

IN THE COURT OF ZAHIR KHAN CIVIL JUDGE-I, KALAYA, ORAKZAI

Case #	=	58/1 of 2020.
Date of Original Institution	=	16.10.2020.
Date of Present Institution	=	02.07.2021.
Date of Decision	=	28.02.2023.

1. Sardar Khan,
2. Kinar Gul,
3. Minadar all sons of Jamal Hussain, residents of Qaum Mishti, Tappa Darwi Khel, Village Shalzara, Tehsil Central, District Orakzai.

.....(Plaintiffs)

Versus

1. Akhtar Gul S/O Ajab Gul,
2. Aurangzb S/O Muhammad Afzal, both residents of Qaum Mishti, Tappa Darwi Khel, Village Shalzara, Tehsil Central, District Orakzai.

.....(Defendants)

SUIT FOR DECLARATION CUM-PERMANENT INJUNCTION AND POSSESSION

JUDGEMENT
28.02.2023

Through this judgement, I am going to decide the suit in hand filed by plaintiffs namely Sardar Khan and two others against the defendants namely Akhtar Gul and one other for declaration cum-permanent injunction and possession.

Brief facts of the case in hand are that plaintiffs have filed the instant suit for declaration-cum permanent injunction and possession

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against the defendants to the effect that plaintiffs are lawful owners of the suit property fully detailed in the headnote of the plaint while defendants have got no concern whatsoever with the same. That the suit property is the ancestral ownership of plaintiffs being successors of Jamal Hussain. Plaintiffs were internally displaced due to Military Operation against the militants and insurgents in the Tribal area and they shifted/migrated to District Kohat and in their absence, defendants illegally and forcibly occupied the suit property which is wrong, illegal and ineffective upon the rights of plaintiffs. That defendants were asked time and again to admit the legal claim of plaintiffs but in vain, hence, the present suit.

(2). With due process of law and procedure, defendants were summoned, who marked their attendance and contested the suit by filing written statement.

Defendants have raised several legal and factual objections in their written statement. Defendants have contended that suit of plaintiffs is time barred. That the suit property is their ancestral ownership and they are owners in possession since long. Plaintiffs have got no concern whatsoever with the suit property. That suit of plaintiffs is not maintainable and liable to be dismissed.

(3). From divergent pleadings of the parties, the following issues were framed for adjudication of real controversy between the parties.

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ISSUES

1. Whether plaintiff has got cause of action? OPP
2. Whether suit of plaintiff is within time? OPP
3. Whether this court has got jurisdiction to entertain the suit of plaintiff? OPP
4. Whether suit of plaintiff is hit by res-judicata? OPD
5. Whether suit of plaintiff is bad due to non-joinder and mis-joinder of the parties? OPD
6. Whether plaintiff is estopped to sue? OPD
7. Whether the suit property is the ancestral ownership of plaintiffs? OPP
8. Whether defendants illegally and forcibly took possession of the suit property in absence of plaintiff? OPP
9. Whether plaintiff is entitled to decree as prayed for?
10. Relief?

(4). Upon submission of list of witnesses, both the parties on being provided with an opportunity to adduce their desired evidence, the parties produced their respective evidence.

(5). After the completion of evidence, arguments of the learned counsels for the parties were heard and record of the case file was gone through with their valuable assistance.

(6). During course of recording evidence, plaintiffs in support of their claim and contention produced 03 witnesses.

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(7). Plaintiff No. 1 and special attorney of plaintiff No. 2 & 3 appeared and deposed as PW-01. He reiterated the averments of plaintiff. He further stated that he along with his family migrated from the area in 2008 as refugees/internally displaced people and came back to the area in 2011. From 2011 till 2017, they used to visit the area and cultivate the cultivatable portion of the suit land but in the year 2017, defendants illegally and forcibly occupied the suit property in their absence. Copy of his CNIC is Ex. PW-1/1. He lastly requested for decree of suit against the defendants as prayed for.

(8). Fazal Asghar and Mastan Asghar, relatives of plaintiffs were examined as PW-02 and PW-03 respectively. Copies of their CNICs are Ex. PW-2/1 and Ex. PW-3/1 respectively. They fully supported plea of plaintiffs.

Thereafter, evidence of plaintiffs was closed.

(09). On the other hand, defendants in support of their claim and contention produced four witnesses.

(10). Defendant No. 1 namely Akhtar Gul, who is special attorney for defendant No. 2 appeared and deposed as DW-01. Copy of his CNIC is Ex. DW-1/1. He denied the claim of plaintiffs asserting that defendants are owners in possession of the suit property since their forefathers. He lastly requested for dismissal of the suit of plaintiffs.



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(11). Aurangzeb, defendant No. 2, appeared and deposed as DW-02. Copy of his CNIC is Ex. DW-2/1. He stated that suit property

(Ghoz Patay/field) devolved upon him after death of his father namely Muhammad Afzal and he is in possession of the same. He further stated that he has got no concern whatsoever with Khaista Gul Patay/(field).

- (12). Ayub Khan and Yousaf Khan neighbours of defendants appeared and deposed as DW-03 and DW-04 respectively. They supported the plea of defendants. Copies of their CNICs are Ex. DW-3/1 and Ex. DW-4/1.


Thereafter, evidence of defendants was closed.

- (13). After completion of evidence of the parties, arguments of the learned counsels for the parties were heard and record of the case file was gone through with their valuable assistance.

My issue wise findings are as under: -

Issue No.02. Whether suit of plaintiff is within time? OPP

- (14). Defendants, in their written statement have raised legal objection to the effect that suit of plaintiffs is time barred. Per averments of plaint, cause of action accrued to the plaintiffs 03 years ago when defendants illegally and forcibly occupied the suit property. Suit in hand was instituted on 16.10.2020. Even otherwise, after the 25th Constitutional (Amendment) Act, 2018, all Federal and Provincial Laws stood extended to the newly merged districts. Period of limitation for filing declaratory suit under Article 120 of Limitation Act, is six years. Suit of plaintiffs is held to be within time. Hence, issue is decided in positive.


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Issue No.03. Whether this court has got jurisdiction to entertain the suit of plaintiff? OPP


(15). Objection regarding jurisdiction of the court has been taken by defendants in the preliminary objections of their written statement contending that this court lacks jurisdiction to entertain the suit but no ground/reason has been mentioned in the written statement. Plaintiffs have sought declaration cum-permanent injunction and possession to the effect that they are ancestral owners of the suit property and defendants have no concern whatsoever with the same which matter comes within the jurisdiction of this court, therefore, issue decided in positive.

Issue No.4. Whether the suit of plaintiff is hit by res-judicata? OPD.

(16). Defendants have not taken this objection in preliminary objections of their written statement. There is nothing on record which could show that suit of plaintiffs is hit by res-judicata hence, this issue is decided in negative and against the defendants.

Issue No.05. Whether suit of plaintiff is bad due to non-joinder and mis-joinder of the parties? OPD.

(17). Burden of proof regarding this issue was on defendants. Plaintiffs seek declaration cum-permanent injunction alleging that the suit property is their ancestral ownership. Initially, suit in hand was filed by plaintiff No. 1 namely Sardar Khan but later on; his two brothers (LRs of deceased Jamal Hussain) namely Kinar Gul and


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Minadar were impleaded as party to the suit. Nothing was brought on record by defendants which could show that deceased Jamal Hussain has got other successors. Resultantly, issue decided in negative and against the defendants.

Issue No. 6: Whether plaintiff is estopped to sue? OPD.


(18). No such objection is taken by defendants in the preliminary objections of their written statement. Even otherwise, estoppel needs cogent, convincing and reliable evidence which is lacking, therefore this issue is decided in negative and against the defendants.

Issues No. 7: Whether the suit property is the ancestral ownership of plaintiff? OPP

& 8: Whether the defendants illegally and forcibly took possession of the suit property in absence of plaintiff? OPP

Both these issues are interlinked hence, taken together for simultaneous discussion. Burdon of proof was on plaintiffs regarding both these issues.

(19). Per averments of plaint, claim of plaintiffs is that they are lawful owners of the suit property fully detailed in the headnote of the plaint while defendants have got no concern whatsoever with the same. That the suit property is the ancestral ownership of plaintiffs being successors of Jamal Hussain. Plaintiffs were internally displaced due to Military Operation against the militants and insurgents in the Tribal area and they shifted/migrated to District Kohat and in their absence, defendants illegally and forcibly


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occupied the suit property which is wrong, illegal and ineffective upon the rights of plaintiffs. On the other hand, defendants have contended that claim of plaintiffs is baseless. They are owners in possession of the suit property since their forefathers.

- (20). As per averments of plaint, operation against militants and insurgents was started by security forces in tribal area, therefore, plaintiffs were internally displaced. They migrated to District Kohat and after the military operation, they returned back to Orakzai and once again shifted to District Kohat. Plaintiff No. 1, stated in his examination in chief that military operation started in tribal areas in the year 2008. They shifted to Kohat and returned back to Orakzai agency in the year 2011. From 2011 to 2017, plaintiffs used to visit and cultivate the cultivatable portion of suit land. These dates are nowhere mentioned in the plaint. Burdon of proof was on plaintiffs to establish that they were in possession of the suit property till 2017 and dispossessed forcibly by defendants in the year 2017.


PW-02 deposed that, he does not know for how long plaintiffs remained in possession of the suit property.

"مجھے معلوم نہیں ہے کہ کھیت متدعوویہ مدعی سردار کی قبضے میں کب سے تھے"

Similarly, PW-03 stated in his cross examination that suit property is in possession of the defendants.

"خاتوری پے اختر گل نے قبضہ کیا ہے۔ جبکہ دوسرا کھیت بھی مدعا علیہم کے زیر قبضہ ہے۔ خاتوری کھیت"

"سال 2011 سے مدعا علیہم کے زیر قبضہ ہے"


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This statement negates the version of plaintiffs that they remained in possession of the suit property till 2017. Similarly, PW-01, stated in his cross examination that defendants were also displaced during the military operation. They were not present in the area.

"میں جب 2008 میں متاثرین ہوا تو مدعا علیہم بھی متاثرین ہوئے تھے"

PW-03, in his cross examination stated that he has not seen any crop in the suit property cultivated by the plaintiffs.

"میں نے اپنی آنکھوں سے جائیداد متدعوئیہ پر کوئی فصل نہیں دیکھی ہے"

- (21). As stated above, plaintiffs were bound to establish that suit property is their ancestral ownership. They remained in possession till 2017 and defendants forcibly dispossessed them from the suit property in the year 2017. Plaintiffs failed to establish their claim through cogent, convincing and reliable documentary and oral evidence. Defendants are in possession of the suit property since long. They have been cultivating the cultivatable portion of the suit property and have residential house in the suit property which fact is also admitted by PWs. There is no land record in this newly merged district, therefore, possession over the disputed property is of paramount importance. If plaintiffs were forcibly dispossessed in year 2017 then they would have definitely approached the courts of Erst-While FATA for redress of their grievances. No such application is placed on file. There is no Jirga decision in favour of plaintiffs.


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(22). None from the family members of the plaintiffs deposed as witness to support the claim of plaintiffs. Plaintiff No. 2 & No. 3 were not produced as witnesses. Although, PW-02 & PW-03 are cousins (tarbors) of plaintiffs but they have land disputes with the cousins (tarbors) of defendants, therefore their statements cannot safely be relied upon. None from the elders and Malaks of the area appeared before the court to support the plea of plaintiffs.

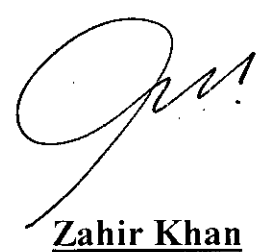
(23). Plaintiffs failed to establish that suit property is their ancestral ownership and they were dispossessed forcibly by defendants. Resultantly, both these issues are decided in negative and against the plaintiffs.

Issue No. 1, No. 9 and Relief?

(24). Crux of my issue wise discussion is that plaintiffs have got no cause of action and they are not entitled to the decree as prayed for, resultantly, suit of plaintiffs is hereby dismissed. No order as to cost.

(25). File be consigned to record room after the necessary completion and compilation.

ANNOUNCED
28.02.2023



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CERTIFICATE

It is certified that this judgement consists of *11* pages. Each page has been dictated, read, corrected and signed by me.



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