

HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

RFA. No.41 of 2019

1. Sri Amal Sarkar, S/O. Late Lal Mohan Sarkar, Resident of Gandhigram
P.S. Airport, Dist. West Tripura, Pin 799012
2. Sri Mihir Lal Sarkar @ Paritosh Sarkar, S/O. Late Lal Mohan Sarkar
Resident of Gandhigram, P.S. Airport, Dist. West Tripura, Pin 799012
3. Sri Bimal Sarkar @ Bimal Kr. Sarkar, S/O. Late Lal Mohan Sarkar,
Resident of Gandhigram, P.S. Airport, Dist. West Tripura, Pin 799012
4. Sri Shymal Sarkar, S/O. Late Lal Mohan Sarkar, Resident of Gandhigram
P.S. Airport, Dist. West Tripura, Pin 799012

.....Appellants Defendants No. (1 to 4).

_V_E_R_S_U_S_

1. Smti. Shila Sarkar (Deb) @ Shila Sarkar, @Shila Deb (Sarkar), W/O. Sri Ashis
Kr. Deb, D/O. Late Lal Mohan Sarkar, Resident of Deochhara, P.S. Panisagar,
Sub-Division - Panisagar, Dist. North Tripura, Pin 799260.
2. Smti. Lila Deb (Sarkar) @ Lila Sarkar (Deb), wife of Sri Chinmoy Deb,
daughter of late Lal Mohan Sarkar, resident of Teliamura, P.S. Teliamura,
District: Khowai Tripura, Pin-799205.
3. Smti. Manju Sarkar (Datta), W/O Sri Madan Datta, D/O late Lal Mohan Sarkar,
resident of Badharghat, P.S. A.D. Nagar, District- West Tripura, Pin-799003
.....Respondent-plaintiffs
4. Sri Ajit Kumar Sarkar, son of late Lal Mohan Sarkar, resident of Gandhigram,
P.S. Airport, District- West Tripura.
5. Sri Dilip Sarkar, son of late Lal Mohan Sarkar, resident of Gandhigram, P.S.
Airport, District- West Tripura.

***as per the Hon'ble Court's order dated 03.09.2020 passed in I.A. 2 of 2020 the name
of respondent No.6 is incorporated as

6. Arati Sarkar (Talukdar), wife of Sri Kumar Ranjan Talukdar, daughter of late
Lal Mohan Sarkar, resident of near the hosue of Ex MLA Sri Ratan Das, P.S.
West Agartala, District-West Tripura, Pin-799001.

***as per the Hon'ble Court's order dated 12.03.2021 passed in I.A. No.03 of 2021
(petition for direction), the name of respondent No.7 has been deleted from the array of
parties.

....Respondent-defendant No.5-7

For Appellant(s)	:	Mr. S. M. Chakraborty, Sr. Advocate. Mr. K. K. Pal, Advocate.
For the respondent(s)	:	Mr. D. Bhattacharjee, Sr. Advocate. Mr. R. Datta, Advocate. Mr. S. Saha, Advocate. Ms. A. Chakraborty, Advocate.
Date of hearing	:	22.01.2025
Date of judgment and order:	:	05.02.2025
Whether fir for reporting	:	YES

HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT
_F_I_N_A_L_O_R_D_E_R_

[T. Amarnath Goud, JJ]

Heard Mr. S. M. Chakraborty, learned senior counsel assisted by Mr. K. K. Pal, learned counsel appearing for the appellants. Also heard Mr. D. Bhattacharjee, learned senior counsel assisted by Mr. S. Saha, learned counsel and Mr. R. Datta, learned counsel appearing for the respondents.

[2] This is an appeal filed under Section-96 of the Civil Procedure Code, 1908 against the judgment dated 30.07.2019 in T.S.(P) 42 of 2015 passed by the learned Civil Judge, Senior Division, Court No.1, Agartala, West Tripura.

[3] Yesterday when the case is called both sides present and the matter was listed for hearing today. The facts of the case are Sri Lal Mohan Sarkar passed away and on the strength of a WILL the children of the first wife filed a suit. During the pendency of the suit, partition has taken place and accordingly, the properties have been partitioned. Aggrieved by the partition, the defendants in the suit i.e. the children of the first wife preferred an appeal. So, for the sake of brevity the plaintiffs are referred as the party No.1A and the defendants of the first wife are referred as party No. 1B. The children of the second wife, who are the defendants, are referred to as the party No.2.

[4] During the course of argument i.e. yesterday party Nos. 1A & 1B i.e. the children of late Lal Mohan Sarkar reported before this Court that they have settled the matter and they are withdrawing the main plaint itself since they are satisfied with the settlement made outside the Court or in terms of the partitioned-decree and they are not interested to pursue the present appeal and also submitted and prayed to dismiss the appeal or permit to withdraw the same and also to dismiss the main suit itself.

[5] At this juncture, upon instructions learned senior counsel appearing for the party No.2, the children of second wife made an objection before this Court and contended that the respondents herein are not in favour of the withdrawal of the appeal or the plaint and they are not accepting the present partition made and express their willingness to contest the matter.

[6] The succinct pleadings of the appellants-defendants are the respondent Nos.1 to 3 initially filed the suit for preliminary decree for the

partition of the suit property, declaration of right title and interest with consequential relief as well as for perpetual injunction under Sections-34, 38 and 39 of Specific Relief Act and under Section-2 of Partition Act against the full blooded brothers i.e. the appellant Nos. 1 to 4 and step brothers and sister i.e. respondent Nos.5 to 7 also against the mother i.e. respondent No.8.

[7] Subsequently, by filing amendment petition sought cancellation of WILL bearing No.-III-22, dated 15.03.1986 and registered sale deed vide No.I-762, dated 11.02.1998. Initially, the learned Court after framing issue as well as after closure of evidence and argument of date was fixed for judgment but the learned Court passed an order on 26.11.2018 the plaintiffs along with other co-sharers i.e. defendant Nos.2 to 8 executed a registered power of attorney vide No. IV-97, Book No.IV, Volume No.1 and constituted defendant No.1 namely Amal Sarkar as lawful attorney for management, sale transfer, partition etc. of the suit land. The said power of attorney was a general power of attorney.

[8] On the strength of the said power of attorney, defendant No.1 sold part of the suit land, but as alleged, did not give the plaintiffs share of the sale proceeds. On 15.03.2013 plaintiff No.1 again executed another register power of attorney vide No. IV-141, Book No.IV, Volume No.2 and constituted defendant No.1 namely Amal Sarkar as lawful attorney for management, sale, transfer, partition etc of the suit land on behalf of said plaintiff No.1 namely, Shila Sarkar.

[9] The plaintiff asserted that the WILL bearing No.-III-22 dated 15.03.1986 alleged to have been executed by Lal Mohan Sarkar was illegal and not valid in the eye of law. They stated that at the time of execution of the alleged WILL, Lal Mohan Sarkar was joint owner of land measuring 6.05 acres along with his brother Anil Ch. Sarkar, but the said WILL was executed in respect of the entire suit land. Due to that reason the WILL in question is illegal and invalid. They further stated that after the death of Anil Ch. Sarkar, defendant Nos. 1 to 4 purchased the share of Anil Ch. Sarkar from his legal heirs by registered sale deed No.1-762.

[10] The plaintiffs claim that their assertion that the WILL being invalid which gets support from the fact that all the defendants and plaintiff Nos.2 and 3 executed power of attorney in respect of the suit land after the death of their father late Lal Mohan Sarkar. As the constituted attorney did not hand over respective shares against the consideration money to the plaintiffs, all of them

demand partition of the suit land on 10.04.2015. But, defendant Nos. 1 to 6 did not agree due to which they requested the defendant No.1 to return the original power of attorney with a further request not to make or transfer any part of the suit land. But, the defendant No.1 did not handover the power of attorney and tried to sell the suit land further. Thus, the plaintiff filed the suit for a decree of partition over the suit land to declare their equal share and also for cancellation of WILL.

[11] The defendant Nos.1 to 4 i.e. the present appellants by filing their written statement raised the question of maintainability of the suit for nonjoinder and misjoinder of parties and by the principles of estoppels, waiver etc. They stated that during the life time of Lal Mohan Sarkar and Anil Chandra Sarkar they got partition of their share, subsequently, the legal heirs of Anil Chandra Sarkar sold their property of Lal Mohan Sarkar was transferred to the step brothers and sisters of plaintiff and defendant Nos.1 to 4. Moreover, the plaintiff and defendants also sold some property inherited from Lal Mohan Sarkar. The execution of WILL by the Lal Mohan Sarkar was all along to the knowledge of plaintiffs.

[12] Having heard the learned counsel appearing for the parties and gone through the material evidences on record, the learned Court below has observed as under:

“In the result, the suit of the plaintiffs is decreed partly holding that they are entitled for a decree declaring the WILL b/No.III-22 dated 15.03.1986 to be void and liable to be cancelled. But at the same time, they are found to be not entitled for a decree declaring the sale deed b/No.I-762 dated 11.02.1998 to be void. The plaintiffs are also found to be not entitled for a decree of partition and perpetual injunction.

The plaintiffs are asked to submit the deficit Court-Fees within 14 days from the date of this judgment.

The suit is disposed of on contest.”

[13] The learned trial Court passed the decree declaring that the plaintiffs are not entitled for a decree of partition and perpetual injunction but most illegally declared the WILL No.III-22 dated 15.03.1986, which is liable to be cancelled. Being aggrieved by the findings and judgment on the issue decided about the WILL, the appellants herein have preferred the present appeal before this Court for proper adjudication.

[14] Mr. S. M. Chakraborty, learned senior counsel assisted by Mr. K. K. Pal, learned counsel appearing for the appellant-defendants has submitted that the learned Court below committed serious error of law and fact at the time of passing the impugned judgment. The learned Court below most illegally and casually without considering the legality and evidence led by the defendants Nos.1-4 declared the WILL No. III-22 dated 15.03.1986 to be void and liable to be cancelled.

[15] The wife of Lal Mohan Sarkar namely, Smti. Bela Rani Sarkar, defendant No. 8 adduced her evidence supporting the stand taken by defendant No. 1 to 4. When she categorically stated that, the legal heirs of Anil Chandra Sarkar sold their share. She has duly identified the signature of her husband Lal Mohan Sarkar in all eleven pages of WILL (Exbt. D). She has stated that the property left by Lal Mohan Sarkar have been disposed by way of WILL. The learned Court below miserably failed to appreciate the evidence of one attesting witness of WILL namely Sri Nani Gopal Deb deposed on behalf of defendant No. 1 to 4 as D.W.-5. And in his examination in-chief he stated that at the time of execution of WILL, he was personally present and put his signature in the said WILL as witnesses.

[16] It has been contended that the learned Court below failed to consider that the WILL was executed on 15.03.1986. The plaintiffs had their knowledge since the death of their father. On the basis of WILL the plaintiff and defendants divided their property among the step brothers and sisters. The plaintiff initially filed the suit for partition and subsequently in the said partition suit they challenged the validity of WILL but requisite Court fee was not paid for such additional relief rendering the same liable to be dismissed. The learned Court below ought to have considered the evidence of mother of plaintiffs and defendants, who deposed in support of the case of defendant Nos. 1 to 4.

[17] The learned Court below has passed the judgment simply basing on the evidence of the plaintiff respondents and without discussion, consideration and appreciation of the evidence of the defendant-appellant Nos.1-4. In their written statement filed on 07.08.2015 the defendant-appellants raised the issue of maintainability of the suit for non-joinder of parties and to be hit by the principles of estoppels, waiver etc. They altogether denied what the plaintiffs have stated in their plaint. They stated that during the lifetime of Lal Mohan

Sarkar and his brother Anil Ch. Sarkar they sold their joint property which is described in the schedule of the plaint. The defendants claimed that unreasonably the plaintiffs incorporated that joint property in this present suit.

[18] The vital twist in the tale came when the defendants brought into record that during his lifetime, their father has executed a WILL No. III-22 dated 15.03.1986 bequeathing his property in favour of his sons and specifically mentioned that the plaintiffs are not entitled for any properties left by their father. The defendants raised the issue of limitation stating that the plaintiffs should have come within three years seeking cancellation of the said WILL. They stated that the property left by their father has been peacefully possessed by them constructing houses and cultivating crops.

[19] In regard to the joint property of their father and uncle, they stated that the said property has been amicably partitioned and the legal heirs of Anil Ch. Sarkar have abandoned their shares. They further stated that the plaintiffs and they themselves sold out the said property and the consideration money got equally distributed amongst parties of both the sides. They admitted that the plaintiffs have constituted, defendant No.1 their lawful attorney and on the strength of said Power of Attorney he sold part of the joint properties distributing the amount with themselves. They also admitted the second power of attorney constituted by plaintiff No.1.

[20] The defendants further mentioned that in his WILL their father clearly stated that the plaintiffs are not entitled for any properties left by him. They reasoned that the Power of Attorneys were executed as the name of the plaintiff No.1 were wrongly recorded in the corresponding Khatian and during sale of those properties, the said Power of Attorneys were executed. Subsequently, they filed a case for deletion of the name of plaintiff No.1 from the said Khatian.

[21] In their subsequent written statement filed after amendment of the plaint in addition the defendant stated that in the WILL at page No.10 one condition is incorporated in which the testator (Lal Mohan Sarkar) intended that, if the marriage of his daughters were given out of the proceeds of sale of his property, none of his daughters will be entitled for any property left by him. The defendants stated that in compliance with that condition plaintiff Nos. 1 and 2 was given marriage after death of Lal Mohan Sarkar and the expenditure was

borne from the personal savings amount of the answering defendants and also by selling part of the property left by their father.

[22] In this written statement the defendant stated that the Power of Attorneys was executed to represent the plaintiffs, to create Khatian as per the WILL etc. They categorically stated that the WILL was executed 30 years prior and on the strength of that WILL the suit land get mutated in favour of the answering defendants, but as wrongly included the name of plaintiff No.1 in the finally published Khatian. To rectify the same the answering defendants filed an application under Section-95 of TLR & LR Act which got numbered as Rev. Case No.374 of 2015 and is pending before the D.M & Collector. Lastly, they raised the issue that the plaintiffs sought cancellation of the registered WILL by way of amendment of the plaint for which they required to file a separate declaratory suit. It has been further contended that in addition they claimed that the suit was initially filed for partition and subsequently, cancellation of WILL was added by way of amendment. But for the newly added relief no further Court fee is paid and the suit is not properly valued and hence prayed for its dismissal.

[23] Mr. S. M. Chakraborty, learned senior counsel has vehemently opposed the prayer of the plaintiffs, the respondents herein, stating that the suit is not maintainable *ab-initio* as after addition of further prayer of cancellation of WILL and sale deed, additional Court fee is not paid. He drew the attention of the Court to the evidence of PW-1 Shila Sarkar who deposed that her step brothers and sisters sold land which they inherited from their father. He stated that this evidence of PW-1 gives a clear picture that the plaintiffs have knowledge of the WILL.

[24] Mr. D. Bhattacharjee, learned senior counsel appearing for the respondents herein, has stated that it is alleged by the defendants that deceased Lal Mohan Sarkar executed one WILL but on the basis of the said WILL mutation was not done. He further agitated that the WILL submitted by the defendants has not been proved in compliance with Sections-67 and 68 of the Evidence Act. He also argued that the attesting witness Nani Gopal Deb who deposed is not the Nani Gopal Deb who actually signed as the attesting witness. It has been further contended that the WILL relied by the defendants is only a piece of paper and is clouded by suspicion as it is not acted upon till institution of the suit. In support of his argument he has averred that even in the year 2013 the

plaintiffs constituted defendant No.1 to be the lawful attorney for the purpose of sale of the suit land.

[25] In terms of the WILL they have already exhausted their respective shares by alienating the property and now it is not open for them that at this juncture, once again came and contest the matter in respect of the properties of the plaintiffs and the defendants who were the children of the second wife of the deceased Lal Mohan Sarkar. The properties according to the share in terms of the WILL of the persons are indicated in Khatian No. 1967/1. For the ready reference the same may be extracted hereunder:

	Description of interest and possessor (in details) (6)	Share (7)	Class to which land holder belongs along with particulars (8)	Special condition and incidents of the tenancy or holding (9)	Subordinate interest, Separate Khatian No. of Subordinate Interest (10)
1	Rayati Possessor		Rayati Permanent	Revenue Increasable	
2	Mihir Sarkar	16667			
3	Bimal Sarkar	16667			
4	Shyamal Sarkar	16667			
5	Amal Sarkar	16667			
6	Shila Sarkar, s/o Lal Mohan Sarkar	16667			
	Bela Sarkar, w/o Lal Mohan Sarkar, Vill. Own (rajnagar), P.O. Gandhigram	16666			

[26] In order to find an answer to the issues involved herein, let us relook through the evidence once again. P.W-1 Smt. Shila Sarkar is the plaintiff No.1 who deposed that after death of their father all the plaintiffs and the defendants started possessing the suit land by way of inheritance. She stated that her father Lal Mohan Sarkar and deceased uncle Anil Ch. Sarkar were the lawful owner and possessor of the land described in schedule C of the plaint. After death of her uncle Anil Ch. Sarkar, his wife and children being his legal heirs sold out their share of land to defendant Nos. 1 to 4 by way of registered deed. She admitted that on 21.10.1998 she along with other plaintiffs and other co-sharers executed one registered general POA appointing defendant No.1 as attorney in respect of the suit land and on the strength of that Power of Attorney [PAO for short], said defendant No.1 sold out some property without making any partition . She also added that on 15.03.2013 she executed another POA appointing the same defendant No.1 to manage, sale, transfer etc in respect of the land described in schedule A and Schedule B.

[27] In support of her testimony, she produced certified copies of Khatian bearing No.537, 538 and 439 (Old). She has also produced the certified copies of New Khatians and has also produced the registered Will dated

15.03.1986 along with these she placed the certified copy of registered sale deed No. 1-762 dated 11.02.1998 and the two POAs stated above. In her cross-examination she admitted that her step brothers and sisters have sold their land which they inherited from their father but she cannot say how her father gave the said land to them. She admitted that her father executed a Will during his life time which she came to know after institution of this suit. The remaining suggestions were outright denied by her.

[28] Coming to the evidence of the defendants it is found that defendant No.1 Amal Sarkar has deposed as D.W-1 whereas defendant No.8 deposed as D.W-2. One Ajit Kr. Sarkar deposed as D.W-3 and thereafter evidence of one Nani Gopal Deb is recorded on their behalf. D.W-1 Amal Sarkar rests his defence on the Will purported to be executed by their father on 15.03.1986. He stated that the marriage of plaintiff No.3 was given during the lifetime of their father whereas the marriage of plaintiff Nos. 1 and 2 were given after his death, expenditure being borne by them. He claimed that the plaintiff as per the said Will is not entitled for any property left by their father. In support of his stand he produced some documents like certified copy of some Khatians and the original Will dated 15.03.1986. He has also produced the original death certificate, survival certificate of their father and one original POA dated 15.03.2013.

[29] On the strength of the said POA, he sold some of the property. He also admitted the second Power of attorney to be executed by plaintiff No.1 and on its strength again he sold some properties distributing the consideration money amongst them. The remaining suggestions were denied by him.

[30] D.W-2 on the other hand deposed that there was no jointly owned property of Lt Lal Mohan Sarkar and his brother Anil Ch. Sarkar. She stated that during his lifetime Lal Mohan Sarkar and his brother mutually partitioned their land and the legal heirs of Anil Ch. Sarkar transferred their share to the defendants. She also stated about the Will and its condition which is discussed above. She stated in her cross-examination that she did not file any W.S. She further stated that the legal heirs of Anil Ch. Sarkar are also the co-sharers of the suit land. She added that once they came to Agartala and sold their share. She admitted that the legal heirs of Anil Ch. Sarkar filed a case against them which got settled amicably.

[31] D.W-3 is one Ajit Sarkar who is one of the defendants. He deposed that his father executed one Will with a condition that if marriages of the plaintiffs was held from the property of their father than they will not get any share on the said property. He further deposed that defendant Nos. 1 to 4 did not pay during the marriages of the plaintiffs. In his cross-examination he admitted that during the life time of their father plaintiff No. 3 was given in marriage. He further stated that after death of his father legal heirs of his uncle Anil Ch. Sarkar, claimed their share over the suit land. Then they instituted a civil suit against them. He further deposed that during the pendency of the suit they abandoned their share for an amount of Rs. 1, 50,000/-. He also stated that after death of his father plaintiff No 1 and 2 got married and the defendants No. 1 to 4 did not bear the expenditure of the said married.

[32] In the light of the above let us have a look at the relevant provisions of CPC. Under clause (b) and (c) of Rule 11 of Order VII CPC the plaint can be rejected for non-payment of deficit court fee on being required by the Court to correct the valuation within a time fixed by the Court and the if plaintiff fails to do so or where the relief claimed is properly valued but the plaint is returned upon paper insufficiently stamped, and plaintiff being called upon by the Court to supply the requisite stamp paper within a time fixed by the Court and plaintiff fails to do so. Proviso to Order-VII Rule-11 CPC would indicate that time so fixed shall not be extended, unless the Court, for reasons to be recorded, is satisfied of the cause shown. Thus, enlarging the time for payment of deficit court fee or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court would necessarily mean and include that a time is to be fixed by the Court for the plaintiff to comply with such direction or the time frame within which deficiency is to be made good or complied. The proviso would also indicate that power is vested to the Court to enlarge the time on twin conditions incorporated therein, if satisfied would vest the Court with the power to enlarge the time or extend the time to correct the valuation or supply the requisite stamp papers, as the case may be.

[33] Now, coming to the point of cause of action. The plaintiffs are admittedly the legal heirs of original owner of the suit land Lal Mohan Sarkar. They have produced the corresponding khatian in the name of their father. It has been laid down that the plaintiffs requested the defendants for partition of the suit land but they denied. The plaintiffs specifically mentioned that on 10.04.15 the

plaintiffs made the request for amicable partition which was denied by the defendants. The term cause of action narrates the bundle of facts which give right to any plaintiff to file any suit. The above narrated fact certainly depicts such cause to remain present for the plaintiffs to have file this suit especially when the plaintiffs rests their claim on khatian standing in the name of their deceased father. The date of cause of action further speaks that the suit is filed within time.

[34] In the present case, another facet also requires to be considered that the WILL is admitted to be a conditional WILL. In this regard, the evidence of DW8 i.e. mother of the parties to the suit deserves discussion. Defendant No. 8 is her written statement admitted execution of the WILL but stated that it is one of the condition of the WILL that if marriage of the plaintiffs was held during the lifetime of the testator or after his death if the expenditure in that case borne by his sons from second marriage i.e. defendants No. 1 to 4, only in that case the plaintiffs will not get any share over the property left by him. She further stated that the marriages of the plaintiffs took place after the death of Lal Mohan Sarkar and defendants' No. 1 to 4 did not bear the expenditure of such marriage.

[35] She supported the suit of the plaintiffs and prayed for a decree of partition. However, she deposed as DW-2 stating altogether a different story stating that the marriage of plaintiff No. 3 was given during the lifetime of her husband and the remaining plaintiffs were given in marriage after his death the expenditure of which was borne by defendants' No. 1 to 4. However, she also admitted execution of power of attorney and that the legal heirs of Anil Chandra Sarkar transferred their entire share in favour of the plaintiffs and defendants No. 1 to 4 and herself. She also admitted that the sale proceed obtained on the strength of POA executed by the plaintiffs was distributed amongst all of them.

[36] The said evidence of DW.2 is totally beyond her pleading as in her W/S she stated that the condition of the WILL was not fulfilled due to which the plaintiffs are entitled for a decree of partition but in her evidence she stated that the said condition was fulfilled. Her evidence being in contrary to her pleading cannot be considered and outright discarded. Having discussed the above situation it gets clear that the WILL purported to be executed by the testator is a conditional WILL and there is no cogent evidence on record as to the fulfillment of such condition.

[37] The defendants in one end is admitting execution of POAs by the plaintiffs and sale of part of the suit land distributing the proceed amongst themselves and on the other end is denying the share of the plaintiffs on the basis of the WILL in question. Presently, this Court is not going into the discussion of fulfillment of the condition of the WILL as its execution is not free from suspicion as per the above discussion. To sum up this Court is of the opinion that the defendants could not remove the suspicious circumstance roaming around the execution of the WILL bearing no. III-22 dated 15.03.1986 and accordingly, is liable to be declared canceled. The plaintiffs are found to be entitled for a decree of declaration in this respect.

[38] The defendant Nos. 1 to 4 in their written statement submitted that the legal heirs of Anil Chandra Sarkar abundant their share and subsequently, the plaintiffs and the defendants sold out the said property distributing the consideration money amongst both the plaintiffs and the defendants. On perusal of documents adduced by both the sides it is found that neither the plaintiffs nor the defendants adduced any evidence regarding the legal heirs of Anil Chandra Sarkar admitted to have died. Going through the relevant Khatians it is found that the land described in C schedule is recorded in the name of Lal Mohan Sarkar and Anil Chandra Sarkar.

[39] The contentions made by Mr. D. Bhattacharjee, learned senior counsel appearing for the respondents cannot be appreciated since he has not preferred any suit nor he has challenged the judgment and decree of the Court below and Order-23 of CPC is not applicable to the facts and circumstances of the case. As per evidence of the party No.2, the clients of Mr. D. Bhattacharjee, learned senior counsel, the children of the first wife in their cross examination has categorically stated as under:

“I cannot say the dag No and khatian No. of the suit land. I filed no suit claiming land of my share against the present plaintiff as well as other defendants.

I constructed my house at Gorkhabasti in the year 1984. At that time I was posted at Agartala in the office of the Industry and commerce. My father expired in the year 1989. I did not file any suit/case challenging any khatian of the suit property.

It is not a fact that I am deposing falsely after supporting the case of the plaintiffs Our father during his life time bequeathed by a WILL land measuring 10 gandas to me and 10 gandas to my brother Dilip Sarkar.

Subsequently, I sold my share. After the death of father I came to know about the WILL. All the parties were well aware of the WILL.”

[40] For the purpose of reference, Order-23 of CPC may be reproduced hereunder:

“1. Withdrawal of suit or abandonment of part of claim.-(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

He shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

[41] Mr. D. Bhattacharjee, learned senior counsel appearing for the respondents submits before this Court that it is not open for the plaintiffs and the defendant appellants herein to collude with each other and in the name of compromise they cannot withdraw by depriving the party No.2. In terms of the clients of Mr. D. Bhattacharjee, learned senior counsel as stated (supra) they have

already alienated their respective shares now, it is not open for them to come and contest.

[42] Mr. S. M. Chakraborty, learned senior counsel appearing for the appellant further contended that when the plaintiffs have decided to withdraw the suit and not interested to pursue the litigation, there cannot be any objection and have neither challenged the WILL nor they have challenged the partition decree and they well come the partition decree and they got their shares as per WILL. There was no challenge by the party No.2 or before any Court except making their submission as the party defendants and it is now open for the defendants to oppose the withdrawal.

[43] This Court finds force in the arguments of Mr. S. M. Chakraborty, learned senior counsel. Defendants to the suit have not chosen to contest upon the judgment and decree of the Court below and have not challenged the same. They have not filed a suit either challenging the WILL nor any claim upon the partition. Therefore, it is not open for them now to seek any relief in a case that is not filed by them.

[44] In view of above observations, the present appeal stands disposed of being withdrawn by the plaintiff-respondents without any objection by the contesting appellant-defendants, accordingly, the judgment dated 30.07.2019 and the consequential decree dated 06.08.2019 stands set aside. As a sequel, miscellaneous application, pending if any, shall stand closed. Prepare the decree accordingly.

B. PALIT, J

T. AMARNATH GOUD, J

A. Ghosh

ANJAN GHOSH | Digitally signed by ANJAN GHOSH
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