

IN THE COURT OF SHAUKAT AHMAD KHAN
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 5/13 OF 2023
DATE OF ORIGINAL INSTITUTION : 05.11.2022
DATE OF TRANSFER-IN : 08.03.2023
DATE OF DECISION : 16.05.2023

RASOOL GUL S/O SAHEED GUL, PRESENTLY RESIDING AT
BAQIZAI KOHAT

.....(APPELLANT)

-VERSUS-

HAMEED GUL S/O SAHEED GUL, R/O CASTE MISHTI, DARWI
KHEL, DISTRICT ORAKZAI

.....(RESPONDENT)

Present: Sardar Khan Advocate, the counsel for appellant.

: Javid Muhammad and Insaf Ali Advocates, the counsels for
respondent.

JUDGEMENT

16.05.2023

Impugned herein is the judgment/decreed dated
13.10.2022 of learned Civil Judge-II, Tehsil Court Kalaya,
District Orakzai vide which suit of the appellant/plaintiff has
been dismissed.

- (2). In a suit before the learned trial court, the
appellant/plaintiff has sought declaration-cum-perpetual and
mandatory injunctions to the fact that the suit property measuring
30 jeribs named as Dukan Patey, Weran Zhawara, Aleem Kale,
Rawaz Tange, Palan Tange and Gande Patey situated at District
Orakzai, being inherited from their father, is jointly owned by
the appellant/plaintiff and respondent/defendant in equal shares
which has not yet been partitioned. That the property situated at
Kohat mearing 08 jirabs along with a house has been privately
partitioned and that the respondent/defendant has sold his share

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to the appellant/plaintiff in lieu of Rs. 14 lacs. That a government school has been constructed in a jointly owned property of Gande Patey in lieu of which the respondent/defendant and his wife are employed; however, one of the employments is the right of appellant/plaintiff. That the respondent/defendant is bent upon selling the suit property, cutting trees or making construction over the suit property. That the respondent/defendant is also bent upon handing over the possession of land of Rawaz Tange and Palan Patey to Sucha Gul and Juma Gul, the uncle of parties. The appellant/plaintiff has also rendition of accounts of the cash amount in possession of respondent/defendant as legacy of the father of parties. In view of above facts, appellant/plaintiff sought possession through partition of the suit property. The respondent/defendant was summoned who appeared before the trial court and contested the suit on various grounds by submitting written statement, wherein he admitted the status of parties as legacy of their father; however, he claimed the same to be properly partitioned by their father during his life where half of the suit property measuring 03 jeribs was transferred to the respondent/defendant while half of the same measuring 03 jeribs was transferred to Mir Rehman and Aqal Rehman, the sons of the appellant/plaintiff. Respondent/defendant also raised various other legal and factual objections. Pleadings of the parties were culminated into following issues;

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- I. Whether the plaintiff has got a cause of action?
- II. Whether the plaintiff is estopped to sue?

- III. Whether the suit of the plaintiff is time barred?
- IV. Whether the suit property measuring 30 jeerab comprising of one house and baithak situated at Jamadar Nawasi, Orakzai is the joint undivided ownership of the plaintiff and defendant?
- V. Whether the suit property measuring 08 jeerab comprising of one house situated at Baqizai, Kohat was purchased by the father of the plaintiff and defendant and it was partitioned between plaintiff and defendant?
- VI. Whether defendant sold his share in 08 jeerab suit property situated at Kohat was purchased by plaintiff from defendant in lieu of Rs. 14 lacs?
- VII. Whether the suit property situated at Jamadar Nawasi is the joint undivided ownership of the parties?
- VIII. Whether the defendant has illegally and wrongfully occupied the entire inherited property situated at Jamadar Nawasi?
- IX. Whether the plaintiff is entitled to half share i.e., 6.5 lacs in the inherited cash amount of Rs. 13 lacs?
- X. Whether the inherited property has already been partitioned privately between the parties?
- XI. Whether suit of the plaintiff is bad due to mis-joinder and non-joinder of the parties?
- XII. Whether the predecessor of the parties namely, Sajid Gul had transferred 03 jeerab to his grandchildren/sons of the plaintiff namely Aqal Rehman and Meer Rehman and in the name of defendant?
- XIII. Whether the sons of the plaintiff and defendant jointly purchased the suit house from their uncle?
- XIV. Whether the plaintiff is entitled to the decree as prayed for?
- XV. Relief.

Parties were given opportunity to produce their evidence. Accordingly, appellant/plaintiff appeared as PW-1 besides producing Mojaffar Khan as PW-2 and Imran Khan as PW-3 in support of his contention. While on the other hand, respondent/defendant Hameed Gul appeared as DW-1 and

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adduced four other witnesses namely, Abdul Malik, Saleem Khan, Mubashir Ahmad and Ali Kabeer as DW-2 to DW-5 respectively.

(4). Th learned trial court heard the arguments and non-suited the appellant/plaintiff. The appellant/plaintiff, being aggrieved of impugned judgment/decreed, filed the instant appeal.

(5). I heard arguments and perused the record.

(6). As evident from pleadings of the parties, the claim of appellant/plaintiff is, that the suit property detailed in the headnote of the plaint measuring 30 jeribs named as Dukan Patey, Weran Zhawara, Aleem Kale, Rawaz Tange, Palan Tange and Gande Patey situated at District Orakzai, being inherited from their father, is jointly owned by the appellant/plaintiff and respondent/defendant in equal shares which has not yet been partitioned. That the property situated at Kohat measuring 08 jeribs along with a house has been privately partitioned and that the respondent/defendant has sold his share to the appellant/plaintiff in lieu of Rs. 14 lacs. That a government school has been constructed in a jointly owned property of Gande Patey in lieu of which the respondent/defendant and his wife are employed; however, one of the employments is the right of appellant/plaintiff.

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Keeping in view the aforementioned controversy between the parties, the learned trial court has filed issue No. IV, issue No. VII, issue No. VIII, issue No. X and issue No. XII.

The respondent/defendant as per written statement has admitted that the suit property is the legacy of the predecessor of parties; however, the quantum of property was claimed by him as 06 jeribs instead of 30 jeribs, that the suit property has privately been partitioned by their predecessor in his lifetime i.e., 03 jeribs for Aqal Rehman, Mir Rehman, (the sons of appellant/plaintiff) and 03 jeribs for respondent/defendant. However, as against his contention in written statement, the respondent/defendant in his statement as DW-1 produced a partitioned deed dated 06.06.1993 wherein the suit property situated at Orakzai has been partitioned into three shares i.e., one each for appellant/plaintiff, the respondent/defendant and father of the parties. The share of the father of the parties was again partitioned between the parties vide partition deed dated 23.07.2008 after the death of father of the parties.

In support of his contention, appellant/plaintiff has appeared in the witness box as PW-1 where he remained strict to his contention i.e., that the suit property has not been partitioned between the parties, that the partition deed dated 06.06.1993 does not bear his signature; however, he does not know the exact quantum of the suit property, that he has left the Orakzai in 1992, that his sons Aqal Rehman and Mir Rehman from his first wife are residing at Orakzai and that his father has died in 2005. He has also produced Mujaffar Khan and Imran Khan as PW-2 and PW-3 respectively; however, PW-2 in cross examination was

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found unaware regarding the number and quantum of the suit property and any transactions between the parties, while PW-3 is the real son of appellant/plaintiff from his first wife. On the other hand, though the respondent/defendant as DW-1 has deviated from his pleadings and produced a partition deed dated 06.06.1993 and partition deed dated 23.07.2008. According to the partition deed dated 06.06.1993 besides the cash amount, property and house at Kohat, the property situated at Teerah (Orakzai) has been divided into three shares i.e., one each respondent/defendant, one for Mir Rehman and Aqal Rehman (sons of the appellant/plaintiff), the share of appellant/plaintiff while the third share was kept by the father of the parties for himself; however, the house was left unpartitioned. The share of the father of the parties was again alleged to have been partitioned vide partition deed dated 23.07.2008 between the parties. Respondent/defendant has also produced Abdul Malik and Saleem Khan, the witnesses of partition deed dated 06.06.1993, Ex. DW 3/2 while Ali Kabir was produced as DW-5, the witness of the partition deed dated 23.07.2008. The witnesses of respondent/defendant have been cross examined by the appellant/plaintiff where various affirmative suggestions have been put to them admitting the execution of both the documents i.e., DW-1 has been put the following suggestions;

"یہ درست ہے کہ ہمارے مابین خانگی تقسیم ہوئی ہے اور ہم اب مزید اتنی پرانی تقسیم جو ہوئی ہے وہ دوبارہ نہیں کر سکتے۔"

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"یہ درست ہے کہ اجکل مدعی کیساتھ اپنے حصہ رسدی میں جو حصہ آیا ہے وہ مدعی کے بیٹوں کے پاس ہے اور وہ کاشت کرتے ہیں۔"

"اگر رسول گل اپنا حصہ رسدی اپنی زندگی میں اپنے بیٹوں سے قبضہ لینا چاہتا ہو تو ہم روکاوت نہیں بنیں گے۔"

DW-2 in the very first line of his cross examination has been put the suggestion, that;

"یہ درست ہے کہ میں نے تحریر دیکھی لی اسمیں فیصلہ کرتے وقت رسول گل (مدعی) کے بیٹے بھی موجود تھے تمام فیصلہ حاجی ساحید گل نے کیا تھا جسکے میں اور دیگر کسان گواہ ہیں اور میں نے خود تحریر کیا ہے مجھے بیانات ریکارڈ ہونے کا علم نہ ہے تاہم تقسیم والد فریقین نے کی اور میں اسمیں گواہ تھا۔"

تحریر Ex. PW 1/2 پرچہ نفر بطور گواہ مع میرے درج ہے۔ یہ درست ہے کہ یہ فیصلہ مورث فریقین ساحید نے ہمارے موجودگی میں کیا تھا۔"

Similarly, DW-3 has been cross examined as;

"میں مورخہ 1993-06-06 کو جرگہ ممبر تھا۔ ہم جرگہ ممبران نے حصہ رسدی مدعی اور اسکے بیٹوں کو اپنے والد کی موجودگی میں حوالہ کیا اور کوہاٹ کا فیصلہ بھی کیا۔ مدعی کی پہلی بیوی یعنی آمیر رحمن اور عقل رحمن کی والدہ مدعی کی بیوی تھی۔ مدعی نے پہلی بیوی کو طلاق دی ہے۔ یہ غلط ہے کہ آج میں نے جھوٹا بیان قلمبند کیا ہے کہ میری بہن کو مدعی نے طلاق دی تھی۔ رسول گل نے اپنی زمین بیٹوں کو دی۔ یہ غلط ہے کہ رسول گل کے بیٹوں نے میری مدد سے رسول گل کی زندگی میں اور اسکی غیر موجودگی میں اسکے حصہ رسدی پر زبردستی قبضہ کیا ہے۔"

Similarly, with respect to partition deed dated 23.07.2008, DW-5 has been cross examined as:

"تین عدد کھیت 2008ء میں ماہین مدعی اور مدعا علیہ کے درمیان خانگی تقسیم کر کے ہر ایک فریق کو اپنا حصہ حوالہ کیا۔ میں جرگہ میں بوقت خانگی تقسیم موجود تھا۔ رسول گل جرگہ میں موجود تھا۔ یہ جرگہ اور کڑی میں ہوا تھا۔ ایک عدد کھیت پٹے دوسرا پلن پٹے تیسرا کھیت سیرا کے نام سے جانے جاتے ہیں۔ اس میں پلن پٹے وہ مدعی کو حوالہ کیا گیا۔ اور اس کے حصے میں آیا۔ اور چھوٹے دو عدد کھیت حمید گل کو حوالہ ہوئے۔"

"یہ درست ہے کہ ہمارے والد اور مدعی اور مدعا علیہ کے والد نے آپس میں تقسیم کیا تھا۔ یہ درست ہے کہ مدعی اس جرگہ پر راضی تھا۔"

(7). With respect to rendition of account, the learned trial court has framed issue No. IX. In this respect, the claim of the

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appellant/plaintiff is restricted to mere assertions of the plaint. He has neither spoken a single word in this respect in his statement as PW-1 nor produced any other documentary evidence. Moreover, the claim of appellant/plaintiff regarding employment at Government school is also not warranted under the law. Issue No. V and issue No. VI relate to the property situated at District Kohat which is situated outside the territorial Jurisdiction of the civil court of District Orakzai; therefore, the civil court at District Orakzai has got no jurisdiction to that extent.

(8). Onus of proof regarding issue No. XIII lies upon the respondent/defendant regarding which no evidence has been led.

(9). Issue No. II regarding estoppel and issue No. III regarding limitation have been decided against the respondent/defendant regarding which no appeal or cross objection have been filed.

(10). With respect to miss-joinder and non-joinder, as per pleadings, the appellant/plaintiff claimed the suit property jointly inherited by him and respondent/defendant, his brother, from their father. In this prospective, the sons of appellant/plaintiff, during lifetime of the appellant/plaintiff are neither necessary nor proper parties to the suit.

(11). Hence, in view of what is discussed above, it is held that as admitted by the parties the suit property is the legacy of predecessor of parties; however, the appellant/plaintiff failed to prove the same to be jointly owned by the parties. On the other

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hand, though the respondent/defendant failed to prove the same to have been partitioned by their predecessor into two shares i.e., 03 jeribs each for the sons of appellant/plaintiff and the respondent/defendant, as per para no. 01 of factual objection of his written statement; however, the same is proved to have been privately partitioned vide partition deeds dated 06.06.1993 and dated 23.07.2008, Ex. DW 1/2 and Ex. DW 5/1. The learned trial court while recording his findings under the issue of relief has simply dismissed the suit of the appellant/plaintiff. and the parties have been left in vacuum. Therefore, the impugned judgement/decreed of the learned trial is set aside. The suit is dismissed to the extent of possession through partition of the suit property and rendition of accounts as prayed for in juz 'ب' and 'ج' of the plaint. However, suit of the appellant/plaintiff is partially decreed to the extent that the suit property is the legacy of the predecessor of parties which has been properly partitioned vide partition deed dated 06.06.1993 and 23.07.2008 Ex. DW1/2 and Ex. DW 5/1 respectively. Parties are left to bear their own costs. File of this court be consigned to record room. Copy of this judgment be sent to the learned court for information.

Pronounced
16.05.2023

(SHAUKAT AHMAD KHAN)
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CERTIFICATE

Certified that this judgment consists of nine (09) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 16.05.2023

(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
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