

**HIGH COURT OF TRIPURA
AGARTALA**

RFA No.06 of 2023

Sri Pradip Krishna Debbarma,
Son of late Subir Krishna Debbarma,
Resident of Ujir Bari, Banamalipur,
P.S. East Agartala, P.O. Agartala,
District: West Tripura

-----Appellant-Plaintiff(s)

Versus

- 1. Smt. Minu Debbarma,**
Wife of late Subir Krishna Debbarma
- 2. Sri Kajal Krishna Debbarma,**
Son of late Subir Krishna Debbarma,
Both are resident of Ujir Bari,
Banamalipur, P.S. East Agartala,
P.O. Agartala, District: West Tripura
- 3. Smt. Nikta Debbarma,**
Wife of Sri Babul Debbarma,
Daughter of late Subir Krishna Debbarma,
Resident of B.K. Road, Lalbahadur Chowmuhan, P.S. East Agartala, P.O. Agartala,
District: West Tripura

----- Respondent-Defendant(s)

For Appellant(s)	:	Ms. S. Deb Gupta, Adv.
For Respondent(s)	:	Mr. S. Lodh, Adv.
Date of Hearing	:	01.12.2023
Date of delivery of Judgment and Order	:	14.12.2023
Whether fit for Reporting	:	YES/NO

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This is an appeal under Section 96 of CPC against the judgment dated 20.01.2023 and preliminary decree dated 13.02.2023 passed by Learned Civil Judge (Senior Division), Court No.1, Agartala, West Tripura in T.S.(P) No.11 of 2019 thereby partly decreeing the suit in favour of the appellant-plaintiff.

02. The gist of the appeal in brief is that one Pradip Krishna Debbarma being the present appellant filed a suit for partition of land measuring 0.0500 acres appertaining to Khatian No.617 under Mouja-Agartala, Sheet No.1-2717 dated 02.06.1995.

03. According to the appellant one Subir Krishna Debbarma (since dead) was the original owner in possession of the suit land and after his death the present appellant and the respondent-defendants became the joint owners of the suit land. On several occasions the appellant-plaintiff requested the respondent-defendants for amicable partition of the suit land. On 03.08.2018, the appellant requested the respondent-defendants for partition of the suit land amicably which was refused. After that the appellant collected the khatian of the suit land and could know that the respondent-defendants No.1 & 2 had mutated the suit land in the name of the defendants No.1 and 2 leaving the

share of the appellant and the respondent-defendant No.3 (sister of the appellant). After filing of the written statement by the respondent-defendants the present appellant amended the plaint on the ground that after filing of the written statement it came to the knowledge of the appellant that 1 ganda 1 kara of land was transferred to the respondent-defendant No.2 by respondent-defendants No.1 and 3 fabricating and forging the signatures of the appellant. So the appellant prayed for partition of the suit property along with cancellation of the sale-deed as stated above. The contesting respondents filed the written statement but did not adduce any evidence. However, after conclusion of trial Learned Court below delivered the judgment which is now under challenge before this court.

04. During trial Learned Trial Court below framed the following issues:

- (i) **Whether the suit is maintainable in its(sic) present form and nature?**
- (ii) **Whether the plaintiff and the defendants are the joint owners of the suit land;**
- (iii) **Whether the plaintiff and the defendants are entitled to 1/4th share each out of the suit land;**
- (iv) **Whether the sale deed bearing No.1-2717, dt. 02.06.1995 is forged, fabricated and liable to be cancelled;**
- (v) **Whether the plaintiff is entitled to any other relief.**

05. At the time of hearing the Learned counsel for the appellant-plaintiff submitted before this court that Learned Court below although partly decreed the suit in favour of the appellant but refused to grant relief in respect

of declaration of alleged sale-deed No.1-1727 dated 02.06.1995 to be forged and fabricated for which the appellant has become prejudiced. Learned counsel Ms. S. Deb Gupta has further drawn the attention of this court to the fact that admittedly the contesting respondents have filed their written statement but ultimately they did not adduce any oral or documentary evidence on record to substantiate their defence. Furthermore, Learned counsel also submitted that before the Learned Trial Court the present appellant-plaintiff submitted two applications one under Order XVI Rule 6 read with Section 151 of CPC for calling Principal of Government College of Art and Craft or authorized person along with official record as per schedule and another application under Section 45 of the Indian Evidence Act for obtaining the opinion of the Hand Writing expert in respect of alleged signatures of the appellant-plaintiff in the registered sale-deed under dispute. But the Learned Court below did not pass any order on that application rather by the order dated 03.12.2021 kept the application reserved for disposal. It is further submitted that the appellant-plaintiff never put his signatures in Bengali on the alleged deed nor the same was executed by him and until and unless the same application is disposed of in accordance with law, then the judgment passed by the Learned Court below would be put into execution and the appellant would be seriously prejudiced. So it requires to be

set aside for non-disposal of that application. Finally Learned counsel very categorically submitted before the court to remand back the case to the Learned Court for disposal of the application filed under Section 45 of the Indian Evidence Act.

06. On the contrary, Learned counsel Mr. S. Lodh appearing for the respondents fairly submitted that it is on record that the contesting respondents/defendants filed their written statement before the Trial Court but ultimately they did not adduce any oral or documentary evidence in support of their defence. It is further averred by Learned counsel that the Learned Court below rightly delivered the judgment treating the disputed sale-deed to be a genuine one. Learned counsel further submitted that there is no scope to remand back the case and prayed before the court to uphold the judgment and decree passed by Learned court below. It is further submitted that the appellant-plaintiff did not comply with the provision of Order VI Rule 4 of CPC in the pleading. Learned counsel has also drawn the attention of the court referring Order XLI Rule 23-A of CPC and submitted that there is no scope at this stage to remand back the case to the Trial Court and relied upon one decision of the Hon'ble Supreme Court of India in **Sirajudheen vs. Zeenath and Others** reported in **2023 SCC OnLine SC 196**.

07. Now after hearing both the sides and after going through entire case record including the record of the Learned court below, this court would like to determine the following point for decision of the appeal:

Is the judgment and decree passed by the Learned Court below perverse?

08. As already discussed that before the Learned Court below the present appellant-plaintiff adduced oral/documentary evidence on record. But the contesting respondent/defendants although filed written statement but they did not adduce any oral/documentary evidence on record to substantiate their defence. Now we are to see how far the present appellant-plaintiff could prove his case before the Learned Court below. As already stated the appellant had filed the suit for partition of the property left by Subir Krishna Debbarma and also for declaration of the registered sale-deed bearing No.1-2717 dated 02.06.1995 to be cancelled. In support of this case the plaintiff-appellant as PW-1 supported his averments made in the plaint during examination in chief and relied upon the exhibited documents and specifically stated that on 19.11.2018 after collecting of khatian of the suit land he came to know that the respondent-defendants No.1 and 2 mutated the suit land after the death of his father in their name suppressing the name of his sister respondent-defendant No.3 and the appellant and also after filing

written statement by the respondent-defendants further he could know that he himself, respondents No.1 and 3 sold out 1 ganda and 1 kara land to the respondent-defendant No.2. But he never executed any such deed in favour of the respondent No.2 and also stated that his signatures were forged and fabricated and submitted that he is entitled to ¼th share of the suit land. Similarly, PW-2 Paritosh Deb appeared as the authorized representative of the Government College of Arts and Craft. He produced the merit register of the year 1997 and the serial No.11 contains the signature of the appellant in English and also produced the University certificate register of the year 2001 wherein serial No.5 the signature of the appellant was in English. In the same way PW-3 Rajpitar Debbarma who appeared on behalf of the Sub-Registrar, Sadar, West Tripura produced the certified copy of the sale-deed bearing No.1-2717 dated 02.06.1995 issued from the Office of the District Sub-Registrar, West Tripura, Agartala and identified the certified copy and further stated that he produced the authenticated copy of the sale-deed and according to him the signature of the plaintiff-appellant was in Bengali and in the paper pasting the signature was also mentioned in Bengali.

09. As already stated those witnesses were not tested for cross-examination by the respondent-defendants. Since the appellant-plaintiff asserted that the signature of

the appellant was forged and fabricated so burden lies upon him to prove his assertions. Excepting PWs 2 & 3 the plaintiff-appellant could not adduce any other witnesses. The plaintiff-appellant to substantiate his contention also could not adduce any other material evidence on record. From the written statement filed by the respondent-defendants it is apparent that the original deed in question was submitted to the bank for obtaining loan by respondent-defendant No.2. Nor they produced the original deed before the court. Learned Court below after going through the evidence on record came to the finding that the deed was genuine, not fabricated and accordingly after deducting the relevant share ordered for partition of the rest part of the suit land.

10. Learned counsel for the respondents in course of hearing stated that there is no scope on the part of this court to remand back the case as per provision of Order XLI Rule 23-A of CPC and relied upon one citation as stated earlier.

11. For the sake of convenience, we would like to refer herein below the relevant provision of Order XLI Rule 23-A which is as under:

"23A Remand in other cases.- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

12. From the aforesaid provision it is clear that the appellate court only can remand a case against a decree of the Learned lower court disposed of otherwise on a preliminary point if the decree is reversed in appeal and the retrial is considered necessary not otherwise. In **Sirajudheen vs. Zeenath and Others** reported in **2023 SCC OnLine SC 196**, the Apex Court has categorically discussed the various aspects of remanding the case by the Learned Appellate Court as follows:

23. The provisions contained in Rules 23, 23-A, 24, 27 and 33 of Order XLI CPC read as under: -

"23. Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A. Remand in other cases.-Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence

which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

24. While explaining the scope of Rules 23 and 23-A of Order XLI CPC, in the case of Municipal Corporation, Hyderabad: (2008) 8 SCC 485 this Court has observed as under: -

"32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court....."

27. One of the striking features of the impugned judgment dated 28.06.2019 is that even while dealing with a regular first appeal against the judgment and decree of the Trial Court, the High Court has not even adverted to the findings of the Trial Court pertaining to the present case and has not specified as to how the findings recorded by the Trial Court were unsustainable or unjustified. As noticed, in the impugned judgment, the High Court has narrated a few circumstances leaning in favour of the plaintiff (in paragraph 21) and then a few other circumstances which favour the genuineness of the sale in question (in paragraph 22) and thereafter, has observed that the evidence necessary for a proper determination of the suit had not been brought on record; and that the evidence on record was insufficient to arrive at a proper finding in favour or against the sale deed in question. The High Court would further observe that material witnesses have not been examined and no evidence has been brought in with regard to passing of consideration.

29. After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that "the decree is reversed in appeal and a re-trial is considered necessary". As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a sine qua non. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC."

13. From the aforesaid principles of law as laid down by the Honourable Apex Court it is very much clear that until and unless the decree is reversed in appeal of the Learned Court below there is no scope to remand back the case to the Learned Court against whose decree the appeal is preferred.

14. In the case at hand the appellant-plaintiff has adduced oral and documentary evidence on record but could not adduce any cogent material on record to substantiate

that his signatures on the purported sale-deed were forged and fabricated, save and except the application filed under Section 45 of the Evidence Act for verification of signature by the Handwriting Expert. It is the admitted position that if the alleged sale-deed is found to be true and genuine one then there is no scope to disbelieve the finding of the Learned Trial Court below. But if it is found that the alleged sale-deed in question is fake and fabricated, in that case share of quantum of land as per decree would be changed. So it is the considered view of this court that Learned court below ought to have disposed of the application filed by the appellant-plaintiff under Section 45 of the Evidence Act before passing judgment and as already stated by the order dated 03.12.2021 the Learned Court below kept the application reserved for disposal. But ultimately no finding was given by the Learned Court to that application and thus partly decreed the suit causing prejudice to the appellant. Learned counsel for the respondents in course of hearing referred the provision of Order VI Rule 4 of CPC which provides as under:

"Particulars to be given where necessary.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

Referring the aforesaid provision of law it was submitted that the plaint of the appellant remained silent regarding applying of fraud by the respondents.

15. On the contrary, learned counsel for the appellant submitted that by the application for amendment of plaint and also in the application for scientific examination under Section 45 of the Evidence Act it was specifically pleaded by the appellant that the signatures of the appellant on the alleged deed are forged and fabricated. So according to Learned counsel the submission of Learned counsel for the respondents cannot be accepted. I have also meticulously gone through the LC record and it appears that on 05.09.2019 the appellant-plaintiff filed one application under Order VI Rule 17 of CPC for amendment of the plaint and by the order dated 06.01.2020 the prayer was allowed and one amended copy of plaint was submitted by the appellant-plaintiff on 17.02.2020. In the amended copy of plaint it was specifically stated that in the alleged sale-deed his signatures were forged by the respondent-defendants and also in the application filed under Section 45 of the Indian Evidence Act similar plea was taken that the signatures as shown in the deed were forged and fabricated.

16. Thus, after hearing both the sides, this court observes that Learned court below committed error in delivering the judgment without disposal of the application filed under Section 45 of the Indian Evidence Act which has caused injustice to the appellant-plaintiff. The citation as referred to by the respondent-defendants is very much relevant but in disposal of this appeal this court does not

find any scope to apply the aforesaid principle in the given case. So in my considered view the case be remanded back to the Learned court below setting aside the judgment and preliminary decree passed. Thus the aforesaid point for determination is decided in affirmative in favour of the appellant-plaintiff of this case.

17. In the result, the appeal is allowed and the judgment and decree passed by the Learned Court below is hereby set aside. Learned Trial court below is asked to dispose of the application filed by the appellant-plaintiff under Section 45 of the Evidence Act within a period of 6(six) months from the date of receipt of the judgment of this court and thereafter to deliver a fresh judgment again in the light of aforesaid observation made in this appeal after taking into consideration all relevant aspects. The cost of obtaining expert opinion shall be borne by the appellant-plaintiff. The parties are asked to appear before the Learned Court below on 16.01.2024.

Prepare the decree accordingly and send down the LCRs forthwith.

JUDGE

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