

HIGH COURT OF TRIPURA
AGARTALA
RSA No.26 of 2023

- 1. Sri Bidhan Chandra Nath**, aged 58 years,
Son of Late Brindaban Chandra Nath,
resident of Hulflong (Kalikapur) PO-Rajnagar Laxmipur,
PS: Dharmanagar, District- North Tripura.
- 2. Sri Birendra Chandra Nath**, aged 38 years,
Son of Late Brindaban Chandra Nath,
resident of Hulflong (Kalikapur) PO-Rajnagar Laxmipur,
PS: Dharmanagar, District- North Tripura.
- 3. Smt. Jayanti Nath**, aged 60 years,
Wife of Sri Sukhmoy Nath,
daughter of Late Brindaban Chandra Nath,
resident of Yubarajnagar, PO-Mangalkhali,
PS-Dharmanagar, District- North Tripura.
- 4. Smt. Drupadi Nath**, aged 55 years,
wife of Sri Niranjan Debnath,
daughter of Late Brindaban Chandra Nath,
resident of Rowa, PO-Rowa,
PS-Panisagar, District-North Tripura.
- 5. Smt. Binodini Nath**, aged 50 years,
wife of Sri Monindra Debnath,
daughter of Late Brindaban Chandra Nath,
resident of Saraspur, PO- Amtila,
P.S – Kadamtala, District – North Tripura.
- 6. Smt. Sukla Rani Nath**, aged 45 years,
wife of Sri Naresh Nath,
daughter of Late Brindaban Chandra Nath,
resident of Tilthai, PO- Tilthai,
PS- Panisagar, District- North Tripura.

----- Appellants

Versus

- 1. Sri Santosh Debnath**,
son of Late Brindaban Chandra Nath,
resident of Railway Colony,
PO- Dharmanagar, PS- Dharmanagar,
District-North Tripura.
- 2. Sri Jyoti Goswami**,
son of Late Dulal Goswami,
resident of Krishnapur,
PO & PS- Dharmanagar, District- North Tripura.
- 3. Smt. Sati Rani Debnath**,
wife of Sri Narayan Debnath,
resident of Gobindapur,
PO & PS- Dharmanagar, District- North Tripura.
- 4. Smt. Adhar Nath**,

son of Not known,
resident of Hulflong (Kalikapur), PO- Rajnagar Laxmipur,
PS- Dharmanagar, District- North Tripura.

----- Respondents

For Appellant(s)	:	Mr. Sankar Lodh, Adv.
For Respondent(s)	:	Mr. Ratan Datta, Advocate, Mr. Aditya Baidya, Advocate.
Date of hearing	:	10.02.2025
Date of delivery of Judgment & Order	:	24.02.2025
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal under Section 100 of CPC is preferred challenging the judgment dated 31.05.2023 and decree dated 05.06.2023 delivered by Learned Addl. District Judge, North Tripura, Dharmanagar in connection with case No. TA No.3 of 2018. By the said judgment and decree, Learned 1st Appellate Court has reversed the judgment and decree dated 18.11.2017 and 28.11.2017 delivered by Learned Civil Judge (Senior Division), North Tripura, Dharmanagar in connection with case No.TS(Partition) No.23 of 2011.

2. Heard Learned Counsel Mr. Sankar Lodh appearing on behalf of the appellants and also heard Learned Counsel, Mr. Ratan Datta appearing on behalf of the respondents.

3. Before proceeding with the merit of the appeal let us discuss about the subject matter of the dispute amongst the rival parties. The respondent-plaintiff Santosh Debnath filed one suit before the Court of Learned Civil Judge (Senior Division), North Tripura, Dharmanagar which was numbered as TS(Partition) No.23 of 2011 for partition of A,

B, C and D schedule land measuring 11.33 acres as mentioned in the schedule of the plaint and also for declaration of nullity of registered relinquishment deed vide No.1-3328 dated 03.09.1982, registered will vide No.III-2 dated 09.03.1983, registered sale deed vide No.1-1046 dated 09.06.2010 and registered sale deed vide No.1-1801 dated 06.10.2010 against the principal defendants of the main suit No.1, 2, 3, 5, 6 & 9.

4. According to the respondent-plaintiff, one Sushila Bala Nath was the original owner of the entire A schedule land and after her death, her only son namely Brindaban Ch. Nath (since dead) became the owner and possessor of A schedule and B schedule and C schedule land of the plaint. Said Brindaban Ch. Nath married twice, and his first wife, Kaushalya Bala Devi, having died, he married pro-defendant No.9, Smt. Biroja Bala Nath. Brindaban Ch. Nath died leaving behind through his first wife, his son namely Santosh Ch. Nath and two daughters namely Suniti Nath who died issueless leaving behind her husband pro-defendant No.10 and his another daughter namely Sandhya Rani Nath who also died leaving behind her son Moti Goswami who died as bachelor and her heirs namely pro-defendant Nos.7 and 8. The respondent-plaintiff further stated that Brindaban Ch. Nath died leaving behind him through his second wife, his two sons i.e. principal defendant Nos.1 and 2 and his four daughters i.e. pro-defendant Nos.3 to 6. After the death of Brindaban Ch. Nath, the original plaintiff, principal defendant Nos.1, 2 and pro-defendant Nos.3, 4, 5, 6, 9 and 10 were/are entitled to get 1.12 acre land each out of the total suit land measuring 11.21 acre as their 1/10th share

while pro-defendant Nos.7 and 8 are jointly entitled to get 1.12 acres of the suit land as their joint $1/10^{\text{th}}$ share i.e., 0.56 acres each. Accordingly, on 14.08.2011, the respondent-plaintiff approached to the principal defendants requesting them to make amicable partition of the suit land between themselves to which the defendants raised objection claiming their absolute ownership over the suit land. The matter was reported to the panchayat but as no settlement took place so, the plaintiff filed the suit before the Learned Trial Court below.

It was the further case of the respondent-plaintiff that the registered relinquishment deed vide No.1-3328 dated 03.09.1982 executed by deceased Brindaban Ch. Nath in favour of his mother Sushila Bala Nath in respect of land measuring 0.121 acre, registered will vide No.III-2 dated 09.03.1983 executed by Smt. Sushila Bala Nath in favour of Bidan Ch. Nath in respect of land measuring 0.121 acre, registered sale deed vide No.1-1046 dated 09.06.2010 executed by Bidhan Ch. Nath in favour of Birendra Ch. Nath in respect of land measuring 4.06 acres and registered sale deed vide No.1-1801 dated 06.10.2010 executed by Bidhan Ch. Nath in favour of Birendra Ch. Nath in respect of land measuring 0.060 acre were fraudulent, void, collusive and not binding upon the plaintiff and is liable to be cancelled. It was further submitted that the registered will dated 09.03.1983 was prepared fraudulently on the basis of the fraudulent and void relinquishment deed and so the probate certificate dated 26.07.2004 obtained in connection with case No.TS(P)/2/2003 also obtained fraudulently by the principal defendant No.1 by suppressing the material fact and without impleading the plaintiff i.e. the

respondent herein and other legal heirs of Late Brindaban Ch. Nath as parties in the Probate case and so it was also liable to be cancelled by setting aside the judgment dated 04.06.2004 in connection with case No.TS(P)/2/2003. The respondent-plaintiff further asserted that the registered sale deeds executed by defendant No.1 are not binding upon the plaintiff as he sold out the excess quantum of land more than his share and the registered sale deeds have come to the knowledge of the plaintiff after going through the written statements filed by the defendants and cause of action for the suit arose on 14.08.2011. So, the respondent-plaintiff by the plaint prayed for preliminary decree for partition of the suit land along with declaratory relief for nullity of alleged instruments to be cancelled.

5. After receipt of summons from the Court, the defendants, principal defendant Nos.1, 2, 3, 5, 6 and 9 appeared before the Learned Trial Court and contested the suit by filing their joint written statement wherein they categorically denied the assertions of the plaintiff particularly that plaintiff is the son of deceased Brindaban Ch. Nath and Kaushalya Bala Devi was the first wife of deceased Brindaban Ch. Nath. According to the answering defendants, plaintiff has/had no *locus standi* to file the suit as he is not a co-sharer of the suit property and Brindaban Ch. Nath had married only once i.e. with defendant No.9 namely Biroja Bala Nath @ Biraja Mayee Devi. It was also denied that Brindaban Ch. Nath had got any children through Kaushalya Bala Devi and defendant Nos.7, 8 and 10 are/were also not the co-sharers of the joint family property while the principal defendants are the only legal heirs of Brindaban Ch. Nath. The

defendants further asserted that Sushila Bala Nath, mother of Briindaban Ch. Nath was the owner and possessor of land as mentioned in schedule A & C of the plaint and Brindaban Ch. Nath was the original owner of the B-schedule land. The C-schedule land though being purchased by Sushila Bala Nath in the name of her son Brindaban Ch. Nath but Brindaban Ch. Nath during his lifetime executed one registered deed of release bearing No.1-3328 dated 03.09.1982 in favour of his mother Sushila Bala Nath and accordingly, the suit land as mentioned in schedule A & C of the plaint came to be recorded in the name of Sushila Bala Nath in the relevant khatians. Brindaban Ch. Nath and his mother including other family members used to reside jointly in the same house and mess while principal defendant No.1 gained her confidence by his service and care to her and for that she bequeathed the suit land as mentioned in schedule A & C of the plaint in favour of principal defendant No.1 by executing registered Will vide No.III-2 dated 09.03.1983 at Dharmanagar Sub-Registry Office being duly identified by the attesting witnesses. It was the further case of the defendant that after the death of testator Sushila Bala Nath on 11.07.1995 and after death of Brindaban Ch. Nath on 21.07.1997, the principal defendant No.1 made an application on 25.11.2003 before the Court of Learned District Judge, the then North Tripura District, Kailashahar seeking probate of the registered Will and also impleaded the other principal defendants in the said probate case which was registered as T.S.(Probate) No.2 of 2003. The plaintiff and defendant Nos.7, 8 and 10 were not made parties in the probate case as they were unknown to the principal

defendants and they had no family relation with Sushila Bala Nath or defendant No.1. After that, upon paper publication of the notice in the probate case none appeared to object the Will of Sushila Bala Nath and ultimately the case was heard ex parte and probate was granted in favour of the original Defendant No.1 vide judgment dated 04.06.2004 and thereafter probate certificate along with the certified copy of original Will as annexure was granted on 26.07.2004. Thereafter, an order dated 14.11.2005 was passed by the learned Probate Court under Section 19(G) of the Court Fees Act read with Section 148 of CPC whereby omission to mention certain C/S plots in the Probate certificate was rectified on the basis of inventory of property of Will in respect of lands as mentioned in schedule A & C of the plaint. The defendants further submitted that the defendant No.1 became the absolute owner and possessor of land as mentioned in schedule A & C of the plaint by dint of testament and mutation of these land was made in his name. Later on, the principal defendant No.1 sold out/transferred almost half of A & C schedule land to his brother i.e. defendant No.2 by executing two registered sale deeds vide No.1-1810 dated 06.10.2010 and vide No.1-1046 dated 09.06.2010 after which the defendant No.2 became the owner and possessor of his purchased land recording his name in the khatian by mutation. It was also submitted that the defendant Nos.1 and 2 were staying separately while defendant No.9 was living with the defendant No.2 and defendant No.1 gave marriage of his sister spending huge money so except defendant Nos.1 and 2 no others have/had any right, title, interest or possession over the suit land as mentioned in

Schedule-A & C of the plaint. Brindaban Ch. Nath having died leaving behind the principal defendants exclusively in respect of B-schedule land as per record of right. So, all the principal defendants will get $1/7^{\text{th}}$ share each out of B-schedule land while the plaintiff or any other defendants have had no share in the suit property. It was further submitted that the Will is proved by the Probate Certificate irrespective of its registration and after granting of Probate Will was entered into the permanent safe custody of the Probate Court which could not be obtained or taken back in original and so the original registered Will could not be challenged by any person in any other Court. It was further admitted by the defendant that Sushila Bala Nath was the original owner and possessor of the land as mentioned in Schedule-A of the plaint but the defendants denied that after her death Brindaban Ch. Nath became the owner of that land. It was also denied that the entire suit land will be divided into $1/10^{\text{th}}$ share amongst the plaintiff and the legal heirs of the deceased Brindaban Ch. Nath. So, finally the defendants submitted that there was no cause of action in the suit and the suit was liable to be dismissed.

On the other hand, the pro-defendants No.7 and 8 by filing their separate written statement claimed that they are the co-sharers of the suit land along with plaintiff and other defendants. So, they prayed for allocation of their share portion out of the suit land as per the law of partition and to decree the suit in favour of the respondent-plaintiff.

6. Before the Learned Trial Court, issues were framed and after conclusion of trial, Learned Trial Court by the judgment dated

14.07.2015 decreed the suit in favour of the original plaintiff. The operative portion of the judgment of the Learned Trial Court runs as follows:

ORDER

50. In the result, it is hereby held that the plaintiff has succeeded to establish the cause of action for the suit and accordingly the suit is allowed and decreed with cost with declaration that the registered sale deed vide No.1-1046 dated 09.06.2010 and the registered sale deed vide No.1-1801 dated 06.10.2010 executed by Principal defendant No.1 Sri Bidhan Ch. Nath in favour of Principal Defendant No.2 Sri Birendra Ch. Nath are fraudulent, collusive and void and not binding upon the plaintiff and these 2 instruments are liable to be cancelled.

I) Accordingly, the two registered instruments vide sale deeds vide No.1-1046 dated 09.06.2010 and vide No.1-1801 dated 06.10.2010 are hereby cancelled.

II) It is hereby declared that the Probate certificate dated 26.07.2004 granted in respect to the registered Will vide No.III-2 dated 09.03.1983, is not binding upon plaintiff in relation to the A-schedule, B-schedule and C-schedule suit land which have no reference in the original registered Will.

III) It is further declared that plaintiff is entitled to get preliminary decree of partition of the A-schedule, B-schedule and C-schedule suit land with declaration of the quantum of the share of the respective share holders as under:-

a) The plaintiff, Defendants No.1, 2, 3, 4, 5, 6 & 9 are entitled to get 1/10th share each out of A-schedule, B-schedule and C-Schedule suit land.

b) Pro-defendants No.7 & 8 being the surviving legal heirs of deceased Sandhya Goswami (Nath) are jointly entitled to get 1/10th share out of A-schedule, B-schedule and C-schedule suit land.

c) Pro-defendant No.10 being the only surviving legal heir of deceased Suniti Nath is entitled to get 1/10 share out of A-schedule, B-schedule and C-schedule suit land.

IV) Prepare preliminary decree accordingly and place it before me for signing within 14 days.

VI) Both the parties are at liberty to make amicable partition of the suit land within the next date and in case, they failed to make any such amicable partition of the decreetal land both the parties are at liberty to approach this court for appointment of Survey Commissioner who will then make division of the share of the share holders and cause partition.

VII) List the case after one month for step by the parties.

Challenging that judgment dated 14.07.2015 and decree dated 22.07.2015, the contesting defendants preferred an appeal before the Learned 1st Appellate Court which was numbered as T.A. No.14 of 2015 and after hearing, the Learned 1st Appellate Court was pleased to set aside the judgment dated 14.07.2015 delivered by Learned Trial Court. The operative portion of the said judgment dated 09.01.2017 runs as follows:

ORDER

9. In the result, the appeal is allowed on contest. The judgment and decree dated 14.07.2015 and 22.07.2015 respectively passed by Ld. Civil Judge (Senior Division), Dharmanagar, North Tripura in Title Suit(Partition) No.23 of 2011 wherein Ld. Trial court preliminarily decreed the suit on contest is hereby set aside. The suit is remanded to the Ld. Trial court for proper adjudication as stated above.

10. The appeal is allowed on contest without cost. Send back the L. C. Record along with a copy of this judgment.

Thereafter, the matter was remanded back to the Learned Trial Court and the Learned Trial Court upon the pleadings of the parties framed the following issues:

ISSUES

- i) Is the suit maintainable in its present form?
- ii) Whether plaintiff is the legal representative of deceased Brindaban Ch. Nath?
- iii) Whether the registered relinquishment deed No.1-3328 dated 03.09.1982 executed by Brindaban Ch. Nath was fraudulent, collusive, void and not binding upon plaintiff?
- iv) Whether the registered sale deed No.1-1046 dated 09.06.2010 executed by Brindaban Ch. Nath in favour of Birendra Ch. Nath was fraudulent, collusive, void and not binding upon plaintiff?
- v) Whether the registered sale deed No.1-1801 dated 06.10.2010 executed by Bidhan Ch. Nath in favour of Birendra Ch. Nath was fraudulent, collusive, void and not binding upon plaintiff?
- vi) Whether there is any cause of action in this suit?
- vii) Whether plaintiff is entitled to get decree of declaration of nullity of suit deeds along with cancellation of these suit deed?

- viii) Whether plaintiff is entitled to get preliminary decree of partition of the Schedule-A, B, C & D landed property?

In order to prove the issues, both the parties before the Learned Trial Court have adduced oral/documentary evidence on record. For the sake of convenience, the name of witnesses of the original plaintiffs and the defendants and their exhibited documents are mentioned herein below:

Name of witnesses of plaintiffs:

1. PW-1 Sri Santosh Debnath
2. PW-2 Sri Bharat Ch. Nath
3. PW-3 Sri Adhar Mohan Nath

Exhibits of the plaintiffs:

1. Ext.-1 series - Certified copy of Khatian No.336, 336/2
2. Ext.-2 - Certified copies of khatian No.180
3. Ext.-3 - Certified copies of khatian No.3256
4. Exbt.-4 - Original birth certificate of plaintiff
5. Exbt.-5 - Original citizenship certificate of plaintiff
6. Exbt.A-6 - Original voter ID card of plaintiff
7. Exbt.7 - Original Adhar Card in the name of plaintiff
8. Exbt.-8 - Original Survival certificate dated 25.05.05 of Late Brindaban Ch. Nath
9. Exbt.-9 - Original Survival Certificate dated 18.07.2008 of Late Kaushalya Bala Devi
10. Exbt.-10- Certified copy of order dated 10.05.1979 passed in Misc. Case No.15 of 1975 by the Ld. J. M. First Class, Dharmanagar.

Name of witnesses of defendants:

1. DW1- Sri Bidhan Ch. Nath
2. DW2- Sri Sribash Nath

Exhibits of the defendants:

1. Exbt.A-Certified copy of Registered Will vide No.III-2 dated 09.03.1983
2. Exbt.B - The registered deed of relinquishment dated 03.09.1982 vide No.1-3328
3. Exbt.C - The original khatian No.180
4. Exbt.D - The certified copy of computerized khatian No.180
5. Exbt.E - The original land revenue receipt vide Sl. No.851111
6. Exbt.F - The certified copy of Probate granted in case No.T.S(Probate) 02 of 2003.
7. Exbt.G - The certified copy of registered Will dated 09.03.1983.
8. Exbt.H - Certified copy of judgment dated 06.04.2004 passed by the Ld. District Judge, North Tripura, Kailashahar in case No.TS (Probate) 02 of 2003 along with certified copy of affidavit.

9. Exbt.I – Certified copy of petition of probate in connection with case No.TS(Probate) 02 of 2003
10. Exbt.J – Certified copy of order dated 14.11.2005 passed in case No.T.S. (Probate) 02 of 2003
11. Exbt. K. – Certified copy of petition u/s.19G of Court Fees Act in connection with Case No.T.S. (Probate) 02 of 2003.
12. Exbt.L. – Certified copy of order as to deposit of Additional Court fees.
13. Exbt.M & M-1, - Certified copy of Khatian No.3256 & computerized khatian No.3256.
14. Exbt.N & N-1 – Khatain No.336 & computerized khatian No.336.
15. Exbt. O & O-1 – khatian No.336/2 & computerized khatian No.336/2 and
16. Exbt.P – Computerized khatian No.787
17. Exbt.Q – Total 42 Nos. land revenue receipt.
18. Exbt.R- Certified copy of registered sale deed No.1-1810 dated 06.10.2010
19. Exbt.S – Certified copy of khatian No.8877
20. Exbt. T – Certified copy of khatian No.8878
21. Exbt. U – The original registered sale deed
22. Exbt.V- Attested copy of family register book No.2 dated 28.05.1992

After conclusion of trial, the Learned Trial Court below by the subsequent judgment dated 18.11.2017 and decree dated 28.11.2017 dismissed the suit filed by the original plaintiff. For the sake of convenience, the operative portion of the judgment dated 18.11.2017 delivered by the Learned Trial Court below runs as follows:

ORDER

40. In the result, it is hereby held that the plaintiff has not succeeded to establish the cause of action for the suit and the suit is not allowed for being not maintainable.

41. Plaintiff is not entitled to get the decree of declaration that (a) the registered relinquishment deed vide No.1-3328 dated 03.09.1982 executed by Brindaban Ch. Nath in favour of Sushila Bala Nath in respect to 'D' schedule suit land measuring 0.121 acre, (b) the registered sale deed vide No.1-1046 dated 09.06.2010 in respect to land measuring 4.06 acre and (c) the registered sale deed vide No.1-1801 dated 06.10.2010 in respect to land measuring 0.060 acre are fraudulent, void and not binding upon plaintiff. These instruments are also not liable to be cancelled. Consequently, the suit is hereby dismissed on contest with cost.

42. Prepare decree accordingly.

43. Thus the suit stands disposed of.

Being aggrieved by the said judgment, the original plaintiff further preferred appeal before the Learned 1st Appellate Court under

Section 96 of CPC which was numbered as TA No.3 of 2018 and after elaborate hearing, Learned 1st Appellate Court by the judgment dated 31.05.2023 and decree dated 05.06.2023 was pleased to set aside the judgment delivered by the Learned Trial Court which runs as follows:

ORDER

In the result, the appeal is allowed and judgment and decree of Ld. Trial Court is set aside. It is declared that-

- i) Plaintiff, defendant No.1 to 6, 9 and 10 each are 1/10th share holder of the suit land described in schedule A, B and C of plaint.**
- ii) Defendant No.7 and 8 jointly are owner of 1/10th share holder of the suit land described in schedule A, B and C of plaint.**

Both the parties are directed make amicable final partition of the suit land described in schedule A, B and C of plaint by meets and bounds within 30 days from today and failure to which any party can moved the Ld. Trial Court on the date as would be fixed by the Ld. Trial Court for final partition of the suit land by meets and bounds by appointing Survey Commissioner.

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.

Challenging that judgment, the defendants as appellants have preferred this second appeal under Section 100 of CPC before the High Court. Before the High Court at the time of admission of appeal, following substantial questions of law were formulated by order dated 26.09.2023:

- i) Whether the correctness of granting of Probate certificate by a competent Court can be questioned in a partition suit filed after granting of Probate?***
- ii) Whether the judgment passed by the first appellate Court is perverse?***

7. In course of hearing of argument, Learned Counsel Mr. Sankar Lodh appearing on behalf of the appellants submitted that the

Learned 1st Appellate Court at the time of delivery of judgment ignored the material facts and laws in considering the appeal and without any basis, Learned 1st Appellate Court reversed the judgment of the Learned Trial Court. According to Learned Counsel for the appellants, Learned Trial Court by the judgment dated 18.11.2017 rightly delivered the judgment in favour of the present appellants after considering the material evidence on record and there was no perversity in the judgment of Learned Trial Court but the Learned 1st Appellate Court at the time of determination of the points failed to appreciate the evidence on record of the present appellants and reversed the judgment of the Learned Trial Court. He also submitted that the registered Will i.e. Exbt.G was a fraudulent one but the Learned 1st Appellate Court opined that it was a valid one and excluded the property as mentioned in schedule D of the plaint from the partition. Learned Counsel further submitted that the findings of Learned 1st Appellate Court that probate certificate cannot be granted by the Court for declaration of title and it can only ensure that as to whether the "Will" in question was genuine or not. He further submitted that this part of finding of Learned 1st Appellate Court is not proper and furthermore, referring the provision of Section 74 of Succession Act, Learned Counsel further drawn the attention of the Court and referring Exbt.-A or G, he also drawn the attention of the Court that in the first page of the testament, two khatians bearing No.13 and 4 were mentioned but in the schedule, the executor totally remained silent about those khatians which shows the intention of the testator but the Learned 1st Appellate Court did not consider those

aspects and came to the finding that schedule D of the suit land be excluded from partition which was the absolute property of the defendant No.1. Learned Counsel again drawn the attention of the Court that the Learned 1st Appellate Court in the judgment observed that Civil Court had no jurisdiction to revoke probate and it was only under the provision of Section 264 of the Succession Act, the same ought to have cancelled which according to Learned Counsel for the appellant was not proper and finally, Learned Counsel submitted that there is substantial questions of law to be decided in favour of the appellants and urged for setting aside the judgment and decree of the Learned 1st Appellate Court and to uphold the judgment dated 18.11.2017 of the Learned Trial Court. Learned Counsel also referred one citation of the Hon'ble Apex Court reported in **AIR 2022 SC 4601** in support of this appeal.

8. On the other hand, Learned Counsel, Mr. Ratan Datta appearing on behalf of the respondent-plaintiff drawn the attention of the Court referring the subject matter of the pleadings of the parties and submitted that Learned Trial Court by the judgment dated 18.11.2017 dismissed the suit without any basis but the Learned 1st Appellate Court considering the evidence on record rightly reversed the judgment of the Learned Trial Court and granted preliminary decree for partition and the Learned 1st Appellate Court also rightly came to the observation that schedule D of the suit land was not part of the joint family property and it was absolutely given to the original defendant No.1 through Exbt.-A or G. He also referred para Nos.21, 22, 23, 24, 29, 36 and 40 of the earlier judgment dated 14.07.2015

delivered by the Learned Trial Court and finally on conclusion of his submission, he submitted that there is no infirmity in the judgment of Learned 1st Appellate Court and urged for dismissal of this appeal and Learned Counsel also referred the provisions of Section 78 and 88 of the Succession Act and submitted that the Will was a genuine one and there was no ambiguity to that and in support of his contention, he referred few citations and further submitted that in this appeal, there is no substantial questions of law in favour of the present appellants and urged for dismissal of this appeal.

9. Learned Counsel referred one judgment of Hon'ble the Supreme Court of India reported in **(1995) 5 SCC 444** titled as **Kaivelikkal Ambunhi (Dead) by LRs. And Others versus H. Ganesh Bhandary** dated **24.08.1995** wherein para No.5, Hon'ble the Apex Court observed as under:

"5. This principle is also contained in Section 88 of the Indian Succession Act, 1925 which, together with its illustrations, provides as under:

"The last of two inconsistent clauses prevails.- Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

- i) The testator by the first clause of his will leaves his estate of Ramnagar 'to A', and by the last clause to his will leaves it 'to B and not to A'. B will have it.
- ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for benefit of B, the latter disposition will prevail.""

Referring the same and also referring the provision of Section 88 of the Succession Act submitted that from Exbt.-A or G i.e. the registered Will specifically in the schedule, the testator expressed her opinion regarding bequeathing of property and in view of the said

principle of law, there is no scope to form a different opinion because by the said Will, the testator Sushila Debi bequeathed her land measuring 0.121 acre in favour of her grandson Bidhan Ch. Nath and the Learned 1st Appellate Court rightly considered the said point.

10. Learned Counsel further referred another citation of the Hon'ble Supreme Court of India reported in **AIR 2003 SC 3669** titled as **Delhi Development Authority versus Mrs. Vijaya C. Gurshaney and another** with **Delhi Development Authority versus Nanak Chand** dated **26.08.2003** wherein in para No.8, Hon'ble the Apex Court observed as under:

"8. In this case the alleged Will is executed on 26th October, 1977. Ram Dhan died on 18th September, 1978. Letters of Administration were granted on 7th May, 1980. Admittedly, the respondent is not related to the deceased Ram Dhan. The High Court clearly erred in holding that merely because Letters of Administration are granted the appellants cannot inquire into the true nature of the transaction. It is settled law that a Testamentary Court whilst granting Probate or Letters of Administration does not even consider particularly in uncontested matters, the motive behind execution of a testamentary instrument. A Testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased. Thus, it is always open to a person to dispute title even though Probate or Letters of Administration have been granted."

Learned Counsel further referred another citation of Hon'ble the Supreme Court of India reported in **(1993) 2 SCC 507** titled as **Chiranjilal Shrilal Goenka (Deceased) through LRS. versus Jasjit Singh and others** dated 18.03.1993 wherein in para No.15, Hon'ble the Apex Court observed as under:

"15. In Ishwardeo Narain Singh v. Smt. Kamta Devi :AIR 1954 SC 280 this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator

had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself."

Referring the said principles of law, Learned Counsel for the respondent-plaintiff drawn the attention of the Court that the Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law or not and whether at the time of such execution, the testator had sound disposing mind and referring the present case, Learned Counsel for the respondent-plaintiff submitted that the Learned 1st Appellate Court at the time of delivery of judgment rightly came to the conclusion regarding granting of probate.

11. Learned Counsel further referred another citation of the Hon'ble Supreme Court of India reported in **(2008) 4 SCC 300** titled as **Krishna Kumar Birla versus Rajendra Singh Lodha and others** dated **31.03.2008** wherein in para Nos.57 and 66 Hon'ble the Apex Court observed as under:

"57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant

of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment or subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (sic probate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.

66. We may, however, at the outset, notice a decision of this Court in Elizabeth Antony v. Michel Charles John Chown Lengera:(1990) 3 SCC 333 which is binding on us. Therein, the testatrix viz. one Mary Aline Browne, was the wife of one Herbert Evander Browne, the eldest son of John Browne. Mary died on 28.03.1972. She had executed a will on 12.03.1962. An application for grant of a letter of administration with a copy of the will annexed was filed by Michel. Petitioner Elizabeth Antony and her husband Zoe Enid Browne filed caveats on the plea that the said will was a forged document. The petitioner therein also claimed that her daughter Browne had executed a will on 23.06.1975 and she had executed a deed of gift in favour of the petitioner. She also claimed herself to be a trustee of John Browne Trust. The Probate Court held that they had no caveatable interest. Caveatable interest, therefore, was claimed as an executor and legatee of the will executed by Zoe Enid Browne as also a deed of gift in respect of one item of the estate executed in their favour. Caveatable interest was also claimed on the premise that the petitioner was appointed a trustee of John Browne Trust. This Court noticed a large number of High Court judgments. It was, however, opined that the petitioner therein failed to establish a caveatable interest stating: (SCC p.336, para 6)

"6. ... We have perused the entire order of the trial court in the context. Admittedly neither the original nor a copy of the will said to have been executed by Zoe Enid Browne, was filed. Now coming to the trust, it is in the evidence of PW 1 that John Browne Trust has come to an end in March 1972 and the same was not in existence. The trial court has considered both the documentary and oral evidence in this regard and has rightly held that the petitioner has no existing benefit from the trust. Likewise the registered gift deed or a copy of it has been filed. Before the learned Single Judge of the High Court also same contentions were put forward. The learned Judge observed that from the objections filed by the caveator she desires the court in the probate proceedings to uphold her title on the strength of a gift deed and the trust deed. It is observed:

'Equally, the petitioner has not placed before the court the will dated 23.06.1975 stated to have been executed by Zoe Enid Browne to establish that under the will dated 12.03.1962 stated to have been executed by Mary Aline Browne some interest given to the petitioner under the will dated 23-6-1975 of Zoe Enid

Browne, is liable to be in any manner affected or otherwise displaced, by the grant of letters of administration in respect of the will dated 12-3-1962 stated to have been executed by Mary Aline Browne.'

Accordingly, the learned Judge held that the petitioner has not established that she has a caveatable interest justifying her opposition to the probate proceedings for grant of letters of administration. In this state of affairs, we are unable to agree with the learned counsel that the petitioner has caveatable interest."

This Court, thus categorically opined that while granting a probate, the court would not decide any dispute with regard to title. A separate suit would be maintainable therefor. If probate is granted, they have a remedy in terms of Section 263 of the 1925 Act also."

Referring the same, Learned Counsel also drawn the attention of the Court that Learned 1st Appellate Court in deciding the appeal rightly considered the probate issued by the Court on the ground that granting of probate does not confer any title.

12. Learned Counsel also referred another citation of Hon'ble Supreme Court of India reported in **AIR 2022 SC 4601** titled as **Chandrabhan(Deceased) through LRs. and others v. Saraswati and others** dated **22.09.2022** wherein in para Nos.31, 32 and 33, Hon'ble the Apex Court observed as under:

"31. The proper test for determining whether a question of law raised in the case is substantial would be, whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is mere question of applying those principles or the question raised is palpably absurd, the question would not be a substantial question of law.

32. To be 'substantial', a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first, a foundation for it laid in the pleadings and the question should emerge from the substantial findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time

before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari:(2001) 3 SCC 179).

33. The principles relating to Section 100 of the CPC relevant for this case may be summarized thus:

(i) An interference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that the High Court will not interfere with findings of facts arrived at by the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

Referring the same, Learned Counsel for the respondent-plaintiff drawn the attention of this Court and submitted that the appellants have failed to satisfy the substantial questions of law in

this case, as such, the present appeal is not maintainable and liable to be dismissed.

13. Learned Counsel Mr. Ratan Datta appearing on behalf of the respondent-plaintiff further referred another citation of the Hon'ble Supreme Court of India reported in **(2000) 7 SCC 543** titled as **Gram Panchayat of Village Naulakha Vs. Ujagar Singh and others** dated **27.09.2000** wherein in para No.6 Hon'ble the Apex Court observed as under:

"6. It appears from the commentary in Sarkar's Evidence Act (13th Edn., Reprint, at p.509) on Section 44 that it is the view of the Allahabad, Calcutta, Patna and Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows:

"Under Section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or collusion and it is not necessary to bring an independent suit for setting it aside (Bansi Lal v. Dhapo:ILR (1902) 24 All 242, Rajib Panda v. Lekhan Sendh Mahapatra:ILR(1900) 27 Cal 11, Parbati v. Gajraj Singh:AIR 1937 All 28, Prayag Kumari Debi v. Siva Prosad Singh:AIR 1926 Cal 1, Hare Krishna Sen v. Umesh Chandra Dutt:AIR 1921 Pat 193(FB), Aswini Kumar Samaddar v. Banamali Chakraborty:(1916-17) 21 CWN 594, Manchharam v. Kalidas:ILR 19 Bom 821, Rangnath Sakharan v. Govind Narasim:ILR 28 Bom 639, Jamiraddin v. Khadejanessa Bibi:AIR 1929 Cal 685, Bhagwandas Narandas v. D.D. Patel & Co.:AIR 1940 Bom 131, Bishunath Tewari v. Mirchi:AIR 1955 Pat 66 and Gurajada Vijaya Lakshamma v. Yarlagadda Padmanabham:AIR 1955 AP 112)."

Thus, in order to contend in later suit or proceeding that an earlier judgment was obtained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram case:AIR 1991 P & H 159 (FB) for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench has not referred to Section 44 of the Evidence Act or to any other precedents of other courts or to any basic legal principle."

Referring the same, Learned Counsel drawn the attention of the Court that in view of Section 44 of the Evidence Act, no separate suit is required for obtaining a decree or order, by fraud or collusion as alleged by Learned Counsel for the appellants.

14. I have heard detailed argument of Learned Counsel of both the sides at length and perused the records of the Learned Courts below as well as the judgment delivered by Learned 1st Appellate Court. After going through the judgment delivered by Learned 1st Appellate Court, it appears that at the time of determination of appeal, the Learned 1st Appellate Court formulated the following points for determination of the appeal and in course of hearing of argument, Learned Counsel for the rival parties also touched upon those points. So, for the sake of gravity, let this Court examine as to whether those points were properly appreciated and decided by the Learned 1st Appellate Court or not as because Learned Counsel of both the sides were also confined their arguments on those salient points. Points formulated by the Learned 1st Appellate Court in connection with case No.T.A. No.3 of 2018 are as follows:

- i) **Whether relinquishment deed No.1-3328 dated 03.09.1982 is valid?**
- ii) **Whether Civil Court has jurisdiction to decide genuineness of a Will of which Probate has been granted?**
- iii) **Whether Probate obtained without making all the legal heirs as a party is valid?**
- iv) **Whether Will No.III-2 dated 09.03.1983 is valid?**
- v) **Which property is bequeathed by Will No.III-2 dated 09.03.1983?**
- vi) **Whether registered sale deed No.1-1046 dated 09.06.2010 and 1-1801 dated 06.10.2010 are void and not binding on the plaintiff?**
- vii) **What is the share of the party of the suit land?**

viii) Whether the Ld. Trial Court is justified in dismissing the suit of the plaintiff?

ix) What relief the parties are entitled?

15. In deciding the point No.(i) as to whether the relinquishment deed bearing No.1-3328 dated 03.09.1982 is valid or not, Learned 1st Appellant Court came to the observation that PW-1 Santosh Debnath, PW-2 Bharat Ch. Nath and PW-3 Adhar Mohan Nath of the main suit in course of their examination deposed that relinquishment deed bearing No.1-3328 dated 03.09.1982 executed by Brindaban Ch. Nath (since dead) in favour of Sushila Bala Nath (since dead) was fraudulent, void, collusive, non-effective and not tenable in the eye of law and also not binding upon the plaintiff and liable to be cancelled but in the plaint, no particulars of fraud were asserted by the original plaintiff. Furthermore, on the contrary, DW-1 Bidhan Ch. Nath i.e., the defendant No.1 now the appellant herein also deposed that Brindaban Ch. Nath (since dead) before his death executed registered deed of release/relinquishment vide No.1-3328 dated 03.09.1982 and on perusal of said deed which was executed in favour of Sushila Bala Nath (since dead), Learned 1st Appellate Court did not find anything to disbelieve the evidence of DW-1 and Exbt.-B. So, Learned 1st Appellate Court relying upon the evidence of DW1 i.e. the appellant herein and Exbt.-B came to the observation that Learned Trial Court also relying upon Exbt.-B rightly decided that the relinquishment/release deed was not void but valid and accordingly decided the point No.(i) in favour of the contesting defendants of the original suit and also against the plaintiff i.e. the present respondent herein.

So, after hearing Learned Counsel of both the sides, it appears that before the Learned Trial Court no particulars of fraud could be proved by the plaintiff, so, Learned 1st Appellate Court rightly decided the said point in favour of the contesting defendants i.e. the present appellant herein and also against the plaintiff i.e. the respondent No.1 herein and this Court does not find any infirmity in deciding the said point by the Learned 1st Appellate Court.

16. In deciding the point No.2 as to whether the Civil Court has jurisdiction to decide genuineness of a 'Will' of which probate has been granted, Learned 1st Appellate Court relied upon one citation of the Hon'ble Gauhati High Court Agartala Bench in **Samar Krishna Saha Vs. State of Tripura and others, 2006 (Supl.) GLT 207** wherein it was held,

"It, therefore, logically follows that Probate will not be required to be obtained by Hindu in respect of a Will made regarding the immovable property situated in the State of Tripura....."

Relying upon the said citation, Learned 1st Appellate Court came to the observation that since probate is not necessary to be obtained in the State of Tripura, but it does not mean that probate cannot be obtained and there is prohibition in obtaining Probate in the State of Tripura in respect of property involved in a Will lying in the State of Tripura.

Learned 1st Appellate Court also relied upon another citation of Bombay High Court in **Sanjay Madanlal Gugale and Others vs. Bebi Madhuri Dhananjay Upasani** in **Writ Petition No.8870 of 2016** dated 07.12.2020 wherein it was stated as under:

"9. As far as reasoning part is concerned, obviously, the decisions (supra) merely lay down that a probate

is not necessary in respect of the properties situated at Ahmednagar. It does not lay down any prohibition for applying for a probate even in respect of the properties situated in Ahmednagar. Therefore, this reasoning resorted to by the learned Judge is clearly illegal and arbitrary."

Relying upon the said decision, Learned 1st Appellate Court came to the observation that the probate of Will obtained in respect of a property situated in Tripura is valid in the eye of law.

It was also further discussed that as referred by Learned Counsel although a Civil Court has got the jurisdiction to negate any judgment obtained by fraud as per Section 44 of the Evidence Act but in view of Section 263 of the Indian Succession Act, if any party wants to revoke a probate, in that case, he has to apply to the Probate Court under Section 263 of the Indian Succession Act and Civil Court has got no jurisdiction to decide that. For the sake of convenience, I would like to refer herein below the provision of Section 263 of Indian Succession Act which runs as follows:

"263. Revocation or annulment for just cause.- The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanantion.-Just cause shall be deemed to exist where-

- (a) the proceedings to obtain the grant were defective in substance; or**
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or**
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or**
- (d) the grant has become useless and inoperative through circumstances; or**
- (e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."**

Learned 1st Appellate Court further relied upon one judgment of the Calcutta High Court in **Kailash Chandra vs. Nanda Kumar** reported in **AIR 1944 Cal 385** wherein it was observed that:

"6. The judgment of a Court of Probate is a judgment in rem and binds all the world. The judgment in a civil suit is operative only between the parties to the suit. It is difficult to see therefore how a judgment in rem can be revoked or set aside by a judgment which is only conclusive inter parties. In our opinion therefore even when there is allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate, is to apply to the Probate Court under Section 263, Succession Act, and not to file a civil suit."

In the said judgment, it was observed that where there was allegation of forgery, the proper remedy for the party who wants to get revocation of a grant of probate, is to apply to the Probate Court under Section 263 of the Succession Act but not under civil suit.

Learned 1st Appellate Court thereafter referred another citation of Karnataka High Court in **Rukn-UI-Mulk S. Abdul Wajid And ... vs Gajambal Ramalingam and Ors., AIR 1950 Kant 57, AIR 1950 Mys 57** wherein the Karnataka High Court observed as under:

"Applying the principle enunciated in the cases cited, I have no hesitation in holding that the Probate Courts are invested with exclusive jurisdiction and the Legislature has prescribed a special procedure for the revocation of probates and a probate granted can be impugned only in the Court that originally granted the same and that no civil suit lies to challenge the judgment of a Probate Court, nor could any objection be raised in derogation of the will probated in any other proceeding as the judgment of a Probate Court will be binding on the parties, and all Courts."

Relying upon the same, Learned 1st Appellate Court came to the observation that Civil Court has got no jurisdiction to decide genuineness of a 'Will' of which Probate has been granted.

Here, in the case at hand, the party concerned did not challenge the probate certificate granted by the Court at any point of

time, so, the probate certificate obtained attained finality and thus, the jurisdiction of the Civil Court to decide genuineness of a Will cannot be decided at this stage. Learned Counsel for the respondents at the time of hearing failed to satisfy this Court that the Learned 1st Appellate Court wrongly decided the point No.(ii) and, as such, this Court is of the considered view that the Learned 1st Appellate Court has rightly decided the point No.(ii) in favour of the contesting defendants i.e. the appellants herein and also against the plaintiff i.e. the respondent herein and this Court also find no infirmity in respect of the aforesaid point decided by the Learned 1st Appellate Court.

17. Learned 1st Appellate Court at the time of determination of point No.(iii) as to whether the probate certificate obtained without making all the legal heirs as a party was valid or not. It was the argument of the Learned Counsel for the respondent that the probate certificate was obtained without making the respondent-plaintiff and other legal heirs as party and, as such, it was not valid. In this regard, Learned Counsel for the appellants submitted that the matter was not within the knowledge of the present appellants herein. Learned 1st Appellate Court in determination of the said point came to the observation that the judgment of the Probate Court must have been obtained in accordance with the prescribed procedure of law and it was a judgment in 'rem', as such, no objection was maintainable and in this regard, Learned 1st Appellate Court relied upon the following citations:

"Hon'ble the Supreme Court in Surinder Kumar and Others v. Gian Chand and Others, 1958 SCR 584:1957 SCJ 159: 1958 SCA 412 held,

"The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself."

Moreover, Page No.657 of the Law of Evidence of Ratanlal & Dhirajlal, 22nd Enlarged Edition Reprint 2009, in Section 41, Under Head Note 4. Probate jurisdiction opined as follows:

"The judgment of a probate Court granting probate of a will in favour of the petitioner must be presumed to have been obtained in accordance with the procedure prescribed by law and it is judgment in rem binding on the whole world and failure to implead other legal heir in probate proceeding would be of no consequence.³⁵

35. Subaitah Beevi v. Yvonn Thambi, 1999 AIHC 3763 (paras 26 and 20)(Mad)."

On perusal of the aforesaid judgment, it appears that the Learned 1st Appellate Court rightly came to the observation that since there is no scope to challenge the judgment of Probate Court before a Civil Court and that can only be done before the Probate Court regarding non-making of legal heirs as a party in the probate proceeding. So, Learned 1st Appellate Court at the time of determination of the said point rightly came to the conclusion that there was no scope to challenge the judgment of a Probate Court to any Civil Court regarding non-making of legal heirs as a party and it is only the Probate Court which can consider the same under Section 263 of the Succession Act and accordingly decided the point and after hearing argument of both the sides, it appears to this Court that the Learned Counsel for the appellant at the time of hearing of argument failed to satisfy this Court regarding the decision of the Learned 1st Appellate Court in respect of the aforesaid point and accordingly on perusal of the findings of the Learned 1st Appellate Court, this Court is also of the considered view that Learned 1st Appellate Court rightly

decided the said point at the time of delivery of the judgment that only the Probate Court can annul or revoke the probate in the event of non-making of legal heirs as a party to a probate proceeding.

18. In respect of point No.(iv) as to whether the registered Will bearing No.III-2 dated 09.03.1983 was valid or not, it appears that Learned 1st Appellate Court came to the observation that since probate certificate was obtained and which was the final determination of the fact that 'Will' was a genuine one and valid and as no particulars of fraud and suspicion was raised by the respondent-plaintiff i.e. the original plaintiff before the Learned Trial Court either by the pleading or by adducing any evidence and accordingly, the Learned 1st Appellate Court rightly decided that the Will bearing No.III-2 dated 09.03.1983 was valid one.

Before this Court at the time of hearing of argument nothing was submitted by the Learned Counsel for the appellant that the said point was wrongly decided by the Learned 1st Appellate Court and Learned Counsel for the respondent also failed to counter anything by showing any evidence on record that the registered Will was a fraudulent one and further, on perusal of the evidence of PW-1, PW-2 and PW-3, nowhere this Court find that those witnesses in course of their examination raised their allegation of fraud or raised any suspicious circumstance from which it can be inferred that the Will was not valid in the eye of law. So, this Court is of the considered view that the Learned 1st Appellate Court at the time of delivery of judgment rightly came to the observation that Exbt.-A or G was genuine and a valid one and accordingly, Learned 1st Appellate Court

decided the said point in favour of the contesting defendants i.e. the appellants herein and also against the respondent-plaintiff.

19. Now let us see what was the observation of Learned 1st Appellate Court in respect of point No.(v) regarding the property bequeathed by the Will No.III-2 dated 09.03.1983. The respondent-plaintiff in his plaint pleaded that the 'Will' in respect of land measuring 0.121 acres was specifically described in the schedule-D of the plaint. Learned Trial Court at the time of delivery of judgment mentioned that property mentioned in the probate covers the land measuring 8.861 acres. The present appellant-defendant in their written statement stated that the Will in original was lying with the Probate Court and, as such, they could not submit the certified copy of the Will annexed with the probate certificate but they only filed the judgment of the Probate Court passed in connection with case No.TS(Probate) No.2 of 2003, probate petition, application for payment of additional court fee, etc. However, the appellants filed the certified copy of the Will obtained from the office of Sub-Registry vide No.III-2 dated 09.03.1983 which was marked as Exbt.-A and from Exbt.-A, it appears that said Sushila Debi (since dead) during her lifetime executed the aforesaid Will in respect of land measuring 0.121 acres in favour of the original defendant No.1 and the same was described in Schedule-D of the plaint. So, the plea of the appellant-defendant is that said deceased Sushila Debi bequeathed all her properties including A and C schedule land of the plaint in favour of defendant No.1 by the said Exbt.-A was not true and correct. The issue regarding mentioning of other property beyond the property of

Will in the probate application and also in the probate judgment bearing No.TS(probate) No.2 of 2003, Learned 1st Appellate Court came to the observation that the same had no force as the Probate Court only decided the question of genuineness of the Will and also regarding the sound state of mind of the testator and also according to Learned 1st Appellate Court, the Probate Court have/had no authority to deal with the existence of the property of the Will; right, title and interest of the testator of the Will, etc. More so, according to the Learned 1st Appellate Court, Probate Court cannot add, reduce, increase or decrease the property of the Will. So, Learned 1st Appellate Court came to the observation that the property as mentioned in the probate judgment and application which is not mentioned in the Will cannot be said to be bequeathed by testator and in this regard, Learned 1st Appellate Court relied upon following citations:

"15. In this respect, the Hon'ble Supreme Court in Commissioner, Jalandhar ... vs Mohan Krishan Abrol & Another on 2 April, 2004, in Appeal (civil) 1257 of 1999 held,

"A bare reading of section 211 shows that the property vests in the executors by virtue of the will and not by virtue of the probate. Will gives property to the executor; the grant of probate is only a method by which the law provides for establishing the will. In the case of Kulwanta Bewa v. Karamchand reported in [AIR 1938 Calcutta 714] it has been held that section 211 provides that the estate of the deceased vests in the executor; that the vesting is not of the beneficial interest in the property; but only for the purposes of representation. In the case of Meyappa Chetty v. Supramanian Chetty reported in [43 Indian Appeals 113], the Privy Council has held that an executor derives his title from the will and not from probate."

16. In this context, the Hon'ble Bombay High Court in Ramchandra Ganpatroa Hande Alias ... vs Vithalrao Hande & Ors on 29 March, 2011, in Appeal No.797 of 2010 held,

"5. In a proceeding for the grant of probate or for the grant of Letters of Administration with a will annexed, the Court exercising testamentary

jurisdiction is not concerned with title to property. In determining whether probate should be granted, the Court determines only upon the genuineness and due execution of the will. Determinations on issues of title are alien to probate proceedings. In *Ishwardeo Narain Singh vs. Kamta Devi*, AIR 1954 SC 280, the Supreme Court formulated the principle of law in the following terms "The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court."

This principle was reiterated in *Chiranjilal Shrilal Goenka (deceased) vs. Jasjit Singh* (1923) 2 SCC 507 in the following observations:

"The Succession Act is a self contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways.

The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself."

6. In *Delhi Development Authority vs. Mrs. Vijaya C. Gurshaney*, (2003) 7 SCC 301 the Supreme Court again emphasized the following principle:

"A Testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased."

7. In *Krishna Kumar Birla v. Rajendra Singh Lodha* (2008) 4 SCC 300, the Supreme Court once again reiterated that:

"The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (sic probate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.""

Finally on conclusion, Learned 1st Appellate Court came to the observation that only the property as mentioned in the Will i.e. D

schedule land was bequeathed by said deceased Sushila Debi in favour of defendant No.1 i.e. the appellant herein and the property not mentioned in the Will but mentioned in the probate application and judgment i.e. the part of land as mentioned in schedule A, B, C of the plaint were not bequeathed by said deceased Sushila Debi in favour of the defendant No.1 now the appellant herein. So, based on the aforesaid discussions, Learned 1st Appellate Court decided that only the land mentioned in schedule D of the plaint was bequeathed by said deceased Sushila Debi in favour of defendant No.1 i.e. the present appellant herein.

So, after hearing Learned Counsel of both the sides and after going through the citations as referred by Learned Counsel for the respondent-plaintiff as well as the Learned Counsel for the appellant and also after perusal of the aforesaid provisions of law, this Court also stands agree with the observation made by Learned 1st Appellate Court that the suit land as mentioned in schedule-D of the plaint was bequeathed by said deceased Sushila Debi in favour of original defendant No.1 now the appellant herein and there was no ambiguity on that. So, in my considered view, Learned 1st Appellate Court rightly decided the said point.

20. In respect of point No.(vi), Learned 1st Appellate Court determined as to whether registered sale deed bearing No.1-1046 dated 09.06.2010 and 1-1801 dated 06.10.2010 were void or not and not binding upon the plaintiff i.e. the respondent-plaintiff herein. Learned 1st Appellate Court in deciding the point observed that sale deed bearing No. 1-1046 dated 09.06.2010 marked as Exbt.-U and 1-

1801 dated 06.10.2010 marked as Exbt.-R and opined that Exbt.-R contained the land as mentioned in schedule-C of the plaint and on perusal of Exbt.-U, Learned 1st Appellate Court came to the observation that the said sale deed contains some part of the land as mentioned in schedule-A of the plaint along with other land. So, according to Learned 1st Appellate Court, the defendant No.1 i.e. now the appellant herein sold land measuring 4.06 acre and 0.060 acre by two separate deeds covering part of A and C schedule land of the plaint along with other lands. So, Learned 1st Appellate Court was of the opinion that those two sale deed comprising the land as mentioned in schedule A and C of the plaint were joint property and accordingly, Learned 1st Appellate Court came to the observation that the specific schedule of land of the said two sale deeds in respect of A and C schedule of land as mentioned in the plaint and joint property has no force and decided the point accordingly.

So, after hearing both the sides and also after going through the judgment of the Learned 1st Appellate Court, it appears that the Learned 1st Appellate Court also rightly decided that point.

21. In respect of point No.(vii), it was the observation of the Learned 1st Appellate Court that the original plaintiff being the son, the original defendant Nos.1 to 6 being sons and daughters, original defendant Nos.7 and 8 being the grand-daughters jointly, the original defendant No.9 being the wife and the original defendant No.10 being the husband of the daughter of deceased are entitled to get 1/10th share on the suit land described in A, B and C schedule of the plaint excluding the land as mentioned in Schedule-D of the plaint which

was bequeathed by the deceased Sushila Debi in favour of defendant No.1 i.e. now the appellant herein.

Thus, it appears to this Court that the Learned 1st Appellate Court also rightly decided the said point.

22. Now in respect of point No.(viii), it was decided by Learned 1st Appellate Court as to whether the judgment of the Learned Trial Court in dismissing the suit of the original plaintiffs was proper or not. According to Learned 1st Appellate Court, Learned Trial Court dismissed the suit of the respondent-plaintiff No.1 on the ground that the land as mentioned in schedule A, B, C of the plaint were bequeathed in favour of the defendant No.1 i.e. the appellant No.1 herein and that bequeathed property was not separately mentioned but jointly mentioned in the plaint. But as the Learned 1st Appellate Court came to the observation that the land as mentioned in schedule-D of the plaint was only bequeathed by said Sushila Debi (since dead) in favour of the defendant No.1 i.e. now the appellant herein by the said registered Will, so, it was a bequeathed property. According to Learned 1st Appellate Court, the observation of Learned Trial Court in this respect was not proper and observed that the Learned Trial Court was not justified in dismissing the suit of the original plaintiff for partition of the joint land described in Schedule-A, B and C of the plaint and accordingly decided the point.

So, after hearing both the sides and also after going through the judgment of the Learned 1st Appellate Court, it appears to this Court that the Learned Trial Court was wrong in dismissing the suit which was rightly reversed by the Learned 1st Appellate Court and

accordingly, this Court also concurs with the view made by the Learned 1st Appellate Court that the suit was maintainable.

23. In respect of point No.(ix), it was the observation of Learned 1st Appellate Court that since the land as mentioned in schedule-A, B and C of the plaint was joint property, so, it was eligible for partition and, as such, according to Learned 1st Appellate Court, the plaintiff was legally entitled to get the preliminary decree of partition and decided the point accordingly.

Since this Court accepted/acceded to the observation made by the Learned 1st Appellate Court in respect of the aforesaid points regarding reversal of the judgment made by the Learned Trial Court, so, this Court is also accordingly stands agrees with the said observation made by the Learned 1st Appellate Court.

24. So, after hearing both the parties at length and also after going through the citations referred by both the parties as well as the records of the Learned Courts below including the judgment of both the Learned Courts below, it appears to this Court that the Learned 1st Appellate Court rightly reversed the judgment of the Learned Trial Court and there is no infirmity to that judgment.

However, in course of hearing, both the parties also relied upon one citation of Hon'ble the Supreme Court of India reported in **AIR 2022 SC 4601** titled as **Chandrabhan (Deceased) through LRs and others v. Saraswati and others** dated **22.09.2022** wherein in the relevant para Nos.31, 32 and 33, Hon'ble the Supreme Court discussed about the principles of substantial questions of law. I have also perused the said judgment. It appears that the proper test

for determining whether a question of law raised in the case is substantial would be, whether it is of the general public importance or whether it is directly or indirectly substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court. If the question is settled by the highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or the question raised is palpably absurd, the question of law would not be a substantial question of law. So, it depends on the facts and circumstances of each case whether a question of law is a substantial one or involved in the case or not. The paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis and the High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law.

Here in this appeal, after hearing both the sides, it appears to this Court that the appellants have failed to show any substantial questions of law to be formulated for deciding this appeal, as such, in my considered view, the appellants are not entitled to get any benefit and the present appeal is liable to be dismissed with costs.

25. In the result, the appeal filed by the appellants is hereby dismissed on contest with costs. The judgment dated 31.05.2023 and decree dated 05.06.2023 delivered by Learned 1st Appellate Court in connection with T.A. No.3 of 2018 reversing the judgment dated 18.11.2017 and decree dated 28.11.2017 delivered by the Learned

Trial Court in connection with T.S.(partition) No.23 of 2011 is hereby upheld and the same is affirmed. The respondent-plaintiff is entitled to get the decree as ordered by Learned 1st Appellate Court in the aforesaid judgment dated 31.05.2023 and decree dated 05.06.2023.

With the above observations, this present appeal stands disposed of.

Prepare decree accordingly.

Send down the records of the Courts below along with a copy of this judgment and Order.

Pending applications(s), if any, also stands disposed of.

JUDGE



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