

In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI AT BABER MELA

Civil Appeal No. CA-24/13 of 2022

Date of institution: 10.12.2022

Date of decision: 15.02.2023

Hayat Hussain and 7 others, all residents of Qaum Ali Khel, Tappa Mirwas Khel, village Bakha, Tehsil Upper, District Orakzai.

..... (**Appellants/plaintiffs**)

...Versus...

Gulistan son of Jan Gul and one other, resident of Qaum Ali Khel, Tappa Mirwas Khel, Tehsil Upper and District Orakzai.

..... (**Respondents/defendants**)

**Appeal against Judgement, Decree and Order dated 27.10.2022,
passed in Civil Suit No. 52/1 of 2022.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellants/plaintiffs against the Judgment, Decree & Order dated 27.10.2022, passed by learned Senior Civil Judge, Orakzai in Civil Suit bearing No.52/1 of 2022; whereby, suit of the appellants/plaintiffs with the title of Hayat Hussain etc. vs Gulistan etc. was dismissed.

2. Briefly stated facts of the case are such that plaintiffs Hayat Hussain and 07 others (Appellants herein) have filed suit against the defendants (respondents herein) for declaration, injunction and recovery against the defendant to the effect that plaintiffs and defendant No. 1 are joint owners of the house and landed property situated at Bakhar Deepar, Qaum Ali Khel; and thus, entitled to equal shares as both the parties are the owners in possession of the said property since their fore-fathers. That survey under CLCP regarding the suit house was conducted in the year 2018, and the amount worth Rs. 4 lacs, on account of damage was

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received by the defendant No. 1. That as per law, amount would have been distributed amongst the owners against prescribed shares. That the defendant No.1 was asked to pay share to the plaintiff but he refused. An application dated 12-06-2019, was filed before the Deputy Commissioner, Orakzai for the said payment but was not acted upon. Consequently, a Jirga was conducted on 30-02-2019; whereby, it was decided that defendant No. 1 will pay an amount of Rs. 80,000/- to the plaintiff. The Jirga verdict was not honored that necessitated institution of suit.

3. Defendant/respondent objected the suit on various legal as well as factual grounds in his written statement. It was specifically pleaded by contesting defendant that the parties have partitioned joint holdings since long and everyone is residing in his own dwelling house situated at different places. He negated the stance of Jirga conducted between the parties and termed institution of suit as for grabbing money from defendant without any justification.

4. The material proposition of facts and law asserted by one party and denied by other have separately been put into following issues by the learned Trial Judge.

- i. *Whether 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 house in the joint ownership and possession of the parties since long?*

v. *Whether the defendant No. 1 has received an amount of Rs.400,000/- under CLCP survey and the plaintiffs are entitled to receive*

their share in the said amount to the extent of Rs. 80,000/- as per the Jirga decision Dated 30-12-2019 from the defendant No. 1?

vi. *Whether the plaintiffs are entitled to the decree as prayed for?*

vii. *Relief?*

5. Opportunity of leading evidence was accorded to both the parties.

Seizing the opportunity, plaintiff produced as much as three witnesses in evidence including attorney of the plaintiff examined as PW-1 who exhibited Jirga Deed Ex.PW-1/1. Syed Shabir Hussain being Jirga member was produced as PW-2; whereas, Abdul Akbar being second Jirga Member was examined as PW-3. On turn, defendants had also produced one person in support of their plea taken in defense. Learned counsel representing parties have been heard and suit was dismissed which is impugned by the plaintiffs in instant civil appeal.

6. Mr. Abid Ali Advocate for appellants argued that plaintiffs have proved their case on the strength of oral and documentary evidence of the sufficient category. Besides, material facts have been admitted by the defendants and grant of decree was natural course of things. Dismissal of suit is based on non-reading of evidence that has not properly been appreciated. The refusal of the decree is the decision being contrary to law may be set aside and suit of the appellants may be decreed.

7. Mr. Sana Ullah Khan Advocate representing respondents resisted the stance of opponent by stating that form of suit was required to be that of specific performance of contract rather declaration and recovery. The parties being residing in separate houses is fact admitted which is sufficient for dismissal of suit. He added that there is material contradiction in the statements of the plaintiffs' witnesses and suit was

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rightly dismissed. The appellant has indulged the defendants in litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal on additional score of limitation as well.

8. The parties have admitted some facts either in their pleadings or in evidence. Plaintiffs and contesting defendant are sharing a common predecessor in interest for being nephews and uncle interse. They have inherited property from a single source that is the grandfather of the plaintiffs and father of defendant. It is further being admitted that survey for assessment of damage in Military Operation has been conducted and an amount of Rs. 400,000/- has been paid to the defendant at contest.

9. The apple of discord between the parties that had given birth to instant litigation, is that defendant has refused to pay the alleged share of the plaintiffs in the total compensation amount worth Rs. 400,000/-. The ownership of appellant is being claimed on the basis of inheritance; whereas, ownership of the respondents/defendants has also been admitted to the extent of his share. Defendant/respondent termed it as sole ownership for being ancestral property partitioned since long; whereas, suit of the plaintiff was named harassment with the object of grabbing amount. Whether plaintiffs are entitled for payment of compensation amount to the extent of their shares on the score of inheritance and defendant has wrongly taken hold of the whole amount and that plaintiff has wrongly been refused grant of decree, are the prime points of determination in pending appeal.

10. Keeping in view the admitted facts discussed in paragraph No.8 followed by point for determination mentioned in paragraph No.9 of this Judgement, the pleadings and evidence of the parties, when assessed, is


reflecting that the plaintiffs and contesting defendant are consanguine being genetically related to each other. The property is inherited and parties being nephews and uncle are enjoying such inherited property from single source of inheritance. This alone is sufficient to establish probability in favor of plaintiffs and would require to be shattered by the defendants but let the evidence of the plaintiffs may be considered for strengthening such probability. The parties are genetically related to each other and all of the properties possessed by every descendant is inherited are facts admitted in pleadings as well as in evidence which is clear, unambiguous and unqualified. The admitted facts are only relevant and not conclusive; therefore, the evidence produced has to be examined in such context. PW-1 has produced a Jirga Deed Ex.PW-1/1 which was exhibited without any objection on part of the defendants. This Jirga Deed transpires that an amount of Rs. 100,000/- was decided to be paid to the plaintiffs out of total compensation amount of Rs. 400,000/-; whereas, an amount of Rs. 20,000 shall be deducted from such total as damages on account of misplacing goat owned by the defendant. Two Jirga Members appeared before the Court and testified the conduct of Jirga as PW-2 and PW-3. They confirmed the fact of the conduct of Jirga, the deduction of Rs. 20,000/- and payment liability of Rs. 80,000/- to the plaintiffs. In such manner, the plaintiffs have proved the case on the strength of oral and documentary evidence along with unqualified and clear admissions on part of defendant. To shatter such probability, defendant relied on his sole statement recorded as DW-1 which is mere assertion without any corroboration through oral or documentary evidence. He admitted the fact of relation of the parties and the status of landed property being inherited

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and had taken a specific plea of defence that everyone is residing in a separate house. First of all, this is unclear plea of defense for the reason that living in a separate house is by no stretch of imagination a negation of the joint ownership nor it is conclusive proof of private partition. If this defence plea, which is unclear and ambiguous, is being considered as plea of private partition taken place; even then, the specific plea taken in defence has to be proved by the defendant in line with Article 118 of the Qanun-e-Shahadat Order, 1984 and defendant badly failed to discharge such burden.

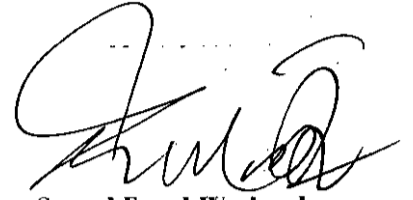
11. As far as legal questions raised by defendant are concerned, objection to form of suit is not appealing to mind as there is no contractual obligation between the parties for which plaintiffs were required to file suit for specific performance of contract. The frame of suit and the form of suit are having no issue at all. Similarly, on limitation, petition for condonation of delay has been annexed to the appeal which speaks about eleven days delay in preferring appeal on the ground that brother of appellant No. 1 was admitted in hospital and that his father, two sisters in law and other relatives were hospitalized being injured which caused such delay. Section-5 of the Limitation Act, 1908 is enabling provision which requires to be construed liberally; therefore, the reason assigned for delay is being considered sufficient cause by this Court for condoning delay of eleven days.

12. For what has been discussed above, it can safely be held that the learned Trial Court has erred in conclusion drawn; that too, for the reasoning not backed by proper application of law and thus not sustainable. Appeal in hand is allowed and consequently, the impugned


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Judgement and Decree dated 27-10-2022 is reversed. Suit of the plaintiff stands decreed as prayed for. Costs shall follow the events. Requisitioned record be returned back with copy of this Judgment; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

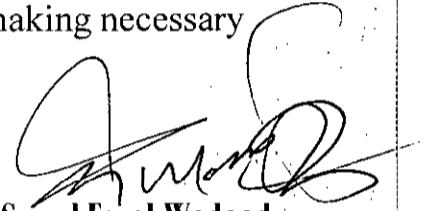
13. Announced in the open Court
15.02.2023



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CERTIFICATE.

Certified that this Judgment is consisting upon seven (07) pages; each of which has been signed by the undersigned after making necessary corrections therein and red over to the parties.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela