

92

IN THE COURT OF REHMAT ULLAH WAZIR,
SENIOR CIVIL JUDGE, ORAKZAI AT BABER MELA

Civil Suit No. 08/1 of 2023
Date of Original Institution: 07.01.2020
Date of Transfer In: 03.01.2023
Date of Decision: 12.01.2023

1. Syed Zakir Hussain s/o Syed Muhammad Asghar
R/O Qoum Bar Muhammad Khel, Tappa Baba Nawasi,
Kharkai, Tehsil: Lower, District: Orakzai
(Plaintiff)

VERSUS

1. Syed Hussain Asghar s/o Syed Muhammad Asghar
2. Syed Laal Hussain s/o Syed Muhammad Asghar
3. Syed Mushtaq Hussain s/o Syed Hussain Asghar
4. Syed Sajid Hussain s/o Syed Hussain Asghar
All R/O Qoum Bar Muhammad Khel, Tappa Baba Nawasi,
Kharkai, Tehsil: Lower, District: Orakzai
(Defendants)

**SUIT FOR DECLARATION-CUM-PERPETUAL &
MANDATORY INJUNCTION AND POSSESSION THROUGH
PARTITION**

JUDGEMENT:

REHMAT ULLAH WAZIR
Senior Civil Judge/JM,
Orakzai at Baber Mela

Plaintiff Syed Zakir Hussain has brought the instant suit for declaration-cum-perpetual and mandatory injunction and possession through partition against the defendants, seeking therein that the plaintiff and defendant No. 01 & 02 are brothers inter-se, whereas, defendant No. 03 & 04 are the children of the defendant No. 01 and the nephews of the plaintiff. That the plaintiff and defendant No. 01 & 02 being brothers inter-se are the joint owners to the extent of their shari shares in the suit property. That the

93

83

ancestor of the parties namely Syed Muhammad Asghar had given the suit property to the plaintiff and defendant No. 01 & 02 and respective share to other heirs who are in the possession of the given shares. That the defendants are denying the ownership of the plaintiff to the extent of his share and have forcibly taken the possession of the suit property including the suit house during the residence of the plaintiff abroad for earning his livelihood. That the plaintiff along with his sons have taken special oath for their share in the suit property through jirga, Dated: 25.03.2019. That several jirgas have been conducted between the parties w.r.t the suit property, in which the decisions have been made according to traditions but the defendants are refusing to act upon the same. That the defendants were asked time and time again to admit the claim of the plaintiff, but they refused, hence, the present suit.

REHMAT ULLAH WAZIR
Senior Civil Judge
Orakzai at Baher Mela

Defendants were summoned through the process of the court in whom the defendant No. 02 submitted cognovit in favour of the plaintiff while the rest of the defendants submitted their written statement in which they denied not only the claim of the plaintiff but also raised various legal and factual objections.

Divergent pleadings of the parties were reduced into the following issues;

Issues:


1. Whether the plaintiff has got a cause of action?
2. Whether the suit of the plaintiff is time barred?
3. Whether the plaintiff is estopped to sue?
4. Whether the suit property is the joint ownership of the plaintiff and defendants, being their ancestral property and the plaintiff is entitled to his shari share in the suit property?
5. Whether the plaintiff has handed over his entire share in the suit property to the defendants through agreement deed dated: 25.04.1986 and in consideration of the same, he has received 16 Kanals of property at Meetha Khan, Kohat from the defendants, which he gave to his wife?
6. Whether the plaintiff is entitled to the decree as prayed for?
7. Relief.

REHMAT ULLAH WAZIR
 Senior Civil Judge/JM,
 Orakzai at Babes Mela

The parties were given ample opportunity to produce their respective evidence.

The plaintiff in support of his contention produced witnesses, in whom the one Muhammad Asif, Clerk, Tehsildar Office, Lower Orakzai appeared as PW-01 but nothing tangible in support of the plaint has been produced by him. Further, Mr. Syed Qanoon Shah appeared as PW-01(A), who supported the stance of the plaintiff as a jirga member w.r.t the taking of special oath by the plaintiff and his sons in support of their claim in the suit property on

25.03.2019 and actually taken by them on the second date on 25.03.2022. He has been cross-examined in this respect but nothing tangible has been extracted out of him during cross-examination. Further, Mr. Syed Muhammad, also a jirga member appeared as PW-02, who also supported the stance of the plaintiff w.r.t the taking of the special oath in support of his claim in the suit property. He has also been cross-examined in this respect but nothing tangible has been extracted out of him during cross-examination. Further, Syed Yad-Ul-Hussain, also a jirga member appeared as PW-03, who fully corroborated the PW-01(A) and PW-02. Further, Mr. Syed Muhammad Idrees, a son and special attorney of the plaintiff appeared as PW-04, who produced jirga decision, dated: 23.11.2018, which is Ex.PW-4/1, whereby the plaintiff and his sons took special oath on 25.03.2019 in support of their claim in the suit property and further fully narrated the same story as in the plaint. He has been cross-examined but nothing tangible has been extracted out of him during cross-examination. Further, Mr. Syed Aan Jan, also a jirga member appeared as PW-05, who fully supported the version of the plaintiff w.r.t special oath. He has been cross-examined but nothing tangible has been extracted out of him during cross-examination.


REHMAT ULLAH WAZIR
 Senior Civil Judge,
 Orakzai at Baber Mela

In order to counter the claim of the plaintiff, the contesting defendants produced only one witness as Mr. Syed Hussain Asghar, the defendant No. 01 himself appeared as DW-01, who produced the jirga deed/decision, Dated: 25.04.1986, which is Ex.DW-1/1, whereby the share of the plaintiff in the suit property was given to the defendant No. 01 and further fully narrated the same story as in the written statement. But admitted during cross-examination that the father of the parties died in the year 2005. That the alleged family partition was done by the parties themselves and no witness was present in the same. That he has no mutation/written proof regarding the ownership of the property situated at Meetha Khan, Kohat. That there is no mention of the land at Meeta Khan, Kohat in the Ex.DW-1/1. The cash/price/share of the coal being extracted out of the suit property is also being received by the plaintiff and he has never objected over the reception of the same by the plaintiff.

My issue-wise findings are as under;

Issues No. 02:

The contesting defendants in their written statement raised the objection that suit of the plaintiff is time barred but I am the opinion that as per Article 120 of the Limitation Act, 1908 there is a period of 06 years for the

REHMAT ULLAH WAZIR
Senior Civil Judge, JM,
Orakzai at Baber Meetha

institution of such like suits but the aforesaid Limitation Act, 1908 is extended to the erstwhile FATA on 31/05/2018 through the 25th constitutional amendment and the same has become operational from the aforesaid date while the instant suit has been filed on **07.01.2020**. Thus, the same is well within time. The issue is decided in negative.


Issues No. 03

The contesting defendants alleged in their written statement that the plaintiff is estopped to sue but later on failed to prove the same, hence, the issue is decided in negative.

Issues No. 04 & 05:

Both these issues are interlinked, hence, taken together for discussion.

The plaintiff alleged in his plaint that the plaintiff and defendant No. 01 & 02 are brothers inter-se, whereas, defendant No. 03 & 04 are the children of the defendant No. 01 and the nephews of the plaintiff. That the plaintiff and defendant No. 01 & 02 being brothers inter-se are the joint owners to the extent of their shari shares in the suit property. That the ancestor of the parties namely Syed Muhammad Asghar had given the suit property to the plaintiff and defendant No. 01 & 02 and respective share to other heirs


REHMAT MULLAH WAZIR
 Senior Civil Judge
 Orakzai at Baber Mela

who are in the possession of the given shares. That the defendants are denying the ownership of the plaintiff to the extent of his share and have forcibly taken the possession of the suit property including the suit house during the residence of the plaintiff abroad for earning his livelihood. That the plaintiff along with his sons have taken special oath for their share in the suit property through jirga, Dated: 25.03.2019. That several jirgas have been conducted between the parties w.r.t the suit property, in which the decisions have been made according to traditions but the defendants are refusing to act upon the same. That the defendants were asked time and again to admit the claim of the plaintiff, but they refused, hence, the present suit.

In order to prove his claim, the plaintiff produced

REHMAT ULLAN WAZIR
Senior Civil Judge JM,
Orakzai at Baber Mera

witnesses, who appeared as PW-01 to PW-06, in whom the PW-01 to PW-03 and PW-05 & 06 have though supported the stance of the plaintiff especially regarding the fact that he is the brother of the defendant no. 01 & 02 but the same is never denied by the contesting defendants and what the rest they have deposed is something irrelevant to the main controversy. The main witness is the PW-04, who is the son and special attorney for the plaintiff, have fully narrated the same story as in the plaint and have denied the alleged agreement deed, Dated: 25.04.1986. He has also asserted a


new fact that the plaintiff is receiving his share in the income out of the coal mining in the disputed area but the same have never been contradicted by the contesting defendants in his cross-examination.

So far as the evidence of contesting defendants is concerned, the defendant no. 01 have only himself appeared as DW-01, who produced the alleged agreement deed, Dated: 25.04.1986 which is Ex.DW-1/1, whereby the plaintiff have given his entire share in the suit property to this defendant in lieu of the property measuring 16 kanals he received from this defendant for his wife at Meetha Khan, Kohat and further narrated the same story as in the written statement. During cross-examination he has admitted the fact that the plaintiff


is his brother and further that their father died in the year 1951. Further, that he has neither a mutation nor any written proof regarding the ownership of the property at Meetha Khan, Kohat. Further, that the plaintiff receives his share in the income out of the coal mining at the disputed property and he has never objected over the same.

Arguments heard and record perused.

After hearing of arguments and perusal of the record, I am of the opinion that **firstly**, it is established and also never denied fact that the plaintiff is the brother of the defendants, **secondly**, it is also established that the suit


 REHMAT ULLAH
 Senior Civil Judge, J.M.,
 Orakzai at Baber, 2005

property is the ancestral property of the parties and their father died in the year 2005 while the contesting defendants claim/allege that the plaintiff gave his share to them in the ancestral property through agreement deed Ex.DW-1/1, Dated: 25.04.1986, meaning thereby that the plaintiff gave his share to the contesting defendants before opening of the inheritance i.e before the death of the father of the parties which is legally something not sustainable even if presumed to be true as the same was even not devolved upon the plaintiff by that time, **thirdly**, so far as the alleged agreement deed, Dated: 25.04.1986 is concerned, there is no mention of any land situated at Meetha Khan, Kohat which would have been received by the plaintiff in lieu of his surrender to the extent of his share in the suit property, meaning thereby that the same agreement is lacking consideration which is legally **life blood** for an agreement and in addition to this, the contesting defendant no. 01 when appeared as DW-01, has admitted that neither he has a mutation of the property at Meetha Khan, Kohat allegedly given by him to the plaintiff nor he has any written proof in this respect, **fourthly**, no witness of the alleged agreement deed Ex.DW-1/1, Dated: 25.04.1986 has been produced by the contesting defendants in support of the same, **fifthly**, it is alleged by the plaintiff and admitted by the contesting defendant no. 01 as DW-01


REHMAT ULLAH WAZIR
 Senior Civil Judge/JM,
 Orakzai at Baber Meetha

that the plaintiff is receiving his share in the income out of the coal mining in the disputed property and he has never objected over the same.

Thus, in view of the aforesaid findings, the plaintiff is entitled to his shari share in the suit property and the contesting defendants failed to prove that the plaintiff has given his shari share to them in the suit property through the alleged agreement deed, Dated: 25.04.1986.

Therefore, the issue no. 04 is decided in positive while the issue no. 05 is decided in negative.

Issues No. 01 & 06:

Both these issues are interlinked, hence, taken together for discussion.

As sequel to my findings on issue no. 04 and 05, the plaintiff has got a cause of action and thus, he is entitled to the decree as prayed for. Hence, both these issues are decided in positive.


Relief

As sequel to my above issue-wise findings, suit of the plaintiffs is hereby **preliminary decreed** as prayed for with costs.

REHMAT MULLAH
Senior Civil Judge, Jm,
Orakzai at Baber Mela

File be consigned to the Record Room after its necessary completion and compilation.


Announced
12.01.2023



(Rehmat Ullah Wazir)
Senior Civil Judge,
Orakzai (at Baber Mela)

CERTIFICATE

Certified that this judgment of mine consists of eleven (11) pages, each has been checked, corrected where necessary and signed by me.



(Rehmat Ullah Wazir)
Senior Civil Judge,
Orakzai (at Baber Mela)