

**IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,
ORAKZAI (AT BABER MELA).**

Original Civil suit No 05/1 of 2022
Date of Original institution 16.02.2022
Date of decision 28.02.2023

- 1. **Naseem Jan S/O Subidar Ali Majan**
- 2. **Muhammad Ullah S/O Subidar Ali Majan**
- 3. **Hadim Ullah S/O Subidar Ali Majan**
- 4. **Samigha Bibi D/O Subidar Ali Majan**
- 5. **Shufida Bibi (Minor) D/O Subidar Ali Majan**
- 6. **Nasrat Bibi W/O Subidar Ali Majan**

**All residents of Qoam Afghan Mishti, Tappa Haider Khel, Chapar Mishti,
Central, District Orakzai.**

..... (Plaintiffs)

Versus

- 1. **Dawood Shah S/O Ramazan Shah**
- 2. **Stori Khan S/O Hakim Khan**
- 3. **Subidar Zar khan S/O Starzai**
- 4. **Haji Naseeb Khan S/O Starzai**

**All residents of Qoam Afghan Mishti, Tappa Haider Khel, Chapar Mishti,
Central, District Orakzai.**

.....(Defendants)

**SUIT FOR DECLARATION, PERMANENT INJUNCTION &
RECOVERY.**

JUDGMENT:

- 1. Brief facts of the case are that plaintiffs have filed the instant suit for declaration cum-permanent injunction alongwith recovery of possession of disputed property in shape of abandon house and adjacent land detailed in headnote of the plaint. The plaintiff also sought recovery of rupees 34,12000. The plaintiffs lay their claim on the disputed property and recovery of amount of Rs.34,12000/-

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for the reason that the defendant No.1 & 2 were watchmen of a shop owned by father of the plaintiffs and the said defendants committed theft in the said shop. The stolen property was equal to the amount for which recovery is sought. That the father of the plaintiffs held defendant No.1 & 2 responsible for the said theft. That in retaliation defendant No.1 & 2 killed father of the plaintiffs for holding them responsible for the said theft. A jirga was convened which held defendant No.1 & 2 responsible for killing of father of the plaintiffs. That a fine of Rupees 10 lacs was imposed on defendant No.1 & 2 by the said jirga. In default of which the house of the defendant No.1 & 2 were burnt down and was handed over to plaintiffs as Diyat amount according the tribal customs of Orakzai by the jirga. That the defendants had restrained from interfering in the disputed property from last 20 years but have now started interference in the possession of the plaintiffs and are reconstructing the house and reclaiming the surrounding land, hence the instant suit.

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After due process of summons the defendant No.1 and legal representative of defendant No.2 appeared in person and contested the suit by submitting written statement in which contention of the plaintiffs were resisted on many legal as well as factual grounds. Defendant No.3 & 4 never appeared before the court and remained absent, hence were placed and proceeded against ex-parte.

3. The divergent pleadings of the parties were reduced into the following issues.

ISSUES.

1. *Whether the plaintiffs have got cause of action?*
2. *Whether the plaintiffs are estopped to sue?*
3. *Whether the suit of the plaintiffs is time barred?*
4. *Whether the present suit is bad in its present form?*
5. *Whether the suit property in shape of a field and ruins of a house are ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated suit property?*
6. *Whether the plaintiffs are entitled to recovery of 34 lacs 12 thousand rupees from defendant No.01?*
7. *Whether the plaintiffs are entitled to the decree as prayed for?*
8. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of their claim and contention produced Five (05) Witnesses. Detail of the plaintiff's witnesses and exhibited documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Naseeb Khan S/o Stori Gul Chapar Mishti Central District Orakzai.	Copy of CNIC is Ex.PW-1/1.
PW-2	Naseem Jan S/o Subidar Ali Majan Chapar Mishti Central District Orakzai.	1.Special Power of Attorney is Ex.PW-2/1. 2.Copy of CNIC is Ex.PW-2/2. 3.List of Stolen items is Ex.PW-2/3.
PW-3	Haleef Khan S/o Aitbar Shah Chapar Mishti Central District Orakzai.	1.Copy of Jirga Deed as Ex.PW-3/1. 2.Copy of CNIC is Ex.PW-3/2.
PW-4	Muhammad Rafiq S/o Gulbat Khan Kacha Kaly Meer Ghara District Orakzai.	Copy of CNIC is Ex.PW-4/1.
PW-5	Zar Khan S/o Stor Zai Qaom Mishti Central District Orakzai.	1.Copy of CNIC is Ex.PW-5/1. 2.Pictures are Ex.PW-5/2.

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Defendants in support of their claim and contention produced one (1) witness. Detail of defendant's witness and exhibited documents are as under;

WITNESSES		EXHIBITIONS
DW-1	Dawood Shah S/o Ramzan Shah Chapar Mishti, Bahadur Banda District Hangu.	Copy of CNIC is Ex. DW-1/1.

5. Plaintiffs in support of their claim and contention produced five witnesses including statement of plaintiff No.1 as PW-02, after which they closed their evidence. Learned counsel for the plaintiffs Mr. Salih Shah Advocate argued that according to tribal customs of district Orakzai, the suit property was given by jirga through 'Qoam Zani' to the plaintiffs approximately 20 Years ago. Since then the defendants had left the area and settled in district Hangu. They never raised any claimed over the disputed property as it was given to the plaintiffs in lieu of murder charges over defendant No.1 & 2. He further stated that since the said jirga was convened before merger of Ex-Fata and the decision according to tribal customs was taken in accordance with law at that time, hence, it is recognized and warranted by the present law. He argued that the stance of defendants in their written statement with respect to setting on fire the house of defendants was the act of plaintiffs and not of the jirga, is baseless. To this effect the statements of PWs are consistent that the said act was result of Qoam Zani according to the verdict of jirga.

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6. Learned counsel for defendant No.1 & 2 Mr. Zahoor Rehman Advocate argued that the claim of the plaintiffs is baseless and the story narrated by the plaintiffs in their plaint is factious. Further stated that neither any theft was committed by defendants, nor any murder was committed by defendants, nor any jirga was convened which had given the disputed suit property to the plaintiffs. Defendants have produced only defendant No.1 as DW-01 and closed their evidence.
7. After hearing arguments and after gone through the record of the case with valuable assistance of learned Counsels for both the parties, my issue-wise findings are as under:

ISSUE NO.2:

Whether the plaintiffs are estopped to sue?

8. This issue was framed from preliminary objections raised by the defendants in their written statement. Burden of proof of this issue was laid on defendants. However, defendants have not produced any oral or documentary evidence to prove that plaintiffs are estopped to sue, therefore, it is held that estoppel does not operate against the plaintiffs to institute the present suit. Hence, the issue is decided in negative.

ISSUE NO.3:

Whether the suit of the plaintiffs is time barred?

9. Though the defendants have taken the defense that the suit is not

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within time but they neither produced any evidence nor the point was agitated before the court at the time of arguments. Even otherwise, there is nothing available on record which can suggest the fact that the suit is time barred. Therefore, it is held that the suit is well within time. Hence, the issue is decided in negative.

ISSUE NO.4:

Whether the present suit is bad in its present form?

10. This issue was framed from preliminary objections raised by the defendants in their written statement. Burden of proof of this issue was laid on defendants. However, defendants have not produced any oral or documentary evidence to prove that the instant suit is not maintainable being bad in its present form. Even during course of arguments learned counsel for the defendants failed to pinpoint any irregularity in the present form of the suit, therefore, it is held that the form of suit is not bad. Therefore, it is maintainable in its present form. Issue is decided in favour of plaintiffs and against the defendants.

ISSUE NO.5:

Whether the suit property in shape of a field and ruins of a house are ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated suit property?

11. The Claim of plaintiffs is that they are lawful owner of suit property by virtue of jirga verdict in their favour. Burdon of proof

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regarding this issue was on plaintiffs. Plaintiffs, in order to discharge this duty, produced Five PWs.

12. Naseeb Khan, who deposed as PW-01, supported the claim of plaintiffs and stated that the theft was committed from the shop of father of the plaintiffs. Defendant No.1 & 2 was held responsible for the said theft who in retaliation murdered father of the plaintiffs. After that jirga was convened who held defendant No.1 & 2 responsible for the said murder and fined them of rupees 10 lacs, in default of which houses of the said defendants were burnt down and handed over to the plaintiffs in Diyat. He further stated that defendant No.1 is trying to interference in the suit property and to take possession of the same. He also stated that theft of Rupees 32,12000/- has been committed and claim of the plaintiffs from defendant No.1 is right. In his cross examination he admitted that proof of the same has neither been annexed with the plaint nor I have produced any documents in support of this claim. He also stated that he has no documentary proof of the said jirga is available. Further stated that the murder of father of the plaintiffs was committed in the year 2002. Nothing contradictory in respect of the main stance of the plaintiffs was brought on surface in the statement of the said PW.

13. Naseem Jan, who deposed as PW-02 and is plaintiff No.1 in the instant case supported the claim of plaintiffs. He reproduced the story narrated in the plaint in his statement. Further stated in his statement that the verdict of Jirga and act of Qoam Zani was in accordance with tribal customs of District Orakzai. No material

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contradiction has been brought before the court in his cross examination.

14. Haleef khan, who deposed as PW-03, supported the claim of plaintiffs. He stated that in default of payment of 10 lac Rupees by defendant No.1 & 2, the suit property was handed over to the plaintiffs in Diyat. Further stated that recently defendant No.1 has started interference in the suit property and in this respect a jirga was convened in order to resolve the dispute between the parties in which I was a member but defendant No.1 was later on reluctant to entrust the matter to the said jirga. Nothing contradictory and material was brought before the court in the cross examination of the said PW.
15. Similarly, PW-04 and PW-05 is the statements of Muhammad Rafiq and Zar Khan respectively. They also supported the claim and contention of plaintiffs and their statements were in confirmation with statements of other PWs.
16. Defendant No.1 in rebuttal of the stance of the plaintiffs himself appeared as DW-01 and recorded in his statement that the suit property is his ownership and no jirga as asserted by the plaintiffs and confirmed by the plaintiff's witnesses had ever taken place. In his cross examination he has admitted that their house was burnt down and they left the area. Further stated in his cross examination that they are residing in District Hangu from last 20 years. He admitted the fact that he has started reconstruction of the disputed house recently, hereby giving strength to the stance of the plaintiffs. Moreover, defendant has not produced any witness who

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could testify that the defendant has possession of the disputed suit property in last 20 years.

17. In spite of lengthy cross-examination, no material contradictions could be brought on record from the PWs. The statements of the plaintiffs' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issue in their favor. Firstly, the witnesses were consistent in their statement regarding the jirga been taken place and that the suit property was given to the plaintiffs due to default on part of defendant No.1 & 2 to pay Diyat amount of Rupees 10 lac. Taking place of Jirga, fine of Rupees 10 lac imposed on defendant No.1 & 2 as Diyat amount, burning down of the houses of the said defendants by the act of Qoam Zani and handing over the suit property to the plaintiffs are established in the statement of PWs. Needless to mention that all the above stated acts committed were warranted by the tribal customs and recognized by the law enforced at that time. Secondly, although no documentary proof of the said Jirga was produced by the plaintiffs but the statements of PWs were consistent regarding the fact that the jirga held defendant No.1 & 2 responsible for the murder of father of plaintiffs and that the suit property was handed over to the plaintiffs in Diyat. Needless to mentioned that in tribal society of District Orakzai and that too in 2002, the verdict of jirgas were usually not reduced in writing. Thirdly, defendant has admitted in his statement that their house was burnt down in 2002 and they have left the area. Since then they are residing in district Hangu. He also admitted that he has started reconstruction of their house recently. All the admissions

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strengthen the stance of the plaintiffs. Furthermore, no specific stance was taken by the defendants in the pleadings rather the stance of the plaintiffs was only rebutted by negation.

18. Keeping in view the above discussion, it is held that plaintiffs produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.05 is decided in favor of plaintiffs and against the defendants.

ISSUE NO. 06

Whether the plaintiffs are entitled to recovery of 34 lacs 12 thousand rupees from defendant No.01?

19. The onus of proving the issue was on plaintiffs. The plaintiffs asserted that defendant No.1 & 2 were watchmen/ caretaker in the shop of their father. A theft of articles worth rupees 34,12000/- were committed in the said shop 20 Years ago. Defendant No.1 & 2 were held responsible for the said theft.
20. Plaintiffs in support of their claim annexed a list of articles which were stolen from the shop of their father. The list is Ex.PW-2/3. Although PWs in their statement held defendant No.1 & 2 responsible for the said theft but in order to make the said defendants liable for the said act, the evidence available on file is insufficient. Moreover, theft pertains to criminal liability and with such deficient evidence on record, the prayer of the plaintiffs cannot be granted in the instant suit.

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21. Keeping in view the above discussion, it is held that plaintiffs have failed to produced cogent, convincing and reliable oral and

documentary evidence in support of this issue, therefore, issue No.06 is decided in negative and no relief can be granted in this respect.

ISSUE NO. 1 and 7:

Whether plaintiffs have got cause of action?

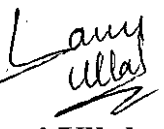
Whether plaintiffs are entitled to the decree as prayed for?

22. Both these issues are interlinked, therefore, taken together for simultaneous discussion.
23. Keeping in view my issue wise discussion, it is held that plaintiffs have got cause of action up to the extent of declaration of the disputed suit property only and are entitled to the decree as prayed for up to the extent of declaration of suit property. The relief as prayed for, in prayer Geem i.e. recovery of 34,12000 rupees is rejected for the reason mentioned in the relevant issue. Hence, the issues are decided partially in favor of plaintiffs and against the defendants.

RELIEF:


24. Crux of my issue wise discussion is that suit of the plaintiffs is hereby partially decreed in their favor against the defendants as prayed for. Cost to follow the events.
25. File be consigned to record room after its necessary completion and compilation.

Announced
28.02.2023


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CERTIFICATE: -

Certified that this judgment consists of Eleven (11) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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