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CAN DONOR UNSETTLE SETTLEMENT

1. Settlement deed has not been defined under the Transfer of Property Act. The Specific Relief Act Section 2(b) defines "Settlement" means an instrument (other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925), whereby the destination or devolution of successive interests in movable or immovable property is disposed of or agreed to be disposed of".

2. To my understanding Settlement does not restrict to in presenti disposition. We always read Section 5 and 6 for transfer and what may be transferred along with Section 7 of the Transfer of Property Act to see who is competent to effect transfer. It is natural then to look at Section 122 which defines Gift and till 129 the various events relating to Gift is dealt with. Section 126 deals with suspension of revocation of Gift. Section 126 will speak that both donor and donee has to agree on the happening of a specified event, the Gift shall be suspended or revoked and the same is revocable fully or partly on the agreement of both the parties. A Gift may also be revoked in any cases (Save want or failure of consideration) in which, if it were a contract, it might be rescinded. Gift otherwise cannot be revoked. The only event of cancellation is that if the Gift is not acted upon.

3. We come across several instances, when the donor simply executes a unilateral cancellation deed and unsettles the settlement. Whether that is permissible under law. This decision of the Supreme Court permitted cancellation of Settlement deed:

5. Section 122 of the transfer of Property Act (for short, the "TP Act") defines 'gift' to mean the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

6. Acceptance by or on behalf of the donee must be made during the life time of the donor and while he is still capable of giving.

7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is : whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his life time. The recitals in the cancellation deed is consistent with the recitals in the gift deed. He had expressly stated that the respondent had cheated him and he had not fulfilled the conditions subject to which there was an oral understanding between them. Consequently, he mentioned that the conditional gift given to him was cancelled. He also mentioned that the possession and enjoyment remained with him during his life time. He stated, "I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore I hereby cancel the conditional gift deed dated 15.5.65 of Rs. 9000

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“44.From the discussions and conclusions we have reached above with reference to various provisions of Statutes and precedents, we reiterate the dictum of Hon'ble Supreme Court in Thota Ganga Laxmi and Ors. Vs Government of Andhra Pradesh & Ors., reported

[illegible]

“In the present context where the validity of registration of unilateral cancellation of a registered document and the authority of sub-registrar to register the document unilaterally cancelling a deed of conveyance is examined, it is also relevant and useful to refer to a

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recent judgment of Hon'ble Supreme Court in the case of Asset Reconstruction Company (India) Limited vs. J.P. Velayutham and ors., reported in MANU/SC/0579/2022. It is a case where the validity of registration of a document of sale through power of attorney was examined. A writ petition was filed by the appellant before the Hon'ble Supreme Court seeking a declaration that the act of the sub-registrar in registering the sale deed executed by the power of attorney agent in favour of his son was null and void. Finding that the power of attorney deed shown before the Registering authority does not authorize the power agent to sell or encumber the property conveyed, the writ petition was allowed holding that there was utter failure on the part of the Registering Authority to follow the mandate of law as prescribed in Sections 32 to 35 of the Registration Act, 1908. Two intra-Court appeals filed by the power of attorney agent as well as his son in favour of whom the sale deed was registered were allowed. On appeal, the Hon'ble Supreme Court considered the issue whether invocation of the writ jurisdiction of the High Court by the appellant was right, especially when civil suits at the instance of third parties are pending and the Hon'ble Supreme Court had directed the parties earlier to move the civil Court in a different proceedings arising under Section 145 of Code of Criminal Procedure."

8. In S. Anitha vs. G. Geetha (05.04.2024 - MADHC) :MANU/TN/1653/2024

"Applying the ratio laid down by the Hon'ble Supreme Court in Daulat Singh's case, referred herein supra, the moment the settlement deed was executed and registered, the father lost all his rights and interest in suit property and therefore, the cancellation deed executed by him subsequently, was not valid in the eye of law, applies to the facts of the present case. The plaintiff has to necessarily succeed and I do not find any material irregularity, illegality or perversity in the findings rendered by the First Appellate Court, warranting interference under Section 100 of the Code of Civil Procedure, 1908."

9. Even today we see cases being decided in both ways, depending on the peculiar circumstances of that case.

10. Under Maintenance and Welfare of Parents and Senior Citizens Act, 2007 . "Section 23 Transfer of property to be void in certain circumstances

1. Where any senior citizen who, after the commencement of this Act, has 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. "

11. Suddenly, we were flooded with many cases where the Authorities under the Act started to cancel the documents with or without looking into Section 23 or the mandatory requirements of the Section. Few of the Judgements of our Court deprecated the practice of cancellation of Settlement except in Strict consonance with Section 23. Many of them took humanitarian view that the elders are cheated and when they are not maintained, there is justification to cancel the settlement.

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The Supreme Court held:

"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.

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.

13. 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.

14. 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

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17. We notice that the statute defines the terms "parent" and "senior citizens", separately. As with all definitions, we also notice that the definition is subject to the qualifier "unless the context otherwise requires". Parent is defined in Section 2(d) as under:

"(d) "parent" means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen;

If Section 2(h) is compared and contrasted with Section 2(d), it becomes evident that "senior citizens" are defined as any Indian citizens above the age of 60 and such definition is agnostic as to whether such "senior citizens" are parents; whereas, "parent" is defined as biological, adoptive or step father or mother, whether or not a senior citizen. Section 4(1) of the statute, which deals with maintenance of parents and senior citizens, uses the expression "a senior citizen including parent", thereby making it abundantly clear that the right to maintenance is available to a parent, whether or not such parent is a senior citizen, and to a senior citizen. Clause (ii) of sub-section (1) of Section 4 also makes it clear that a childless senior citizen may make a claim against a relative as defined in Section 2(g), i.e. "a legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death", thereby indicating clearly that a senior citizen, who is not a parent, may claim maintenance in specified circumstances. Section 23, in contrast to Section 4, uses the expression "senior citizen" but not "parent". From the above discussion, it follows that Parliament has consciously defined and used the terms "senior citizens" and "parent" separately and distinctively and that Section 23 has to be understood as defined, i.e. as conferring the benefit thereof only on any Indian citizen above the age of 60, whether or not a parent, subject to satisfaction of the other requirements thereof. As a corollary, neither text nor context support reading the expression "senior citizen" in Section 23 as including a parent below the age of 60 years.

18. Turning to the question whether Section 23 may be invoked by a person who had not completed the age of 60 on the date of transfer but did so prior to or on the date of resorting to such provision, the text of Section 23 uses the expression "where any senior citizen ... has transferred", thereby indicating that the person should be a senior citizen on the date of transfer. Even otherwise, it should be recognised that the absence of free consent on account of fraud, coercion or undue influence is a formation defect. Consequently, the existence of such formation defect is required to be tested as of the date of transfer. Besides, it should not be lost sight of that Section 23 incorporates by legal fiction a deemed lack of free consent and constitutes an exception to the general rule under the Contract Act that the absence of free consent should be established by the person making the said allegation. Therefore, we conclude that Parliament has provided the benefit of the legal fiction of deemed absence of free consent only to Indian citizens who were above the age of sixty years on the date of execution of the instrument of transfer, perhaps in recognition of the fact that older people are vulnerable and often susceptible to undue influence by their children or near relatives.

19. The third condition under Section 23 is that the transfer should be made subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor. As discussed earlier, the Settlement Deed does not contain any indication that the transfer was made subject to such condition. In fact, there are clear indications to the contrary by expressly providing that the transferor does not have the right to cancel the settlement at any time and that any such cancellation would not be valid. On this issue, the Hon'ble Supreme Court held in *Sudesh Chhikara*, in paragraph 14 and, in relevant part in paragraph 15, as under:

"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.

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15. 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...."

20. The Writ Court, in paragraph 8 of the common order, recorded in relevant part, as under:

"8. It is not in dispute that the third respondent had executed a Settlement Deed dated 25.08.2009 in favour of his own daughter/the petitioner herein with a promise that she would maintain her father till his lifetime by providing all the facilities which he had enjoyed till the execution of said Settlement Deed...."

As discussed earlier, the above conclusion is not in consonance with the provisions of the Settlement Deed. It is, consequently, also not in conformity with the law laid down in Sudesh Chhikara. Another aspect should also be noticed: Section 23 enables a "senior citizen" to approach the Tribunal for a declaration that the instrument of transfer is void, but not to unilaterally cancel the transfer. In this case, the third respondent executed the Cancellation Deed to unilaterally cancel the Settlement Deed. In view of the foregoing discussion and for reasons set out above, the unilateral cancellation of the Settlement Deed by the Cancellation Deed is invalid.

26. In *R.Sasikala v. The Inspector General of Registration*, MANU/TN/0685/2021, one of us (SVNJ) emphasised the role of the Sub-Registrar/Registrar in ensuring that senior citizens avail of the statutory benefit of Section 23. Given the fact that Section 23 imposes pre-conditions to be fulfilled before a senior citizen can avail of the benefit of the provision, in line with and pursuant to the statutory mandate under Section 21 of the Senior Citizens Act, we direct the Inspector General of Registration to issue a circular to all registration offices functioning under his jurisdiction to ensure that senior citizens are provided information about their statutory rights, such as the right to retain life-interest in the property proposed to be settled in favour of their children or legal heirs and about the advisability of incorporating a condition in the settlement deed that the transferee should provide for their basic amenities and physical needs and that the settlement is liable to be revoked otherwise. An easy-to-use check list may be prepared to ensure that gift or settlement deeds are executed with the informed consent of senior citizens."

D. Devi vs. The Inspector General of Registration and Ors. (06.11.2023 - MADHC) : MANU/TN/6273/2023

13. Even after the Supreme Court Judgement, Full Bench Judgement and Division Bench Judgement, I see that many Single Judge holding that since the Settlement is out of "Love and Affection" the breach of it is sufficient to cancel the document under Section 23. However, I do not agree with such a view is because the judgements discussed in previous paragraphs clearly holds the unless the mandatory requirement of Section 23 is strictly available, the Settlement deed cannot be cancelled by the Authorities under the Act.

14. Though, my topic is only "can a donor unsettle settlement". I thought we had to also discuss the impact of Section 23 as today we come across so much of events happening in unsettling settlement by the Authority.

15. I conclude that except under Section 126 of the Transfer of Property Act, the donor cannot unsettle a settlement".

This article is written by G.Surya Narayanan, Advocate, Madras High Court and assisted by S.Adhiti, 3rd Year Student, VITSOL, Chennai