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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-4/13 of 2022

Date of institution: 17.01.2023

Date of decision: 10.04.2023

Khayal Shah and 16 others, all residents of Qaum Mishti, Tappa Haider Khel, village Alwara Mela, Tehsil Lower, District Orakzai.

..... (**Appellants/plaintiffs**)

...Versus...

Safar Gul and 6 others, all residents of Qaum Mishti, Tappa Darvi Khel, village Alwara Mela, Tehsil Lower, District Orakzai.


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

Appeal against Judgement, Decree and Order dated 20-12-2022, passed in Civil Suit No. 12/1 of 2020.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants/plaintiffs against the Judgment, Decree & Order dated 20.12.2022, passed by learned Civil Judge-II, Tehsil Courts Kalaya, Orakzai in Civil Suit bearing No.12/1 of 2020; whereby, the suit with the title of Khial Shah etc. vs Safar Gul etc. was dismissed.

2. Briefly stated facts of the case are such that the plaintiffs have filed suit against the defendants (respondents herein) for declaration with consequential relief of injunction to the effect that plaintiffs are owner in possession of the fields/property along with a house and defendants are using the same as tenants. Defendants are farming in the same giving half produce of the land to the plaintiffs. Last year, defendants No.1 to 6 started claiming as possessors of the same property and stopped giving produce of the land to the plaintiffs. That defendant No. 2 unlawfully exchanged 40 marlas property of the same property with defendant No.7. That these acts are unlawful and ineffective upon the rights of the plaintiffs.


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3. Defendants/respondents No. 1,2,4,5 and 6 on appearance, objected the suit on various legal as well as factual grounds in their written statement while the defendants who did not put appearance despite proper service were placed and proceeded ex-parte. It was specifically pleaded that the disputed property is in their possession since their ancestors. Plaintiffs are neither owners nor in possession of property.

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 then learned Trial Judge.

- i. *Whether plaintiffs have got cause of action?*
- ii. *Whether the plaintiffs are estopped to sue?*
- iii. *Whether the suit of the plaintiffs is time barred?*
- iv. *Whether disputed property is the ancestral property of the plaintiffs and defendants have got nothing to do with the same?*
- v. *Whether the defendants are illegally interfering in the suit property?*
- vi. *Whether the plaintiffs are entitled to the decree as prayed for?*
- vii. *Relief?*

5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiffs produced as much as three persons in evidence. All the three witnesses supported the contention of the plaintiffs and stated that the suit property is the ancestral property of the plaintiffs. On turn, defendants had also produced one person in support of their plea taken in defense. Learned counsel representing parties have been heard and suit was decreed which is impugned by the defendants in instant civil appeal.

6. Learned counsel representing appellants argued that the stance of defendants is evasive denial and no evidence whatsoever has been produced by them. The pleadings and evidence of the defendant are not in consonance with each other and


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evidence beyond pleadings has wrongly been considered. The evidence of the plaintiff produced in the Court is confidence inspiring and cogent one that has not been considered. The issues framed have either not been framed in proper way or had not been determined on the basis of logical appreciation of evidence and proper application of law. The suit of the plaintiff is proved on the strength of oral and documentary evidence and therefore withholding of decree by way of dismissal of suit is based on illegality. It was concluded with the prayer that appeal may be allowed and the suit may be decreed by reversing the Judgement of the Trial Court.

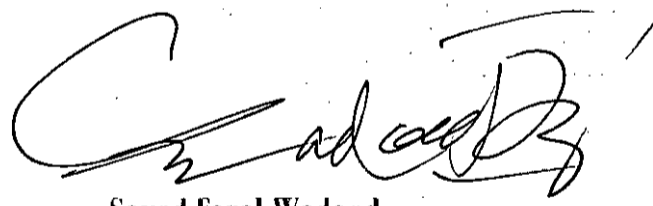
7. Learned counsel representing respondents/defendants contended that the plaintiffs have failed to prove their case and was rightly dismissed. The Judgement of learned Trial Court is judicial determination based on deep appreciation of evidence and backed by law. The appeal is protraction of litigation on part of the plaintiffs with ulterior motive of harassing the defendants; which, may be dismissed with cost.

8. 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 the material preposition of law and facts asserted by one party and denied by other have not properly been put into distinct issues. The plaintiff has alleged tenancy as base of the suit which is detrimental in subject matter jurisdiction of the Court but tenancy is nowhere part of the issues. The defendant at contest has taken specific plea of defense regarding the claim of the property as exclusive owner in possession and law burdens him to prove this issue but it is missing in the frame of issues available on file. The object of framing issue is to ascertain real issue between the parties by narrowing down the area of conflict and determine between the parties where they differ. It is one of most important stages of the trial in view of Order 18 Rule-2 read with Order-20 Rule-5 and Order 24 Rule-1 of the Code of Civil Procedure, 1908. It has further been clarified that in case any

issue improperly framed can be raised at any stage as was settled in Raja Ghulam Haider's case reported as 1991 MLD 1284. In another case reported as 1997 SCMR 1849, it has been ordained that it is the Judge who is duty bound to frame proper issue. Both the matters referred above are affecting the merits of the case as well the jurisdiction of the Court and omission on part of the learned trial court is not curable. Wisdom can be drawn from Judgement reported as 2005 CLC 970 read with 1985 CLC 1448 and 2028; wherein, it is declared that party is likely to be prejudiced by such omissions, which despite being an irregularity, is not curable under section 99 Code of Civil Procedure, 1908.

9. For what has been discussed above, appeal is allowed. The case is remanded back to the learned Trial Court for framing of issue in the light of observation recorded under Paragraph No.8 above; where after, the parties may led evidence on newly framed issues for getting the decision of learned Trial Court afresh. The parties shall appear before the learned Trial Judge on 04-05-2023. 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.

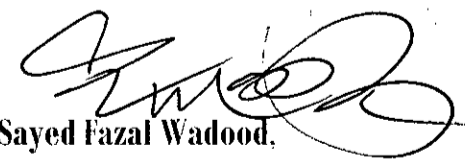
Announced in the open Court
10.04.2023



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 read over.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela