

**IN THE HIGH COURT OF TRIPURA
AGARTALA**

RSA.NO. 56 OF 2009

Sri Dhirendra Ch. Paul,
son of late Sashi Bhushan Paul,
resident of 8, Mantribari Road,
Agartala, P.S. West Agartala,
District - Tripura West

.....Defendant appellant

-V E R S U S-

1. Shri Chitta Ranjan Paul,
son of late Bhupendra Ch. Paul,
resident of Mantribari Road,
Agartala, P.S. West Agartala,
District - Tripura West.
- 2(a) Smt. Jyoti Paul,
wife of late Binoy Bhushan Paul
- 2(b) Miss Ishita Paul,
daughter of late Binoy Bhushan Paul,
both are resident of Mantribari Road,
Agartala, P.O. Agartala
P.S. West Agartala, Dist- West Tripura
3. Agartala Municipal Council,
represented by the Executive Officer,
Battala Super Market Complex,
Agartala, at present by the Chief Executive Officer
City Centre, Paradise Chowmohani,
Agartala, Tripura West

.....Plaintiff -respondents

**B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellant	:	Mr. D.R.Choudhury, Advocate Mr. D.Deb, Advocate
For the respondents	:	Mr. S.M.Chakraborty, Sr. Advocate Mr. T.D.Majumder, Advocate. Mr. D. Das, Advocate.
Date of hearing	:	26.02.2015
Date of judgment & order	:	08.05.2015

Whether fit for reporting

:

Yes	No
✓	

JUDGMENT & ORDER

This is an appeal under Section 100 of the CPC questioning the legality of the judgment dated 15.05.2009, delivered in Title Appeal No. 19/2006 by the Additional District Judge, West Tripura, Agartala, Court No. 4, affirming the judgment and decree dated 28.06.2002, delivered in Title Suit No. 21/2001 by the Civil Judge, Senior Division, West Tripura, Agartala, Court No. 1.

[2] It appears from the record; particularly from the order dated 27.04.2012 that this Court intended to hear the matter under Order XLI Rule 11 of the CPC and for that purpose the notice was issued to the respondents and to the lower court.

[3] Having regard to that aspect of the matter, it would be apposite to reproduce the provisions of Order XLI Rule 11 of the CPC.

11. “Power to dismiss appeal without sending notice to Lower Court— [1] The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

[2] If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

[3] The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

[4] Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.

11A . Time within which hearing under rule 11 should be concluded— Every appeal shall be heard under rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed.] 11 . Power to dismiss appeal without sending notice to Lower Court— [1] The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

[2] If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

[3] The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

[4] Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment”.

[4] Thus, it is the duty of every Court to examine appeal at the stage of Order XLI Rule 11 and to dismiss the same in exercise of power conferred by the said provision, if it lacks merit and does not deserve admission. The first appeal filed under Section 96 of the CPC is always subject to Order XLI Rule 11 and can be dismissed by the Court after hearing the appellants or his pleader. It clearly implies that an appeal under Section 96 is not to be admitted as a matter of right or even under convention unless the Court is satisfied about the merit of the appeal. Order XLI Rule 11 has been enacted by the legislature for the Appellate Court for the same purpose and object as Order VII Rule 11 is for

the trial court. An appeal filed under Section 96 of the CPC requires hearing under Order XLI Rule 11 by the Appellate Court to satisfy itself about its merit. No convention or practice can be allowed to override that mandatory provision of the statute. The apex court in **MGMT of Devi Theatre v. Vishwanath Raju**, reported in **AIR 2004 SC 3325** has observed that it is not open for the Court to impose any condition mere for purpose of admission. No order under provisions of Order XLI, Rule 11 can be passed for purpose of admission imposing a condition of deposit of money, meaning that on deposit of money or laying undertaking etc. an appeal cannot be admitted for hearing on merits. Such practice, if exists, is not legally permissible. No order of that nature can be sustained.

[5] There may not be any amount of confusion that even though by the provision of Rule 1, Order XLII of the CPC, the provisions of Order XLI has been made applicable to the appeal from the appellate decree, but those shall apply so far as may be relevant, not as the straight jacket. Now a very pertinent question, ancillary to the procedural propriety, emerges whether in a second appeal provisions of Order XLI Rule 11 shall apply or not, in the context that Section 100 of the CPC categorically provides as under:

(a) **Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal**

shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(b) An appeal may lie under this section from an appellate decree passed ex-parte.

(c) In an appeal under this Section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(d) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(e) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-Section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

[Emphasis Supplied]

[6] In **Kulwant Kaur v. Gurdial Singh Mann (dead)** by **LRs** reported in **2001(4) SCC 262**, the apex court has enunciated the law that Section 100 of the CPC has introduced a definite restriction onto the exercise of jurisdiction by the High Court. Needless to record that the Code of Civil Procedure (Amendment) Act 1976 has introduced such an embargo for achieving a definite objective and since we are not required to probe further on that score, we are not detailing out, but the focus remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on the wrong test and on the basis of

assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue in a Second Appeal. This is, however, only in that event, such a fact is brought to the light by the High Court explicitly and the judgment categorically provides as to the issue of perversity *vis-a-vis* the concept of justice, even on such premises, the concurrent finding of fact can be interfered with in the second appeal. Perversity itself is a substantial question of law, worth adjudication. What is required is a categorical finding on the part of the High Court as to perversity. It is further the duty of the High Court that while admitting an appeal it must formulate the substantial question on which the appeal shall be heard. Unless a second appeal is admitted, no notice is served either to the respondent or to the court below. As such, unless the High Court finds *prima facie* involvement of the substantial question of law, since the second appeal cannot be admitted in absence thereof, no pre-admission notice can be issued inasmuch as whether a second appeal would be admitted or not, it is exclusively subject to satisfaction of the High Court. The respondent cannot have any role to play.

[7] It appears from the provisions of Section 100 that only an appeal shall lie to the High Court, from the judgment passed in an appeal by the court subordinate to the High Court, if

the High Court is satisfied that the case involves substantial questions of law. Not only that, the duty is cast on the High Court to satisfy itself prima facie that a substantial question of law involves in the case and as sequel, it shall formulate the same and then the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such questions.

[8] By the proviso below Section 100 it has been clearly provided that the High Court may if it finds that there are other substantial questions of law not formulated by it, if it is satisfied that the case involves such questions, the High Court may hear the appeal on those substantial questions of law. The ambit of “substantial question of law” had fallen for consideration of the apex court on several occasions. It has been held that usually the concurrent findings of fact shall not be interfered with, save and except what has been formulated in **Kulwant Kaur v. Gurdial Singh Mann (dead)** as stated.

[9] This Court is of the considered opinion that a second appeal should not be heard under Order XLI Rule 11 of the CPC. If the appellant cannot satisfy the High Court of involvement of any substantial question of law in the appeal, the second appeal shall invariably be dismissed at the threshold without admission. The purpose of imposing such restriction for the appeal under Section 100 of the CPC is obvious, to clog the flow of frivolous

appeals. Any practice which emerges becomes instrumental to frustrate the object of Section 100 of the CPC cannot be approved of. If the statute provides that certain procedure has to be followed in a certain way, breach thereof cannot be held legal or germane to the rule of law.

[10] This appeal has not been admitted on formulating the substantial question of law. However, the notice, both to the respondent and to the lower court was issued. Having confronted thus, Mr. D. R. Choudhury, learned counsel appearing for the appellant has submitted that the appellant has proposed the following substantial questions of law :

(a) Whether the finding as returned by the appellate court that the suit property is *benami* is an outcome of perverse reading of the evidence including the registered sale deeds?

(b) Whether the unregistered deeds of partition Exbt.E and Exbt.H series can form the record of title in favour of the defendant-appellant? And

(c) Whether the possession of the defendant/appellant can be stated to have been hostile for acquiring title by prescription as provided under Section 27 read with Article 65 of the Limitation Act?

[11] Before these proposed substantial questions of law are appreciated, the essential fact, material for decision, may be laid. The plaintiff, hereinafter the respondent No. 1 or the plaintiff - respondent No. 1, filed the suit being TS. No. 21/2001 in the court of the Civil Judge Sr. Division, Court No. 1, West Tripura, Agartala against the defendant - appellant, Sri Dhirendra Chandra Paul for declaration of title, recovery of possession and for

injunction in respect of the suit land, described in the Schedule-B appended to the plaint measuring 5 Gandas 3 Karas 2 Krantas 17½ Dhurs. The land described in the Schedule A of the plaint was jointly purchased by the respondent No. 1(the plaintiff) and the respondent No. 2 in the year 1962 by a registered sale deed bearing No. 1-7582 dated 23.07.1962 from one Amarendra Dasgupta (now deceased). After purchasing the land described in the Schedule- A of the plaint, it was duly mutated in the Khatian bearing No. 4593 in their names under Mouja - Agartala Sheet No. 15 in the equal share. The said land has been duly recorded by the Agartala Municipality, now Agartala Municipal Corporation under holding No. 158/A. The amicable partition of Schedule-A land between the respondent Nos. 1 and 2 was made on 05.10.1976 by an unregistered deed of partition. The respondent No. 1 got the Schedule-B land of the plaint out of which he gifted 1 Kara 4 Dhurs of land to Sri Kanchan Kr. Paul, son of the defendant-appellant in the suit. The remainder 5 Gandas 3 Kara 2 Kranties 17½ Dhurs of land being part of the Schedule-B of the plaint was under the ownership and possession of the plaintiff - respondent No. 1 at the time of his leaving the State for his employment at Kolkata.

[12] The appellant had approached the respondent No. 1 to allow him to stay in the hut constructed over the Schedule-B

land. Since the appellant is the uncle of the respondent No. 1 there had been no reason to distrust and disbelieve him and so he allowed the appellant to stay in the suit premises as a permissive possessor. On 15.03.01 the respondent No. 1 was informed by his younger brother, who is his constituted attorney in respect of the suit land, that the appellant had started a pucca construction over the suit land without taking prior permission. Immediately, the respondent No. 1 instructed his attorney, Shri Nihar Ranjan Paul to ask the appellant to refrain him from proceeding with the illegal and un-authorised construction but with no avail. Situated thus, the respondent No. 1 instituted the suit. The defendant-appellant contested the suit by filing the written statement and contending inter alia that the land described in the Schedule-A of the plaint was jointly owned and possessed by him and his another brother, namely, Phani Bhushan Paul (now dead) by constructing a building thereon. The defendant-appellant and said Phani Bhushan Paul, since deceased, subsequently partitioned the suit land. As per the terms of the amicable family partition, the defendant-appellant got the Schedule-B land of the plaint. The plaintiff – respondent No. 1 gifted 1 Kara 4 Dhurs of land, which was the part of the schedule B land, appended to the plaint, to his son, namely, Sri Kanchan Kr. Paul illegally and un-authorisedly as he had no right and title over the Schedule-B land of the plaint. The defendant-appellant had constructed building in the suit land

by taking permission from Agartala Municipal Council on 14.02.2001. The record of right as well as the Municipal holding in respect of the suit land was created in the name of the defendant-appellant bearing Khatian No. 43618 and the Municipal holding No. 158/A of the Ward No. 14, which were never challenged by the plaintiff - respondent No. 1. The entire Schedule-A land as well as the land at Silchar, Assam and at Kolkata, West Bengal were purchased from the joint family fund by the predecessors of the plaintiff –respondent Nos. 1 and 2 and the defendant-appellant. The Schedule-A land of the plaintiff was purchased in the year 1962 in the name of the plaintiff – respondent No. 1 and the respondent No. 2 from the joint family fund, accumulated in the erstwhile East Pakistan, now Bangladesh. The consideration money was sent through the defendant- appellant which is clearly mentioned in the sale deed. The predecessors of the plaintiff - respondent No. 1 and the respondent No. 2 and the defendant- appellant made amicable family partition in the entire land of Tripura, Assam and West Bengal in the year 1966. Another family partition was made in the year 1379 B.S. amongst the predecessors of the plaintiff-respondent, the defendant-appellant and others. As per the terms of that family partition, the defendant- appellant got the suit land including other land at Agartala. Since then, the defendant appellant has been in possession over the suit land. The

defendant-appellant at the same time denied the title and possession of the plaintiff- respondent No. 1 over the suit land and prayed for dismissal of the suit. Several issues have been framed by the trial court, which are as under:

- (a) Whether the suit land of schedule A was purchased from the joint family fund of the predecessors of the plaintiff/defendant No. 1 and 2?
- (b) Is the suit maintainable?
- (c) Has the plaintiff right title and interest over the suit land of schedule A and B?
- (d) Is there any amicable family partition of the properties of the predecessor of the plaintiff and the defendant No.1 and 2 and has the defendant No. 1 got the A schedule land by that amicable family partition?
- (e) Is the story of plaintiff's possession over the A schedule land and also the plaintiff's story of dispossession of B schedule land by the defendant No. 1 true?
- (f) Is there any construction in the suit land, if so, who has made the construction?
- (g) Is the plaintiff entitled to get decree for declaration of title over B schedule land, recovery of possession of B schedule and perpetual injunction against the defendant No. 1 as prayed for?
- (h) What other relief/reliefs the parties are entitled in this suit?

[13] The plaintiff respondent No. 1 examined two witnesses and introduced the following documents:

Exbt.1 : The power of Attorney executed by the plaintiff in favour of the PW-2.

Exbt.2 : Certified copy of the Khatian No. 4593 of Agartala Sheet No. 15 in the name of the plaintiff and the defendant No. 2 of A schedule land.

Exbt.3 : Certified copy of the purchase deed of the plaintiff and the defendant No. 2

Exbt.4 : Unregistered partition deed along with sketch map of A Schedule land between the plaintiff and the defendant No. 2

Exbt.5 : Municipal tax receipt of the suit land in the name of the plaintiff.

Exbt.6 : Certified copy of gift deed No. 1-3013 dated 28.05.1988, in the name of Kanchan Kumar Pal, son of the defendant No. 1 executed by the plaintiff.

[14] The defendant-appellant examined four witnesses and introduce the following documents:

Exbt.A : Certified copy of the sale deed dated 27.08.1953.

Exbt.B : Original Sale Deed of the suit land.

Exbt.C Series : 17 Nos. of certified copy of the Khatian of various lands of the parties of the suit.

Exbt.D series : 2 Nos. of land revenue receipts for the year 1404 and 1409 B.S.

Exbt.E : Un-registered partition deed dated 23.11.66.

Exbt.F Series : Certified copy of Khatian of suit land and letter conveying the approval of the plan for construction of the building on the suit land.

Exbt.G : Certified copy of the Khatian No. 4926 of shop premises in the name of the defendant No. 1.

Exbt.H- Series : 2 Nos. of un-registered deeds of the family arrangement among the three brothers of the defendant No. 1 dated 29th Magh 1379 B.S.

Exbt.I Series : Land revenue receipt and Municipal tax payment receipt.

[15] It is to be noted that Exbt.E is the un-registered partition deed dated 23.11.66 whereas Exbt.H series are the two un-registered dated 29th Magh 1379 B.S deeds of the family arrangement amongst 3 brothers of the defendant No. 1. The trial court after appreciating the evidence so laid by the parties and while deciding the issue Nos. B, C, and D has observed that from the recital of the deed, it appears that the plaintiff and the defendant No. 2 jointly purchased the A schedule land from one Amarendra Dasgupta on payment of consideration money through the defendant No. 1. It is argued that the plaintiff and the defendant No. 2 were minor at the time of the purchase of land on 23.07.1962 and the plaintiff paid the part of his consideration

money receiving from his mother who had a joint partnership business with the defendant No. 1 and others. Exbt.4 is an unregistered partition deed of the A schedule land between the plaintiff and the defendant No. 2 dated 05.10.1976, showing that the B schedule land has gone in the share of the plaintiff out of the A schedule land. It appears further that the Exbt.4 is an unregistered deed and is not duly stamped. So, according to the defendant- appellant, it has little evidential value so far the transfer of the land by partition is concerned. But the plaintiff has made the defendant No. 2 party in this suit and the defendant No. 2 has not contradicted the version of the plaintiff either appearing as the witness or by filing his written statement. So the contention of the plaintiff as regards the amicable partition of the A schedule land with the defendant No. 2 is liable to be accepted. Exbt.5 reveals that the suit land was mutated and recorded in the name of the plaintiff under Agartala Municipality holding No. 158/A in the Ward No. 4 and the plaintiff has paid the Municipal tax/revenue up to March 1989. Exbt.6 reveals that a part of the B schedule land was transferred by way of gift to the son of the defendant No.1-appellant, namely Kanchan Kumar Pal. So it further appears that the plaintiff by adducing oral as well as the documentary evidence has established his story of joint purchase of the suit land along with the pro-defendant No. 2 and he has got

the suit land described in the B schedule by amicable partition with him.

[16] While appreciating the evidence laid by the defendant-appellant, it has been observed by the trial court that DW-1, the defendant No. 1 has tried to support his case in his deposition. DWs 2 and 3 have stated that they do not know the plaintiff and they have been seeing the defendant No. 1 in possession of the suit land for a long period. The defendant No. 4 is a Deed Writer and he has been examined to support the contention of the alleged family arrangement under Exbt. E and Exbt. H series. He has stated that the family arrangement dated 29th Magh 1379 B.S. was written by the Deed Writer namely Mohini Mohan Ghosh. He has further deposed that Mohini Mohan Ghosh died in the meantime. He knows the signature and the hand writing of Mohini Mohan Ghosh who used to work sitting by his side. The defendant No. 1 has produced the other documents to show that many lands were purchased in the name of several members of their family by means of the joint family fund, accumulated at East Pakistan, now Bangladesh and subsequently vide Exbt.E his three brothers got 1/3rd share of their entire joint properties in Agartala, Silchar, Calcutta and other places and subsequently vide Exbt. H Series further partition or amicable family arrangement had taken place among

the defendant No. 1, the father of the plaintiff and another brother of the defendant No. 1 and the present suit land has come in the share of the defendant No.1. It appears that Exbt. E has not been duly signed by those persons. It has been further pointed out by the plaintiff that on the same date i.e. on 29th Magh 1379 B.S., two questioned family arrangement were struck for different lands among Satyendra Pal, the father of the plaintiff and the defendant No. 1 and it is again pointed out why on the same day two alleged deeds of the family arrangement were written in two different languages i.e. one is in English and the other in Bengali has not been explained. It is also argued that as the defendant No. 1 had the opportunity to get some old blank signed papers for the purpose of their joint business etc. he has utilised those by preparing the documents under exhibit H series. It has been asserted that the said documents under Exbt. E and Exbt. H series are not admissible in the evidence as these are not registered and duly stamped. Apart that, pre-requisite of the title, for purpose waiving the requirement of registration, is not available in the evidence.

[17] For the defendant, however, it has been contended that in view of the decision of the apex court in **Maturi Pullaiah and Another v. Maturi Narasimha and Others**, reported in **AIR 1966 SC 1837**, if any joint Hindu family arrangement is made

bona fide and if such arrangement is entered into, the court should more readily give assent to such an arrangement than to avoid it. However, **Kale and Others v. Deputy Director of Consolidation and Others**, reported in **AIR 1976 SC 807** has also been relied on to contend that if the family settlement is bona fide and voluntary, and even if, such arrangement is oral, the registration would not be necessary only if the terms of the family arrangement are reduced into writing, otherwise not. But parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same. The trial court after appreciating the evidence and on taking into consideration of the relevant law has observed thus:

“Considering the evidence of both the parties and ratio laid down in the apex court as well as in the Madras High Court it appears that the defendant has failed to show that the suit land was purchased from the joint family fund. It also appears that in Exbt. E.(S.O) and Exbt. H series (S.O) the plaintiff and the defendant No. 2 has not cited as witnesses of the alleged family arrangement to show that the arrangement was done in the presence of the person in whose name the land was purchased. It further appears that the defendant No. 1 has not put forward any counter claim for declaration of his title over the suit land. Accordingly, it is held that by way of Exbt. E (S.O) and

Exbt.H series (S.O) the defendant No. 1 has not got the right title and interest over the suit land. It further appears vide Exbt.F series that the suit land is recorded in the name of the defendant No. 1 under Khatian No. 43618”.

[18] Thus the suit has been decreed by declaring the title of the respondent No. 1 over the schedule B land and also by restraining the defendant-appellant. The defendant- appellant preferred an appeal against the said judgment, delivered in the appeal under Section 96 of the CPC in the court of the District Judge, West Tripura being Title Appeal No. 19/2006, which was in the course of time transferred to the court of the Additional District Judge, West Tripura, Agartala, Court No. 4. By the impugned judgment dated 15.07.2009, the said appeal has been dismissed on affirming the finding of the trial court in the following terms:

“The defendant appellant failed to lead convincing evidence to discard the evidence of PW-1 that the mother of the plaintiff respondent No. 1 had no means to give consideration money for purchase of the suit land. None of the predecessors of the defendant appellant or their family members came forward to support the plea of the defendant appellant that the suit land was purchased by joint income and the suit land was coparcenary property. The defendant appellant also failed to establish by satisfactory evidence that at the time of transaction of sale under Sale Deed No. 1-7587 dated 23.07.1962 (Exhibit –B) executed in favour of the plaintiff respondents No. 1 and 2, they were the coparceners in Hindu undivided family and the property was held for the benefit of the coparceners in the family”.

[19] It has been further held that on perusal of Exbt. E series, it is found that on 29th Magh 1379 B.S. Shri Satyendra Paul, Bhupendra Chandra Paul and the defendant-appellant made

two (2) un-registered deeds of the family partition (Exhibit-H series) settling their properties situated in Bangladesh and India. Having gone through the impugned judgment, the first appellate court has observed that the trial court did not accept the deeds of the family partition mainly on the ground of non-registration and non-stamping under the Stamp Act and for the other reasons stated therein. Exbt. H series were not considered as the registered owners were not parties to the said un-registered deeds of the family partition. It has transpired from the evidence led by the defendant appellant (D.W-1) that at the time of execution of the sale deed (Exhibit-B) the plaintiff- respondents No. 1 and the respondent No. 2 used to read in Class-X in Kolkata. If it was so, on 29th Magh 1379 B.S. when the deeds of family partition (Exhibit-H series) were executed, certainly the plaintiff-respondent No. 1 and the respondent No. 2 had attained majority. In this back ground, the property held in their names could not be legally transferred to the other members of the family without making them parties to the transaction for recording their consent in the arrangement. Hence, Exhibit- H series can not be the basis of acquisition of the title by the defendant-appellant over the suit land. Further, those can not be considered to be a valid document for deriving title by the defendant-appellant over the suit land for absence of pre-requisite title.

[20] Even the opening of the new Khatian bearing No. 43618 in the name of the defendant-appellant by means of the proceeding No. 8/1997, does not clearly show that the provisions of the TLR &LR Act was followed before correction of the earlier record of right standing in the names of the plaintiff- respondent No. 1 and the respondent No. 2. Thus, the first appellant court has held that there is no infirmity in the judgment as returned by the trial court.

[21] Mr. D. R. Choudhury, learned counsel appearing for the appellant has strenuously submitted that both the Courts below did not read the evidence properly else it would have surfaced that the Schedule A land was *Benami* in the name of the plaintiff- respondent No. 1 and the respondent No. 2 and that land was purchased from the joint fund of the Hindu undivided family. These aspects of the matter have not been dealt by the trial court as well as by the first appellate court. On the contrary to such assertion, what surfaces is that they have categorically held that the claim of the appellant is neither supported by any documentary evidence or by any reliable witness from the family. Mr. Choudhury, learned counsel, has continued to submit that the way the deed of partition (Exhibit- B) and the record of rights (Exhibit-H series) have been appreciated by the courts below, it shows that the trial court and the first appellate court did not read those materials in the relevant perspective. From the documents,

according to him, it has surfaced that the defendant-appellant has got the title, particularly by virtue of the deed of partition (Exhibit-E). Such act of partition is recoded in the Exhibit-H series. This Court after scrutiny of the records as well as the judgment rendered by the trial court and the first appellate court, finds that sufficient reasons have been assigned by the courts below for discarding Exhibit-E and Exhibit-H series. The defendant-appellant has even failed to prove that by any act of hostility, he had possessed the suit land described in the Schedule B appended to the plaint and as such, this Court is of the considered opinion that there cannot have any application of Section 27 read with Article 65 of the Limitation Act. It is well settled that the un-registered partition *Chitthas* can be admitted in the evidence for purpose of appreciating the instance of partition. In this regard, reference may be made to **Abdul Haq vs. Mohd. Hashim and Another**, reported in **AIR 1946 Allahabad 200**. Except the substantial question No. 2, the other proposed substantial questions are either the question of fact or the mixed questions of fact and law. The way those questions have been dealt with by the courts below, no space has been left for any interference. It is well settled when an un-registered deed of the family arrangement can be admitted in the evidence. In **Kale and Others v. Deputy Director of Consolidation and Others**, those principles have been succinctly laid. On scrutiny, this Court finds

having regard to those principles that the trial court below admitted the un-registered partition deeds in the evidence and read into their contents. In the said exercise, both the courts below did not commit any illegality for giving rise to any substantial question of law which might require fresh examination in an appeal under Section 100 of the CPC. As stated, there had been no pre-requisite title in favour of the defendant-appellant.

[22] Accordingly, this appeal is dismissed without admission. Mr. S. M. Chakraborty, learned senior counsel, along with Ms. D. Das, learned Advocate, was present at the time of hearing on the proposed substantial question of law. However, since this Court has declined to admit the appeal, there had been no requirement to hear the respondents.

[23] Prepare the decree accordingly and thereafter send down the LCRs.

JUDGE

A. Ghosh.