

**HIGH COURT OF TRIPURA
AGARTALA
RSA NO.51 of 2022**

Sri Ranjit Paul,

S/o. Late Suresh Chandra Paul @ Suresh Paul, aged about
54 years,
Resident of Village- Ujan Dudhpur,
P.S.- Kumarghat, P.O.-82,
District- Unakoti Tripura.

.....Plaintiff- Appellant.

Versus

Sri Subhash Chandra Paul,

S/o. Late Suresh Chandra Paul @ Suresh Paul,
Resident of Village-Ujan Dudhpur,
P.S.- Kumarghat,
District-Unakoti Tripura.

.....Defendant-Respondents.

For Appellant(s)	:	Mr. S. Lodh, Adv.
For Respondent(s)	:	Mr. Ratan Datta, Adv.
Date of Hearing	:	01.02.2024
Date of delivery of Judgment and Order	:	06.02.2024
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

The appellant, Ranjit Paul has preferred this appeal under Section 100 of CPC challenging the judgment and decree dated 11.05.2022 passed by the Learned District Judge, Unakoti District, Kailashahar in Title Appeal No.33 of 2019 whereby the Learned District Judge, Unakoti District Kailashahar has upheld the judgment dated 06.04.2019 and decree dated 09.04.2019 passed by the Learned Civil Judge, Senior Division, Kailashahar, Unakoti District, Court No.1 in T.S. 35 of 2018.

02. Before coming to the conclusion of this appeal, let us revisit the subject matter of the dispute.

The present appellant as plaintiff filed one suit before the Court of Learned Civil Judge, Senior Division, Kailashahar, Unakoti District, Court No.1 for granting decree of a declaration that the plaintiff has right, title, interest over the suit land as described in Schedule 'A' of the plaint and for recovery of possession of the suit land along with mud house, kacha house and cow shed by evicting the defendant and also removing all obstructions. The subject matter of suit of the plaintiff before the Learned Trial Court is that the father of the plaintiff and the defendant hereinafter called the respondent Suresh Chandra Paul alias Suresh Paul was the original owners in possession of the suit land measuring 2 acres of Khatian No.1218, R.S. Plot Nos.2418/3611, 2419, 2420/3612 corresponding to Old C.S. Plot Nos.1618(p), 1805(p) by way of allotment. Said Suresh Paul expired on 15.01.1999 and his wife Kukil Rani Paul expired on 18.05.1984. Suresh Chandra Paul during his lifetime executed one Will Vide No.2643 dated 27.11.1992 and the same was registered before Sub-Registrar, Kailashahar and by the said Will he bequeathed the aforesaid property in favour of the plaintiff. One Biresh Paul was made an executant of the Will and after the death of his father, the plaintiff came to know about the execution of Will from said Biresh Paul and after that the plaintiff applied for mutation of

the said land in his favour and the said land measuring 2 acres i.e. the suit land was mutated Vide MR.No.20120007 and Khatian No.1218 was created in his name.

03. It was further submitted that the defendant hereinafter referred as respondent also got 2 acres of land in his name from the property of his father during his lifetime and their two sisters were given marriage and they are respectively residing to their husband's house. According to the plaintiff, after mutation, since 2012 he was possessing the suit land by making construction but since he was a private employee and serving at Guwahati, so, on 05.05.2018 the defendant occupied the house of the plaintiff and on 07.05.2018 the plaintiff came to the suit land after getting information and requested the defendant to vacate the same in presence of the villagers when he refused to vacate the same.

04. It was further submitted that in the year 2017, the defendant tried to enter into the suit land for which a case was filed under Section 145 of Cr.P.C. before the Court of SDM, Kumarghat and the said case was disposed of on 17.02.2017.

05. It was further asserted that the plaintiff made an agreement for sale with one Laxmikanta Acharjee of the suit land by taking advance consideration of Rs.80,000/- on 15.01.2018, but the defendant created obstruction, hence the plaintiff-appellant filed the suit. The suit of the plaintiff

was contested by the defendant by filing W.S. In the written statement, it was submitted that the suit was not maintainable and the same was bad for non-joinder of necessary party as one Subrata Sarkar was not made party, who was in possession of a part of suit land measuring 0.66 acres. But said Subrata Sarkar was made a party in the proceeding before SDM, under Section 145 of Cr.P.C. It was further submitted that the defendant has been using and possessing the suit land since 1992, by constructing a pucca house with full knowledge of the plaintiff and their father adversely denying the right, title, interest of their father, mother and plaintiff peacefully, continuously without any disturbance and also acquired title by way of adverse possession and the suit was barred by limitation.

06. The answering defendant further submitted that their father did never execute any Will in respect of the suit land in favour of the plaintiff and questioned Will was created fraudulently by creating illegal pressure upon their father as the defendant has been possessing Hal Plot No.2419 measuring 34 decimals. The defendant further took the plea that Khatian was created in the name of the plaintiff without observing required formalities. The defendant also submitted that the case filed by the plaintiff under Section 145 of Cr.P.C. was dismissed by SDM after enquiry as it was revealed from the enquiry report that the defendant was possessing Plot No.2419 and Hal Plot No.2420/3612

measuring 0.66 acres is under peaceful possession of Subrata Sarkar and hence, the defendant by filing written statement prayed for dismissal of the suit of the plaintiff.

07. Upon the pleadings of the parties, Learned Trial Court below framed the following issues:

- (i) Whether the suit is maintainable?
- (ii) Whether the suit is bad for non-joinder of necessary party?
- (iii) Whether the WILL No.III-10 dated 27.01.1992 is valid or created fraudulently by creating illegal pressure?
- (iv) Whether the defendant perfected title over the suit land by way of adverse possession?
- (v) Whether the plaintiff is entitled to the relief as prayed for and or any other relief or reliefs in this suit?

08. To substantiate the issues both the parties have adduced their oral and documentary evidence before the Learned Trial Court:

APPENDIX

(A) Plaintiffs' Exhibits:-

Ext.-1:- Khatian No.1218.

Ext.-2:- Khatian No.903.

Ext.-3:- Death certificate of deceased Suresh Chandra Paul.

Ext.-4:- Death certificate of deceased Kukil Rani Paul.

Ext.-5:- Survival certificate of deceased Suresh Chandra Paul.

Ext.-6:- WILL No.III-10 dated 27.11.1992.

Ext.-6(i):- Signature of Suresh Chandra Paul in the WILL identified by PW.1.

Ext.8:- Orders passed by Executive Magistrate in case No.Misc 26(M)/2017 U/S 145 of Cr.P.C.

(B) Plaintiff's Witnesses:-

PW.-1 Sri Ranjit Paul.

PW.-2 Sri Chitta Ranjan Nama.

(C) Defendant's Witnesses:-

DW.- Sri Subhash Chandra Paul.

No documentary evidence was adduced by the defendant-respondent of the case.

09. However, after taking evidence on record and after hearing both the sides Learned Trial Court below gave the following judgment/order. The operative portion of the judgment runs as follows:

"In the result, the suit of the plaintiff is decreased on contest without cost with a declaration that plaintiff is allottee co-owner/co-sharer of the suit land along with defendant and other sharers being the legal heirs of Suresh Chandra Paul @ Suresh Paul.

The plaintiff is directed to pay deficient court fees, before this court within 30 days from today to make the judgment and decree effective, accordingly to the value of the suit land Rs.1,25,000/- in view of Clause (v) of Section 7 of the Court Fees Act deducting the court of Rs.70/-, which has already been paid.

The suit is disposed of contest without cost."

10. Challenging that judgment, the plaintiff-appellant preferred First Appeal before the Learned District Judge, Unakoti District, Kailashahar which was numbered as Title Appeal No.33 of 2019. It is to be noted here that before the Learned First Appellate Court, the plaintiff-appellant filed one application under Order 41 Rule 27, read with Section 107 of CPC praying for allowing additional evidence by calling the

witness Md. Makuddas Ali Khadim or to remand back the suit to the Lower Court. Accordingly, Learned First Appellate Court by order dated 19.09.2019 allowed the prayer of the appellant and directed the Learned Trial Court to record the additional evidence of witness Md. Makuddas Ali Khadim and thereafter to return back the case record to the Learned First Appellate Court again and accordingly, Learned Trial Court recorded the additional evidence of witness and returned back the record to the Learned First Appellate Court and finally, after hearing arguments of both the sides, Learned First Appellate Court by a judgment dated 11.05.2022 uphold the judgment and decree passed by Learned First Appellate Court with certain modification and accordingly, decree was drawn up. The operative portion of the judgment of the Learned First Appellate Court runs as follows:

"In the result the appeal filed by the plaintiff-appellant, namely, Sri Ranjit Paul stands fails being devoid of merit and it stands dismissed.

However, while upholding the judgment and decree passed by the learned trial court the same is modified relating to payment of Court fees by plaintiff-appellant as the same has not been challenged by defendant-respondent side.

Prepare appellate decree accordingly. Send down the LCR along with a copy of this judgment.

The case stands disposed of accordingly."

Challenging that judgment and decree the present appellant preferred this Second Appeal before the High Court.

11. At the time of admission of the appeal the following substantial question of law was formulated by this Court by order dated 23.03.2023:

**"1. Whether the judgment passed by learned first appellate confirming the judgment of the trial court is perverse?
2. Whether non consideration of the evidence adduced by PW.3 on behalf of plaintiff is bad law?"**

12. Heard argument of Mr. S. Lodh, Learned Counsel for the appellant and also Mr. Ratan Datta, Learned Counsel appearing for the respondent-defendant.

Learned Counsel for the appellant at the time of hearing submitted that the present appellant filed one suit for declaration of title and for recovery of possession before the Learned Civil Judge, Senior Division, Kailashahar, Unakoti District. But in the said suit, no decree was granted regarding recovery of possession of the suit land by the Learned Trial Court but the Learned Trial Court held that the plaintiff-appellant is an allottee co-owner/co-sharer of the suit land along with the defendant and other sharers which was also erroneous and perverse.

13. Learned Counsel also submitted that thereafter the said plaintiff-appellant preferred appeal before the Learned First Appellate Court and before the Learned First Appellate Court the present appellant filed one application under Order 41 Rule 27 of CPC read with Section 107 of CPC on 03.09.2019 for adducing additional evidence by calling one witness Md. Makuddas Ali Khadim and thereafter,

Learned First Appellate Court by order dated 19.09.2019 allowed the prayer of the plaintiff-appellant and directed the Learned Trial Court i.e. Civil Judge, Senior Division to record additional evidence of Md. Makuddas Ali Khadim after observing all formalities. Learned Trial Court recorded the evidence of said Md. Makuddas Ali Khadim and after receipt back of the case record, Learned First Appellate Court after hearing both the sides delivered the judgment and decree. But unfortunately, Learned First Appellate Court could not legally appreciate the evidence on record of the said witness, Md. Makuddas Ali Khadim in respect of proving the disputed 'Will' as per Section 69 of the Evidence Act and also came to an erroneous and perverse finding.

Learned Counsel for the appellant further drawn the attention of the Court referring the para no.4 of the plaint submitted before the Learned Trial Court and also the written statement filed by the respondent-defendant in para no.4 and last part of para no.5 of the written statement and submitted that since the Learned Trial Court already hold that the respondent-defendant has failed to prove his right of adverse possession over the suit land, so, the respondent-defendant is liable to be evicted from the suit land.

14. He further submitted that the respondent defendant in one side has taken the plea of his long possession over the suit land, in another side he has taken

the plea of adverse possession which are contradictory to each other. Learned Counsel for the appellant further submitted that from the evidence of PW-1, in his examination-in-chief, it is proved that he had identified the signature of his deceased father on the Will which were marked as Exhibit-6/1 series. But there was no cross-examination in this regard from the side of the respondent-defendant and further, PW-3 Md. Makuddas Ali Khadim in his examination-in-chief very specifically identified the signatures of the deed writer on the Will as well as the signatures of the attesting witnesses on the Will. Thus, according to Learned Counsel for the appellant, the plaintiff-appellant has duly proved the execution and registration of the Will as required by law under Section 69 of the Indian Evidence Act. But the Learned First Appellate Court without considering the said evidence on record came to an erroneous finding, for which the intervention of the Court is required. Learned Counsel submitted that the witnesses of the appellant-plaintiff also supported his case but both the Courts below did not consider the evidence on record. Learned Counsel also submitted that since Exhibit- 6(Will) was duly executed and registered in accordance with the provisions of law, so, there was no scope to draw any suspicious circumstances on the same but the Learned Trial Court below came to an observation that Exhibit-6 was a suspicious one and similarly, Learned First Appellate Court

also came to the same finding for which the interference of the Court is required and urged for setting aside the judgment of the Learned First Appellate Court.

15. On the contrary, Learned Counsel for the respondent-defendant submitted before the Court that both the Courts below gave concurrent finding and there is no merit in this present appeal and submitted that the plaintiff-appellant has failed to prove his case before the Learned Trial Court i.e. in respect of Exhibit-6 and the Learned Trial Court gave a detailed finding which was affirmed by the Learned First Appellate Court. He also submitted that in para 4 of the plaint, it was asserted that the testator of the Will had appointed one Biresh Paul as executor of the Will. But the appellant has failed to adduce said Biresh Paul as witness to substantiate the disputed Will as genuine before the Learned Trial Court. Learned Counsel further submitted that the Sub-Registrar was not produced by the appellant to prove the contents of the Will. So, there was no scope to place any reliance regarding due execution of the Will.

16. Learned Counsel further drawn the attention of the Court referring para 6 of the plaint and submitted that on 05.05.2018 the respondent-defendant occupied the suit land and on 07.05.2018 the plaintiff-appellant requested the defendant-respondent to vacate this suit land. But referring the cross-examination part of PW-2, i.e., the witness of the appellant, who in his cross-examination very specifically

stated that the suit land was under possession of the respondent-defendant since last 30/35 years. Similarly, PW-1 in his cross-examination also specifically stated that in Dag No.2418 his brother Subhasish Chandra Paul made one mud-wall and GCI sheet house and the said house is there for last 30/35 years. So, the version of the plaintiff-appellant is contradictory to each other and the story of possession and dispossession, according to Learned Counsel for the respondent-defendant was totally a dire falsehood because according to Learned Counsel for the respondent-defendant, the plaintiff-appellant never possessed the suit land at any point of time. So, the question of his possession and dispossession does not arise. Rather he (defendant) possessed the same since from the time of his deceased father. Learned Counsel also at the time of hearing of argument referred the provision of Section 69 of the Indian Evidence Act and submitted that the plaintiff-appellant has failed to prove the Will(Exhibit-6) as required by law and furthermore, referring the cross-examination part of PW-3, he also submitted that the said witness could not say that the Will was made voluntarily. He had no acquaintance with the testator of the Will, so, no reliance could be placed upon the evidence of said witness PW-3. So, according to Learned Counsel for the respondent-defendant, the Learned Trial Court rightly and reasonably and thereafter, the Learned

First Appellate Court rightly delivered the judgment dismissing the appeal of the present appellant.

17. Learned Counsel also submitted that in Exhibit-6 it was mentioned that the suit land was 'jote' land but factually, it was an allottee land. There was no explanation in this regard from the side of the appellant. Furthermore, since the respondent-defendant has challenged the validity of the Will, so, it was the duty of the plaintiff-appellant that the testator was in sound state of mind at the time of execution of Will. So, Learned Trial Court rightly came to a conclusion that the Exhibit-6 was of full suspicious circumstances and ultimately, hold that no relief could be granted to the plaintiff-appellant on the basis of said Will. Learned Counsel for the respondent, finally, submitted that the Learned Trial Court at the time of disposal of the suit had referred so many judgments of the Hon'ble Apex Court and relying upon those judgments refused to grant any relief in respect of recovery of possession. But the Learned Trial Court came to the conclusion that the plaintiff-appellant was one of the co-owner/co-sharer of this suit land along with other lands and there is no substantial question of law involved in this appeal and at this stage, there is no scope to determine any facts rather than law. So, Learned Counsel submitted before the Court for dismissal of the appeal with costs.

18. Learned Counsel of both the sides in course of hearing also relied upon some citations which would be

discussed in due course. From the arguments of both the sides, it appears that Learned Counsel for the appellant tried to convince the Court that the Learned Court below did not appreciate the Will executed by Suresh Paul i.e. the father of the parties in favour of the present appellant, which was a registered one. Learned Counsel for the appellant also submitted that the present appellant duly proved the Will i.e. Exhibit-6 as per provision of Section 69 of the Evidence Act read with Section 63 of the Indian Succession Act. According to Learned Counsel, the appellant as PW-1 in course of his examination-in-chief before the Learned Trial Court, duly proved the Will executed by his father. There is no cross from the side of the contesting defendant-respondent in this regard and more so, through the evidence of PW-3, Md. Makuddas Ali Khadim, the appellant also could prove the Will as per Section 69 of the Evidence Act. But the Learned First Appellate Court failed to appreciate the evidence of the said witness, PW-3. Even the Learned Trial Court did not consider the evidence of PW-1 regarding execution of Will by the testator in favour of the appellant.

19. On the contrary, Learned Counsel for the respondent-defendant submitted that the 'Will' was full of suspicious circumstances and the appellant could not prove that the testator was in sound state of mind at the time of execution of Will and furthermore, from the cross-examination of PW-3 it also appears that he could not

specifically say regarding the due execution of the Will by the testator for which Learned Court below came to conclusion that the Will was under full suspicious circumstances and ultimately, rejected the Will. Regarding recitals of the Will, Learned Counsel for the defendant-respondent submitted that it was an allottee land but on the body of the Will it was written that it was a 'jote' land. There was no explanation from the side of the appellant, so, a doubt is created regarding genuineness of the Will. I have gone through Exhibit-6 and also gone through the evidence on record.

20. Now, for the sake of convenience, I would like to refer herein below the relevant provision of Section 63 of the Indian Succession Act and also the relevant provision of Section 69 of the Indian Evidence Act:

Section 63 of the Indian Succession Act:

"63. Execution of unprivileged wills.-- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one

witness be present at the same time, and no particular form of attestation shall be necessary.”

“Section 69 of the Indian Evidence Act:

69. Proof where no attesting witness found.—

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

From the aforesaid provisions it is clear that for valid execution of the Will, the Will shall be attested by two or more witnesses each of whom had seen the testator to sign or affix his mark to the Will. Here in the case at hand, the scribe or the attesting witnesses are no more alive. So, the plaintiff appellant produced one additional witness, Md. Makuddas Ali Khadim, deed writer, who had the occasion to work with this scribe as well as the attesting witnesses. Since all of them were deed writers/Advocate Clerk. As per Section 69 of the Evidence Act, it appears that if the attesting witnesses cannot be found, it must be proved that the attestation of one witness atleast is in his hand writing and that the signature of the person executing the document is in the hand writing of that person. Because the attestation of a Will means testifying of signatures of the executors. It is not just a mere formality to be valid. A Will should be attested by two or more witnesses and propounder should examine one attesting witness to prove the Will. Attesting witness should speak not only about testator signature or affixing his

mark to the Will but also that each of the witnesses had signed the Will in presence of the testator.

21. Now, if we go through the evidence on record, it appears that the plaintiff as PW-1 in his examination-in-chief before the Court identified the signature of his father Suresh Chandra Paul on the Will which were marked as Exhibit-6/1 series. To counter his evidence there was no cross-examination from the side of the respondent-defendant in this regard. Now, if we go through the evidence of PW-3 Md. Makuddas Ali Khadim, who in course of his examination-in-chief specifically stated that he knew the hand writing and signature of the writer of the Will Vide No.III-35 dated 27.11.1992. According to this witness, the writer of the Will Dharendra Kumar Datta is no more and accordingly, he identified the hand writing of the deed writer Dharendra Kumar Datta as scribe which was marked as Exhibit-6 and also the signatures of deed writer Dharendra Kumar Datta marked as Exhibit-6(ii) series. The said witness further stated that the witnesses of the Will Prafulla Ranjan Dasgupta and Dwijendra Chandra Malakar were also dead and he knew their signatures as Dwijendra Chandra Malakar was a deed writer and Prafulla Ranjan Dasgupta was an advocate's clerk and he identified the signatures of Dwijendra Chandra Malakar as an attesting witness marked Exhibit-6(iii) and the signature of Prafulla Ranjan Dasgupta marked Exhibit-6(iv). Thus, from the evidence it is clear that

the propounder i.e. the plaintiff-appellant of this case rightly and lawfully proved the execution of Will before the Court but the Learned First Appellate Court failed to appreciate that part of evidence and came to an erroneous finding that Exhibit-6 was not duly proved.

22. Learned Counsel for the respondent although tried to draw the attention of the Court that said PW-3 had no idea about said Suresh Chandra Paul, executant of the Will and he also could not say as to whether the Will executed, made voluntarily or not. In this regard, it can be said that it was not possible for PW-3 on that relevant point of time, as to whether the testator executed the Will voluntarily or not and it was not his duty also. More so, he was not present at the time of execution of the Will. Said witness PW-3 appeared in pursuance of Section 69 of the Evidence Act to prove the signature of the attesting witnesses as well as the scribe and PW-1 already admitted the signature of his father, Suresh Chandra Paul.

23. Furthermore, from the contents of the Will, it appears that the testator, Suresh Chandra Paul during his lifetime through Exhibit-6 although bequeathed 2 acres of land in favour of the present plaintiff-appellant and at the same time he also gifted more 2 acres of land in favour of the respondent-defendant in support of CS Plot Nos. 2421 and 2416 of Khatian No.1140 and Jote No.791 and further stated that in course of the marriage ceremony of the

daughters, he gave dowry among them, according to his capacity and both of them peacefully residing to the residences of their husbands. So, from the contents of the Will, i.e. Exhibit-6, it is clear that he has distributed his property with full conscious and sound state of mind and presented the same for registration before the Sub-Registrar after due execution and accordingly, the same was registered by the Sub-Registrar, Kailashahar and after going through the contents as well as from the evidence on record, it appears to this Court that the disputed Will was not made under suspicious circumstances, which in my considered view, Learned Trial Court/First Appellate Court wrongly interpreted at the time of delivering the judgment.

24. Regarding possession, both the parties have adduced witnesses in support of their case. It is on record that the present appellant was at Guwahati for a considerable period of time for the purpose of his employment. So, it is quite natural that he did not have any overall control over the suit land and it may so happen that the respondent-defendant in his absence utilized the same for his personal purpose for the time being. But that utilization/temporary possession cannot become the grounds to be a lawful owner. The respondent-defendant although took the plea that he was adversely possessing the suit land and thus, he acquired right of adverse possession over the suit land. But in this regard, the Learned Trial Court at the

time of delivering the judgment came to the conclusion that the respondent-defendant has failed to establish his right of adverse possession over the suit land and furthermore, before the First Appellate Court also, there was no such cross-appeal/objection from the side of respondent challenging the observation of the Learned Trial Court. So, the plea of adverse possession cannot be accepted as a valid one. More so, after knowing the contents of the Will, it appears that the present plaintiff-appellant applied for mutation and as per TLR and LR Act, there are certain procedures before allowing mutation and vide MR case No.20120007 his prayer for mutation was allowed finding him in possession and the suit land was rightly recorded in the name of the present plaintiff-appellant. The respondent-defendant did not challenge that Khatian standing in the name of appellant before any other forum. Nor there was any counter-claim by the respondent-defendant challenging the creation of Khatian before the Learned Trial Court in favour of the plaintiff-appellant and more so, to substantiate the case the respondent-defendant save and except his evidence did not adduce any other witnesses in support of his defence.

25. Learned Counsel for the respondent although drawn the attention of the Court that the witnesses of the plaintiff and specifically PW-1 during their cross-examination asserted that the defendant was possessing the suit land.

But from their evidence, it is not clear as to how the respondent-defendant possessing the suit land. Because his right of adverse possession had already been dismissed by the Learned Trial Court. More so, mere possession over a property for a long period of time does not grant the right of adverse permission on its own. As already stated, the appellant was out of State for a considerable period, so, naturally in his absence respondent-defendant being the brother can utilize the same for his personal purpose temporarily in absence of the plaintiff. But that possession cannot be treated as a valid possession in the eye of law. More so, since the plaintiff-appellant has been able to prove his valid right, title, interest over the suit land, so, the story of possession by the respondent-defendant cannot be accepted as lawful possession at this stage.

Furthermore, if the story of possession as alleged by the respondent-defendant is allowed by any Court of law in that case no lawful owner in the country having valid right, title and interest on his land would be able to protect his property and there would be multiple numbers of litigations across the country in this regard. So, the story of the defendant as alleged cannot be accepted.

26. Learned Counsel for the appellant, in course of hearing of argument relied upon one citation in **Shyamal Majumder vs Manju Rani pal and Another** dated

01.04.2022 reported in **(2022) SCC Online Tri 311**. In para no.25 this High Court observed as under:

"25. From the body of the Will, it has come to our notice that the Sub-Registrar, Sadar has endorsed the presentation of the Will by late Gita Rani Majumder. It is clearly written that "Presented for Registration at 12 A.M. on the 6th Nov. day at the Sadar Sub-Registry office by Smt. Gita Rani Majumder". The testator Gita Rani Majumder also put her signature beneath the said endorsement. Again, the Sub-Registrar endorsed at the last page of the Will that the testator admitted the execution of the Will (Exbt.-'C') and under the stamp and seal it is clearly written that "Execution is admitted by Smt. Gita Rani Majumder ..." and, therefore, the Sub-Registrar put his signature thereon dated 6/11/2010."

27. He also relied upon another citation of a co-ordinate bench of this High Court in connection with case No. RSA 17 of 2021 wherein in para No.8, this High Court further observed as under:

"8. It is settled proposition of law that while deciding the genuinity and propriety of a Will, the Court is to look upon its execution part and the subsequent registration, if any. From the evidences of PW3 and PW5, the two attesting witnesses have categorically deposed that Lt. Joshoda Bala Chakraborty was fully conscious when the Will was executed, though, her hands were trembling due to arthritis and for that reason, she put her thumb impression on the Will. They have also categorically deposed that on her dictation, the Will was written by PW2, the scribe. It was read over to her and she understood the contents of the Will and having satisfied with the contents of the Will, she put her thumb impression on the Will in front of them. Thereafter, on her request, PW3 and PW5 put their respective signatures as attesting witnesses on the Will.

PW2, the scribe in clear terms has deposed that Jashoda Bala Chakraborty herself approached him expressing her willingness to execute a Will in favour of the plaintiff. Accordingly, he had written the Will. He further deposed that at the time of execution of the Will she was free and

in sound disposing mind and further, Lt. Joshoda Bala Chakraborty was in a perfect position to understand the contents of the Will. The contents being written according to her wish, it was read over to her and after being satisfied, she put her thumb impression on the Will as her hands were trembling due to arthritis. At her request, two neighbouring witnesses were along present during the process of execution who put their respective signatures on the Will as attesting witnesses after the thumb impression was put by Lt. Jashoda following her request."

28. Here in the case, it appears that the deceased Suresh Chandra Paul himself presented the Will before the Sub-Registrar, Kailashahar for registration after due execution and accordingly, it was registered in accordance with law and as already discussed from the contents of the Will, it is clear that the deceased, testator by the Will(Exbihit-6), not only bequeathed the suit land in favour of the present plaintiff-appellant of this case, rather in the Will it was specifically mentioned by him that he also gave more 2 acres of land from his 'jote' in favour of the respondent-defendant of the suit. So, this Court can safely arrive to a finding that the 'Will' in question was proved in accordance with law and the factors required to draw suspicious circumstances as observed by Learned Trial Court are wholly absent and the plaintiff-appellant has rightly and lawfully proved due execution of the Will and from the contents of the Will, it appears that the testator had expressed his last desire on the body of the Will. So, there was no question to form any suspicious circumstance on the purported Will as alleged by the suit land.

29. Learned Counsel for the respondent-defendant in course of hearing of argument relied upon one citation of the Hon'ble Supreme Court in **Rangammal v. Kuppuswami & Anr.** dated 13.05.2011 reported in **AIR (2011) SC 2344** wherein in para no.19, 21, 22 and 24 observed as under:

"19. Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in this matter and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was "whether the transaction in question was a *bona fide* and genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious. This ratio can aptly be relied upon in this matter as in this particular case, it is the plaintiff/respondent No.1-Kuppuswami who relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the defendant/appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor. Thus, it was the plaintiff/respondent No.1 who should have first of all discharged the burden that the sale deed executed during the minority of the appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the defendant/appellant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence - much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is the defendant/appellant herein who should have challenged the genuineness of the

sale deed after attaining majority within the period of limitation.”

“21. It has been further held by the Supreme Court in the case of State of J & K v. Hindustan Forest Company, 2006 (12) SCC 198, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.”

“22. It was still further held by this Court in the matter of Corporation of City of Bangalore v. Zulekha Bi, 2008 (11) SCC 306 (308): (AIR 2008 SC (supp) 885:2008 AIR SCW 4959) that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case, for, it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.”

“24. It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that. This basic principle, seems to have been missed not only by the trial court in this case but consistently by the first appellate court which has been compounded by the High Court.”

Referring the same, Learned Counsel drawn the attention of the Court that it was the duty of the plaintiff-

appellant to disprove the allegation of sham and bogus transaction and onus lies upon the plaintiff-appellant to discharge the same. But here in the case, the plaintiff-appellant has failed to discharge his onus to prove the suit and prayed for upholding the judgment passed by Learned First Appellate Court.

30. I have already discussed in detail that the Exhibit-6 was duly proved and executed by the executant, Suresh Paul, in favour of the plaintiff-appellant which was a registered Will and on the basis of the Will, the suit land was recorded in the name of the plaintiff-appellant. The respondent-defendant possessed the suit land in absence of the plaintiff-appellant, but ultimately tried to establish his right of adverse possession over the same which the Learned Trial Court already been decided against him and the Learned First Appellate Court erroneously came to a wrong finding that the disputed Will (Exhibit-6) was a sham transaction and uphold the judgment of the Learned Trial Court.

31. So, after hearing both the sides and going through the records of the Learned Court below as well as after considering the citations as referred by Learned Counsel of the parties, it appears that the present plaintiff-appellant became the absolute owner of the suit land by dint of the registered Will and got possession of the same and since the plaintiff-appellant has been able to prove his title

over the suit land. So, he is entitled to remain in possession of the suit land and the defendants without having any valid right, title and interest over the suit land is liable to be evicted from the suit land by due process of law. It is also the settled position of law that the decree of Civil Court shall always prevail over the order of Executive Magistrate passed under Section 145 of Cr.P.C. Thus, the substantial question of law framed by this Court is accordingly answered in affirmative in favour of the appellant of this case.

32. In the result, the appeal filed by the plaintiff-appellant is hereby allowed on contest with costs. The judgment and decree passed by the Learned First Appellate Court upholding the judgment of Learned Civil Judge, Senior Division, Kailashahar, North Tripura is hereby set aside. The right, title and interest of the plaintiff-appellant over the suit land is hereby declared. The respondent-defendant is asked to vacate the suit land in favour of the plaintiff-appellant, failing which the plaintiff-appellant shall recover the same by due process of law removing all obstructions there from. With this observation the appeal stands disposed of. Pending applications, if any, also stands disposed of.

Prepare decree accordingly and send down the LCRs.

JUDGE

**MOUMITA
DATTA**

Purnita

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MOUMITA DATTA
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