

IN THE COURT OF SHAUKAT AHMAD KHAN,
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 16/13 OF 2022
DATE OF INSTITUTION : 05.12.2022
DATE OF DECISION : 23.12.2022

1. GUL AJAB KHAN S/O NOOR MUHAMMAD
 2. ZAFAR KHAN S/O NOOR MUHAMMAD
 3. SHAUKAT KHAN S/O KHIALI KHAN
 4. WAJID KHAN S/O KHIALI KHAN
 5. FAIZ ULLAH S/O KHIALI KHAN
- ALL RESIDENTS OF TAPA UMARZAI, VILLAGE LAK
KANRE, CASTE SHEIKHAN, DISTRICT ORAKZAI

.....(APPELLANTS)

-VERSUS-

1. SHEERIN S/O MAHBAL HUSSAIN
 2. SYED REHMAN S/O MUHAMMAD DIN
- ALL RESIDENTS OF TAPA UMARZAI, VILLAGE LAK
KANRE, CASTE SHEIKHAN, DISTRICT ORAKZAI
3. CIVIL JUDGE-II, TEHSIL COURT KALAYA, DISTRICT
ORAKZAI

..... (RESPONDENTS)

Present : Aziz Ur Rehman Advocate for appellants
: Sana Ullah Khan Advocate for respondents no. 1 & 2.

JUDGEMENT
23.12.2022

Impugned herein is the judgement/decreed dated 17.11.2022 of learned Civil Judge-II, Tehsil Kalaya, District Orakzai vide which suit of the appellants/plaintiffs has been dismissed.

- (2). The appellants/plaintiffs through a civil suit before the learned trial court sought declaration-cum-perpetual injunctions with possession of the suit property named as "Tagha Patay" measuring 02 Kanals and "Soor Patay" measuring 05 Kanals, boundaries of which are detailed in the headnote of the plaint, to the fact that they are owners in possession of the suit property, being devolved upon them from their predecessor Noor

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Muhammad while the respondents/defendants have got no concern with the suit property. That during operation of law enforcement agencies against Taliban, appellants/plaintiffs migrated to Kohat and the respondents/defendants forcefully occupied the suit property. The respondents/defendants were summoned who appeared before the learned trial court and contested the suit on the ground, that the suit property named as "Soor Patay" has been purchased by defendant No. 1, who was abroad at that time, through defendant No. 2 against a sale consideration of Rs. 72000/- on 29.06.2003, while suit property named as "Tagha Patay" has been purchased against a sale consideration of Rs. 85000/- on 10.07.2003 and that in that respect, the proceedings of sale transactions have been recorded in an audio cassette. The respondents/defendants also raised various other legal and factual grounds. Pleadings of the parties were culminated into the following issues;

- I. Whether the plaintiffs have got a cause of action?
- II. Whether the plaintiffs are estopped to sue?
- III. Whether the suit of the plaintiffs is time barred?
- IV. Whether the suit property is the ancestral property of the plaintiffs and the defendants have got nothing to do with the same?
- V. Whether the plaintiffs are entitled to the possession of the suit property?
- VI. Whether the suit property has been purchased by the defendants on 29.06.2003 and 10.07.2003 through cash payment of Rs. 72000/- and 85000/- respectively and have received the possession of the same from the plaintiffs and the defendants are the owners in possession of the suit property since 2003?

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VII. Whether the plaintiffs are entitled for decree as prayed for?

VIII. Relief.

Parties were provided with opportunity to produced their evidence. Accordingly, appellant/plaintiff Gul Ajab Khan appeared in the witness box as PW-1 and produced Payo Khan and Mir Ajab Khan as PW-2 and PW-3 in support of their contention. While the respondents/defendants produced Syed Rehman, Sheerin Khan, Badshah Khan, Khan Muhammad Khan and Gulab Khan as DW-1 to DW-5.

After conclusion of the trial, the learned trial court heard the arguments and dismissed the suit of appellants/plaintiffs. The appellants/plaintiffs, being aggrieved of the impugned judgement/decree, filed the instant appeal.

(3). I heard arguments and perused the record.

(4). It is evident from the record that as per pleadings of the parties, the issues required to be decided are; that whether the suit property is the ancestral property of the appellants/plaintiffs and that whether the suit property has been purchased by respondent/defendant No. 1 through respondent/defendant No. 2, via two different sale transactions of 29.06.2003 and 10.07.2003.

Admittedly, the ownership of the appellants/plaintiffs has not been denied by the respondents/defendants in their written statements, rather they claimed the suit property to have purchased the same. So, it is the sole burden of the respondents/defendants to prove the sale transaction regarding

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land named as "Soor Patay" of 29.06.2003 and the sale transaction regarding the land named as "Tagha Patay" of 10.07.2003. The respondents/defendants, in order to discharge their burden, have produced Badshah Khan, Khan Muhammad Khan and Gulab Khan as DW-3 to DW-5 respectively, while the respondent/defendant No. 1 and respondent/defendant No. 2 have appeared in the witness box as DW-1 and DW-2 respectively. The DW-3, Badshah Khan and DW-4, Khan Muhammad Khan are the alleged witnesses of sale transaction of 29.06.2003 regarding "Soor Patay" against the sale consideration of Rs. 72000/-. DW-3 has stated that on 29.06.2003 at esha vela, the said transaction was effected at the Hujra of Nasar Khan against the sale consideration of Rs. 72000/- in the presence of Noor Afzal, Nawab Khan, Munawar Khan, Haji Meer Rehman, Khan Muhammad and Said Rehman etc. That at the time of sale transaction, appellants/plaintiffs Gul Ajab Khan and Zafar Khan were also present and that the sale consideration was paid in the morning. He has further stated that an audio regarding the sale transaction was also recorded in a cassette. The DW-4/Khan Muhammad Khan is also the alleged witness of sale transaction of 29.06.2003 regarding the land named "Soor Patay" against sale consideration of Rs. 72000/-. He has also stated that on 29.06.2003 at esha vela at the Hujra of Noor Afzal on 29.06.2003 the sale transaction was effected against the sale consideration of Rs. 72000/-, that at the time of transaction Meer Rehman, Nasar


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Khan, Sameen Khan, Nawab along with other people and the parties were also present, and that in the morning Said Rehman paid Rs. 72000/- to Zafar etc. He has also stated that an audio was recorded regarding the sale transaction. DW-5/Gulab Khan is the alleged witness of sale transaction of 10.07.2003 regarding "Tagha Paty" against the sale consideration of Rs. 85,000/. He has stated that Said Rehman, the respondent/defendant No. 2, called him to Gul Plaza Kohat, where Said Rehman, Munawar Khan, Meer Rehman Haji, Zafar Khan, Shaukat Khan and Gul Ajab Khan were present, the transaction was effected and audio was recorded. That later on the sale consideration was paid in the medical store of Said Rehman. The respondent/defendant No. 2 has appeared in the witness box as DW-1 wherein he has stated that appellants/plaintiffs Gul Ajab Khan and Zafar Khan contacted him for sale of land named as "Soor Paty", at which he contacted his uncle Shereen Khan, the respondent/defendant No. 1, who agreed to purchase the same. Thereafter, he contacted the whole family of appellants/plaintiffs who agreed to sell the land, and on 29.06.2003 at esha vela the transaction was effected at the Hujra of Noor Afzal and on 29.06.2003 he paid the sale consideration in the morning. That in this respect an audio was recorded regarding the proceedings of sale transaction which was produced before the court as Ex. DW 1/1. After some time, Zafar Khan and Shaukat Khan, the appellants/plaintiffs, again contacted him for purchase of land named as "Tagha Paty", at



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which again he contacted his uncle respondent/defendant No. 1 and the whole family of appellants/plaintiffs and that on 10.07.2003 the transaction was effected at Gul Plaza Kohat, while the amount of Rs. 85000/- was paid by him in his own shop at Sheikhan in the presence of Nasar Khan, Munawar Khan, Meer Rehman and Haji Gulab to Gul Ajab Khan, Zafar Khan and Shaikat Khan. The respondent/defendant No. 1 has appeared in the witness box as DW-2 wherein he has stated that the suit property has been purchased by him through his nephew Said Rehman who had received money from his home and had paid the same to the appellants/plaintiffs and that since then he is in the possession of the suit property.

Keeping in view the pleadings of the parties coupled with the aforementioned evidence brought on record in respect of the purchase of the suit land, it is admitted on record that the suit property was originally owned by Noor Muhammad, the predecessor of appellants/plaintiffs, who was alive at the time of alleged purchase of the suit land by respondent/defendant No. 1 through respondent/defendant No. 2. It is also admitted on record that the suit property has allegedly been purchased by respondents/defendants from appellants/plaintiffs No. 1 to 3 and not from Noor Muhammad. In these circumstances the core issue is, that whether the appellants/plaintiffs No. 1 to 3, the would-be successors of Noor Muhammad, at the time of alleged sale transaction, could validly sell the property belonging to Noor


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Muhammad, the would-be predecessor, at that time. The plain answer in the light of prevalent law to the question is a big No; however, in this respect the respondents/defendants and that too in their evidence instead of their pleadings, have alleged that the whole family of the appellants/plaintiffs was taken on board regarding the sale transaction but not a single word has been spoken regarding the consultation or consent of Noor Muhammad, the original owner of the suit property. The learned counsel for the respondents/defendants during the course of arguments agitated that as per prevalent customary laws in ex-FATA, the elder son could sell the land of his father, even during the life-time of his father but despite being asked to produce any such customary law on the point, he failed to produce the same. Be that as it may, even if the existence of such a customary law is presumed on the point, the same being in conflict with the constitution of Pakistan and the Islamic law, would have got no effect upon the rights of appellants/plaintiffs.

With respect to proof of the sale transactions, the respondents/defendants have produced audio cassette but the same being not examined through FSL regarding the identification of voice and its genuineness, has got no value in the eyes of law; hence, not admissible in evidence. Further, as per statement of respondent/defendant No. 2 as DW-1, the sale transaction regarding "Soor Patay" has been effected at the Hujra of Noor Afzal on 29.06.2003 at esha vela while the sale

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consideration has been paid on 29.06.2003 at morning time. This fact has also been endorsed by DW-3 and DW-4 in their statements. As such, it is admitted on record that the sale consideration has not been paid at the time of alleged sale transaction on 29.06.2003 in evening time. The statements of all the three PWs are vague regarding the factum of payment of sale consideration as to the fact that whether the sale consideration was paid prior to sale transaction or it has been paid the next morning and that in whose presence the amount of sale consideration was paid. With respect to alleged sale transaction regarding the land named as "Tagha Patay", the sale transaction has allegedly been effected at Gul Plaza Kohat while sale consideration has allegedly been paid at the medical store of respondent/defendant No. 1 at Sheikhan, here too the payment of the sale consideration is vague as to the fact that when and in whose presence the amount of sale consideration has been paid. Furthermore, out of the witnesses of respondents/defendants, DW-3, is the real uncle while DW-5 is the real brother of respondent/defendant No. 1.

(5).

Hence, in view of what is discussed above, it is held that the appellants/plaintiffs No. 1 to 3 were having no legal capacity to sell the land of their would-be predecessor during his life time and the respondents/defendants failed to prove that either Noor Muhammad, the original owner of the suit property was consulted or his consent was obtained in this respect.

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Similarly, respondents/defendants also failed to prove the alleged sale transactions of 29.06.2003 and 10.07.2003. While on the other hand, it is admitted from record that appellants/plaintiffs, being successors of Noor Muhammad, the original owner of the suit property, are owner of suit property while the learned trial court has incorrectly relied upon an audio recording and has overlooked the law on the point; therefore, on acceptance of the instant appeal of the appellants/plaintiffs, the impugned/decreed dated 17.11.2022 of the learned Civil Judge-II, Tehsil Kalaya, District Orakzai is set aside and the suit of the appellants/plaintiffs is decreed as prayed for. File of this court be consigned to Record Room while record be returned. Copy of this judgement be sent to learned trial court.

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CERTIFICATE

Certified that this judgment consists of nine (09) pages.

Each page has been read, corrected wherever necessary and signed by me.

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