

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-03/13 of 2023

Date of institution: 09.01.2023

Date of decision: 08.04.2023

1. Provincial Government through Secretary to KP Government for Home & Tribal Affairs.
2. C&W Division Orakzai through SDO, C&W Orakzai
3. Incharge Levi Section, District Orakzai
4. DPO, Orakzai

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

...**Versus**...

1. Kareem Gul son of Muhammad Wazir r/o Qaum Goda Rabia Khel, Tappa Ayaz Khel, Tehsil Ismail Zai, District Orakzai.

..... (**Respondent/plaintiff**)

2. Mujahid Contractor of the Project.

..... (**Respondent**)

Appeal against Judgement, Decree and Order dated 29.11.2022 in Civil Suit No. 42/1 of 2022.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 29.11.2022, passed by learned Senior Civil Judge, Orakzai, in Civil Suit bearing No. 42/1 of 2022; whereby, the suit of the plaintiff/respondent with the title of "Kareem Gul vs Provincial Government etc." was decreed.

2. Karim Gul being plaintiff (respondent herein) claims exclusive ownership and possession of a major chunk of landed property in the area of Goda Rabia Khel Orakzai. Out of alleged One thousand (1000) Acre property, a piece of land measuring 30 Marla has been taken for construction of Police



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Post by the defendants (appellants herein) without adopting due course of law. They have been asked to initiate the process of land acquisition prescribed by law or pay an amount of Rs. Seventy thousand per Marla as compensatory cost of land utilized for constructing of Police Post. On refusal of defendants, the matter was dragged to the Civil Court for adjudication in suit for declaration, injunction, recovery of money and other relief deemed fit.

3. Defendants/appellants on appearance through their representative objected the suit on various legal as well as factual grounds in their written statement. It was specifically pleaded that plaintiff is neither the sole owner of the suit property nor the property is owned and possessed by a single person or family. The property utilized by the Provincial Government of KP for construction of Police Post is joint property of Qaum Rabia Khel and had been gifted to the Government by the whole of the Qaum with the intent to prevail peace and tranquility in the region. The construction of Police Post was started on the request of Mashran of Qaum Rabia Khel (Local gentry of sub-sect) in the year 2017 and no one has raised any objection over construction of the same. The suit was termed time barred as well.

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 plaintiff is estopped to sue?
- iii. Whether suit of the plaintiff is time barred?
- iv. Whether the suit property is the ownership of the plaintiff which is given to him as a result of family partition and the defendants have nothing to do with the suit property rather they have forcibly taken


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possession of the same and have built up a security picket without proper acquisition?

- v. Whether plaintiff is entitled to the recovery of the market value of the suit property?
- vi. Whether the suit property is given to the government by the caste Rabia Khel as the same is a part of the Shamilat-e-Rabia Khel and not the sole ownership of the plaintiff that is why the suit of the plaintiff is baseless?
- 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, plaintiff produced as much as six persons. PW-1 Qudrat Ullah submitted relevant decision deed consisting 02 pages as Ex.PW-1/2. Khyber Gul appeared as PW-2 who is the Jirga member of mentioned decision. Another Jirga member Khayal Man Shah appeared as PW-3 who submitted another Jirga Deed as Ex.PW-3/2. Further, Noor Sharwasn and Nazeer Man Shah examined as PW-4 and PW-5 who are also the Jirga member of the said Jirga. They fully supported the stance of the plaintiff as prayed in the plaint. Plaintiff himself appeared as PW-6 and narrated the story of the plaint. On turn, defendants had also produced three person in support of their plea taken in defense. DW-1, the Record Keeper of C&W Department, Orakzai produced the relevant record as Ex.DW-1/1 to Ex.PW-1/4. PW-2, Ishtiaq Hassan, SI Legal Orakzai appeared as representative of DPO Orakzai submitted his Authority letter as Ex.DW-2/1. Further, Mr. Fazal Raheem, Naib Tehsildar, Ismail Zai, Orakzai appeared as PW-3. All the DWs denied the claim of the plaintiff. Learned counsel representing parties have been heard and suit was decreed which is impugned by the defendants in instant civil appeal.

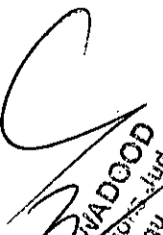
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6. Mr. Noor Kareem Khan Orakzai Advocate for appellants argued that disputed land is falling within the area of shamilat of Qaum Rabia Khel and the Qaum has collectively dedicated this small piece of land for construction of Police Post. The scheme has been approved in Annual Development Plan and remained under construction for sufficient length of time but no one including plaintiff had ever objected. The General Public as well as the owners of Shamilat Land has welcomed the construction and termed it necessary and beneficial for peace in the area. He added that the evidence of the plaintiff 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. Abid Ali Advocate representing respondents resisted the stance of opponent by stating that it has been admitted by the defendants in pleadings as well as evidence that neither process of land acquisition has been initiated nor compensation has been awarded to the plaintiff. He has Jirga Deed of the year 1960 followed by the decision of APA, Orakzai on his credit; while, the defendants have neither oral evidence nor documentary evidence in support of their plea. The plaintiff has rightly approached the competent forum of Civil Court Orakzai for redressing grievances which was allowed in shape of decree. The appellants have indulged the plaintiff in rounds of litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal.

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


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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 it has been admitted by both parties that neither acquisition of land has been processed nor the compensation has been awarded to anyone. The ownership of plaintiffs is proved through oral evidence of independent witnesses. They have categorically testified that the property in dispute was ownership of the forefathers of the plaintiff which devolved upon the plaintiff as inherited legacy. The plaintiff has produced Qudrat Ullah as PW-1 who produced the Register containing the verdicts of that time delivered by his forefathers commonly known as Akhunzadagan of Balyamina; the socio-religious class of the society. He happens to be the descendant of Akhunzada of Balyamina and had confirmed the possession as well the deed in favor of the plaintiff. This property was again subjected to dispute with Ibrahim Khel in the year 2016. The matter was referred to Jirga by the then APA, Orakzai and the Jirga has opined that the matter decided decades back by Akhunzada Balmina needs not to be re-opened; the Jirga member confirms this as PW-5. This Jirga has been adopted by the Assistant Political Agent, Orakzai in his Judgement available on file. Other witnesses had also testified ownership of the plaintiff and thus plaintiff was successfully establishing preponderance of probability in his favour that shifted burden to the opponent.

10. When plaintiff has established his ownership of the landed property in the area including that of disputed property followed by unequivocal admission on part of defendants regarding nonpayment of any compensatory award to anybody; the plea taken in defense was therefore required proof of higher degree. It is defense plea that the property has been gifted by the Qaumi Mashran but did not bother to produce any such document or one of the Qaumi

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Mashar who can testify this fact as true. It was the second plea of defense that the Police Post disputed was Levi Post established decades back but failed to produce a single document that may substantiate the version. The documents so produced by the defendants in shape of Administrative Approval, Work Order and Tender Invitation Notice of the project does specify the date of date of construction or rehabilitation of such Police Post in the year 2017. The direct evidence of the plaintiff is supported by documentary evidence in shape clubbed with admission on nonpayment had sufficiently established probability in favor of plaintiff and successfully shifted the onus of proof to defendants. The defendants have produced three witnesses but none of them could have shattered the probability so established as this is the matter of preponderance of probability where the weight of the defendants' evidence is far below.

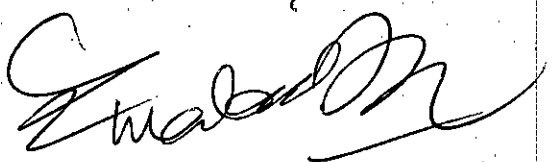
11. The property utilized by the Provincial Government for construction of Police Post is gifted by Qaumi Mashran on the consideration that this will enhance the peace in exurbia of Musa Tang; asserted by defendants. This very argument is not acceptable on the single score that maintaining law and order situation is the primary responsibility of State for which its subjects are not supposed to gift landed properties. The taxes of all types being paid by the subjects are sufficient for State to discharge its primary function of maintaining peace and secondary function of welfare activity.

12. So far, the legal question raised in Appeal is concerned, the non-consideration of the documentary evidence of defendants by the learned Trial Court is justified for different reasons. Article 119 of the Qanun-e-Shahadat Order, 1984 postulates that it is the defendant who shall prove every specific plea taken in defense and on this criteria, the defendant party was required to

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prove the fact of gift of such property and construction of Levi Piquet decades back but their evidence is not available on both the sides.

13. For what has been above, it can safely be concluded that the learned Trial Court has properly appreciated the evidence and rightly passed the impugned Judgement and Decree dated 29-11-2022. Consequently, as the Judgement under appeal does not warrant interference; therefore, the appeal in hand stands dismissed. Costs shall follow the events. Requisitioned record be returned with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.



14. Announced in the open Court
08-04-2023

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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