

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-21/13 of 2022

Date of institution: 24.11.2022

Date of decision: 20.02.2023

Mansoor Khan son of Aman Ullah Khan and 05 others, residents of Abdul Aziz Khel, Sultanzai, Tehsil Lower, District Orakzai.

..... **(Appellants/Defendants)**

...**Versus**...

Khawidad Khan son of Jafar Khan and 19 others, residents of Qaum Feroz Khel, Tappa Jaisal Khel, Tehsil Lower, District Orakzai.

..... **(Respondents/plaintiffs)**

Appeal against Judgement, Decree and Order dated 25.10.2022 in Civil Suit No. 27/1 of 2019.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 25.10.2022, passed by learned Civil Judge-II, Tehsil Courts Kalaya, Orakzai in Civil Suit bearing No.27/1 of 2019; whereby, the suit of the plaintiffs/respondents with the title of "Mawali Khan etc. vs Jan Muhammad etc." was decreed.

2. Briefly stated facts of the case are such that the plaintiffs Mawali Khan etc. (respondents herein) have filed suit against the defendants (appellants herein) for declaration and injunction with the stance that plaintiffs are owners in possession of landed property (09 fields) and defendants have no right to interfere in the possession of the plaintiffs. That predecessors of the plaintiffs have purchased the landed property about 28 years back from Subidar Iman Shah, Muhammad Marjan, Zakaria Khan, Safi Ullah Khan and Mir Hassan Jan, all residents of Qaum Feroz Khel, Tappa Jaisal Khel and since then

plaintiffs are owners in possession of disputed property. That in year 2012, defendant No. 1 and 2 started illegal interference in the suit property, on which, plaintiffs filed an application before the Court of the then Political Tehsildar. The then APA, Orakzai constituted Jirga and on the findings of the such Jirga, the APA Orakzai accepted petition of the plaintiffs vide Judgement dated 09-04-2015 and recovered the possession of the said land from defendant No. 1 and 2. That after 02 years of that Order/Judgement, defendant's No. 03 to 05 filed an appeal before the Commissioner FCR, Kohat Division, praying therein that they were not made party in the suit fraudulently. The Commissioner FCR Kohat, remanded back the suit vide Order dated 09-02-2017 with directions to constitute a fresh Jirga after framing of proper issues. The Trial re-commenced on 10-03-2017, but during pendency of suit, FCR Courts were abolished and the case was transferred to Civil Courts. The learned CJ-II, Orakzai through impugned Order, after pointing out the concluding remarks of AC Lower Orakzai in order sheets dated 13-03-2019, declared the case as past and closed transaction. Being aggrieved, plaintiffs filed an appeal before the Worthy District Judge, Orakzai; the appellate Court accepted appeal and remanded the case back with direction to proceed further with the Trial of the case.

3. Defendants/appellants on appearance objected the suit on various legal as well as factual grounds in their written statement. It was specifically pleaded that plaintiffs are strangers belonging from Afridi cast and local custom does not permit them to purchase land in district in the area of qoum Orakzai and thus no sale purchase has been conducted. The persons from whom plaintiffs are deriving rights through purchase were neither owners nor possessors as the property in dispute as well as adjacent property is owned and possessed by the forefathers of defendants by now falling under the

allotted share of the defendants at contest. The plaintiffs are Hamsaya (settlers) remained tenants in different areas of district Orakzai having no nexus with the ownership.

4. The material preposition 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 plaintiff has got a cause of action?
- ii. Whether the plaintiffs' fathers and fore-fathers bought property from elders of defendants (Qaum Feroz Khel, Kandai Jaisal Khel, Orakzai) comprising of 09 fields?
- iii. Whether competent forum in the time of Erst-While FATA has decided issues between parties and attained finally?
- iv. Whether proper Court Fee has been affixed?
- v. Whether the suit of the plaintiffs is bad for joinder and misjoinder for the parties?
- vi. Whether plaintiffs are of Afridi caste and were tenants on different properties of Orakzai Tribes and have got no ownership land of the District Orakzai area?
- vii. Whether plaintiffs are entitled to the decree as prayed for?
- viii. Relief?

5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiffs produced as much as four persons in evidence exhibited certified copies of application, Jirga decision, Order/Judgement dated 09-04-2015 as Ex.PW-4/2 (consisting 05 pages); where after closed it. 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 decreed which is impugned by the defendants in instant civil appeal.

6. Syed Hamza Gillani Advocate for appellants argued that defendants are in possession of the suit property since long. The evidence of the plaintiffs was deficient and grant of decree was result of non-reading and misreading of evidence. The impugned Judgement is based on non-appreciation of evidence and wrong application of law. He concluded that the Judgment in question may be set aside for being illegal and appeal in hand may be allowed.

7. Mr. Akhunzada Sayed Pervez Advocate representing respondents resisted the stance of opponent by stating that plaintiffs have purchased the suit property on the strength of a valid sale transaction concluded decades back. The right of the plaintiffs was initially denied which was referred to Jirga for its resolution. The Assistant Political Agent Orakzai has decided the matter in issue in favor of the plaintiffs against the first set of defendants (defendants No. 01 and 02) and delivered vacant possession of the property to them in the year 2015 and since then, they are in possession of suit property. Evidence produced by the plaintiffs is of sufficient degree and the Trial Court has rightly passed judgement in their favor. The defendants have neither oral evidence nor documentary evidence in support of their plea and their denial is evasive. The plaintiffs have rightly approached the competent forum of Civil Court Orakzai for redressing grievances which was allowed in shape of decree. The appellants have indulged the plaintiffs in rounds of litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal.

8. Whether plaintiffs have no nexus with the ownership of the disputed property which has wrongly been granted decree is the prime point of determination in pending Civil Appeal.

9. The pleadings of the parties; issues framed and evidence adduced thereon, when assessed in light of the professional assistance of the counsel representing parties, are reflecting that the ownership of disputed property was subject of litigation amongst the plaintiffs and defendant No. 01 and 02 (first set of defendants hereinafter) in previous round of litigation before the Assistant Political Agent Lower Orakzai. The first set of defendants being Afridies have been declared disallowed to purchase land in the area of qoum Orakzai in accordance with local Rewaj of Orakzai tribes and was thus granted decree in favor of plaintiffs. The second set of defendants No.03 to 06 filled an appeal before the Commissioner Kohat Division on the score that they are the actual owners which have not been arrayed as parties and suit was conducted against their tenants. Appeal was accepted and cases was remanded back for constitution of Jirga to be followed by decision afresh. Meanwhile, Civil Courts have been established and the matter was referred for decision. On conclusion of Trial, Learned Civil Judge-II Kalaya has granted decree; feeling aggrieved, respondents assailed the same before this Court in civil appeal. Article 117 of the Qanoon-e-Shahadat Order 1984 postulates that who asserts must prove and initial burden of proof is lying on plaintiffs. The plaintiffs were required to prove the sale transaction; that too, from the ostensible owners of the land in dispute. Plaintiffs produced PW 1 to 3 who speak about sale of the property in dispute by their forefathers to the forefathers of the plaintiffs; but, this is mere assertion without any oral or documentary proof of the ownership of their forefathers. All of them had categorically admitted in their cross examination that they have neither documentary nor other proof of the ownership and possession of their forefathers as well as the transaction alleged by them. Both ownership and possession of the forefathers of such witnesses have been proved nor the sale

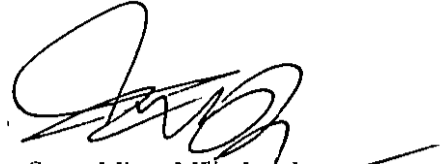
transaction; even if it is oral, was required to be proved. Neither specification of property has been made nor the exact time, place and payment of sale consideration either mentioned or proved. The attorney for plaintiffs being examined as PW-4 admits that he has got no evidence of the sale as well as payment of sale consideration. Furthermore, Transfer of Property Act 1882 prescribes that an owner of property cannot transfer a better title to a transferee than he himself possessed and when the ownership of the alleged owners, where from plaintiffs have derived rights, has not been established, the transaction, if even proved, is of no value. In such situation, this Court is of the firm opinion that plaintiffs have not discharged burden of proof and thus failed to establish probability in their favor and thus defendants were not required to rebut. Even then, the defendants produced Private Partition Deed Ex-DW1/1 of the family of defendants which is reflecting the partition plan of all the properties owned by the defendants including disputed land concluded in Jirga decades back in 1984. Similarly, the adjacent property of the disputed land has been given by the defendants for District Sports Complex and is bounded by the property owned and possessed by the defendants No. 3 to 6. This very fact is also admitted one that the adjacent land to the disputed property from all direction is owned by the defendants and the plaintiffs have no ownership in the contiguous area. Hence, preponderance of probability favors the defendants rather plaintiffs.

10. 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 Judgement and Decree dated 25-10-2022 is reversed. Suit of the plaintiff stands dismissed. Costs shall follow the events. Requisitioned record be returned back with copy of this

Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

11. Announced in the open Court

20-02-2023



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment consists of seven (07) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela