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**IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,
ORAKZAI (AT BABER MELA).**

Civil suit No	19/1 of 2023
Date of original institution	09.11.2019
Date of transfer in	16.03.2023
Date of decision	28.04.2023

1. Abdul Qayum S/o Bakhtiar Ali
2. Rafi Ullah S/o Deen Akbar
3. Khosh Rang Khan S/o Fazal Rehman

All residents of Qoam Sheikhan, Tappa Samozai, Lower, District Orakzai.

..... (Plaintiffs)

Versus

1. Aman Ullah S/o Abid Gul
2. Khan Rasool S/o Deen Muhammad Khan
3. Muhammad Ayaz S/o Abdul Shakoor
4. Intekhab Alam S/o Abdul Qayum

All residents of Qoam Sheikhan, Tappa Samozai, Lower, District Orakzai.

.....(Defendants)

**SUIT FOR DECLARATION, PERMANENT & MANDATORY
INJUNCTION AND POSSESSION THROUGH PARTITION.**

JUDGMENT:

1. Brief facts of the case are that plaintiffs filed the instant suit for declaration, permanent & mandatory injunction and possession through partition to the effect that they are co-owner in possession of suit property (fully detailed in the head note of the pliant) along with defendants. That the plaintiffs lay their claim on the suit property in light of Jirga decision affected in the Year 1970. That the defendants have no right to deny the legal rights of plaintiffs and they be restrained from denying the same. That defendants were asked time

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and again to admit the legal claim of plaintiffs but in vain, hence, the present suit.

2. After due process of summons the defendants appeared in person and contested the suit by submitting written statement in which contention of the plaintiffs were resisted on many legal as well as factual grounds.
3. The divergent pleadings of the parties were reduced into the following issues.

ISSUES.

1. *Whether the plaintiffs have got cause of action?*
2. *Whether the suit of the plaintiffs is time barred?*
3. *Whether this court has got the jurisdiction to entertain this suit?*
4. *Whether the suit property is the joint ownership and possession of the parties through Jirga decision on oath in the Year, 1970?*
5. *Whether the suit property is the exclusive ownership of the defendants and the plaintiffs have nothing to do with the same?*
6. *Whether the plaintiffs are entitled to the decree as prayed for?*
7. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of their claim and contention produced 05 Witnesses. Detail of the plaintiff's witnesses and exhibited documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Khan Afzal S/o Said Asghar Resident of Qoam Sheikhan, Tappa Samozai, Lower District Orakzai.	Nil
PW-2	Fazal Ghafoor S/o Mena Gul Resident of Qoam Sheikhan, Tappa Samozai, District	Nil

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PW-3	Muhammad Rauf S/o Muhammad Farooq Resident of Qoam Sheikhan, Tappa Samozei, District Orakzai.	Nil
PW-4	Abdul Zar Jan S/o Agha Jan Resident of Ameer Banda Tehsil and District Kohat.	Nil
PW-5	Abdul Qayum S/o Bakhtiar Ali Resident of Qoam Sheikhan, Tappa Samozi, District Orakzai.	Special Power of attorney is Ex.PW-5/1. Map Sketch is Ex.PW-5/2.

Defendants in support of his claim and contention produced four (04) witnesses. Detail of defendant's witnesses and exhibited documents are as under;

WITNESSES		EXHIBITIONS
DW-1	Afsar Ali (SDO) S/O Mayan Wali Khan SDO Public health Department District Orakzai.	Copy of Acceptance of Rates is Mark-A
DW-2	Hadar Khan S/o Baghi Shah Resident of Qoam DDM, Safial Dara District Orakzai.	Copy of Jirga Deed as Ex. DW-2/1.
DW-3	Ulas Khan S/o Noor Muhammad Resident of Qoam Sheikhan, Tehsil Central District Orakzai.	Nil
DW-4	Khan Rasool S/o Din Muhammad Khan resident of Qoam Sheikhan, Tappa Samozi, Central District Orakzai.	Nil

5. Learned counsel for the plaintiffs Mr. Javid Muhammad Advocate argued that plaintiffs have produced cogent evidence and reliable

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witnesses to prove that the suit property is joint ownership of plaintiffs and defendants. The witnesses are consistent in their statements that the suit property was jointly owned by the parties in which larger portion was partitioned and a land situated near the spring is yet to be partitioned. Further argued that in absence of any documentary evidence in District Orakzai, plaintiffs have proved their case.

6. Learned counsel for the defendants Mr. Haseeb Ullah Khan Advocate argued that the plaintiffs have not produced sufficient evidence in order to prove their case. That the suit property as per statements of witnesses is already partitioned and both the parties are in possession to their respective shares. Moreover, the contested portion of the suit property regarding which plaintiffs sought declaration and partition is in possession of defendants and plaintiffs have no right over the same. Furthermore, plaintiffs don't have any documentary proof in support of their stance.
7. After hearing arguments and after gone through the record of the case with valuable assistance of learned Counsels for both the parties, my issue-wise findings are as under:

ISSUE NO.2:

Whether the suit of the plaintiffs is time barred?

9. The onus to prove this issue was on the defendants. The plaintiffs filed suit for possession through partition. As per averments of the plaint, cause of action accrued to the plaintiffs few months prior to the institution of this suit, when the defendants refused the share of the plaintiffs in the disputed property. But even without considering this fact, the suit for partition can be sought without the ambit of

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limitation. Wisdom is drawn from the judgments of Superior Courts and reliance is made on 2015 SCMR 869.

Hence, the issue is decided in negative and in favor of the plaintiffs.

ISSUE NO.3:

Whether this court has got the jurisdiction to entertain this suit?

- 10. This objection was raised in preliminary objections in the written statement and the issue was framed keeping in mind the aforementioned objection. Burdon of proof regarding the issue was on defendants, however, defendants failed to discharge their duty in this respect. Moreover, there is nothing available on record which suggests bar of jurisdiction of this court to decide the instant suit. Hence, the issue is decided in negative.

ISSUE NO.4:

Whether the suit property is the joint ownership and possession of the parties through Jirga decision on oath in the Year, 1970?

- 11. The claim of the plaintiffs is that they are the co-owner in possession of the disputed property and defendants have no right to deny the legal right of the plaintiffs. The plaintiffs lay their claim on the suit property based on a jirga decision taken place in the Year 1970 owing to which the suit property was left to the plaintiffs and defendants by a cast namely Dery Khela. Burden of proof regarding the issue was on plaintiffs. Plaintiffs in order to discharge this duty, produced five witnesses. The essence of their statements which helped in deciding the issue are as under.

- 12. Khan Afzal, who deposed as PW-01, while supporting the claim of the plaintiffs stated in his examination in chief that the suit property is

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joint ownership of plaintiffs and defendants, in which some portion has been unofficially partitioned between the parties. The plaintiffs admitted in his cross examination that the portion of property where tube-well is situated is not disputed between the parties as the same is situated over another property.

13. PW-02 is the statement of Fazal Ghafoor, who supported the stance and contention of plaintiffs in his examination in chief and stated that the suit property is joint ownership of plaintiffs and defendants which is yet to be partitioned. The said PW recorded in his cross examination that the property where tube-well is situated does not fall in the description of the suit property as mentioned in the plaint.
14. Muhammad Rauf and Abdul Zarjan who deposed as PW-03 and PW-04 respectively admitted possession of plaintiffs and defendants in respect of the suit property and stated that the same is owned by them jointly. Both the PWs stated in their statements that some portion of the suit property has been partitioned while some of it is yet to be partitioned.
15. Abdul Qayom who is plaintiff No.1 in the instant suit deposed as PW-05 recorded in his examination in chief that landed property and a hill situated in the suit property has already been partitioned between plaintiffs and defendants through jirga decision however, a portion of property situated near the hill and where a spring (Chishma) is situated has not been partitioned yet. And lastly prayed for partition of the same. The said PW recorded in his cross examination that half portion of partitioned suit property is in possession of the plaintiffs and other half is in possession of the defendants.

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16. The statements of the plaintiffs' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues in their favor. Firstly, the witnesses were consistent in their statement that the plaintiffs and the defendants were joint owners of the suit property and some portion of the same is partitioned between them while the portion of the property near the spring is yet to be partitioned. Similarly, the respective shares of the disputed property is in possession of the plaintiffs and defendants, which were partitioned between them. However, the disputed portion of the suit property was contested between the parties and jirgas were convened between the parties but of no avail. Secondly, the defendants have contented in support of their stance that a subsequent jirga has decided the matter in favor of defendants but there is nothing available on file which shows that the either the jirga decision was accepted by the plaintiffs or the jirga has ever reached on any material conclusion. Similarly, the statements of DWs revealed that plaintiffs have never given their consent (واک اختیار) to the said jirga. Thirdly, the reference of the matter to the jirga also revealed that the plaintiffs have claim over the disputed property from long ago and they have raised claims over disputed suit property over time. Fourthly, the possession of the disputed portion of the suit property with defendants has never been quite possession, as many jirgas were convened over time and all the jirgas failed to reach on any final conclusions. So much so that the matter was referred to the office of the Assistant commissioner, Orakzai, and the learned AC placed reliance on the past jirga, which revealed that the plaintiffs will produce witnesses in the jirga regarding proving their stance. Which further revealed that the past jirgas and the reference of the dispute to the office of Assistant

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commissioner never decided the matter conclusively rather directed the plaintiffs to produce witnesses. In absence of any conclusive decision of the jirgas and the matter been unresolved, no reliance can be placed legally on the same in order to decide the matter between the parties. Lastly, PWs were constant in their statement that plaintiffs are owner in possession of their respective share in the suit property. Moreover, defendants in their written statement have denied the ownership and possession of the plaintiffs in whole suit property, but in deviation to the pleadings, the statements of DWs revealed that they have admitted that the suit property is already partitioned between them and the real disputed property is only on a portion of the same, which is yet to be partitioned.

17. Keeping in view the above discussion, it is held that plaintiffs produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.02 is decided in favor of plaintiffs based on their evidence and admissions made by the defendant's witnesses

ISSUE NO.05:

Whether the suit property is the exclusive ownership of the defendants and the plaintiffs have nothing to do with the same?

18. Defendants in their written statement have contended that the suit property is exclusive ownership of the defendants and is their possession since long. The burden of proof regarding the issue was on defendants. Defendants in order to prove their stance, produced four witnesses in their favour.
19. Afsar Ali SDO Public Health Department Orakzai recorded his statement as DW-01 and stated that work order dated 27.05.2016 was issued in the name of contractor Khan Rasool for construction of

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water pipeline. The said DW admitted in his cross-examination that he has no documentary evidence regarding the location of said pipeline and the same has not been specified in the work order exhibited as Mark-A. He also admitted that there is no mention of construction of tube-well according to his record. He further recorded in his statement that there is no mention of any owner in their record, on whose land the said pipeline is constructed.

20. Khawar Khan recorded his statement as DW-02 and stated that a water pipeline scheme was initiated by government for the benefit of Qoam Alam Sher Nawasee (defendants). Moreover, in the year 1990 a Jirga was convened over the dispute of the suit property who decided the matter in favor defendants. Further stated that he is witness of the said Jirga. He admitted in his cross examination that the said Jirga decision was one sided. He further admitted that plaintiffs and defendants both are owners in the suit property. Further stated that a hill and some portion of plaint situated in the suit property has already been partitioned. Moreover, the disputed portion of the suit property is only the land situated near the spring. The said DW further recorded that he is unaware of the possession of the disputed portion of the suit property. He also admitted that the plaintiffs were reluctant to give their consent (واک اختیار) to the said jirga.

21. Ulas Khan deposed as DW-03 and recorded in his statement that plaintiffs and defendants belong to the same sub-cast (Tappa) and that the land near the hill has been partition between them. That the land near the spring has been partitioned by their fore fathers and the hill is partitioned by us. Further stated that he is unaware of the fact that whether defendants have possession of whole disputed portion of suit

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property or not. He admitted in his cross examination that both the parties are owners in the suit property and some of it has been partitioned while some are not.

22. Khan Rasool who is defendant No.2 in the instant case deposed as DW-04 and recorded in his statement that plaintiffs have no share in the suit property and defendants are owners of the same. That the land near the spring is our (defendants) ownership and I also have watermill on the said portion of the suit property. Further stated that a jirga was convened in the year 1990 over dispute of the suit property which gave its verdict that the plaintiffs have to take oath within fifteen days, in default of which the suit property will be given to the defendants. That the suit property is presently in our possession. The said DW stated in his cross examination that the suit property has been partitioned between the parties to the instant suit and have possession of their respective shares. The property on which tube-well is situated was purchased by myself.

23. The statements of the defendants' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues. Firstly, the tube well, which the defendants contended that it has been constructed in their property and to their benefit, is actually situated in property which has not been disputed in the suit and that property is adjacent to the suit property. This fact has been brought on record in statement of both PWs and DWs. Secondly, admittedly the suit property was jointly owned by the parties to the instant suit and which has been partitioned. Thirdly, the defendants have denied ownership of plaintiffs in their written statement but in evidence DWS have admitted that plaintiffs were joint owner in the suit property and which has been partitioned. They further stated that

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the landed property and hills has already been partitioned between the plaintiffs and defendants and the real dispute is on the land situated around the spring which they call Spring land. Moreover, the fact that the spring land is given to the defendants by a jirga decision, the same has been discussed in issue No.4 in detail.

24. Keeping in view the above discussion, it is held that defendants have failed to produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.05 is decided in negative and against the defendants.

ISSUE NO. 1 and 6:

Whether plaintiffs have got cause of action?

Whether plaintiffs are entitled to the decree as prayed for?

25. Both these issues are interlinked, therefore, are taken together for discussion.
26. Keeping in view my issue wise discussion, it is held that plaintiffs have got cause of action and are entitled to the decree as prayed for. Both these issues are decided in favor of plaintiffs and against the defendants.

RELIEF:

27. As a result of issue wise findings, suit of the plaintiffs succeed. It is therefore, decreed. Plaintiffs are held entitled to the suit property and preliminary decree for the recovery of possession through partition in respect of the suit property is passed in favor of the plaintiffs to the extent of their legal and Shari shares.
28. Cost to follow the events.
29. File be consigned to record room after its necessary completion and compilation.

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