

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.23 of 2021

Smt. Kalpana Marak (Chakraborty)

W/O- Sri Nayan Chakraborty,
Resident of Nandannagar (Marak Para),
P.S- New Capital Complex,
Agartala, West Tripura

---Appellant(s)

Versus

1. **Sri Majindra Marak,**
S/O- Lt. Khidan Marak
2. **Smt. Soma Marak (Chakraborty)@**
Kaushalya Marak,
W/O- Sri Babul Chakraborty,
3. **Sri Manindra Marak,**
S/O- Lt. Majendra Marak
4. **Sri Sudhan Marak,**
S/O- Lt. Lutish Marak
5. **Sri Swapan Marak,**
S/O- Lt. Raichan Marak
6. **Sri Sailendra Marak,**
S/O- Sri Jamendra Marak
All are resident of Nandannagar (Marak Para),
P.S.- New Capital Complex, Agartala, West Tripura.

---Respondent(s)

For the Appellant(s)	:	Mr. D. Bhattacharya, Sr. Advocate Mr. Samar Das, Advocate
For the Respondent(s)	:	Mr. P. Rathor, Advocate Ms. Ranasree Pal, Advocate
Date of hearing and Delivery of Judgment & Order	:	03.05.2023
Whether fit for reporting	:	Yes

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER (ORAL)

The present second appeal is directed against the judgment and decree dated 02.09.2021, passed in T.A. No. 53 of 2017 by the Ld. District Judge, West Tripura, Agartala upholding the judgment and decree dated 26.10.2017, passed in TS No.105 of 2015 by learned Civil Judge (Senior Division), West Tripura, Agartala.

2. The facts, as projected by learned Trial Court, may be produced here-in-below:-

“Brief facts leading to this suit is that one Majindra Marak was the owner in possession of a land measuring 1.89 acres under mouja-Indranagar and a land measuring 1.06 acres under mouja- Debendra Chandranagar. Said Majindra Marak died leaving behind five legal heirs namely Nirendra Marak, Samir Marak, Manindra Marak, Sachindra Marak and Kaushilya Marak. After the death of Majindra Marak all the above five legal heirs have made partition of the entire aforementioned land on the strength of registered deed of partition bearing No. 1-1514, dated 07.02.2005 and thereby demarcated and allotted their respective shares by metes and bounds with proper measurement. As a result of said partition one of the legal heirs namely Sachindra Marak got a land measuring 0.89 acres including the suit land at Mouja- Indranagar and 0.36 acres at Debendra Chandranagar. Sachindra Marak died on 18.07.2007 leaving behind his wife Jatila Das (Marak) and his minor son Sumit Marak. After the death of Sachindra Marak both of them having inherited the property made partition of it amicably on the strength of registered deed of partition bearing No. 1-3207 dated 16.04.2015 and as a result of partition Jatila Das got the suit land and thereby she sold it to the plaintiff on the strength of registered sale deed bearing No. 1-3472, dated

28.04.2015. Accordingly, the plaintiff applied for having mutation which is still under process. Immediately after purchase the plaintiff has been cultivating the suit land by growing crops and also by raising bamboo fencing surrounding the suit land. All the defendants, however, creating disturbance demanding illegal money from the plaintiff. Allegedly on 28.06.2015 in the morning the defendants broke and threw some portion of bamboo fencing. Not only that on 22.07.2015 at about 6 pm the defendants further broke down the boundary fencing with a view to encroach the suit land but the plaintiff somehow managed to resist the defendants. The husband of the plaintiff also lodged a complaint in this regard in writing with the GB Police outpost under New Capital Complex Police Station. Even after lodging complaint, on 28.09.2015 all the defendants further made attempts to encroach the suit land when husband of the plaintiff managed to resist them and as such the defendants could not be succeed. Situating thus the plaintiff approach this court to have a declaration of her title over the suit land along with consequential relief for perpetual injunction as stated above.

2.1 On the basis of aforesaid facts, the learned trial court had framed following issues:-

- “(i) Is the suit maintainable in its present form and nature ?
- (ii) Has the plaintiff any cause of action to file the instant suit?
- (iii) Has the plaintiff right, title and interest over the suit land?
- (iv) Is the plaintiff in possession of the suit land? If so, is the plaintiff entitled to an order of perpetual injunction, as sought for?
- (v) Is the plaintiff entitled to a decree, as prayed for?
- (vi) What other relief/ reliefs the plaintiff is entitled to?

2.2. In support of their respective cases, the plaintiff and the defendants had introduced the following documents:-

- “(i) Authenticated copy of khatian bearing No.11301 of Mouja Indranagar (Exbt-1).
- (ii) Original copy of registered sale deed bearing No. 1-3472, dated 28.04.2015 in five pages (Exbt-2).

- (iii) *Certified copy of khatian bearing No. 9456 of Mouja Indranangar (Exbt-3).*
- (iv) *Photo copy of registered deed of partition bearing No. 1-3207, dated 13.04.2015 in five pages (Exbt-4).*
- (v) *Original copy of death certificate of Sachindra Marak (Exbt-5) (subject to objection by defendant).*
- (vi) *Original copy of survival certificate of Sachindra Marak (Exbt-6) (subject to objection by defendant)."*

2.3. The first two issues have been decided in favour of the plaintiff. Both the courts below held that it is an admitted fact that the suit land along with other land was originally belonged to one Majindra Marak. It is further observed by the courts below that there is no dispute that Jatila Das had transferred the suit land to the plaintiff on the strength of registered sale deed bearing no. I-3472, dated 28.04.2015.

2.4. The defendants, however, challenged the competency of the vendor (Jatila Das) of the plaintiff in transferring the suit land to the plaintiff on the following grounds:-

- “(i) That, the deed was executed in violation of section 187 of TLR and LR Act;*
- (ii) That, the source of acquiring title by Jatila Das vide deed of partition bearing No. 1-1514 was executed keeping two of legal heirs of Majindra Marak beyond the partition deed;*
- (iii) That, Jatila Das obtained survival certificate showing her as wife of Sachindra Marak. Simultaneously she has been receiving family pension of Manindra Marak being the wife. Jatila Das also further sworn an affidavit declaring her and her son to be the wife and son respectively of Manindra Marak vide affidavit dated 06.02.2006 sworn before notary public.”*

2.5. Both the courts below had raised serious suspicion in respect of the fact that whether Jatila Das is the real wife of late Sachindra Marak or Manindra Marak. It is an admitted position that both Sachindra and Manindra belong to tribal community, but it is not the case of the defendants that the suit land had been transferred to a person belonging to non-tribal community. Both the courts held that the plea taken by the defendants has an embargo in transferring the suit land in favour of the plaintiff is devoid of any merit.

2.6. It is further held that the property left by the original owner, Majindra Marak was partitioned on the strength of a registered partition deed between his 5(five) legal heirs including Sachindra Marak. Majindra Marak had also 2(two) daughters, but they were not included in the partition deed.

2.7. On consideration of the overall facts, both the courts held that Jatila Das, who is the vendor of the sale deed, had failed to prove her identity and status as the wife of late Sachindra Marak. For the reasons that some documents, like the Bank account lying with the State Bank of India and electricity bill, suggest that she is the wife of Manindra Marak and not wife of Sachindra Marak.

2.8. Learned trial court held that it surfaced from the evidence that Jatila Das had been maintaining dual identity being the wife of Sachindra Marak as well as the wife of Manindra Marak. In this

situation, the court held that in absence of any cogent evidence as to the status of Jatila Das as either wife of Sachindra or Monindra, it can be easily said that Jatila Das had no competency to transfer the suit land in favour of the plaintiff by way of executing a registered sale deed and the said document is not enforceable in law. On the basis of this finding, the learned trial court held that Jatila Das had no right, title and interest over the suit property while transferring the said land in favour of the plaintiff and, therefore, the plaintiff has no right, title and interest over the suit property and he is not entitled to have an order of perpetual injunction.

2.9. Accordingly issue nos. (iii), (iv), (v), (vi) and (vii) has been answered in negative and dismissed the suit.

2.10. The first appeal being preferred against the said judgment and decree passed by learned trial court, the learned District Judge, West Tripura, Agartala came to a similar finding as that of the learned trial court regarding the issues formulated by the trial court and accordingly, dismissed the first appeal.

3. Being aggrieved by and dissatisfied with the said judgments and decrees passed by the courts below dismissing the suit, the plaintiff has preferred the present second appeal before this Court.

4. At the time of admission of this appeal, following substantial questions of law have been formulated:-

- “I. Whether on a prayer for perpetual injunction the title deed and mutation record be ignored having dispute in vendors identity?*
- II. Whether without challenging the Deed of Sale and partition deed of vendor, the sanctity of title be ignored?*
- III. Whether the Ld. Court below appreciated the title deed of Appellant (Exbt-2) and Partition Deed (Exbt-4) in the light of Section 44 of T.P Act?”*

5. I have heard Mr. D. Bhattacharya, learned senior counsel assisted by Mr. Samar Das, learned counsel appearing for the plaintiff/appellant. Also heard Mr. P. Rathor, learned counsel appearing for the defendant/respondents.

6. Mr. Bhattacharya, learned senior counsel for the plaintiff/appellant has contended that the sanctity of the partition deed (Exbt.-4) as well as the sale deed (Exbt.-2) executed by Jatila Das in favour of plaintiff/appellant cannot be challenged unless and until these two documents are cancelled by a competent court and both the documents stand good till the declaration that these two documents are *void ab initio* and *non est*. Mr. Bhattacharya, learned senior counsel has further submitted that there is no record in the instant suit that the Khatians created in favour of Jatila Das had been challenged or cancelled by the competent authority. He has further argued that there is no proof that Jatila Das had transferred minor's property. To substantiate this submission, Mr. Bhattacharya, learned senior counsel has tried to persuade this court that there is a registered partition deed

executed between Jatila Das, the wife of Sachindra Marak and Sumit Marak, being their only son and on the strength of this partition deed, Smt. Jatila Das had sold a portion of her share in favour of the plaintiff, Smt. Kalpana Marak (Chakraborty).

Learned senior counsel has further contended that both the courts below have decided the suit on different connotations and has totally been misdirected. Learned senior counsel has drawn the attention of this Court as regards the survival certificate issued by the competent authority in favour of Jatila Das and Sumit Marak, being wife and son of late Sachindra Marak. Mr. Bhattacharya, learned senior counsel has urged this Court to allow this appeal dismissing the judgments and decrees passed by the courts below.

7. On the other hand, Mr. Rathor, learned counsel for the defendant/respondents has submitted that both the courts below have rightly held that the plaintiff has miserably failed to establish the source of title. According to learned counsel for the defendant/respondents, Jatila Das is not the wife of late Sachindra Marak, because in the statement of account lying with the State Bank of India and from electricity bills, it clearly reveals that the name of the husband of Jatila Das has been recorded as Manindra Marak and not as Sachindra Marak. In the pension document also, the name of Manindra Marak has been written as the husband of Jatila Das.

Learned counsel for the defendant/respondents has strongly submitted that neither the partition deed nor the sale deed has been proved in accordance with law. Mr. Rathor, learned counsel has led much emphasis on the point that Jatila Das had sold her minor son's property without taking guardianship certificate from the competent court and it is settled law that minor's property cannot be transferred in any manner whatsoever and any such transfer should be declared as *void ab initio* and *non est*.

Mr. Rathor, learned counsel has also submitted that from the two sale deeds under Exbt. F and G respectively, it comes to fore that Jatila Das had executed the sale deeds for a land which measures in excess of the land which she obtained as inheritor of the deceased Sachindra Marak.

8. I have given my thoughtful considerations to the submissions advanced by the learned counsel appearing for the parties. It is settled proposition of law that the court while exercising its jurisdiction under Section 100 of the Code of Civil Procedure will confine itself within the substantial question of law formulated by the court.

8.1 During the course of hearing, none of the learned counsel has proposed any other substantial question of law. As such, this court has proceeded to dispose of the present case on the basis of the substantial questions of law as already had been formulated by this Court. The first

substantial question of law that “*whether on a prayer for perpetual injunction the title deed and mutation record be ignored having dispute in vendors identity?*”. The answer of the substantial question of law should be in negative. As long as the title deed as well as the record of right created in favour of a person stand good, the prayer for granting of perpetual injunction cannot be ignored. Till today, there is no record before this Court that title deed executed in favour of the plaintiff and record of right created in favour of her have been declared as *void ab initio* and *non est*. As such, it is held that plaintiff is entitled to get a decree of perpetual injunction on the basis of title deed and the record of right created in favour of her.

8.2. The second substantial question of law that “*Whether without challenging the Deed of Sale and partition deed of vendor, the sanctity of title be ignored?*”. In my opinion, the answer of the substantial question also should be in negative. There is no record before this Court that the defendant/respondents in this suit have ever raised objection by way of counter claim that the sale deed executed in favour of the plaintiff and the record of right created in favour of her have been challenged and claimed to be cancelled the same. Unless and until, it is challenged and on the basis of such challenge if the said documents are not cancelled, then it should be treated as good in the eye of law and the sanctity of these documents cannot be ignored.

9. I have taken into consideration the submission of learned counsel appearing for the plaintiff/appellant that the sale deed has not been proved in accordance with law. During the course of hearing, I put a specific question to Mr. Rathor, learned counsel for the defendant/respondents whether the sale deed was produced before the court in original is a primary document or not. Learned counsel has firmly submitted that it being a document of primary evidence is admissible in evidence.

This question has been raised in so many appeals as regards evidentiary value of such a document even if it is exhibited.

10. In the instant case, when the sale deed (Exbt.-2) has been introduced in evidence and marked as exhibit, the defendant/respondents has not raised any objection regarding the mode of proof of the said sale deed or to be brought it into the evidence. In the opinion of this Court, in this circumstance, the party, that is the defendant/respondents here-in, who have disputed the document, i.e. the sale deed, as a whole, then, such objection must be raised at the earliest point of time when such deed was introduced in evidence before the trial court.

11. The Privy Council in the case of *Padman Vrs. Hanwanta*, **AIR 1915 PC 111**, [SCC OnLine PC 21] did not permit the appellant to take objection to the admissibility of a registered copy of a Will in

appeal for the first time. It was held that this objection should have been taken in the trial court. Further, it was observed that:- [AIR p.112]

“The defendants have now appealed to His majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar’s office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.”

“21. In this regard, I may again fortify myself from a decision of Privy Council rendered in Bhagat Ram Vrs. Khetu Ram & Anr., 1929, SCC OnLine PC 5: AIR 1929 PC 110, where their Lordships held that when no objection is taken to the admissibility of a document at the trial, it is not necessary to consider whether the document was admissible under the law. Similar view was expressed in the case of Dol Govinda Das Vrs. Makbul Sekh’s infant heir and Ors., 1935 SCC OnLine Cal 142: AIR 1936 Cal. 164] that objection has to be raised at the earliest opportunity as envisaged under Section 5 of the Evidence Act. The said principle of law was further followed by Hon’ble Supreme Court in P.C. Puroshothama Reddiar Vrs. S. Perumal, 1972 (1) SCC 9: AIR 1972 SC 608.

22. In the instant case, admissibility of the certified copy of the sale deed dated 21.04.1980 has not been challenged and only the mode of proof of the certified copy of the said sale deed has been challenged alleging the same to be irregular or insufficient. In the former case, mere marking the document as “an exhibit” shall not exclude the aggrieved party from raising objection regarding its admissibility even at a subsequent stage or even in appeal or revision, but, in the latter case, when the admissibility of the document is not challenged and it is allowed to be brought on record, then, objection to the mode of

*proof cannot be raised at a later stage as a matter of rule of fair play. Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialed by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion but the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adapted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to here- in-above, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court. [Ref: (2003) 8 SCC 752, **R.V.E.Venkatachala Gounder Vrs. Arulmigu Viswesaraswami & V.P. Temple & Anr.**]*

12. Applying the aforesaid principle of law enunciated by the above authoritative decisions, I may easily come to the conclusion that

if the objection is not raised at the earliest by the time when the document was introduced in evidence, then the party opposing the admission of these documents cannot raise objection at a later stage.

13. In view of the above discussions on this point of law, I do not find any merit in the submission of learned counsel appearing on behalf of the defendant/respondents challenging the mode of proof at the second appellate stage. Accordingly, this submission is repelled.

As a corollary, the sale deed and the record of right till today stands good in favour of the plaintiff/appellant.

14. The third substantial question of law is that “*Whether the Ld. Court below appreciated the title deed of Appellant (Exbt-2) and Partition Deed (Exbt-4) in the light of Section 44 of T.P Act?*”

At the outset, I should refer to Section 44 of TP Act which reads as under:-

“44. Transfer by one co-owner--*Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor’s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.*

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

14.1. It is admitted position that partition deed amongst the legal heirs of the original owner, i.e., Majindra Marak had been executed and registered, though two daughters of Majindra Marak being his legal heirs have not been included in the partition deed. But till today, that partition deed has not been challenged by those two daughters and unless and until this partition is cancelled, such partition deed stands good and as long as it stands good, the source of title of the co-owner cannot be challenged. The defendants in the suit are the beneficiaries of the partition deed. They have not challenged the said partition deed by way of any counter claim. In view of this, Section 44 of the TP Act will come into play. Since the partition deed stands good, which is the source of title of Smt. Jatila Das being the wife/inheritor of the co-owner, i.e. late Sachindra Marak is valid in the eye of law till today and on the strength of this valid deed, Jatila Das had transferred the suit land in favour of the plaintiff/appellant and after such transfer the plaintiff/appellant has created a record of her right without any objection from any co-owner including the defendants, in view of this, the title has been divested to the plaintiff. The plea taken by the learned first appellate court that, the sale deed, i.e. Exbt.-2 is liable to be treated as illegal and void *ab initio* is only misdirected and unwarranted for the reason that minor has not come forward to challenge the said sale deed. Moreso, there is specific averment that there is a partition of the total land which has been inherited to Jatila

Das and Sumit Marak due to the death of Lt. Sachindra Marak in equal shares and Jatila Das had sold the land from her share. There is no evidence or there is no issue framed by the courts below whether Jatila Das had sold that land in excess of her share. As such, this court sitting in second appeal will not enter into this fact in question.

15. In the light of above, in my opinion, the plaintiff is entitled to get a decree of declaring right, title and interest over the suit land and also a decree of perpetual injunction. Accordingly, it is ordered that the plaintiff has acquired right, title and interest over the suit property and she is entitled to get a decree of perpetual injunction. Accordingly, it is ordered that the defendants are permanently and perpetually restrained from interfering with the peaceful possession of the plaintiff over the suit land.

Accordingly, the instant second appeal stands allowed. As a corollary, the judgments and decrees passed by the learned courts below as afore-stated, stand set aside and quashed.

Draw a decree accordingly.

Pending application(s), if any, shall also stand disposed.

Send down the LCRs.

JUDGE