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*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-01/13 of 2023

Date of institution: 03.01.2023

Date of decision: 18.03.2023

Sameer Khan son of Khiyal Muhammad resident of Qaum Ali Khel,
Tappa Sher Khel, Bazid Nawasi, Tehsil Upper, District Orakzai.

..... (**Appellant/plaintiff**)

...Versus...

Zaman Khan son of Jannat Khan, Aman Ullah Khan and Dilawar Khan
son(s) of Fazal ur Rehman all residents of Qaum Ali Khel, Tappa Sher
Khel, Tehsil Upper, District Orakzai.


..... (**Respondents/defendants**)

**Appeal against Judgement, Decree and Order dated 30.11.2022,
passed in Civil Suit No. 76/1 of 2022.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/plaintiff
against the Judgment, Decree & Order dated 30.11.2022, passed by
learned Senior Civil Judge, Orakzai in Civil Suit bearing No.76/1 of 2022;
whereby, suit of the appellant/plaintiff with the title of "Sameer Khan vs
Zaman Khan etc." was dismissed.

2. Sameer Khan being plaintiff claimed ownership and possession of
the landed property in the area named Wacha Kadda Talay located in
Upper Tehsil of District Orakzai. The Pine Trees have forcefully been cut
and transported for illegal sale by the defendants which is counted as three
hundred (300) trees. The plaintiff on basis of four thousand rupees (Rs.
4000) per tree as tentative cost estimation presented suit for recovery of
1.2 Million Rupees.



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3. Defendants/respondents on appearance objected the suit on various legal as well as factual grounds in their written statement. It was specifically pleaded that the landed property of Wacha Kadda Talay is the joint holding of more than fifty families where plaintiff is one person but he cannot go back to the area being supporter of Militant Group during militancy.

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 plaint of the plaintiff is wrong and baseless?*
- iii. *Whether the suit of the plaintiff is time barred?*
- iv. *Whether plaintiff is entitled to the recovery of an amount of Rs. 1,200,000 as the price of 300 Cheerh tree cut down by the defendants?*
- v. *Whether the plaintiff is entitled to the decree as prayed for?*
- vi. *Relief?*

5. Opportunity of leading evidence was accorded to the parties. Plaintiff produced 03 witnesses; where, plaintiff appeared as PW-01, who narrated the same story as in his plaint. Mr. Akbar Jan brother of the plaintiff appeared as PW-2, Mr. Muhammad Khaliq appeared as PW-3 and Mr. Badshah Wazir appeared as PW-4. All the witnesses supported the contention of the plaintiff by narrating the same story as in the plaint. In rebuttal, defendants produced 03 witnesses. Dilawar appeared as DW-01, Nia Zaman Khan appeared as DW-02 and Aman Ullah appeared as DW-3. All the three defendants' witnesses denied the claim of the plaintiff.


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6. Mr. Ihsan Ullah Advocate for appellant argued that plaintiff has proved his case on the strength of evidence of the sufficient category of cogency. Besides, material facts have been admitted by the defendants and grant of decree was natural course of things. Dismissal of suit is based on non-reading of evidence that has not properly been appreciated. The refusal of the decree is the decision being contrary to law may be set aside and suit of the appellant may be decreed.

7. Learned counsel representing respondents/defendants is of the stance that learned Trial Court has rightly dismissed the suit on the score of lacking evidence and dragging the matter in appeal as to protract litigation without justifiable reason.

8. Whether plaintiff has proved his case and refusal of decree was result of non-appreciation of evidence and wrong application of law, as the point of determination in appeal.

9. Bare reading of the pleadings reflects that the defendants have unequivocally admitted the status of the defendant to the extent of owner of his own share in disputed property. Reasoning of Judgement in question includes that no measurement of the wood had been taken place and pictures of the cutting are not available. This is the question which cannot be determined without getting on the spot information and investigation through local commission was the right course of things mandated in Order-26 of Code of Civil Procedure, 1908. The appointment of Local Commission would have been elucidated the available evidence as well. It is also worth mentioning that defendants themselves suggested in Para No.2 of written statement that commission may be appointed to ascertain the fact of the cutting or otherwise of the trees.


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10. For what has been discussed above, appeal is allowed. The case is remanded back to the learned Trial Court for local investigation and to get on the spot information through commission with the following points for determination.

- i. Whether property in dispute is exclusive ownership or the joint holding of the local inhabitants?
- ii. What type of forest is available in disputed area?
- iii. Whether any cutting has been conducted and if yes, what is its tentative quantum and market value?
- iv. Any other matter that may be helpful in providing on the spot information or elucidating the available evidence.

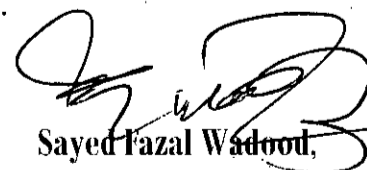
11. The learned Trial Judge shall appoint the local commission and decide the case afresh in the light of such report. Requisitioned record be returned with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

Announced in the open Court
18.03.2023


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment is consisting upon four (04) pages; each of which has been signed by the undersigned after making necessary corrections therein and red over to the parties.


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela