

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.42 of 2022

Smt. Anindita Roy (Chowdhury),

Wife of Late Anjan Chowdhury,
Daughter of Late Soroj Kumar Roy,
A resident of Parbati Villa,
Palace Compound, Jagannath Bari Road,
P.O. Agartala, P.S. West Agartala,
District: West Tripura, Age: 54

----Plaintiff-Appellant (s)

Versus

Smt. Alakananda Roy (Basu),

Wife of Shri Biswajit Basu,
Daughter of Late Soroj Kumar Roy,
A resident of Parbati Villa,
Palace Compound, Jagannath Bari Road,
P.O. Agartala, P.S. West Agartala,
District: West Tripura

---- Defendant-Respondent (s)

For Appellant(s)	:	Mr. S. M. Chakraborty, Sr. Adv. Ms. P. Chakraborty, Adv.
For Respondent(s)	:	Mr. D. C. Saha, Adv.
Date of Hearing	:	06.03.2024
Date of delivery of Judgment and Order	:	13.03.2024
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal under Section 100 of CPC is filed challenging the judgment and decree dated 06.08.2022 delivered by Learned Addl. District Judge, Court No.5, West Tripura, Agartala in Title Appeal No.08 of 2022 dismissing the appeal and upholding the order of Learned Civil Judge

(Senior Division), Agartala, West Tripura, Court No.1 dated 21.01.2022 delivered in connection with T.S.(P)37 of 2020.

02. Heard Mr. S. M. Chakraborty, Learned Senior counsel assisted by Ms. P. Chakraborty, Learned counsel appearing for the appellant and Mr. D. C. Saha, Learned counsel appearing for the respondent. Before entering into the merit let us revisit the subject matter of the dispute amongst the rival parties. The appellant as the plaintiff filed a suit before the court of Learned Civil Judge (Senior Division) Court No.1, West Tripura, Agartala which was numbered as TS(P)37 of 2020, seeking a decree of partition of the parental property inherited by the parties in equal share. According the appellant-plaintiff the father of the plaintiff and the respondent-defendant was the owner of the suit land including two storeyed building and three shop premises by purchase and during his lifetime he executed one 'Will' bearing No.III-239 dated 22.05.2006 and distributed his property in favour of plaintiff and defendant. After the death of the father, the plaintiff-appellant found a photocopy of 'Will' and in the said 'Will' it was mentioned that land measuring 2 ganda 2 kara but practically there was only land measuring 2 ganda 1 kara. So according to the plaintiff-appellant the 'Will' was defective and not binding upon them. It was also pleaded by the appellant-plaintiff that she requested the defendant for partition of the suit land. But the respondent-defendant avoided the

request. Lastly on 20.04.2020 the plaintiff-appellant again requested for partition and initially the respondent-defendant though agreed but later on she refused to agree with the proposal. On 14.05.2020, the plaintiff informed the matter to the local people and the local people also asked the defendant, but they failed. It was further submitted that the building over the suit land was constructed in the year 1978 and condition was deteriorated and required to be demolished and new building is required to be constructed and after the death of father of the parties the defendant has been taking all the rent of shop premises and has taken all the security money of rent and premises and on being requested for equal distribution of money by the appellant-plaintiff the husband of the respondent-defendant threatened the plaintiff and her son. Hence, the appellant-plaintiff filed the suit.

03. The respondent-plaintiff contested the suit by filing written statement denying the plea of the plaintiff and pleaded that the father of the plaintiff and defendant during his lifetime executed a registered 'Will' vide No.III-239 dated 22.05.2006 and father of the defendant and plaintiff declared the possession of plaintiff and defendant and therefore, the partition of the suit was liable to be dismissed. It was further asserted that by the said 'Will' 2 and half ganda land having double storied building was distributed and the building is in good condition and not

required to be demolished. It was further submitted that both the parties are in possession of the building as per possession declared in the 'Will'. Therefore, no question of partition arise and the right, title, interest and possession is already acquired by the party through the 'Will' and the contesting respondent-defendant by the written statement prayed for dismissal of the suit. Thereafter, the respondent-defendant filed one application before the Learned Trial court under Order 7 Rule 11 of CPC for rejection of the plaint on the ground that the partition suit was barred by law as there is one 'Will' bequeathing and distributing the suit land and partition suit does not arise at all. So the Learned Trial Court on the petition filed heard both the sides framed one preliminary issue on 01.10.2021 and after that by order dated 21.01.2022 dismissed the suit of the appellant-plaintiff. For the sake of convenience, I would like to reproduce herein below the relevant portion of the order dated 21.01.2022 passed by Learned Trial court which is as follows:

* * * * *

Be it observed that on the above said ground the injunction application was also dismissed.

The plaintiff in para No.2 of her plaint categorically mentioned that the predecessor of the parties executed one Will regarding the suit property.

Considering all facts and circumstances, this court of the opinion that this instant suit for partition is barred by law.

Accordingly, this suit is hereby dismissed and disposed of on merit."

* * * * *

04. Challenging that order the appellant-plaintiff preferred an appeal before the court of the Learned District

Judge, West Tripura, Agartala and in due course of time the case was assigned to the Learned Addl. District Judge, West Tripura, Agartala, Court No.5 and the case was numbered as Title Appeal No.8 of 2022. The Learned First Appellate court after hearing both the sides by judgment and order dated 06.08.2022 dismissed the appeal upholding the order of the Learned Trial court. For the sake of convenience, the relevant portion of the judgment and order of the Learned First Appellate Court runs as follows:

**"In the result, I find the appeal is liable to be dismissed and stands dismissed.
This appeal is disposed of on contest.
Prepare appellate decree accordingly and place before me for signature within 15 days.
Send down the Trial Court Record along with a copy of this Judgment and decree.
Make entry in Trial register and upload in CIS."**

05. At the time of admission of this appeal by order dated 04.11.2022, the following substantial questions of law were framed:

(i) Whether both the Courts below committed serious perversity while dismissing the partition suit and first Appeal thereof because of existence of Will without at all going through and appreciating the contents of the said Will correctly and properly?

(ii) Whether the dismissal of the suit by the Ld. Courts below by passing a simple order without framing any issue and taking the Will in question in evidences as Exhibit rendered the impugned order totally bad and perverse in the eye of law?

06. At the time of hearing of arguments Learned Senior counsel Mr. S. M. Chakraborty fairly submitted that the Learned Trial Court below without application of mind has dismissed the suit on the ground that since there was 'Will' so the partition suit was not maintainable. Learned senior counsel further submitted that the appellant-plaintiff

filed the suit for partition of the paternal property and it was specifically admitted the fact of execution of one 'Will' by their deceased father. In the said 'Will' there was no whisper regarding distribution of lands for which the appeal was required to be held. But the Learned Trial court below without understanding the legal provisions in respect of partition dismissed the suit of the appellant-plaintiff without any grounds and the Learned First Appellate court also did the same wrong. Learned Senior counsel further submitted that the partition is affected in view of the provisions of the Partition Act and there is no bar as per the Partition Act for partition of the suit property when there is existence of any 'Will'. But the Learned Trial court and the First Appellate court did not consider these aspects. Learned Senior counsel further drawn the attention of the court referring Section-59 of the Indian Succession Act and submitted that *every person of sound mind not being a minor may dispose of his property by will*. So by the 'Will' the testator expressed his last desire as to how the building standing on the earth would be distributed but there is no recital in the 'Will' regarding distribution of land amongst the parties for which the order has become infructuous and furthermore the testator executed the 'Will' in favour of his wife not in favour of the parties of this appeal. But the Learned court below did not consider the same. Learned Senior counsel further submitted that by this time the wife of the original testator expired. Learned Senior counsel further submitted

that even the purported 'Will' was not admitted in to evidence by the Learned Trial court, then how the Learned Trial court without admitting the documents came to the observation that suit was not maintainable. Learned Senior counsel further submitted that in view of Section-107 of CPC Learned First Appellate court also could remand back the matter to the Learned Trial court for framing proper issues and to dispose of the case as per law. But the Learned First Appellate court also did not follow the procedure and committed the same wrong for which the judgments are not maintainable and further submitted that if for argument sake at one point of time if the building is demolished or damaged in that case in absence of land how the party would proceed for further construction over the land in question. So finally Learned Senior counsel for the appellant-plaintiff submitted that the matter may be remanded back to the Learned Trial court for partition of the suit property after making proper issues as per law.

07. Per contra, Learned counsel Mr. D. C. Saha, appearing for the respondent-defendant submitted that both the courts below rightly and reasonably delivered the judgment dismissing the suit and the appeal filed by the appellant-plaintiff. Learned counsel further drawn the attention of this court that as per Order 7 Rule 11 of CPC the Learned Trial court passed the order which was affirmed by Learned First Appellate court and there is no infirmity in the judgment of the Learned First Appellate court as well as

the Trial court. So Learned counsel for the respondent-defendant urged for dismissal of this appeal with costs.

08. I have heard submissions of both the sides and also gone through the records of the Learned courts below. Admittedly in this case there is no dispute on record in respect of execution of one 'Will' by the predecessor father of the parties. The said 'Will' was not marked as exhibit by the Trial court nor it was taken into consideration by the Learned First Appellate court. However, at the time of hearing Learned Senior counsel drawn the attention of the court that although the 'Will' could not be marked as exhibit as per law but for perusal of this court the appellant along with the memo of appeal has annexed the same which is now available with the record and on perusal of the same it appears that the testator of the said 'Will' bequeathed both his moveable and immovable properties to his wife who is also by this time has expired and on perusal of the Will it appears that in the said 'Will' the testator only has distributed the building standing on his land amongst his two daughters in the event of death of his wife, but regarding distribution of land the 'Will' is totally silent.

09. The Learned Trial court below just on the basis of one application filed by the respondent-defendant under Order 7 Rule 11 of CPC framed one preliminary issue and ultimately dismissed the suit. Now for the sake of convenience, I would like to mention herein below the

provision of Section-59 of Succession Act, Order 13 Rule 4 of the CPC and Order 7 Rule 11 of the CPC:

Section-59 of Succession Act:

59. Person capable of making wills.- Every person of sound mind not being a minor may dispose of his property by will.

Order 13 Rule 4 of CPC:

4. Endorsements on documents admitted in evidence.- (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the Suit the following particulars, namely:—

**(a) the number and title of the suit,
(b) the name of the person producing the document,
(c) the date on which it was produced, and
(d) a statement of its having been so admitted;
and the endorsement shall be signed or Initialed by the Judge.**

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge.

Order 7 Rule 11 of CPC:

11. Rejection of plaint.-The plaint shall be rejected in the following cases.-

**(a) where it does not disclose a cause of action;
(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, to do so
(d) where the suit appears from the statement in the plaint to be barred by any law;
(e) where it is not filed in duplicate;
(f) where the plaintiff fails to comply with the provisions of Rule 9;**

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

10. The Learned Trial court came to the observation that since there is 'Will' regarding the suit property so the

suit was barred by law and dismissed the suit. But Learned Trial court did not specify anything under what provisions of law and also under which act the suit was barred. Similarly, the Learned First Appellate court also dismissed the appeal of the plaintiff on the same grounds. Because on perusal of the 'Will' which was not marked as exhibit by the Learned Trial court it appears that by the said 'Will' the testator had distributed the share of building amongst his legal heirs but regarding the quantum of land the 'Will' was totally remained silent. But the Learned Trial court below came to the observation that since the building is standing on the suit property so no partition was required and without proper application of mind dismissed the suit which in my considered view Learned Trial court below and as well as the Learned First Appellate court committed serious error in dismissing the suit and the appeal. Moreso, by the said 'Will' the testator bequeathed his property to his wife not to the present parties. But the Learned Trial court below did not consider the said fact in discussing the preliminary issue. Even the said 'Will' was not taken into consideration and proved as per law. Moreso, the petition filed under Order 7 Rule 11 of CPC was also not appropriate for dismissal of the suit as filed by the respondent-defendant because the provision relied upon speaks for 'rejection of plaint' not for 'dismissal of suit', but the Learned Trial court dismissed the suit. Thus in my considered view both the courts have committed serious perversity in delivering the order and

judgment for which in my considered view the matter be remanded back to the Learned Trial court for framing of proper issues and to pass appropriate judgment and decree in accordance with law as prayed for by the appellant-plaintiff within a period of 4(four) months from the date of receipt of the copy of judgment.

11. In the result, the appeal filed by the appellant-plaintiff is hereby allowed with costs against the respondent-defendant. The judgment and decree dated 06.08.2022 delivered by the Learned First Appellate court in Title Appeal No.08 of 2022 is hereby set aside. The suit be remanded back to the Learned Trial court i.e. the Learned Civil Judge (Senior Division), Court No.1, West Tripura, Agartala for framing the proper issues and to deliver the judgment and decree in accordance with law after taking evidence and hearing arguments of both the sides within a period of 4(four) months from the date of receipt of the copy of the judgment. The parties shall appear before the Learned Trial court on 26.03.2024.

Send down the LCRs along with a copy of this judgment.

Prepare decree accordingly.

Pending application(s) if any, stands disposed of.

JUDGE

SABYASACHI
BHATTACHARJEE

Moumita

Digitally signed by
SABYASACHI BHATTACHARJEE
Date: 2024.03.15 01:17:39
+07'00'