



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

Original Civil suit No 19/1
Date of Original institution 05.11.2019
Date of decision 24.02.2023

1. Zarmast Khan S/o Azmat Khan
 2. Nasar Khan S/o Meer Abbas Khan through legal heirs
 - 2/1. Mst. Akhter Jana W/O Zarmast
 - 2/2. Mst. Wahid Jana W/O Azim Khan
 - 2/3. Mst. Hadi Marjan W/O Khadim Rehman
 - 2/4. Mst. Abdul Manan S/O Naseem Khan S/O Nasar Khan.
 3. Ajmir S/o Mewa Khan
 4. Muhammad Hayat S/o Taza Khan
 5. Rasheed Khan S/o Yousaf Khan
- All residents of Qoam Ali Khel Treho Pakha Tehsil Upper, District Orakzai.
..... (Plaintiffs)

Versus

1. Saif Ur Rehman S/O Nooraza Gul
Resident of Qoam Ali Khel, Village Ghotak Tehsil Upper, District Orakzai.
.....(Defendant)

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

JUDGMENT

1. Brief facts of the case are that plaintiffs have filed the instant suit for declaration cum-permanent injunction to the effect that they are lawful owner in possession of landed property and a house fully detailed through boundaries in the head note of plaint. The suit property mentioned in the head note of the plaint consists of a house measuring 40 Marla's and landed property in different part of the area namely Chenay Zavar, Seez Rawaz, Ghawagay Kaas

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and Serrey Rawaz. The plaintiffs also seek declaration of their ownership to the extent of their share in a hill by the name of Ranjoko Baba Ghar. The plaintiffs claimed their ownership on the basis of their ancestral right over the suit property and further asserted that back in 1923 when predecessor the defendant raised claim on the suit property, a Jirga was convened, headed by the then ruler namely Mahmood Akhonzada. The said jirga decided ownership over the suit property in favour of the plaintiffs. Since then, the plaintiffs are enjoying peaceful possession of the suit property until the year 2019 when the defendant again raised claim over the suit property. That defendant was asked time and again to admit the legal claim of plaintiffs but in vain, hence, the present suit.

2. After due process of summons the defendant 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. The defendant also filed amended written statement in which he admitted the claim of plaintiffs up to extent of ownership of the disputed house only and contested their ownership of disputed landed property.
3. The divergent pleadings of the parties were reduced into the following issues primarily after submission of first written statement by defendant.

ISSUES.

1. *Whether the plaintiff has got cause of action? OPP*
2. *Whether suit of the plaintiff is bad in its present form? OPD*
3. *Whether plaintiffs are owner and in possession of house consisting of 6 rooms with description of surrounding given*

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in the plaint from past 150 years? OPP

4. *Whether disputed regarding the suit property (house consisting of 6 rooms with description of surrounding given in the plaint) was decided and settled long before between the parties, and its effect? OPP*
5. *Whether defendant has any rights in the suit property (house consisting of 6 room with description of surrounding given in the plaint) via inheritance being ancestral property, and its effect? OPP*
6. *Whether plaintiff is entitled to the decree as prayed for? OPP*
7. *Relief.*

4. After submission of amended written statement by the defendant, the following amended issues were framed.

AMENDED 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 bad for mis-joinder and non-joinder?*
4. *Whether the suit property is the ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated suit property?*
5. *Whether the plaintiffs have share in the disputed hill?*
6. *Whether plaintiffs are entitled to the decree as prayed for?*
7. *Relief.*

5. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of his claim and contention produced 06 Witnesses. Detail of the plaintiff's witnesses and exhibits are documents are as under; -

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	WITNESSES	EXHIBITIS
PW-1	Zarmast Khan S/O Azmat Khan Qaom Ali Khel Upper, District Orakzai	Power of attorneys are Ex.PW-1/1 and Ex.PW-1/2. Copy of CNIC is Ex.PW-1/3
PW-2	Guldad Shah S/O Subhan Shah Qaom Ali Khel Upper, District Orakzai	Copy of CNIC is Ex.PW-2/1
PW-3	Qalandar Shah S/O Douran Shah Qaom Ali Khel, Tehsil Upper District Orakzai	Copy of CNIC is Ex.PW-3/1
PW-4	Sher Rehman S/O Rasool Khan Qaom Ali Khel Upper, District Orakzai	Copy of CNIC is Ex.PW-4/1
PW-5	Himat Khan S/O Said Rehman Qaom Ali Khel Upper, District Orakzai	Copy of CNIC is Ex.PW-5/1
PW-6	Fazal Rahim S/O Gul Bar Khan Qaom Feroz Khel Ismailzai, District Orakzai	Copy of Citizen Losses Compensation Program (CLCP) is Ex.PW-6/1 to 6/4

Defendant in support of his claim and contention appeared as a witness himself. Detail of defendant's witness and exhibited documents are as under;

	WITNESSES	EXHIBITIONS
DW-1	Saif Ur Rehman S/O Nooraza Gul Qaom Ali Khel Upper, District Orakzai.	Copy of CNIC is Ex. DW-1/1.

6. Plaintiff No.1 in support of his claim and contention himself appeared and recorded his statement as PW-01. He stated that the predecessors of defendant have sold the disputed property 150 years ago and had left the area for good since then. That some

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hundred years ago between 1920 to 1930, the defendant had raised claim over the disputed property but the matter was resolved in favour of the plaintiffs through jirga convened by the then ruler namely Mahmood Akhonzada. That the decision taken in the said jirga was on the basis of taking oath of ten persons in favour of the plaintiffs, in which testimony of four persons were formally taken on sacred oath and oath of six persons were waved off by the jirga. Since then, the defendant had not raised any claim on the disputed property but in the year 2016-2017 the defendant returned to the area after repatriation of the masses in the area when military operations ended and started to raise claim over the disputed property in the year 2019. The plaintiff No.01 finally stated in his statement that the suit property is in their ownership and possession since long and they have backing of the aforementioned jirga in respect of the same. PW-02 is the statement of nephew of the persons who took oath in the said jirga in favour of the plaintiffs. PW-03 is the statement of a witness who confirmed that the jirga has taken place between the parties on the subject matter of the suit. PW-04 is the statement of a witness whose father took oath in the said jirga. PW-05 is the statement of a witness whose grandfather took oath in the said jirga. PW-06 is the statement of the Tehsildar who recorded his statement regarding the survey of the houses on the disputed property. Thereafter, plaintiffs closed their evidence.

7. Saif Ur Rehman, who is defendant in the instant case, himself deposed as DW-01. He denied the claim of plaintiffs asserting that the suit property is the ancestral ownership and no jirga of

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whatsoever has ever taken place regarding the suit property. The defendant closed his evidence after recording of his statement. After completion of evidence of the parties, arguments of the learned counsel for the parties were heard and record of the case file was gone through.

8. 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.4 and 5:

Whether the suit property is the ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated with suit property?

Whether the plaintiffs have share in the disputed hill?

9. Both these issues are interconnected and material, therefore, are discussed and decided together. The Claim of plaintiffs is that they are lawful owner in possession of suit property by virtue of a jirga decision taken place in 1923. The suit property was sold by the predecessors of the defendant some 150 years ago and in 1923, a jirga decided the matter in favour of the plaintiffs. Burdon of proof regarding this issue was primarily on plaintiffs at first instance and secondly on the defendant in rebuttal of the stance of the plaintiffs. Plaintiffs, in order to discharge this duty, produced six PWs.

10. Zarmast Khan, who deposed as PW-01 and is plaintiff No.01 in the instant suit, while supporting the claim of plaintiffs stated that the suit property was sold by the great grandfather of the defendant due to their enmity, and after disposing of their

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property, they left the area. That some hundred years ago between 1920 to 1930, the predecessor of defendant had raised claim over the disputed property but the matter was resolved in favour of the plaintiffs through jirga convened by the then ruler namely Mahmood Akhonzada. That the decisions taken in the said jirga was on the basis of taking oath of ten persons in favour of the plaintiffs, in which four persons were formally given oath and oath of six persons were waved off by the jirga. Since then, the defendant had not raised any claim on the disputed property but in the year 2016-2017 the defendant returned to the area after repatriation of the mases in the area when military operations ended and started to raise claim over the disputed property. Besides some minor contradiction, PW-01 in his cross examination admitted that he does not know as to who had purchased the suit property from the predecessors of the defendant. Furthermore, he admitted that two fields by the name of Cundwala and Dagaray are not in their possession and the same are not contested through the instant suit. He also admitted that he is not eye witness of the jirga as it took place approximately hundred years ago but his grandfather was witness of the same and information of the said jirga come into his knowledge through his grandfather. In his cross examination he recorded names of five persons who took oath in favour of the plaintiffs in the said jirga. Moreover, he stated that the disputed property consists of 32 fields (situated in the areas mentioned in the headnote of the plaint) and the same has been detailed through maps annexed with the plaint. Further stated that survey of houses on disputed property have

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taken place in name of the plaintiffs and in that respect, compensation was also received by the plaintiffs.

11. Gul Dawood Shah, who deposed as PW-02, supported the claim of plaintiffs. He stated that ten persons took oath in favour of the plaintiffs in the said jirga, in which four persons formally took oath on the fact that defendant don't have any property in District Orakzai except a small piece of land by the name of Dagaray and a piece of land for the purpose of house by the name of Kundwala. PW-02 admitted in his cross examination that he was not present in the said jirga but information regarding the jirga came into his knowledge through his uncle in presence of persons namely Abdul Salam and Khawaja Muhammad Khan, who are now not alive. Further stated that the suit property consists of 32 fields in total which are in possession of the plaintiffs. He also recorded in his statement the names of all six persons whose testimony was abandoned by the jirga, as the testimony on secret oath of four persons was considered as a whole by the jirga. He supported the claim of the plaintiffs and no material contradiction has been brought before the court in his cross examination.

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12. Qalandar Shah, who deposed as PW-03, recorded his statement in favour of the plaintiffs and supported the claim of plaintiffs. However, his cross examination was not recorded in the course of evidence due to his ailing health condition.

13. Sher Rehman, who deposed as PW-04, recorded his statement in favour of the claim of plaintiffs. PW-04 admitted the fact that he is son of one of the persons namely Rasool Khan who took oath in the said jirga in favour of the plaintiffs and he came to know about

the details of the said jirga through his father. He admitted the fact that the suit property is in possession of the plaintiffs. He recorded in cross examination that he remembers the names of persons who took oath in favour of the plaintiffs in the said jirga but he doesn't remember the names of the persons whose taking of oath was waved off. He also admitted that he doesn't know as to whom the property was sold by the predecessors of the defendant 150 years ago.

14. Himat Khan, who deposed as PW-05, recorded his statement in favour of the claim of plaintiffs. PW-05 admitted the fact that he is grandson of one of the persons namely Rasool Khan who took oath in the said jirga in favour of the plaintiffs and he came to know about the details of the said jirga through his father and his uncle. PW-05 in his examination in chief also stated that a jirga between the parties regarding the subject matter of the suit has taken place long ago in which four persons took formal oath and testimony of six persons were taken without formal oath in favour of the plaintiffs. Further stated that Peer Gul who was predecessor of the defendant had left the area due to certain enmity and sold their property. He admitted in his cross examination that he doesn't know the exact year and place in which the said jirga took place. And he does not know about the place where the jirga took place.

15. Fazal Raheem, Tehsildar Ismail Zai recorded his statement as PW-06, and stated therein that on 29.11.2016 Tehsildar Khaista Akbar conducted survey of houses on disputed property. He recorded in his statement that according to the documents which he has

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produced before the court, the survey of the houses was conducted on the names of Sher Khan, Azeem Khan, Nasar Khan and Hafiz Muhammad Sadiq. Further stated Azeem Khan and Hafiz Muhammad Sadiq are sons of Azmat Khan. It is pertinent to mention here that Azeem Khan and Hafiz Muhammad Sadiq are brothers of plaintiff No.1 which shows the possession of family of plaintiffs over houses on the disputed property. In his cross examination he admitted the fact that survey is conducted on the name of person who resides in the house and the fact is further confirmed from village committee. However, the issue related to houses as disputed in the originally submitted written statement was framed by this court but after submission of amended written statement, the defendant has admitted possession and ownership of plaintiffs over the houses situated on disputed property. In absence of documentary evidence, possession of persons over disputed property is considered to decide the issues in question. In the instant suit, after admission of ownership and possession of houses over the disputed property by the defendant shows that the plaintiffs are residing over the disputed property.

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16. Defendant in rebuttal of the stance of the plaintiffs himself appeared as DW-01 and recorded in his statement that the suit property is their ownership and no jirga as asserted by the plaintiffs and confirmed by the plaintiff witnesses had ever taken place. In his cross examination he has admitted the ownership of the houses of the plaintiffs on the disputed property. He further admitted that I had a house in Tirah valley (referring to the place where disputed property is situated) but is now in ruins. Hereby

giving strength to the stance of the plaintiffs that the family of the defendant had left the area for good. He has also admitted in his cross examination that he has not raised any claim on any land throughout his life. It is pertinent to mention here that since plaintiffs' evidence has stated on oath in their statements that the possession of the disputed property is with the plaintiffs and the fact that defendant has not ever raised any claim over their possession, meaning thereby that the possession of the plaintiffs has remained unchallenged throughout the course of time. Moreover, defendant has not produced any witness who could testify that the defendant has possession of single field on the disputed property. It is also worth mentioning here that the two fields who were given to the predecessors of the defendant by the jirga are still laying uncultivated. Which further support the stance of the plaintiffs that the family of defendant had left the area long ago.

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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 issues in their favor. Firstly, the witnesses were consistent in their statement regarding the jirga been taken place and that the witnesses therein taking sacred oath. Three of the witnesses were relatives of the persons who were part of the jirga and had taken oath in favor of the plaintiff in the said jirga. As the jirga had taken place between the year 1920 and 1930 according to the statements of the plaintiffs' witnesses and in the year 1923 according to the plaint.

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The direct evidence is not possible due to lapse of time. Hence, the instance case is based on circumstantial evidence and that circumstantial evidence is well established by the plaintiff in their favor in the instance case. Secondly, Tehsildar was produced before the court along with the documents in which the survey for the purpose of compensation was conducted in the name of relatives of the plaintiffs. Although the survey documents are not by any means title documents but possession may be determined by the same. The defendant on other hand has rather admitted in his statement as Dw-01 that the only house they have on the disputed property is abandoned and is in ruins. Hereby, admitting the stance of the plaintiffs that family of defendant had left the area for good long ago. Moreover, the two pieces of land admitted by the plaintiffs and their witnesses that the same belong to the defendant is still uncultivated and is laying idol from long time. In the far-flung area such as the area where the suit property is situated; the custom of the tribal society and in absence of record of any nature, possession of land is given due importance. And that too when the possession is long standing and un-interrupted. The possession of plaintiffs over the disputed property is established through evidence in the instant case. Thirdly, the defendant has admitted the ownership of the houses of plaintiffs and their family members on the disputed property in his amended written statement. This fact alone establishes the stance of the plaintiffs regarding ownership and possession of the whole disputed property on one hand and the fact that defendant had left the area on score of the enmity and disposing of their property 150

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years ago on the other hands. Moreover, in such far-flung area, usually houses of those people are situated who have possession and ownership of surrounding land and no outsider can built house in the middle of land of another person. However, subject to single exception when an owner either allow his tenant to build a house or owner let his tenant live in his house. No such stance is taken by the defendant in his written statement. Furthermore, no specific stance was taken by the defendant in the pleadings rather the stance of the plaintiffs was only rebuted by the 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, and defendant failed to rebut the stance of the plaintiffs. Therefore, issue No.04 & 05 are decided in favor of plaintiffs and against the defendant.

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ISSUE NO. 2 and 3:

Whether the plaintiffs are estopped to sue?

Whether the suit of the plaintiffs is bad for mis-joinder and non-joinder?

19. Both the issues were neither discussed nor stressed, hence remained redundant.

ISSUE NO. 1 and 6:

1. Whether plaintiffs have got cause of action?

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

20. Both these issues are interlinked, therefore, taken together for discussion.

21. Keeping in view my issue wise discussion, it is held that plaintiffs has got cause of action and is entitled to the decree as prayed for. Both these issues are decided in favor of plaintiffs and against the defendant.

RELIEF:

22. Crux of my issue wise discussion is that suit of the plaintiffs is hereby decreed in their favor against the defendant as prayed for.

Cost to follow the event.

23. File be consigned to record room after its necessary completion and compilation.

Announced
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CERTIFICATE: -

Certified that this judgment consists of Fourteen (14) pages. Each and every page has been read over, corrected and signed by me where ever necessary.

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