

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-05/13 of 2023

Date of institution: 19.01.2023

Date of decision: 29.04.2023

Shahid Gul son of Nazir Gul resident of Meer Khel, District Orakzai.
..... (**Appellant/plaintiff**)

...Versus...

Rasheed Gul son of Jan Gul resident of Orakzai, presently Madrassa
Terthel-Al-Quran Faqeer Kali, Peshawar and 15 others.

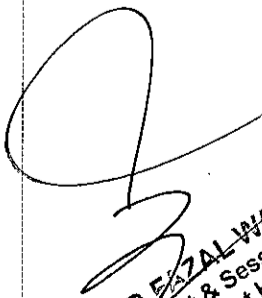
..... (**Respondents/defendants**)

**Appeal against Judgement, Decree and Order dated 21.12.2022,
passed in Civil Suit No. 30/1 of 2020.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/plaintiff against the Judgment, Decree & Order dated 21.12.2022, passed by learned Civil Judge-I, Orakzai in Civil Suit bearing No.30/1 of 2020; whereby, suit of the appellant/plaintiff with the title of "Shahid Gul vs Rasheed Gul etc." was dismissed.

2. Plaintiff Shahid Gul claimed in suit for declaration and injunction with consequential relief of possession through partition that he is one of the legal heirs Nazeer Gul (late) who happened to be the common predecessor in interest of the parties. The dwelling house occupied by the defendants and adjacent landed property situated in Mir Kalam Khel Jangali Kalo Orakzai is the legacy of common predecessor of the parties and all legal heirs are entitled to their Sharee share and such joint lot. The plaintiff is presently residing in Hafizabad District Kohat and is not willing to carry on joint ownership with the defendants. They have been


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asked to admit his share and deliver his share but was of no use which necessitated presentation of suit.

3. Defendants/respondents objected the suit on various legal as well as factual grounds in their written statement. Defendants admitted the ownership of the plaintiff as legal heir and the status of property being inherited one but they have taken special plea of defense that they have purchased the entire share of plaintiff vide Sale Deed dated 30-03-2009; against total sale consideration of Rs. 200,000/- (two lacs); wherein, Rs. 50,000/- (fifty thousands) was paid on the spot and balance amount was delivered later on. The plaintiff has sold out his property to Defendant No.1 and has having no nexus with property in dispute.

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 cause of action?*
- ii. *Whether the plaintiff is estopped to sue?*
- iii. *Whether the suit of the plaintiff is time barred?*
- iv. *Whether the plaintiff being successor of the one Nazir Gul is entitled to the declaration and possession after partition of his sharee share in the suit property?*
- v. *Whether the plaintiff has sold out his entire share in the suit property to the defendant No. 1 vide sale deed, Dated 03-03-2009?*
- vi. *Whether the plaintiff is entitled to the decree as prayed for?*
- vii. *Relief?*

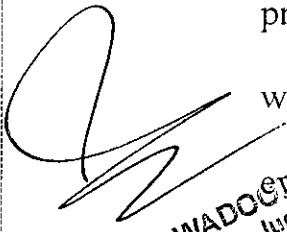
5. Opportunity of leading evidence was accorded to both the parties.

Seizing the opportunity, plaintiff recorded his evidence as PW-1 who

repeated the story of the plaint. On turn, defendants had been able to examine three persons in support of their plea taken in defense. DW-1 is the statement of Rasheed Gul (Defendant No.1) who denied the claim of plaintiff on the score of alleged sale. He produced his CNIC as Ex.DW-1/1 and Sale Deed as Ex.DW-1/2. Marginal Witness namely Muhammad Ibrahim was examined as DW-2 who produced his CNIC as Ex.DW-2/1. Second Marginal Witness of the Deed namely Kemya Gul was examined as DW-3 who produced his CNIC as Ex.DW-3/1. Parties have been heard and suit was dismissed which is impugned by the plaintiff being aggrieved in instant civil appeal.

6. Mr. Farhan Ullah Shahbanzai Advocate and Abid Ullah Advocate for appellant argued that plaintiff has proved his case on the strength of confidence inspiring 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 appellants may be decreed.

7. Mr. Sana Ullah Khan Advocate representing respondents resisted the stance of opponent by stating that plaintiff is residing in Kohat and has got no nexus with the property. He has been paid whole of the sale consideration and thus seized to be shareholder in joint holdings. Plaintiff was supposed to file rejoinder which was omitted. The plaintiff failed to produce witnesses in his support; whereas, defendants produced the witnesses who testified with consistency. He added that there is lake of

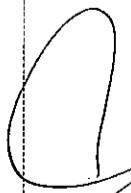

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appellant has indulged the defendants in litigation and protracting it for no justifiable reason with mala fide. He conclude that appeal may be dismissed with cost.

8. The parties have admitted some facts either in their pleadings or in evidence. Plaintiff and contesting defendant are sharing a common predecessor in interest for being nephews and uncle interse. They have inherited property from a single source that is the father of the plaintiff and father as well as grandfather of some of the defendants. It is further being admitted that the property is legacy of one and common predecessor of the parties.

9. The apple of discard between the parties that had given birth to instant litigation, is that defendants have alleged sale transaction against consideration which has already been paid by the defendants to plaintiff; whereas, plaintiff is negating such transaction of sale. Whether plaintiff is entitled for share in the dwelling house and adjacent property on the score of inheritance and defendant has wrongly taken hold of the same on the ground of purchase and that plaintiff has wrongly been refused grant of decree, are the prime points of determination in pending appeal.


10. Keeping in view the admitted facts discussed in paragraph No.8 followed by point for determination mentioned in paragraph No.9 of this Judgement, the pleadings and evidence of the parties, when assessed, is reflecting that the plaintiff and contesting defendants are consanguine being genetically related to each other. The property is inherited and parties being nephews and uncle are enjoying such derived rights in inherited property from single source of inheritance. This alone is sufficient to establish probability in favor of plaintiff and would require


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to be shattered by the defendants but let the evidence of the plaintiffs may be considered for examination of the strength of such probability. The parties are genetically related to each other and all of the properties possessed by every descendant is inherited; are, facts admitted in pleadings as well as in evidence which are clear, unambiguous and unqualified. Admitted facts need not to be proved is the mandate of law; however, such facts are only relevant and not conclusive; therefore, the evidence produced has to be examined in such context. PW-1 is the statement of plaintiff who has reproduced the facts narrated in the plaint by stating that the common predecessor of the parties namely late Nazeer Gul was survived by four sons and two daughters. All of the sons excluding plaintiff have been died. The property is legacy and everyone of legal heirs are entitled to their due share. He has been subjected to cross examination which is wholly focused on the sale. He has refused to accept any kind of sale or payment received by him. He has also not been examined on his relationship/status as well as on property being legacy in his cross examination. Statement of PW as well as the unqualified admission on part of defendants about the status of plaintiff as legal heirs and the property as legacy establish strong probability in favor of the plaintiff. To shatter such probability and to prove their special plea taken in defense as postulated in Article 118 of the Qanoon-e-Shahadat, 1984, defendants produced DW-2 and DW-3 who are signatories of the Deed dated 30-03-2009 Ex.DW-1/2. Both of them have testified the contents of such document and there was no apparent ground for disbelieving such document and therefore rightly believed by the learned Trial Judge.

However, this Deed speaks about unpaid amount of one lac and fifty


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thousand Rupees (Rs.150,000/-) as balance sale consideration out of total two lac as sale price. The defendants were supposed to prove the payment of balance amount which is obviously huge amount for being 75% of total sale price. Defendants during examination as DW-1 categorically admits that he has got no oral or documentary evidence of the fact of paying balance amount to the plaintiff. Similarly, other two witnesses have also admitted in cross examination that they are not witnesses of the payment of balance amount. Payment of sale consideration is integral part of components of a valid sale and required to be proved by the defendants. Chapter-V of the Qanun-e-Shahadat, 1984 deals the subject of documentary evidence and prescribes how the contents as well the execution of a document shall be proved. If the Court ignores the agreement to sell Ex.DW-1/2 being written on plain white paper, not scribed by Deed Writer and other legal defects on the score of being family matter as well as the prevailing customs of that time in the Tribal Region and consider this very document (Ex.DW-1/2) as a genuine document fulfilling legal criteria; even then, the aspect of non-payment of balance amount is fact that cannot be ignored.

11. For what has been discussed above, it can safely be held that the learned Trial Court has erred in conclusion drawn; that too, for the reasoning not backed by proper application of law and thus not sustainable. Appeal in hand is allowed and consequently, the impugned Judgement and Decree dated 21-12-2022 is modified. Preliminary decree of possession through partition is granted to the extent of three fourth (3/4) of the plaintiff's share as one fourth (1/4) of the share of the plaintiff has been proved to be sold out to the defendant No.1 against sale


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consideration of fifty thousand (Rs. 50,000/-). Costs shall follow the events. Requisitioned record be returned back with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

12. Announced in the open Court
29.04.2023


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment is consisting upon Seven (07) 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