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IN THE COURT OF SYED ABBAS BUKHARI
CIVIL JUDGE - II, TEHSIL
COURTS KALAYA ORAKZAI

Suit No. 96/1 of 2020

Date of Original Institution.....21.09.2020

Date of transfer to this court05.07.2022

Date of Decision of the suit05.04.2023

1. Qadeem Khan s/o Said Raheem
2. Sadiq Rahman s/o Noor Rahman
3. Hayat Khan s/o Zaman Khan
4. Sakhi Rahman
5. Mujeeb Rahman sons of Noor Rahman
6. Kashif
7. Sohail sons of Sabir Rahman
8. Bilawar Khan s/o Abdul Rahman residents of Chaman Jand Payan Qom Stori Khel Tapa Lal Bi Khel Lower Orakzai.Plaintiffs

Versus

1. Fazal Wadood s/o Abdul Hakeem
2. Drusta Khan s/o Sharif Khan
3. Qamar Zaman s/o Waris Khan
4. Muhammad Younas s/o Karim Bakhsh
5. Taj Muhammad s/o Abdul Rasheed
6. Hayat Muhammad s/o Noor Muhammad Qom Stori Khel Tapa Lal Bi Khel residents of Chaman Janna Bala Lower Orakzai.
7. Shamroz Khan s/o Malik Lateef Khan
8. Rooh Ullah s/o Nadir Khan
9. Riayat Khan s/o Abdul Qadir residents of Sheraz Ghari Tapa Lal Bi Khel Lower Orakzai.Defendants

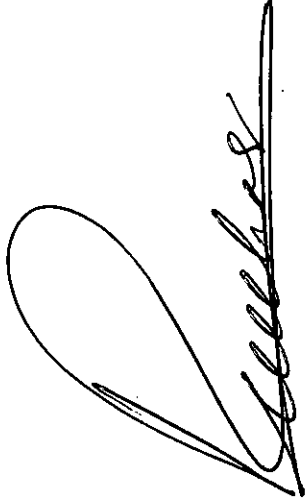
SUIT FOR DECLARATION, SPECIFIC
PERFORMANCE OF CONTRACT AND
PERMANENT INJUNCTION

Counsel for plaintiff: Syed Hamza Gillani

Counsel for defendants: Abdul Qayum

SYED ABBAS BUKHARI
Civil Judge II
Tehsil Courts Kalaya

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JUDGMENT**05.04.2023**

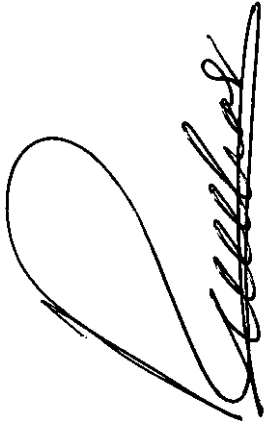
Vide this judgment I intend to dispose of suit captioned above.

2. It is a suit from plaintiffs against defendants for declaration, specific performance and permanent injunction to the effect that plaintiffs are owners in possession of the suit property through private partition vide deed dated: 04.01.2012 and thus the defendants have got no right to interfere with the suit property or dispossess the plaintiffs from suit property or to change the nature of the same through construction.

Brief facts of the case as narrated in the plaint are that parties to the suit belong to one tribe namely Stori Khel and thus previously there existed disputes between parties to the suit in respect of their joint property situated at Chaman Janna and after deliberation held between the parties, said joint property was privately partitioned between the parties vide partition deed dated: 04.01.2012. As per terms and conditions contained in partition deed, the property situated at Chaman Janna Bala was handed over to the defendants no.01 to no.06 while the property situated at Chaman Janna Payan was given to the plaintiffs and plaintiffs by making improvements not only made the barren land cultivable but also constructed houses, Hujra and Mosque etc over the same. The defendants after partition of the suit property are interfering with the peaceful possession of plaintiffs and

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further claim the suit property situated at Chaman Janna Payan to be their ownership and thus are disturbing the peaceful possession of plaintiffs. In this respect the defendants were time and again requested that by acting upon terms and conditions contained in partition deed dated: 04.01.2012, refrain from interfering with the share of plaintiffs/suit property but they refused, hence the instant suit.

After institution of the plaint, the defendants were summoned and accordingly defendants no.01 to no.06 appeared and submitted their respective written statement while defendants no.7 to no.09 were placed and proceeded as ex-parte due to their non-appearance.

5. Out of controversies of the parties, as raised in their respective pleadings, the then incumbent Court has framed the following issues on 24.08.2022.

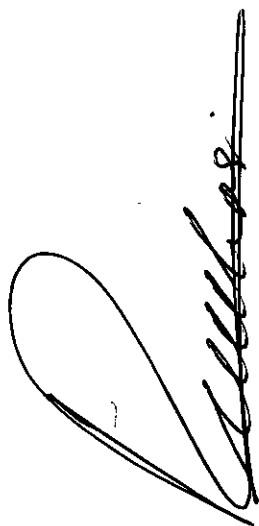
1. Whether the plaintiffs have got a cause of action?
2. Whether the plaintiffs are estopped to sue?
3. Whether the suit of plaintiffs is time barred?
4. whether suit of plaintiffs is bad in its present form due to non-joinder and mis-joinder of parties?
5. Whether the plaintiffs are entitled to the possession of their shares in the suit property under family partition agreement deed dated: 04.01.2012?
6. whether under agreement deed dated: 04.01.2012 property situated at Chamanjana Bala was given to defendants and the property situated at chamanjana payan was given to plaintiffs?
7. Whether the plaintiffs are entitled to the decree as paryed for?
Relief.

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6. Both the parties were directed to produce their evidence, which they did accordingly. Plaintiffs produced as many as four witnesses and thereafter closed their evidence. Contrary to this the defendants produced two witnesses and thereafter closed their evidence with a note.

7. Both the learned counsels for the parties to the suit then advanced arguments. Learned counsel for the plaintiffs opened the arguments and argued that parties to the suit belong to one and the same tribe namely Stori Khel and thus previously disputes arose between the parties to the suit in respect of their joint property and thus in this respect after deliberation a private partition took place between the parties and in this respect partition deed dated: 04.01.2012 was also scribed. Learned counsel further added to his arguments that property situated at Chamanjana Bala was given to defendants while that situated at Chamanjana Payan was given in possession of plaintiffs. However subsequently after settlement of dispute, defendants started to interfere with the peaceful possession of plaintiffs. He further adduced that defendants were time and again requested to refrain from interfering with the suit property but they refused, hence instant suit was instituted. He further argued that the plaintiffs succeeded to prove their stance through cogent, convincing and reliable evidence and further nothing in rebuttal is available on the record, hence prayed that the suit



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in hand may kindly be decreed in favour of plaintiffs and against the defendants for the relief as prayed for.

8. Contrary to this learned counsel for the defendants no.1 to no.06 argued that plaintiffs have got no cause of action. He further adduced that neither any private partition between the parties has previously taken place nor defendants no.1 to no.6 have signed any partitioned deed. He further argued that parties to the suit are not joint owners rather they are in possession of their respective shares since time of their ancestors. Learned counsels further contended that the plaintiffs failed to prove their stance through cogent and convincing evidence. On the other hand, the defendants succeeded to produce evidence in light and support of their stance previously alleged in their written statement. Hence, prayed that as plaintiffs failed to prove their case, accordingly the suit in hand may kindly be dismissed.

9. Now on perusal of record, available evidence and valuable assistance of both the learned counsels for the parties my issue wise findings are as under.

ISSUE NO. 2:

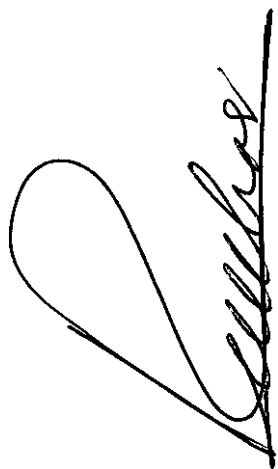
Whether the plaintiffs are estopped to sue?

ISSUE NO. 3:

Whether the suit of plaintiffs is time barred?

ISSUE NO. 4:

Whether the suit of plaintiffs is bad in its present form due to non-joinder and mis-joinder of parties?



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Defendants no.01 to no.06 have previously alleged in their written statement that plaintiffs are estopped to sue, suit of plaintiffs is barred by limitation and suit of plaintiffs is bad for mis-joinder and non-joinder of parties, hence burden to prove issues no.2 to issue no.04 was on the shoulders of defendants no.1 to no.6. In this respect, to prove the issue in hand, defendants no.01 to no.06 produced two witnesses as DW-01 and DW-02. However perusal of the statements of both the DWs it has been noticed that they failed to utter a single word regarding the abovementioned issues and thus deviated from the stance of defendants no.1 to no.06 previously alleged in their respective written statement.

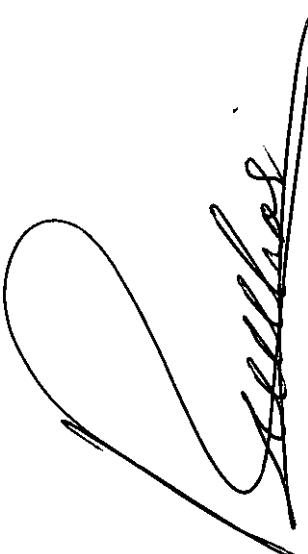
In light of what has been discussed above, as defendants no.01 to no.06 miserably failed to prove issues no.02, 03 and 04 through their cogent, reliable and convincing evidence, hence the aforementioned issues are hereby decided in negative against defendants no.01 to no.06 and in favour of plaintiffs.

ISSUE NO. 5 and ISSUE NO. 06:

Whether the plaintiffs are entitled to the possession of their share in the suit property under family partition agreement deed dated: 04.01.2012?

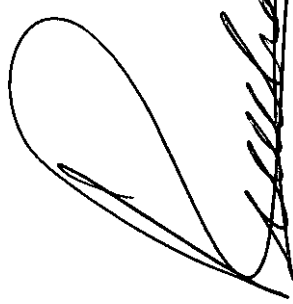
Whether under agreement deed dated: 04.01.2012 property situated at Chamanjana Bala was given to defendants and the property situated at Chamanjana Payan was given to plaintiffs?

Issues no.05 and no.06 being interlinked, are hereby discussed and decided collectively. Plaintiffs in their plaint had

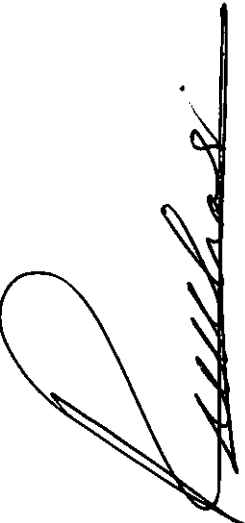

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previously alleged that the suit property was previously privately partitioned amongst the parties to the suit vide partition deed dated: 04.01.2012 and property situated at Chamanjana Bala was given in possession of defendants while that situated at Chamanjana Payan was handed over to plaintiffs. To prove their stance plaintiffs produced one Wajid Ali s/o Ghulam as PW-01, who deposed on oath that he had seen Ex-PW1/1, which is private partition deed and was executed amongst parties to the suit, which alongwith all its contents is correct. Ex-PW1/1 correctly bear his signature as well as thumb impression. The elders of defendants had not objected over private partition deed at that very time. During cross examination the witness deposed that he had scribed Ex-PW1/1. It is correct that at the time of scribing Ex-PW1/1 Waris Khan and Noor Muhammad were not present. Self-stated that Waris Khan was dead at that time while Noor Muhammad was ill. It is correct that Ex-PW1/1 does not bear the signatures of Waris Khan, Noor Muhammad or their legal heirs. Self-stated that defendants were present at the time Ex-PW1/1 was scribed but they refuse to sign the same. It is correct that at the dorsal side of Ex-PW1/1, the signatures/thumb impressions of Fazal Wadood, Drusta Khan and Muhammad Younas are not available. Self-stated that they were personally present but refused to affix their signatures. Ex-PW1/1 was not scribed at Hungu rather same was scribed at his Hujra.


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 CIVIL JUDGE (II)
 District Court, Lahore

PW-02 was produced and examined as one Shamroz Khan s/o Latif Khan, who deposed on oath that he had seen Ex-PW1/1, which is private partition deed amongst parties to the suit. All the contents of Ex-PW1/1 are correct and correctly bear his signatures. One Noor Muhammad and Waris Khan, elders of defendants, were present at jirga and they did not object over the decision made in Jirga. During cross examination he deposed that on Ex-PW1/1 the signatures/thumb impressions of none of the defendants are available. He is not in knowledge that where Ex-PW1/1 was scribed.



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PW-03 was produced and examined as one Rooh Ullah Khan s/o Nadir Khan, who deposed on oath that he had seen Ex-PW1/1, which is private partition deed amongst the parties. All the contents of Ex-PW1/1 are correct and correctly bear his signatures and thumb impression. During cross examination he deposed that Ex-PW1/1 was scribed at Chamanjana in the house of one Qadeem Khan. Those whose signatures are available over Ex-PW1/1 were present and those whose signatures are not available over Ex-PW1/1 were not present. It is incorrect to suggest that Ex-PW1/1 was scribed at the hujra of Malik Wahid.

PW-04 was produced and examined as one Qadeem Khan s/o Said Raheem, plaintiff no.1 and special attorney for rest of plaintiffs, who deposed on oath in light and support of the stance of plaintiffs previously alleged in the plaint. During cross examination he deposed that it is correct that the name of no one

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amongst the defendants has been mention on the front or dorsal side of Ex-PW1/1. It correct that Ex-PW1/1 does not bear signature or thumb impression of defendants.

Now in light of the above evidence produced by the plaintiffs to prove the issue in hand, it is pertinent to mention here that plaintiffs have filed instant suit on the basis of private partition deed dated: 04.01.2012 (Ex-PW1/1) and thus their whole case rest over the proof or disproof of Ex-PW1/1. It is also worth mentioning here that Ex-PW1/1 does not bear the signatures/thumb impressions of defendants and this fact has also been admitted by the PWs in their respective cross examinations. Furthermore, the PWs had also deposed in their cross examinations that the defendants were present on the spot but they refused to affix their signatures/thumb impressions over Ex-PW1/1. In given circumstances this court is of the view that the refusal to affix signature/thumb impression over Ex-PW1/1 by the defendants, lead this court to presume that the defendants were not agree with the mode of partition mentioned in Ex-PW1/1 and thus for that very reason they refused to sign the same. Furthermore, in this respect Ex-PW1/1 is disputed between the parties from the day it was scribed. On the other hand PW-01 had deposed in his cross examination that Ex-PW1/1 was scribed in his hujra while PW-03 had deposed that same was not scribed at the hujra of Malik Wahid Ali rather it was scribed in the house of Qadeem Khan at Chamanjana.


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Moreover, Ex-PW1/1 was scribed on 04.01.2012 while instant suit was previously filed by plaintiffs on 21.09.2020 for specific performance of contract, declaration and perpetual injunction. In given circumstances, it is pertinent to mention here that as per Article 113 of The Limitation Act, 1908, the period of limitation to file a suit for specific performance is three years while that for declaratory suit is six years as per Article 120 of the Limitation Act, 1908. In present case, as stated earlier, Ex-PW1/1 is disputed from the very first day of its execution, for the reason that defendants refused to sign the same. Hence in circumstances the period of limitation would be calculated from the date when defendants refused to sign the same i.e. 04.01.2012 and thus the suit in hand is also barred by limitation. Furthermore, plaintiffs cannot enforce an agreement which was not signed by the other party to the agreement rather refusal to that effect has also been admitted by the plaintiffs.

In light of the above discussion, as plaintiffs failed to prove both the issues in hand through cogent, convincing and reliable evidence; hence accordingly both the issues are hereby decided in negative against the plaintiffs and in favour of the defendants.

ISSUE NO. 1

Whether the plaintiffs have got cause of action? OPP

In wake of issue wise findings above, the plaintiffs have got no cause of action, hence the issue in hand is decided in negative against the plaintiffs and in favour of defendants.

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CIVIL JUDGE
Tehsil Court, Abeyad - 04-10-2023.

ISSUE NO.07:

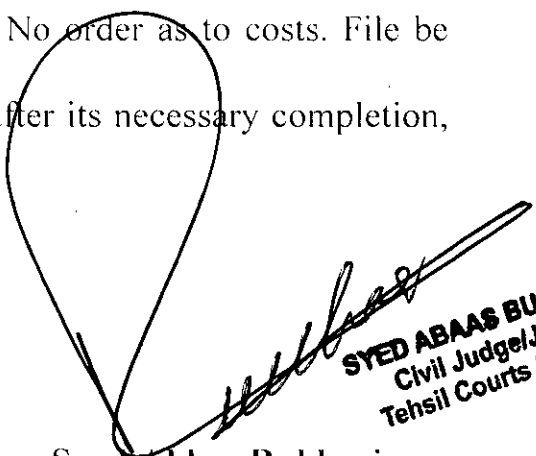
Whether plaintiffs are entitled to the decree as prayed for?
OPP

In wake of my issue wise findings above, plaintiffs are not entitled to the decree as prayed for, hence the issue in hand is decided in negative against plaintiffs and in favor of defendants.

Relief:

As per issued wise findings above the instant suit of plaintiffs is hereby **dismissed**. No order as to costs. File be consigned to the record room after its necessary completion, compilation and scanning.

Announced
05.04.2023


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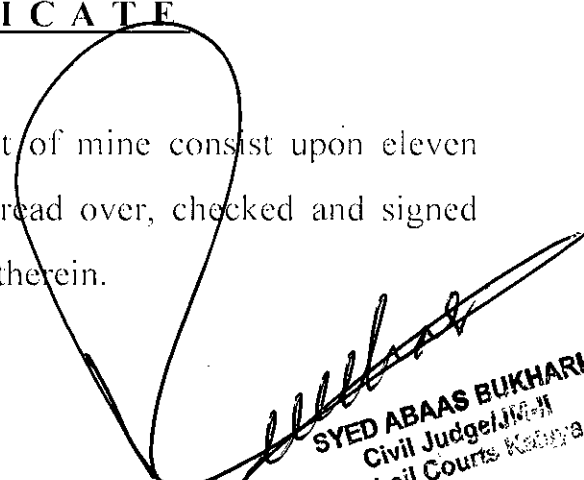
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Civil Judge/JJ-II
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C E R T I F I C A T E

Certified that this judgment of mine consist upon eleven (11) pages. Each page has been read over, checked and signed after making necessary correction therein.

Dated: 05.04.2023


Syed Abbas Bukhari
Civil Judge-II

Tehsil Courts, Kalaya, Orakzai

SYED ABAAS BUKHARI
Civil Judge/JJ-II
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