

In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

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BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI AT BABER MELA

Civil Appeal No. CA-15/13 of 2023

Date of institution: 01.04.2023

Date of decision: 12.06.2023

Syed Wajid Hussain son of Syed Awan Hussain and 03 others, residents of Qaum Bar Muhammad Khel, Tappa Baba Nawasi, Tehsil Lower, District Orakzai.

..... **(Appellants/Defendants)**

...**Versus**...

Noroz Ali and 08 others, residents of Qaum Sepoy, Tappa Mitha Khan Khel, Tehsil Lower, District Orakzai.

..... **(Respondents/plaintiffs)**

Appeal against Judgement, Order and Decree dated 20.03.2023 in Civil Suit No. 12/1 of 2023.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 20.03.2023, passed by learned Senior Civil Judge, Orakzai in Civil Suit bearing No. 12/1 of 2023; whereby, the suit of the plaintiffs/respondents with the title of "Nowroz Ali etc. vs Wajid Ali etc." was decreed.

2. Briefly stated facts of the case are such that the plaintiffs Nowroz Ali etc. (respondents herein) have filed suit against the defendants (appellants herein) for declaration and injunction with the stance that plaintiffs are owners in possession of landed property situated at Zaridar which has wrongly been taken into possession by the Defendant No.1 on pretext of so called sale transaction allegedly executed between the forefathers of the parties. The Sale Deed, if any, is claimed by the plaintiffs to be fake, forged and ineffective upon the rights of the plaintiffs and is therefore liable to be cancelled. Defendants were time and again asked not to claim

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ownership and return back the vacant possession of suit property to the plaintiffs but they refused which necessitated presentation of suit.

3. Defendants/appellants 01 to 04 (defendants at contest) on appearance objected the suit on various legal as well as factual grounds in their written statement. The defendants (appellants herein) specifically pleaded in written statement that they are owners in possession of the property on the basis of Sale Deed dated 25-02-1967 executed between the forefathers of the parties and are in possession since then.

4. The material prepositions of fact 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 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 plaintiff is exclusive owner of the suit property and the defendants have nothing to do with the same?
- v. Whether plaintiff is entitled to the possession of the suit property?
- vi. Whether defendants are the owners in possession of the suit property vide sale Deed dated 25-02-1967 through which they have purchased the suit property from the predecessor of the plaintiff?
- vii. Whether plaintiffs are entitled to the decree as prayed for?
- viii. Relief?


5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiffs produced as much as seven 07 persons in evidence. PW-01 to PW-03 are the Jirga members constituted by the AC, Lower Orakzai on application of the plaintiffs. They confirmed constitution of Jirga followed by the proceedings conducted in the Office of Assistant Commissioner, Lower Orakzai.

PW-04 is the statement of plaintiff No. 01, who appeared as special attorney for

the rest of the plaintiffs. He repeated the story of the plaintiff PW-05 is the statement of Record Keeper, AC Office, namely Taimour who produced record before the Court as Ex.PW-05/1. Mr. Atta Hussain appeared as PW-06 who recorded his statement by negating to be part of the Jirga or sale transaction alleged by the defendants. He stated that nor does he thumb impressed the alleged sale deed nor the same was written in his presence. PW-07 is the statement of Shahsawar Ali, who testified the ownership of the plaintiffs; where after, evidence of the plaintiff was closed. On turn, defendants had produced four persons in support of their plea taken in defense. Mr. Wajid Hussain appeared as DW-04 who narrated the same story as was in the written statement and produced the alleged Sale Deed Ex.DW-4/1 through which his father purchased the suit property from the father of the plaintiffs. Learned counsel representing parties have been heard and suit was decreed which is impugned by the defendants in instant civil appeal.

6. Mr. Abid Ali Advocate for appellants argued that defendants are in possession of the property for about fifty (50) years which is being backed by a valid sale transaction documented in the year 1967. They have produced the Sale Deed Ex.DW-4/1 and the sons of both the marginal witnesses have been produced in evidence as they are departed. The deed is fifty years old to which presumption of truth has been attached and cannot be shattered without strong and cogent evidence. The evidence so produced by the plaintiff is contradictory and has wrongly been believed by the Trial Court. Similarly, the contractual capacity and competence was neither part of the pleading nor evidence and thus wrongly discussed and relied upon being not in issue. The plaintiffs remained silent for decades for no believable explanation and suit was badly time barred. The averments made in the plaint are ambiguous and form and frame of suit is defective.

The evidence of the plaintiffs was deficient and grant of decree was result of non-reading and misreading of evidence. The impugned Judgement is based on non-


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appreciation of evidence and wrong application of law and may be set aside for being illegal and appeal in hand may be allowed.

7. Sayed Basit Ali Advocate representing respondents resisted the stance of opponent by stating that plaintiffs are owners of the suit property since forefathers. The right of the plaintiffs was initially denied which was referred to Jirga for its resolution. The Assistant Political Agent Orakzai has decided the matter in issue in favor of the plaintiffs against the first set of defendants (defendants No. 01 and 04). Evidence produced by the plaintiffs is of sufficient degree and the Trial Court has rightly passed judgement in their favor. The defendants have neither oral evidence nor documentary evidence in support of their plea and their denial is evasive. The plaintiffs have rightly approached the competent forum of Civil Court Orakzai for redressing grievances which was allowed in shape of decree. The appellants have indulged the plaintiffs in rounds of litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal.

8. Whether plaintiffs have no nexus with the ownership of the disputed property which has wrongly been granted decree is the prime point of determination in pending Civil Appeal.

9. The pleadings of the parties; issues framed and evidence adduced thereon, when assessed in light of the professional assistance of the counsel representing parties, are reflecting that the ownership of disputed property was subject of litigation amongst the plaintiffs and defendant No. 01 and 04 (first set of defendants hereinafter) in previous round of litigation before the Assistant Commissioner, Lower Orakzai. On establishment of the regular Civil Courts, the matter was referred for its decision. On conclusion of Trial, Learned Senior Civil Judge, Orakzai has granted decree; feeling aggrieved, appellants assailed the same before this Court in civil appeal.


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10. Admittedly, the disputed property was ownership in possession of forefather of the plaintiffs as is evident from the pleadings and evidence of the parties. The apple of discord between the parties is that the defendants alleged purchase of the property from the forefather of the plaintiffs in the year 1967, which fact has been denied by the plaintiffs. Whether the plaintiffs have ceased to be owners on concluding valid sale transaction since decades back and grant of decree was illegal, are points for determination in instant civil appeal.

11. Article 117 of the Qanoon-e-Shahadat Order 1984 postulates that who asserts must prove and the initial burden of proof lies on plaintiffs. Plaintiffs alleged that they are owners of the property in dispute and retaining of its possession by defendants is illegal and unauthorized. Defendants categorically admitted the fact of ownership of forefathers of the plaintiffs till the year 1967. Despite being admitted, the plaintiffs produced witnesses of the fact that ownership of the disputed property was subject matter of Jirga proceeding conducted time and again with the conclusion that plaintiffs are owners and retaining possession of the property by the defendants is illegal. Record Keepers of District Record Room and that of Office of the Assistant Commissioner deposed as PW-5 and PW-6 and produced all such record testifying the facts of the conduct of Jirga and its conclusion in favor of plaintiffs. Other witnesses have also confirmed the fact that the property is ancestral ownership of the plaintiffs. The plaintiffs through independent cogent evidence coupled with the admission on the part of defendants have established probability in their favour and had thus discharged the liability of initial burden of proof.

12. Article 119 of the Qanoon-e-Shahadat Order 1984, requires the defendants to prove the plea taken in defence subject to condition that initial burden of proof has already been discharged as was done in instant case. The defendants admitted the ownership of the forefathers of the plaintiffs and alleged transfer of ownership

followed by delivery of possession through valid sale transaction documented vide Sale Deed Ex.DW-4/1. Chapter-V of Qanun-e-Shahadat Order 1984 provides scheme of documentary evidence. In order to prove a document creating financial liability has to be attested by two witnesses. Where execution of such document is denied, the party relying on the document is required to prove execution and contents of same by some cogent and convincing evidence. Mere placing it on record does not prove the document to be true and genuine. The defendant relied on sale deed of the year 1967, the attesting witness thereof namely Ata Hussain son of Momin is the single witness alive who recorded his statement as PW-6 denying the contents as well as execution of document. He added that no such transaction was ever negotiated or entered in his presence. Other witnesses of sale deed are deceased and defendants produced DW-1 and DW-2 being their sons to confirm the thumb impression of their fathers; but, such witnesses failed to produce any type of document matching the thumb impression of their fathers. They also failed to establish that how, when and in whose presence they have been told about the contents and execution of the sale deed especially when the witness alive is negating such document. This is what leads the Court to hold the defendants being beneficiary have not proved the Sale Deed Ex.DW-4/1.

13. As far as the objections and grounds of attack of the appellants regarding presumption of truth attached to the fifty years old document and possession over the landed property with special reference to limitation are concerned; yes, Article-100 of the Qanun-e-Shahadat Order 1984, aims at to do away the Rule of strict proof in case of old and ancient document. A thirty years old document or more is presumed to be true but it shall necessarily come out of legitimate and proper custody. The single attesting witness being alive has negated the document and other witnesses are not available being dead to testify the sale deed. The persons produced as DW-1 and DW-2 could not have produced any document matching the

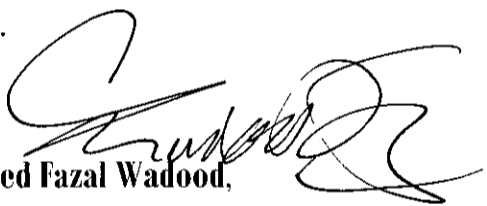

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thumb impression of their fathers and had also failed to point out any person testifying the fact of being told or informed about the sale transaction by their fathers. Mere age is not the sole ground that can be based as exclusive gadget for determining authenticity of a document as the presumption attached to such document is permissible and not imperative; especially, when the other conditions are not being fulfilled. Similarly, the possession by itself, if not backed with ownership and title, is creating no right over the property and law terms it as adverse possession against which no limitation runs.

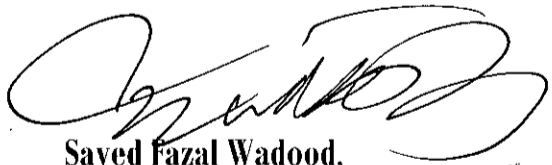
14. For what has been above, it can safely be concluded that the learned Trial Court has properly appreciated the evidence and rightly passed the impugned Judgement and Decree dated 20.03.2023. Consequently, as the Judgement under appeal does not warrant interference; therefore, the appeal in hand stands dismissed. Costs shall follow the events. Requisitioned record be returned with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

15. Announced in the open Court
12-06-2023


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CERTIFICATE.

Certified that this Judgment consists of seven (07) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.


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ADJ, Orakzai at Baber Mela