

Item No.03.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 10.07.2024

DELIVERED ON: 10.07.2024

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
(CHIEF JUSTICE)
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**FMA 262 of 2023
with
IA No. CAN 1 of 2023**

**Md. Kuddus Ali
Vs.
The State of West Bengal & Ors.**

Appearance:-

Mr. Golam Mustafa
Mr. Tarasankar Samanta
... For the Appellant

Mr. Amal Kr. Sen, Id. AGP
Mr. Ashima Das (Sil)
... For the State

Mr. Subrata Karmakar
Md. Ali Ahasan
Mr. Animesh Mukherjee
... For the private respondents

JUDGMENT

(Judgment of the Court was delivered by Hiranmay Bhattacharyya, J.)

1. The appellant herein who claims to be a senior citizen has approached this Court with this intra-Court appeal challenging the order dated 25.01.2023 passed by the learned Single Judge in WPA 134 of 2023.

2. The order of the Sub-Divisional Officer, Domkol, Murshidabad dated 19.01.2022 rejecting a petition under Section 23 of the Maintenance of Welfare of Parents & Senior Citizen Act, 2007 (for short, the 2007 Act) being case no. 15/2019 dated 19.01.2022 praying for cancellation of the gift deed was challenged before the learned writ court.

3. The appellant claims that since he had no issue, he brought up the 5th respondent herein as his son and in view of the good relationship between the parties and also that the appellant had no other son or daughter, the appellant herein executed a registered deed of gift (Hebanama) in favour of the 5th respondent on 12.07.2018.

4. Alleging that the 5th respondent was not looking after the appellant herein, the appellant approached the Sub-Divisional Officer, Domkol, Murshidabad by filing an application under Section 23 of the 2007 Act praying for declaration that the deed of Hebanama is void.

5. The Sub-Divisional Officer, Domkol, Murshidabad in his order dated 19.01.2022 took note of the objection of the 5th respondent herein that there is no condition in the Hebanama deed that the 5th respondent shall be bound to fulfill the basic need to their parents and ultimately rejected the said application.

6. The appellant approached the learned writ court and the learned Single Judge noted that Section 23 of the 2007 Act would indicate that the deed of gift must contain the condition that the transferee shall provide the basic amenities, physical needs to the transferor. It was further noted that the declaration of the deed as void by the Tribunal is premised on such condition and subsequent refusal of the transferee to fulfill and comply with such condition. In the light of the aforesaid observation, the learned Single Judge rejected the writ petition.

7. Learned counsel appearing for the appellant strenuously contended that as per the Mohammedan Law, the Deed of Hebanama has to be without any condition. In support of the contention that even if the Deed of Hebanama does not contain any such condition as contemplated under Section 23 of the 2007 Act, the Tribunal under the said Act can declare a deed to be void in case the donee fails to maintain the donor, he refers to a decision of the Hon'ble Karnataka High Court in the case of **Kavitha R. vs. State of Karnataka** reported at **AIR 2024 Karnataka 1**.

8. Learned counsel representing the State refers to a decision of this Bench in MAT 665 of 2023 [Amar Nath Dutta vs. The State of West Bengal & ors.] delivered on 20.12.2023 and submits that the learned Single Judge was right in dismissing the writ petition as the Hebanama did not contain any stipulation as contemplated under Section 23 of the 2007 Act.

9. This Court in Amar Nath Dutta (supra) after considering Section 23 of 2007 Act and the law laid down by the Hon'ble Supreme Court in the case of **Sudesh Chhikara vs. Ramti Devi & anr.** reported at **(2022) SCC Online SC 1684** held as follows:

*“10. The Hon'ble Supreme Court in the case of **Sudesh Chhikara vs. Ramti Devi & anr.** reported at **(2022) SCC Online SC 1684** held that Section 23 covers all kinds of transfers as is clear from the use of the expression “by way of gift or otherwise”. It was further held therein that for attracting sub-section (1) of Section 23 the following twin conditions must be satisfied-*

(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 refused or fails to provide such amenities and physical needs to the transferor.

11. It was further held in the said reported decision that if the aforesaid twin conditions are satisfied, by a legal fiction the transfer shall be deemed to have been made by fraud or coercion or undue influence and such a transfer then becomes voidable at the instance of the transferor and the Maintenance Tribunal gets jurisdiction to declare the transfer as void. The Hon'ble Supreme Court summed up its conclusions by observing that effecting transfer subject to a condition for providing the basic amenities and basic physical needs to the transferor cum senior citizen is sine-qua-non for applicability of Sub-section (1) of Section 23.

12. In view of the aforesaid well settled legal proposition, the Maintenance Tribunal while invoking the provisions laid down in Section 23 of the 2007 Act has to be first satisfied whether the impugned transfer was subject to a condition of providing the basic amenities and basic physical needs to the transferor cum senior citizen. Only upon being satisfied that the transfer was subject to such condition the Tribunal is then required to inquire into whether the transferee refused or failed to provide

such amenities and physical needs and only after the Tribunal arrives at a finding that the transferee refused or failed to provide such amenities and physical needs, the Tribunal, upon being approached by the transferor, can declare the deed of transfer to be void.

.....

17. Section 23(1) contemplates that the transfer of property by way of gift or otherwise must be subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor. In the instant case, the property was transferred by a gift deed. Section 123 of the Transfer of Property Act, 1882 states that for the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Therefore, it goes without saying that for applicability of Section 23(1) of the 2007 Act the instrument of transfer i.e., the registered gift deed must incorporate the aforesaid condition.”

10. It was specifically observed therein that for applicability of Section 23(1) of the 2007 Act, an instrument of transfer that is the registered gift deed must incorporate the conditions that the transferee shall provide the basic amenities and basic physical needs to the transferor.

11. Learned counsel appearing for the appellant, in his usual fairness, admits that there is no condition incorporated in the deed of Hebanama as contemplated under Section 23 of the 2007 Act.

12. The decision in the case of **Kavitha R. (supra)** did not take into consideration the aforesaid aspects as well as the decision of the Hon'ble Supreme Court in the case of **Sudesh Chhikara (supra)**. The said decision cannot be said to be a binding precedent.

13. The learned Single Judge was right in dismissing the writ petition.

14. For all the reasons as aforesaid, this Court is not inclined to interfere with the decision of the learned Single Judge.

15. On a query of the Court, learned counsel appearing for the private respondent submits that the private respondents are not creating any disturbances to the peaceful possession of the appellant in the property in question. Such submission is placed on record.

16. In the result, the appeal stands **dismissed**. Consequently, the connected application also stands dismissed. However, this order shall not preclude the appellant from working out his remedies in accordance with law, if so advised.

I agree.

(T.S. SIVAGNANAM)
(CHIEF JUSTICE)

(HIRANMAY BHATTACHARYYA, J.)

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