

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

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| Original Civil suit No | 25/1 of 2022 |
| Date of original institution | 05.04.2022 |
| Date of transfer in | 05.07.2022 |
| Date of decision | 31.03.2023 |

1. **Abdur Raziq S/o Muhammad Sadiq**
Resident of Qoam Mishti, Tappa Darwee Khel, Kandee Mandra Khel, Mishti Chapper, presently Mayan Mela, Central District Orakzai.
2. **Muhammad Shafiq S/o Taza Khan**
Resident of Qoam Mishti, Tappa Darwee Khel, Kandee Mandra Khel, Mishti Chapper, Central District Orakzai, presently Shahoo, District Hangu.
3. **Lal Saeed S/o Haji Man Shah**
Resident of Teri Banda Tappa Darwee Khel, Shoib Khel, Central District Orakzai.
4. **Minawar Khan S/o Haji Mazar Khan**
Resident of Khairullah Gari, Tappa Darwee Khel, Shoib Khel, Central District Orakzai.

..... (Plaintiffs)

Versus

1. **Nawab S/o Abdul Malik**
2. **Saad Ullah S/o Abdul Malik**
Both residents of Qoam Mishti, Tappa Mamezai, Utmanri, Central District Orakzai.
3. **Haji Arsal S/o Hakeem Khan**
Resident of Qoam Ali Khel, Tappa Zanka Khel, Kandy Madon Nawasi, Branzona, Kocha Khel, Central District Orakzai.
4. **Johar S/o Moghal Baz**
Resident of Qoam Mishti, Tappa Darwee Khel, Ibrahim Zona, Madon Nawasi, Central District Orakzai.
5. **Shaheen S/o Khana Gul**
Resident of Qoam Mishti, Tappa Darwee Khel, Central District Orakzai.

.....(Defendants)

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

JUDGMENT:

1. Brief facts of the case are that plaintiffs filed the instant suit for deceleration-cum perpetual mandatory injunction and possession through partition to the effect that they are owner in possession of suit property measuring 20 Kanal land fully detailed in the head note of the pliant. That the defendants have no right to deny the legal rights of plaintiffs and start mining coal without the permission of the plaintiffs and the act of defendants denying the legal rights of plaintiffs is illegal and against the law. That defendants be restrained from denying the rights of plaintiffs and that defendants were 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 defendants 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.
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 this court has got the jurisdiction to entertain this suit?*
3. *Whether the plaintiffs are estopped to sue?*
4. *Whether the suit of the plaintiffs is time barred?*
5. *Whether the present suit is bad in the present form?*
6. *Whether the plaintiffs are owners in the suit property and are entitled to enjoy all the rights associated with the same?*
7. *Whether the defendants are doing illegal mining in the suit property?*
8. *Whether the plaintiffs are entitled to the decree as prayed for?*
9. *Relief.*


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4. Parties were afforded with ample opportunity to adduce evidence. Plaintiff in support of his claim and contention produced 04 Witnesses. Detail of the plaintiff's witnesses and exhibits are documents are as under; -

| | WITNESSES | EXHIBITIS |
|------|---|-----------|
| PW-1 | Sunab Khan S/o Faraz Khan Resident of Qoam Mishti, Tappa Darwee Khel, Central District Orakzai. | Nil |
| PW-2 | Zahid Sultan S/o Pehlawan Khan Resident of Qoam Mishti, Tappa Darwee Khel, Central District Orakzai. | Nil |
| PW-3 | Abdur Razaq S/o Muhammad Sadiq Resident Qoam Mishti, Tappa Darwee Khel, Central District Orakzai. | Nil |
| PW-4 | Minawar Khan S/o Uzar Khan Resident Qoam Mishti, Tappa Darwee Khel, Central District Orakzai. | Nil |

Defendants in support of his claim and contention produced five (05) witnesses. Detail of defendant's witnesses and exhibited documents are as under;

| | WITNESSES | EXHIBITIONS |
|------|---|--------------------------------|
| DW-1 | Ghalib Khan S/O Ghuncha Gul Resident Qoam Mishti, Tappa Darwee Khel, Central District Orakzai. | Copy of CNIC as Ex. DW- 1/1 |

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|------|---|--|
| DW-2 | Ghafor Khan S/o Hassan Sher Resident of Qoam Mishti, Tappa Darwee Khel Nari Kada District Orakzai. | Copy of service card as Ex. DW-2/1 |
| DW-3 | Wazir Khan S/o Lal Baz Khan Resident of Qoam Mishti, Tappa Darwee Khel District Orakzai. | Copy of CNIC as Ex.DW-3/1 |
| DW-4 | Habib Ur Rehman S/o Yar Bad Sher resident of Qoam Mishti, Tappa Darwee Khel District Orakzai | Copy of CNIC as Ex.DW-4/1 |
| DW-5 | Saeed Ullah S/o Abdul Malik resident of Qoam Mishti, Tappa Darwee Khel District Orakzai. | Special power of attorney is Ex.DW-5/1. Deed of partnership dated 03.05.1995 is Ex.DW-5/2. Agreement of Coal Mine dated 28.05.2008 is Ex.DW- 5/3. Agreement dated 28.08.2021 is Ex.DW-5/4. Copy of CNIC as Ex.DW- 5/5. |

5. Learned counsel for the plaintiffs Mr. Ahmad Nadeem Advocate argued that plaintiffs have produced cogent evidence and reliable witnesses to prove that the suit property is ancestral ownership of plaintiffs. The witnesses are consistent in their statements that the suit property is ownership of the plaintiffs and defendants have no right to carry on extracting minerals from the disputed property.

6. Learned counsel for the defendants Mr. Noor Karim Advocate argued that the plaintiffs have not produced sufficient evidence in order to proof their case. It is brought before the court in evidence that the

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suit property came in ownership of defendants by exchange, which has taken place long ago with cast Darwee Khel. It is also established in evidence that defendants have long standing possession of suit property. Plaintiffs don't have any documentary proof in support of their stance. On the other hand, defendant's possession has been admitted by PWs in their statements.

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 this court has got the jurisdiction to entertain this suit?

9. This objection was raised in preliminary objections in the written statement and the issue was framed keeping in mind the aforementioned objection and due to the fact that the suit property consists a coal mine.

10. Perusal of case file reveals that the plaintiffs has sought declaration to the effect of ownership of the suit property and not the shares in the produce of the mines. Although minerals are government property and the government reserve the right to lease out the mines containing minerals to any person as it deems fit according to the laws and rules applicable on the subject. But the instant case the pertains to the factual controversy of the ownership of land in question and not minerals.

11. Moreover, the section 102(1) of the Khyber-Pakhtunkhwa Mines and Minerals, 2017 provides for appeal to appellate authority against any impugned order of the Licensing authority. Section 102(6) of the Act ibid bars the jurisdiction of civil court to entertain and adjudicate upon any matter against an order of the licensing authority. In the

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instant case no order of licensing authority is challenged rather declaration to the effect of ownership of the suit property is sought.

12. Keeping in view the above discussion, the issue is decided in positive and in favour of the plaintiffs.

ISSUE NO.3:

Whether the plaintiffs are estopped to sue?

13. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendants, therefore issue is decided in negative and against the defendants.

ISSUE NO.4:

Whether the suit of the plaintiffs is time barred?

14. Though the defendants have taken the defense that the suit is not 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.5:

Whether the present suit is bad in the present form?

15. This objection was raised in preliminary objection in written statement however, the issue was neither discussed nor stressed upon, hence remain reddened.

ISSUE NO.6:

Whether the plaintiffs are owners in the suit property and are entitled to enjoy all the rights associated with the same?

16. The claim of the plaintiffs is that they are the owner in possession of the disputed property and defendants are interfering in the same by

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doing mining activities. Burden of proof regarding the issue was primarily on plaintiffs at first instance and secondly on the defendants in rebuttal of the stance of the plaintiffs. Plaintiffs in order to discharge this duty, produced four witnesses. The essence of their statements which helped in deciding the issue are as under.

17. Sunab Khan, who deposed as PW-01, while supporting the claim of the plaintiffs stated in his examination in chief that the suit property is the ownership of Tappas (Sub Cast) of the plaintiffs. That defendant No.01 and 02 might have exchanged their property with Shergha Khel cast but the suit property neither belonged to Shergha Khel nor they have any claim on it at present. Further stated that the point on which coal mining has been started belongs to the plaintiffs and the defendants without prior permission of the plaintiffs have started mining coal even without getting NOC from the government. The said PW stated in his cross examination that defendants have possession of the suit property from last one year. Further stated that the suit property is joint ownership of cast Haider Khel, Mamezai and Darwee Khel. The said PW also stated that two jirgas were conducted on the issue of this disputed suit property. Further stated that the suit property has never been cultivated by our self, but was given tenant for this purpose.

18. PW-02 is the statement of Zahid Sultan who supported the stance and contention of plaintiffs in his examination in chief. The said PW recorded in his cross examination that the defendants have possession of the suit property from last one year.

19. PW-03 namely Abdul Raziq recorded his statement in support of the plaintiffs and reproduced the same facts which were recorded by the above mentioned PWs in their examination in chief. He recorded in

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his cross examination that he does not know the measurement of suit property. It is pertinent to mention here that the said PW is plaintiff No.01 in the instant case. Further stated that the defendants have possession of one Jareeb only in the suit property.

20. Minawar Khan deposed as PW-04 and reproduced the facts which were recorded by other PWs in their examination in chief. He recorded in his cross examination that we have conducted Jirgas with the defendants. He stated that defendants namely Nawab and Asad Ullah have possession of the suit property from last one year.
21. Defendants in rebuttal of the stance of the plaintiffs produced five witnesses. The essence of defendant's evidence is as under.
22. Ghalib Khan appeared before the court as DW-01 and recorded his statement in which he stated that the disputed property was exchanged by our predecessors with the family of defendant No.01 and 02. In exchange with the suit property, we had received property in another place called Narri Kadda. He recorded in his cross examination that in partition of the area in which the suit property is situated, our cast namely Darwee Khel has received area stretching from Cundo Tall to Painsa Khan Talab. The said partition has taken place in time of our predecessors.
23. DW-02 is the statement of Ghafoor Khan who also belongs from cast Darwee Khel and reproduced the said facts as that of PW-01. Neither worth mentioning contradiction was recorded in his cross examination nor any new fact came before the court in the same. Similarly, DW-03 and DW-04 are also the witnesses who belong to Cast Darwee Khel and supported the stance of defendants regarding exchange of the property. They stated that due to this exchange, the suit property came into ownership and possession of the defendants.

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24. Saeed Ullah who is power of attorney for defendants and defendant No.02 himself, recorded his statement as DW-05. The said DW exhibited partnership agreements dated; 03.05.1995, 28.05.2008 and 29.08.2021, pertaining to coal mine on the disputed property. He stated that the first successful coal mine on the suit property started in the year 2008. Before that, four attempts for the said purpose remain unsuccessful. Further stated that he has constructed boundary wall of Painsa Khan Talab situated on the suit property in 2002 and we have possession of the suit property since long. The said DW admitted in his cross examination that he has not produced any witness of the aforementioned coal mine agreements by which he wants to prove his possession on the suit property. Further admitted that he has not taken any permission from the competent authority regarding mining activity on the suit property. Moreover, the said DW also stated that the exchange of property had taken place in the year 1967 due to which we had received disputed property.

25. The statements of aforementioned witnesses produced by the plaintiffs in support of their stance and the witnesses produced by defendants in rebuttal of the stance of plaintiffs, brought the facts before the court, which provided reasons mentioned hereinafter, to decide the issue in hand. Shedding light over the statements of PWs, the following observations were noted down by this court. Firstly, the suit is claimed to have been filed in representative capacity by making one person from each Tappa (Cast) as a plaintiff. However, the said procedure is not warranted by the Law as envisaged in Code of Civil Procedure, 1908. Secondly, some of the PWs stated in their statements that the suit property is in their possession through their tenant, however, the tenant was not produced in course of evidence to

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testify on their behalf. Thirdly, all the PWs have admitted possession of defendants on the suit property at present. Fourthly, the PWs despite been interested in the suit property are not consistent on the fact that whether any jirga has been convened to resolve dispute over the suit property. Fifthly, the description of suit property given by the PWs in their statements vary from each other and also from the description given in plaint. It is pertinent to mention here again that all the PWs have claimed over the suit property yet they are unaware of the description of the suit property.

26. Coming to the statements of DWs, following facts were established during course of their evidence in the instant suit. Firstly, defendants produced four witnesses who belongs to cast Darwee Khel. All the said DWs have admitted the fact that the suit property was exchanged by our predecessors with the predecessors of the defendants and that's how the defendants came in ownership of the suit property. Secondly, all the DWs were consistent on the fact recorded in their evidence that defendants have lawful possession of the suit property. Thirdly, in absence of any revenue record in District Orakzai, possession of the property cannot be ignored to decide land dispute between parties.

27. 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 their claim, therefore, issue No.06 is decided in negative and against the plaintiffs.

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ISSUE NO.7:

Whether the defendants are doing illegal mining in the suit property?

- 28. The burden of proof regarding the issue was on defendants. Defendants have to prove that the mining activity on the suit property is legal on two scores; firstly, that they have lawful possession of the suit property and secondly, they have followed the scheme of things provided by Khyber Pakhtunkhwa Mines and Minerals Act, 2017. The possession in question is already discussed in issue No.06. However, defendants have failed to bring forth any license, lease agreement or NOC issued by competent authority in their favour.
- 29. Keeping in view the above discussion, it is held that defendants have failed to produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.07 is decided in negative and against the defendants.

ISSUE NO. 1 and 8:

Whether plaintiffs have got cause of action?
Whether plaintiffs are entitled to the decree as prayed for?

- 30. Both these issues are interlinked, therefore, taken together for simultaneous discussion.
- 31. The discussions on the above referred issues show that plaintiffs have failed to prove their case by fulfilling the requirements of law and by producing cogent and confidence inspiring evidence; therefore, they have got no cause of action and are not entitled to the decree as prayed for.
- 32. Thus, issues No.01 and 07 are decided in negative and against the plaintiffs.

RELIEF:

- 33. The detailed discussion on issues mentioned above transpires that the

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plaintiffs have failed to prove their case against the defendants by proceedings cogent and confidence inspiring oral or documentary evidence. Hence, suit of the plaintiffs is **Dismissed**.

34. Cost to follow the events.


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

Announced
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CERTIFICATE: -

Certified that this judgment consists of twelve (12) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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