

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

CIVIL APPEAL NO. : 1/13 OF 2023
DATE OF INSTITUTION : 02.01.2023
DATE OF DECISION : 31.01.2023

1. SUBIDAR JAMEEL S/O LALBAT KHAN
 2. PIR BADSHAH S/O LALBAT KHAN
 3. ZIRMAT KHAN S/O LALBAT KHAN
 4. TALIB JAAN S/O LALBAT KHAN
 5. ILYAS KHAN S/O SARBAT KHAN
 6. MAWEEZ KHAN S/O SARBAT KHAN
- R/O VILLAGE IBRAHIM ZONA TAPA HAIDER KHEL, CASTE
MISHTI, TEHSIL LOWER, DISTRICT ORAKZAI
.....(APPELLANTS)

-VERSUS-

1. KASHMIR KHAN S/O HAJI NIAZBAT KHAN
 2. RAEES KHAN S/O HAJI NIAZBAT KHAN
 3. EID BADSHAH S/O SAMANDAR KHAN
 4. MUHAMMAD YOUNIS S/O MUZAFAR KHAN
 5. FAZAL SUBHAN S/O SUBIDAR AKHTAR JAAN
 6. ABDUL QAYYUM S/O MIR MAT ULLAH
 7. GUL HABIB S/O KHIAL
- R/O VILLAGE IBRAHIM ZONA TAPA HAIDER KHEL, CASTE
MISHTI, TEHSIL LOWER, DISTRICT ORAKZAI
..... (RESPONDENTS)

Present: Mr. Abdul Qayyum and Abid Ali Advocates for appellants
: Mr. Sana Ullah Khan Advocate for respondents

JUDGEMENT
31.01.2023

Impugned herein is the judgment/decreed dated 21.12.2022 of the learned Civil Judge-I, Tehsil Kalaya, District Orakzai vide which suit of the appellants/plaintiffs for declaration-cum-permanent injunction and possession as alternative has been dismissed.

- (2). The appellants/plaintiffs through a civil suit before the learned trial court sought declaration with permanent injunctions to the fact that the appellants/plaintiffs are owners in possession of the suit property measuring 06/07 Jirabs since their forefathers as detailed in the headnote of the plaint marked as A, B, C, D in the sketch annexed with the plaint

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while the respondents/defendants having their houses and land on eastern side of the suit property, marked as E, F, G, H in the sketch annexed with the plaint, have got no concern with the suit property. As per contents of plaint, a dispute between the parties over the suit property has been resolved in favour of the appellants/plaintiffs through oath on Holy Quran. That the respondents/defendants have got no concern with the suit property and that they have got no right to alienate the same through exchange or make interference in the suit property. The respondents/defendants no. 1 to 4 contested the suit vide their written statements wherein they contended that they are owners in possession of the suit property vide a family partition between the parties in 2002, that they have exchanged the same with respondents/defendants no. 5 to 7 vide a deed dated 02.05.2019 and that a portion of the suit property has also been transferred for construction of a veterinary hospital and a solar tube well. The respondents/defendants also raised various other legal and factual grounds. Pleadings of the parties were culminated into the following issues;

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- I. Whether plaintiffs have got a cause of action?
- II. Whether the suit of plaintiffs is within time?
- III. Whether this court has got jurisdiction to entertain the suit of plaintiffs?
- IV. Whether the suit of plaintiffs is hit by res-judicata?
- V. Whether the suit of plaintiffs is bad due to non-joinder and mis-joinder of the parties?

- VI. Whether plaintiffs are estopped to sue?
 - VII. Whether plaintiffs are owners in possession of suit property?
 - VIII. Whether suit property is the ancestral property of plaintiffs?
 - IX. Whether family partition between the parties was affected in the year 2002 as a result of which property situated at Mishti Bazar was given to defendant no. 1 to 4 and property situated at Ibrahim Zona, Mishti Mela was given to plaintiffs?
 - X. Whether the plaintiffs are entitled for decree as prayed for?
 - XI. Relief.
- (3). Parties were given opportunity to produce evidence.

Accordingly, appellant/plaintiff No. 1 as attorney for rest of the appellants/plaintiffs appeared in the witness box as PW-1. They also examined Sarwar Shah and Syed Janan as PW-2 and PW-3 respectively. On the other hand, respondent/defendant No. 1 as attorney for respondents/defendants No. 2 to 4 appeared as DW-1. Naseeb Gul and Akhtar Gul also appeared as DW-2 and DW-3 respectively.

After closure of evidence of parties, the learned trial court heard the arguments and dismissed the suit. Appellants/plaintiffs, being aggrieved of the impugned judgment, filed the instant appeal.

- (5). The respondents/defendants were served notices in response of which contesting respondents/defendants no. 1 to 4 appeared and the case was fixed for final arguments; however, counsel for the appellants/plaintiffs submitted


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application for amendment in pleadings or withdrawal of suit with permission to file a fresh one. Reply of the same was submitted by respondents/defendants.

(6). Arguments on application as well as on main appeal heard and the record perused.

(7). **Application of the appellants/plaintiffs for amendment of pleadings/withdrawal of suit with permission to file a fresh one:**

As per contention of the appellants/plaintiffs, they have been non-suited on the ground, that all the LRs of the common predecessor of the parties, being necessary parties, have not been impleaded in the suit and the suit property has not been claimed as jointly owned by the parties, in the headnote of the plaint as against version of the appellants/plaintiffs in their evidence. The appellants/plaintiffs claimed that these are formal defects for which either they may be allowed to amend the plaint or in alternate they may be allowed to withdraw the suit with permission to file a fresh one. The respondents/defendants contested the application on the ground, that the appellants/plaintiffs were in knowledge of these defects from the very inception of the suit and, after dismissal of their suit they want to fill the lacunas which cannot be allowed at this belated stage.


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Keeping in view the aforementioned contention of the parties coupled with the pleadings and evidence led by the parties, it is observed that no doubt all the LR's of the common predecessor of the parties have not been impleaded in the suit and the suit property has not been specifically claimed as jointly owned by the parties in the plaint; however, both these defects are formal in nature and cannot operate to deprive the appellants/plaintiffs of the decree if they are otherwise entitled to the same on the basis of merits specially at this belated stage where the parties have gone through a protracted round of litigation for about more than 02 years.

Hence, in view of what is discussed above, the application of appellants/plaintiffs is dismissed.

Main Appeal:


The legal objections of the respondents/defendants regarding limitation, jurisdiction, res-judicata and estoppel have been decided against the respondents/defendants regarding which the respondents/defendants have not submitted any cross objection. So far, non-joinder of the necessary parties is concerned, admittedly all the LR's of the common predecessor of the parties have not been impleaded in the suit and this issue has rightly been decided by the learned trial court against the appellants/plaintiffs. With respect to factual position, issues no. 7, 8 and 9 have been

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framed which involved common questions of fact and law; therefore, taken together for discussion.


The claim of the appellants/plaintiffs as per contents of plaint is, that the suit property shown in the sketch annexed with the plaint, with the alphabets as A, B, C, D and E, F, G, H is the ownership and exclusive possession of the appellants/plaintiffs to the extent of land shown as A, B, C, D while the respondents/defendants are owner in possession of the land shown as E, F, G, H. On the other hand, the respondents/defendants no. 1 to 4 in their written statement claimed the suit property as their exclusive ownership on the basis of family partition between the parties in 2002 which has been exchanged by them with respondents/defendants no. 5 to 7. They further claimed that out of the suit property they have transferred some of the land for construction of a veterinary hospital and a solar tube well in lieu of employments for respondents/defendants no. 3 and 4.

In order to prove their stance, appellant/plaintiff no. 1 as attorney for the rest of appellants/plaintiffs appeared in the witness box as PW-1, wherein he changed his stance by claiming the suit property as jointly owned by the parties, stating that the suit property was Hindu evacuee property regarding which there was enmity of the parties, that some of the land has been transferred to a veterinary hospital in lieu of two employments for the respondents/defendants and one


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for the appellants/plaintiffs. The appellants/plaintiffs also produced two other witnesses i.e., Sarwar Shah as PW-2 and Syed Janan as PW-3. Both of them supported the contention of appellants/plaintiffs to the extent that the suit property is jointly owned by the parties; however, in possession of respondents/defendants no. 1 to 4.

The respondents/defendants in support of their contention produced respondent/defendant no. 1 as attorney for respondents/defendants no. 2 to 4, as DW-1 while Nasir Gul and Akhtar Gul were examined as DW-2 and DW-3 respectively. Respondents/defendants no. 1 to 4 in their evidence also deviated from the pleadings and claimed the suit property as their exclusive ownership instead of jointly owned by the parties, on the pretext that there was enmity of respondents/defendants no. 1 to 4 with Gul Habib etc., that he has inherited the suit property from his father, that some of the land has been transferred to the hospital and tube well by their father in lieu of employments. However, in cross examination when he was asked as to how his father came to ownership of the suit property, he stated that he is unaware of the facts as to whether the suit property was the evacuee property of Hindus or as to whether it was inherited by the parties from their grandfather or as to whether it was purchased by his father. He admitted that there are three employments in veterinary hospital out of which two have


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been allotted to the appellants/plaintiffs, but he does not know that as to whether these employments were given to the parties on the basis of having transferred land to the veterinary hospital or otherwise. The other two witnesses also supported the contention of respondents/defendants no. 1 to 4 that they are in possession of the suit property and it has been inherited by them from their father but they also shown themselves unaware of the fact that whether the suit property was evacuee property or as to how the respondent/ defendants no. 1 to 4 became owners of the suit property.

Keeping in view the pleadings and evidence of the parties, it is observed that admittedly the appellants/plaintiffs and contesting respondents/defendants no. 1 to 4 are relatives, the suit property has claimed by the appellants/plaintiffs as evacuee property occupied by the predecessor of the parties but the respondents/defendants claimed the same to be the exclusive ownership of the father of respondent/defendant no.

1 but he is unaware of the fact that as to how his father has become exclusive owner of the same. The existence of a veterinary hospital and a solar tube well in the suit property is also admitted between the parties. Both the parties claimed that the land to veterinary hospital has been transferred by them in lieu of employment but in cross examination both the appellant/plaintiff no. 1 and respondent/defendant no. 1 admit that two employments have been allotted to


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respondents/defendants while one of the employments has been given to the appellants/plaintiffs. Regarding the fact that whether the suit partition between the parties as claimed by the respondents/defendants no. 1 to 4, not an iota of evidence either oral or documentary is brought on record.


In view of aforementioned discussion, it is concluded that the appellants/plaintiffs failed to prove that they are exclusive owners in possession of the land marked as A, B, C, D in the sketch while the respondents/defendants no. 1 to 4 also failed to prove that they are exclusive owners of the suit property on the basis of family partition. However, keeping in view the facts that the claim of the appellants/plaintiffs to the extent that the suit property was evacuee property occupied by the predecessor of parties has not been denied by the respondents/defendants in their evidence, that the respondents/defendants failed to bring on record an iota of evidence regarding their changed version to the extent of exclusive ownership of the suit property of their father, that the parties are relative hailing from common predecessor and that employments in veterinary hospital have been allotted to both the parties in lieu of the transfer of land, show that the suit property is jointly owned by parties. Moreover, respondents/defendants no. 1 to 4 in their written statements have also indirectly admitted the suit property as

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jointly owned by parties, however partitioned, which they failed to prove.

(8). Hence, as the appellants/plaintiffs failed to prove that they are exclusive owners in possession of a land marked as A, B, C, D in the sketch annexed with plaint; therefore, the learned trial court has rightly decided both issues no. 7 and 8 against the appellants/plaintiffs. Similarly, respondents/defendants have also failed to prove the factum of private partition; therefore, issue no. 9 has also been rightly decided against the respondents/defendants. But while deciding the fate of suit property the learned trial court has escaped to appreciate the evidence on file regarding joint ownership of the suit property by the parties including other LRs of their common predecessor. Therefore, the decree is modified and it is declared that the suit property is jointly owned by the parties including other LRs of their common predecessor with exclusive possession of the same with respondents/defendants no. 1 to 4. Any of the parties may seeks partition of the same. File of this court be consigned to Record Room while record be returned. Copy of this judgement be sent to learned trial court for information.


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CERTIFICATE

Certified that this judgment consists of ten (10) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 31.01.2023


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