

DAUD SHAH VS NASEEM JAN ETC.
Case Appeal No. 6/13 of 11.03.2023

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And

NASEEM JAN ETC. VS DAUD SHAH ETC.
Case Appeal No. 7/13 of 28.03.2023

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

CIVIL APPEAL NO. : 6/13 OF 2023
DATE OF INSTITUTION : 11.03.2023
DATE OF DECISION : 19.05.2023

DAUD SHAH S/O RAMZAN SHAH, R/O CASTE MISHTI, TAPA
HAIDER KHEL, CHAPPAR MISHTI, DISTRICT ORAKZAI

.....(APPELLANT)

-VERSUS-

1. NASEEM JAN S/O SUBIDAR ALI JAN
2. KHADIM ULLAH S/O SUBIDAR ALI JAN
3. SAMIA BIBI D/O SUBIDAR ALI JAN
4. SHAFIDA BIBI D/O SUBIDAR ALI JAN
5. NUSRAT BIBI W/O SUBIDAR ALI JAN
6. MUHAMMAD ULLAH
7. RAHEEM KHAN
8. MUHAMMAD NAWAZ
9. ZARKHANA BEHAN
10. MST. NEZA

ALL R/O CASTE MISHTI, TAPA HAIDER KHEL, CHAPPAR MISHTI,
DISTRICT ORAKZAI

..... (RESPONDENTS)

CIVIL APPEAL NO. : 7/13 OF 2023
DATE OF INSTITUTION : 28.03.2023
DATE OF DECISION : 19.05.2023

1. NASEEM JAN S/O SUBIDAR ALI MAJAN
2. MUHAMMAD ULLAH S/O SUBIDAR ALI MAJAN
3. KHADIM ULLAH S/O SUBIDAR ALI MAJAN
4. MST. SAMIA BIBI D/O SUBIDAR ALI MAJAN
5. SHAFIDA BIBI D/O SUBIDAR ALI MAJAN
6. NUSRAT BIBI W/O SUBIDAR ALI MAJAN

ALL R/O CASTE MISHTI, TAPA HAIDER KHEL, CHAPPAR MISHTI,
DISTRICT ORAKZAI

..... (APPELLANTS)

-VERSUS-

1. DAUD SHAH S/O RAMZAN SHAH
2. MUHAMMAD RAHIM
3. MUHAMMAD NAWAZ
4. MST. ZARKHANA
5. MST. MEHRA D/O STORI KHAN ALIAS SHER KHAN

ALL R/O CASTE AFGHAN MISHTI, TAPPA HAIDER KHEL CHAPPER
MISHTI DISTRICT, ORAKZAI.

6. NASEEB KHAN S/O STORZAI
7. SUBIDAR ZAR KHAN S/O STORZAI

ALL R/O CASTE AFGHAN MISHTI, TAPPA HAIDER KHEL TEHSIL
CENTRAL, DISTRICT ORAKZAI

.... (RESPONDENTS)

Present: Abid Ali Advocate, the counsel for appellant in CA No. 6/13 and
that respondent no. 1 in CA No. 7/13
: Salih Shah Advocate, the counsel for respondents no. 1 to 6 in
CA No. 6/13 and that of appellants in CA No. 7/13

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CONSOLIDATED JUDGEMENT

19.05.2023

The instant civil appeal no. 6/13 titled "Daud Shah VS Naseem Jan etc." and connected civil appeal no. 7/13 titled "Naseem Jan etc. VS Daud Shah etc." are the result of the same judgment/decree dated 28.02.2023 passed by learned Civil Judge-I, Orakzai at Baber Mela; therefore, both are taken together for disposal.

(2). The respondents no. 1 to 6 of the instant case being plaintiffs, herein after referred to as plaintiffs, through a suit before the learned trial court sued the appellant being defendant no. 1 and Stori Khan, the predecessor of respondents no. 7 to 10, the defendants no. 1 and 2 in the suit and proforma defendants (Subidar (Rtr) Zar Khan and Haji Naseeb Khan), herein after referred to as defendant no. 1, legal heirs of defendant no. 2 and proforma defendants respectively. Plaintiffs have sought declaration-cum-perpetual injunction and recovery of rupees Rs. 3,412,000/- to the fact that the plaintiffs are owner in possession of the house detailed in the headnote of the plaint and landed property situated at Margochan being transferred to them in lieu of Diyat for murder of Sub (Rtr) Ali Majan by defendant no. 1 and that the defendant no. 1 has got no concern whatsoever with the suit property. Plaintiffs have also prayed for recovery of Rs. 3,412,000/- as the value of the

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articles stolen from the shop of deceased Ali Majan against
defendant no. 1 being watchman of the shop.

It is alleged in the plaint that plaintiffs are legal heirs of deceased Ali Majan while proforma defendants are the real brothers of the deceased Ali Majan who was having a market near Jamia Masjid Topko, Chapper Mishti where defendant no. 1 was employed as a watchman. That on 22.06.2002 the articles as per list annexed with the plaint worth Rs. 3,412,000/- were stolen from a shop in the market for which defendant no. 1 being watchman was made accountable for, regarding which defendant no. 1 and defendant no. 2, who was a relative of defendant no. 1, were asked to settle a matter through jirga; however, the defendants avoided the matter and at last Sub (Rtr) Ali Majan was murdered by defendant no. 1 and defendant no. 2. That as per the customs of locality the tribe discussed the matter with defendants no. 1 and 2 and their relatives and as a result, the defendants no. 1 and no. 2 were made liable to pay Rs. 200,000/- to the legal heirs of deceased Ali Majan as diyat and Rs. 800,000/- to the tribe but the defendants instead of honouring the verdict of tribe absconded themselves. The tribe in retaliation set the houses of defendants no. 1 and 2 on fire and gave the same along with their landed property in the locality to the legal heirs of deceased Ali Majan, the plaintiffs, in lieu of Diyat. That now defendant no. 1 has returned to the locality making interference in the suit house by


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reconstructing the same and that defendant no. 1 is also liable to pay the amount of Rs. 3,412,000/-, the value of the stolen articles.

Defendants were summoned out of whom defendant no. 2 and proforma defendants no. 3 and 4 failed to attend the court; therefore, they were placed and proceeded ex-parte while the defendant no. 1 contested the suit by submission of written statement wherein besides raising various other legal and factual objections, he denied the factum of any theft or its accusation against him. He alleged that the predecessor of plaintiffs, was murdered by some unknown persons for which the defendant no. 2 was accused of, and at that time defendant no. 1 was minor. He further alleged that the house of defendant no. 1 was not put on fire by the tribe rather by plaintiffs and their uncles. During pendency of suit defendant no. 2 Stori Khan was reported dead and the list of his legal heirs was placed on file. They were summoned and proceeded ex-parte; however, the entry of their names in the panel of defendants or in the judgement and the decree sheet has not been made.

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Pleadings of the parties were culminated into following issues;

- I. Whether the plaintiffs have got a cause of action?
- II. Whether the plaintiffs are estopped to sue?
- III. Whether the suit of the plaintiffs is time barred?
- IV. Whether the present suit is bad in its present form?

V. Whether the suit property in shape of a field and ruins of a house are ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated suit property?


VI. Whether the plaintiffs are entitled to recovery of 34 lacs 12 thousand rupees from defendant no. 1?

VII. Whether the plaintiffs are entitled to the decree as prayed for?

VIII. Relief.

(3). Parties were given opportunity to produce their evidence. Accordingly, plaintiffs produced 05 witnesses namely, Naseeb Khan, Naseem Jan, Haleef Khan, Muhammad Rafiq and Zar Khan as PW-1 to PW-5 in support of their contention. While on the other hand, defendant no.1 Daud Shah remained contended with his sole statement as DW-1.

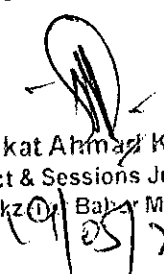
(4). After having heard the arguments, the learned trial court partially decreed the suit of the plaintiffs/respondents to the extent of declaration and permanent injunction to the fact that plaintiffs are owners in possession of the suit house and property while suit of the plaintiffs to the extent of recovery of Rs. 3,412,000/- was turned down. The appellant/defendant no. 2, being aggrieved of the impugned judgment filed the instant appeal. Similarly, the plaintiffs through a connected civil appeal no. 7/13 of 28.02.2023 titled as "Naseem Jan etc. VS Daud Shah etc." has also assailed the impugned judgment/decree partially to the extent of recovery of Rs. 3,412,000/-. As both the appeals are the result of same


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judgment/decree; therefore, both are taken together for disposal.

(5). I heard arguments of the learned counsels for parties and perused the record.

(6). As discussed earlier, the claim of the plaintiffs as per contents of plaint is that plaintiffs are legal heirs of deceased Ali Majan while proforma defendants are the real brothers of the deceased Ali Majan who was having a market near Jamia Masjid Topko, Chapper Mishti where the defendant no. 1 was employed as a watchman, that on 22.06.2002 the articles as per list annexed with the plaint worth Rs. 3,412,000/- were stolen from a shop in the market for which defendant no. 1 being watchman was made accountable for, regarding which defendant no. 1 and defendant no. 2, who was a relative of defendant no. 1, were asked to settle the matter through jirga; however, the defendants avoided the matter and at last Sub (Rtr) Ali Majan was murdered by defendants no. 1 and defendant no. 2, that as per the customs of locality the tribe discussed the matter with defendants no. 1 and 2 and their relatives and as a result the defendants no. 1 and no. 2 were made liable to pay Rs. 200,000/- to the legal heirs of deceased Ali Majan as diyat and Rs. 800,000/- to the tribe but the defendants instead of honouring the verdict of tribe absconded themselves. The tribe in retaliation set the houses of defendants no. 1 and 2 on fire and gave the same along with their landed


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property in the locality to the legal heirs of deceased Ali Majan, the plaintiffs, that now defendant no. 1 has returned to the locality making interference in the suit house by reconstructing the same and that defendant no. 1 is also liable to pay the amount of Rs. 3,412,000/-, the value of the stolen articles. The defendant no. 1 through a written statement contested the suit wherein he denied the factum of any theft or its accusation against him. He alleged that the predecessor of plaintiffs was murdered by some unknown persons for which the defendant no. 2 was accused for, and at that time defendant no. 1 was minor. He further alleged that the house of defendant no. 1 was not put on fire by the tribe rather by plaintiffs and their uncle.

As evident from the pleadings, it is admitted on record that the suit house and land was the ownership of father of the defendant no. 1. It is also admitted that the Sub (Rtr) Ali Majan was murdered. It is also admitted on record that the house of defendant no. 1 was put on fire and he along with his family was forced to leave the locality. The controversy between the parties is, that whether a theft was committed from the shop of deceased Ali Majan for which defendant no. 1, being watchman of the market, was made accountable for, if yes, whether the list of stolen articles or their value is proved? whether defendant no. 1 was accused of the murder of Ali Majan? whether the tribe had decided the defendant no. 1 to pay Rs. 200.000/- to the plaintiffs being legal heirs of Ali


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Majan and Rs. 800,000/- to the tribe? whether in case of non-abiding by verdict of the tribe the house of defendant no. 1 was put on fire by the tribe and the tumbled down building of the house along with landed property of defendant no. 1 were given by the tribe to the plaintiffs being legal heirs of deceased Ali Majan in lieu of Diyat? and that whether the verdict of the tribe was having any legal force? The burden of proof of all the aforementioned questions of facts lay upon the plaintiffs. The plaintiffs in order to discharge their burden examined Naseeb Khan as PW-1 and Naseem Jan, plaintiff no. 1 being attorney for the rest of the plaintiffs, as PW-2. They have also examined Haleef Khan, Muhammad Rafiq and Zar Khan as PW-3 to PW-5 respectively. All the witnesses in their statements have almost reiterated the contents of plaint except the facts that as per contents of plaint, *after the commission of theft at the shop of deceased Ali Majan, defendant no. 1 was accused of the theft,* while as per statements of PW-1, PW-2, the brothers of Ali Majan, (profarma defendants no. 3 and 4) and PW-2, the plaintiff no. 1, *after the commission of theft, defendant no.1 was asked to trace the real culprits but he failed either to tell the names of real culprits or to make good the damage.* That the defendants murdered Ali Majan. Similarly, statements of PW-3 and PW-4, the alleged Jirga members are also general to the extent of the commission of theft at the shop of deceased Ali Majan and his murder i.e., *that a theft was committed in the*

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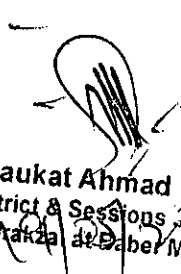
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shop of deceased Ali Majan for which defendant no. 1 was accused of and in this matter the murder of Ali Majan was committed. PW-1 to PW-5 are the brothers of deceased Ali Majan while PW-2 Naseem Jan is plaintiff no.1 who as per cross examination was about 10 years of age at the time of alleged commission of theft at the shop of Ali Majan. PW-3 and PW-4 alleged themselves as the members of jirga held in 2002, however, in cross-examination PW-3 has categorically admitted that he was not present in Jirga regarding theft while PW-4 when put to cross examination, was found unaware about the year of the occurrence of theft and the name of person who was made accused of theft.

All the witnesses have categorically admitted in their statements that there is no proof of factums of the commission of theft at the shop of deceased Ali Majan and that of the jirga held in 2002. It is admitted on record that defendant no. 1 at the time of alleged theft or that of murder of Ali Majan was minor. It is also admitted on record that neither the matter of theft nor that of the murder of Ali Majan was reported to the then political administration. No evidence has been brought on record as to the factum of defendant no. 1 being watchman of the market or any remuneration paid to him. The statements of witnesses are general in nature to the extent of allegations of the commission of theft at the shop of deceased Ali Majan and that of his murder. In this respect no direct oral or documentary


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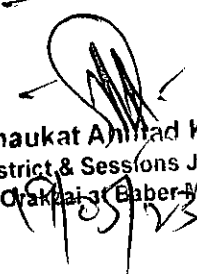
evidence has been brought on record i.e., none of the witnesses has given evidence to the fact that either he was witness of the theft or that of the murder of Ali Majan rather as stated above, after the commission of theft defendant no. 1 was asked to tell the names of real culprits or to make the damage good and that the murder of Ali Majan was committed for which defendant no. 1 was accused of. None of the elders who allegedly held the jirga in 2002 has been produced as witness in the court. Though prior to the merger of the then FATA with the province of Khyber Pakhtunkhwa and the extension of the laws, a customary law prevailed in the locality but at the same time a legal mechanism for deciding the civil and criminal disputes existed in the form of Frontier Crime Regulation, 1901 (FCR) where a criminal matter after reporting to the then Political Agent would be referred to the jirga which would submit its recommendation regarding conviction or acquittal, to the Political Agent and the Political Agent would decide the case accordingly. In the instant case, even if the holding of jirga is admitted, the matter was admittedly neither reported to the then political administration nor the jirga was constituted under the FCR, 1901 and as such the decision of the jirga was having no legal or binding effects. Counsel for the plaintiffs also failed to point out the existence of any customary law where the decision of privately constituted jirga would have binding effects except with the mutual consent of parties.

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It is also admitted on record that the house of the defendant no. 1 was put on fire but no direct oral or documentary evidence is available on file which would show that the house of defendant no. 1 was put on fire by the tribe. Similarly, the plaintiffs also failed to lay hand on any customary law allowing the tribe to put the house of accused on fire and award the belongings of the accused family to the family of victim in lieu of Diyat. Even if the factum of putting on fire of the house of defendant no. 1 by the tribe, is admitted as correct, in that case too the act of the tribe was neither warranted by the Islamic law nor by the principles of natural justice.

As per contents of the plaint, defendant no. 2 is the relative of defendant no. 1 but the nature of their relation is neither explained by the plaintiffs in plaint nor in the statements. Moreover, defendant no. 2 during pendency of the suit was reported dead, the list of his legal heirs was submitted by the plaintiffs wherein the mother, brothers and a sister of the defendant no. 2 were shown as his legal heirs. However, counsel for the defendant no. 1 during arguments submitted copy of FIR no. 526 dated 26.06.2013 u/s 302 PPC of Police Station Chamkani Peshawar, vide which the defendant no. 2 with the name of Sher Muhammad s/o Hakeem Khan has been murdered for which one, Gula Khan and the present proforma defendant no. 4, Zar Khan (PW-5) was charged as accused. The


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said Zar Khan has also faced trial in the instant case. The list of the legal heirs of defendant no. 2 was also available on file wherein Hakeem Khan (father), Mst. Mehar Bibi (mother), Nasreen Bibi, Sumaira Bibi (daughters), Adnan, Umar, Ali Akbar and Abdul Wahab (sons) are shown as the legal heirs of deceased which shows that at the time of institution of the suit the plaintiffs were in the knowledge of the death of defendant no. 2. Similarly, in the presence of father, mother, widow, sons and daughters of the defendant no. 2, the brothers and a sister were not the legal heirs of deceased Stori Gul (defendant no. 2). It is also admitted on record that the suit house and land is the legacy of the father of defendant no. 1 and he is not a sole legal heir rather the other legal heirs of his deceased father are alive and co-owner of the suit house and property. In these circumstances, the suit being brought against a dead person is also bad for non-joinder and miss-joinder.

(7). Hence, in view of what is discussed above, it is held that the findings of learned trial court to the extent of partial decree in favour of plaintiffs is based on non-reading of evidence on record; therefore, the appeal is accepted and the impugned decree/judgment dated 28.02.2023 of learned Civil Judge-I, Orakzai is set aside. The connected appeal of plaintiffs, being appellants in civil appeal no. 7/13 of 28.03.2023 titled as "Naseem Jan etc VS Daud Shah etc", is dismissed. Resultantly, suit of plaintiffs, being respondents in

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civil appeal no. 6/13 titled as "Daud Shah VS Naseem Jan etc",

is dismissed. File of this court be consigned to Record Room

while record be returned. Copy of judgment be placed on

connected civil appeal no. 7/13 of plaintiffs titled as "Naseem

Jan etc. VS Daud Shah etc". Copy of this judgment be sent to

learned trial court for information.

Pronounced

19.05.2023



(SHAUKAT AHMAD KHAN)

District Judge, Orakzai
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CERTIFICATE

Certified that this judgment consists of thirteen (13) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 19.05.2023



(SHAUKAT AHMAD KHAN)

District Judge, Orakzai
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