यांचा तपशिल खालील प्रमाणे/—

वडीलोपार्जीत मिळकतीचा तपशिल :—

१. सर्वे नंबर ४०/अ, प्लॉट नं. १०, क्षेत्रफळ २०९.००४० चौ.मी. गैरअर्जदार क.२ यांनी स्वतःचे नांवाने करून घेतलेली आहे.
२. गट क्रमांक व उपविभाग ३९/२/४३ ही वडीलोपार्जीत मिळकत शब्बीर अहेमद रफिक गैरअर्जदार नं.४ चे नावे केली आहे.
३. म.न.पा. हद्दीतील मौजे मालेगांव सर्वे नंबरी ४०/अ, प्लॉट नं. ९, २०९ चौ.मी. लांबी रुंदीचा हा प्लॉट व मिळकत नं. २ यांनी स्वतःचे नांवाने करून घेतली आहे.
६. वरील मिळकतीमधून गैरअर्जदार यांनी बेकायदेशिरपणे अर्जदाराला घरातून हुसकावून लावले असून अन्नवस्त्र दिले नाही त्यामुळे अर्जदाराने सी.आर.पी. सी.क्र. १२५(१) अन्वये अर्ज दाखल केला तो न्यायप्रविष्ट आहे.
७. वरील मिळकती गैरअर्जदार यांनी आपल्या स्वतःचे नावाने केल्यामुळे गैरअर्जदार नं. १ व २ यांनी मिळकती हडप करण्याचे कृत्य केल्यामुळे अर्जदाराची उपासमार होत आहे.
८. अर्जदाराची वयोमानाने प्रकृती ठिक राहत नाही व वेळोवेळी औषधोपचाराचा खर्च लागतो. गैरअर्जदार हे अर्जदार हिस प्रत्येकी ३०,०००/— रुपये अन्नवस्त्र, निवारा यासाठी लागतात व सदरहु रक्कम देण्याची गैरअर्जदार यांची ऐपत आहे.”

(Emphasis added)

The English translation of the above is set out herein below :

“3. The Non-applicant has taken disadvantage of the illness of the Applicant's husband and while he was

ill during his old age prior to the date 15.10.2019, the Non-applicant Atique Ahmed Rafique Ahmed and the Non-applicant No. 3 to 4 have grabbed all the ancestral properties during the said period. The particulars thereof are as under :-

Particulars of the Ancestral properties:-

- 1. The Non-applicant No.2 has got transferred the property bearing Survey No. 40/A, Plot No.10, Area 209.0040 sq.mt. to his own name.*
- 2. The ancestral property bearing Gat No. and Sub-division No. 39/2/43 has been got transferred to the name of Non-applicant No.4 - Shabbir Ahmed Rafique.*
- 3. The Non-applicant No.2 has got transferred the plot bearing Survey No.40/A, Plot No.9, adm. 209 sq.mt. in length and width, situated at village Malegaon within the limits of Municipal Corporation to his own name.*
- 6. The Non-applicant has driven out the applicant from the house and from the above-mentioned properties unlawfully and has not even given alimony and therefore, the Applicant has filed application under section 125(1) of the Cr.P.C. which is still pending before the Hon'ble Court.*
- 7. As the Non-applicants have got transferred the aforesaid properties to their own names and as the Non-applicant No. 1 and 2 have committed acts of grabbing the properties, the Applicant is starving.*
- 8. The Applicant is not keeping well due to old age and expenses are required to be incurred for medical*

treatment from time to time. The Non-applicants are required to pay Rs. 30,000/- each for food, clothes and shelter and the Non-applicants are in a position that they can afford the same.”

(Emphasis added)

8. The present Petitioner by filing a reply, has denied the said contention and his brothers have also filed reply. It is significant to note that all the brothers, including the Petitioner have raised technical pleas. It is further significant to note that, in the present case, the Respondent No.1 has filed an evidence affidavit stating that she has not been given even food or medicine. In the evidence affidavit, she has stated her age to be 73 years.

9. This Court by Order dated 4th September 2023, directed the Secretary, District Legal Services Authority, Nashik to depute two Para-Legal Volunteers to visit the premises in question, where Respondent No.1, who is a senior citizen aged 85 years is residing, and it has been directed that the report regarding physical and mental condition as well as overall living condition of Respondent No.1 be submitted to this Court. Accordingly, two Para-Legal volunteers working with the District Legal Services Authority as well as the Taluka Legal Services Authority were deputed and they filed a report dated 7th September 2023. The said report, *inter alia*, states as follows :

“प्रतिवादी क्र.०१ हया मानसिक व शारिरीक चांगल्या आहेत. हया सदर

खोलीत एकटया राहतात. त्यांना गुडघ्याचा आजार आहे. तसेच त्यांना बी.पी. च्या गोळ्या चालू आहेत. त्यांना एकुण १२ मुले आहेत. त्यापैकी ०५ मुले व ०७ मुली आहेत. मोठी मुलगी साहिदा जेवण बनवून आणून देते. मुले चौकशी व देखभाल करत नाहीत. त्यांचा ४ नंबरचा मुलगा बी.पी. च्या गोळ्या आणून देतो. राहत्या घरावर व इतर घरांवर जेथे इतर मुले राहतात त्यावर ५ नंबरच्या मुलाने माझे सह माझे सर्व मुले व मुली असे एकुण १३ जणांचे नावे लावले आहेत. ६ रातील सर्व सामान, संसार माझा आहे. ज्या घरात मी राहते ते घर माझे पतीचे आहे असे सांगितले. तसेच माझे लहान ५ नंबरचा याने हायकोर्टात दावा दाखल केला आहे. हे मला दुस-या व्यक्तीकडून मागील आठ दिवसांपुर्वी समजले. मला व्यवस्थित ऐकु येते.”

(Emphasis added)

The English translation of the above report is set out herein below:

“Defendant No.1 is mentally and physically sound. She resides alone in the said room. She is suffering from knee-ailment. Further, she is taking tablets for the issue of her blood-pressure. She has in all 12 children. Of them, 05 are sons and 07 are daughters. Elder daughter by name Sahida cooks and brings meal for her. Sons do not look after and maintain her. Her number four son brings tablet for blood pressure and gives it to her. Number five son has got entered names of my all sons and daughters including myself, thus in all 13 persons, to the residential house and other houses where other children are residing. All house-hold things and articles in the house belong to me. It is told that the house wherein I reside is of my husband. Further, my younger, number five son has filed a suit before the Hon’ble High Court and I have learnt about this, eight days ago, from another person. I am able to hear properly.”

10. It is shocking that the Respondent No.1 is a senior citizen aged 85 years, having 12 children i.e., five sons and seven daughters and not a single child is taking care of her. One daughter, Sahida, gives food and one son provides medicine. The Respondent No.1 is suffering from various ailments. Thus, it is clear that this is a case where not only it is the allegation of the Respondent No.1-mother that the Petitioner is not maintaining her, but she has stated the same in her Application filed before the learned Tribunal and also in her evidence affidavit. The same is also mentioned in a report filed by two Para-Legal Volunteers.

11. Mr. Bubna, learned counsel appearing for the Petitioner is not in a position to deny the contentions raised in an evidence affidavit as well as in the report of Para-Legal Volunteers. The learned Presiding Officer on the basis of material on record, has observed that the Petitioner is not maintaining her. Perusal of the Application filed under the said Act by the Respondent No.1 and her Evidence Affidavit shows that there is sufficient compliance of twin conditions as contemplated under Section 23 of the said Act.

12. As per the settled legal position, jurisdiction under Articles 226 and 227 is to be exercised sparingly.

13. It is a settled legal position that the power under Article 227 of the Constitution of India is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the

subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors². Supervisory jurisdiction is not to correct every error of fact or even a legal flaw. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is to be exercised sparingly in appropriate cases and that such discretionary relief must be exercised to ensure that there is no miscarriage of justice³.

14. Therefore, this is not a case where, interference by this Court under Articles 226 and 227 of the Constitution of India is warranted.

15. Accordingly, the Writ Petition is dismissed with a cost of Rs.10,000/-. The said cost to be paid to the Respondent No.1 within a period of three months from today.

[MADHAV J. JAMDAR, J.]

2 (1972) 1 SCC 898 ; AIR 1954 SC 215 ; AIR 1951 Cal 193

3 (2022) 4 SCC 181