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IN THE COURT OF REHMIAT ULLAH WAZIR,
CIVIL JUDGE-I ORAKZAI AT BABER MELA

Civil Suit No. 42/1 of 2019
Date of Original Institution: 08/04/2019
Date of Institution: 05/07/2019
Date of Decision: 21/12/2020

1. *Malak Khalil-Ur-Rehman S/O Ghazi Marjan*
 2. *Nourang Khan S/O Warook Khan*
 3. *Laiq Shah S/O Gul Din*
 4. *Mihnam Shah S/O Qadar Shah*
- All R/O Qoum Rabia Khel, Tappa Ayaz Khel, Village Tabi, District Orakzai*
(Plaintiffs)

VERSUS

1. *Gul Zaman S/O Ali Daan Shah, R/O Qoum Karegaran, Ghoz Garh, District Orakzai and 12 others*
- (Defendants)*

**SUIT FOR DECLARATION -CUM- PERPETUAL AND
MANDATORY INJUNCTION, RECOVERY, SPECIFIC
PERFORMANCE OF A CONTRACT AND POSSESSION.**

JUDGEMENT:

Plaintiff Malak Khalil-Ur-Rehman and 03 others have brought the instant suit for suit for Declaration-cum-Perpetual and Mandatory Injunction, Recovery, Specific Performance of a Contract and Possession against defendants, seeking therein that the plaintiffs and the proforma defendants no. 07 To 13 are the owners in possession of the suit mountain since their forefathers while the defendant no. 01 To 03 have nothing to do with the same. That the defendant no. 01 To 03 have got no right to insist themselves as the owners of the suit mountain and take possession of the same. That these defendants have illegally and forcibly cut

*Rehmat Ullah Wazir
Civil Judge/Jud-I
Orakzai at (Baber Mela)*

down and sold out trees and have excavated stones from this mountain worth Rs. 28,20,000/-. That they are not entitled to cut down trees over the same, excavate stones in this mountain. That a jirga was conducted between the parties and a decision dated: 13.09.2015 was made whereby the plaintiffs were declared as owners in possession of the suit mountain and the defendants were restrained from interference in the same.

That the defendants were asked not to interfere in the suit mountain and to pay the amount of Rs. 28,20,000/- of the sold trees and stones and act upon the decisions of the arbitrators dated: 11.04.2017 and 13.01.2019 but they refused, hence, the present suit.


Defendants were summoned, in whom the defendant no. 01 appeared before the court and contested the suit by filing his written statement, wherein he raised some factual and legal objections while the rest of the contesting defendants no. 02 and 03 failed to appear before the court, hence, placed and proceeded ex-parte.

Divergent pleadings of the parties were reduced into the following issues;

Issues:

1. Whether the plaintiffs have got a cause of action?
2. Whether the plaintiffs are estopped to sue?
3. Whether the suit of the plaintiffs is time barred?

4. Whether the suit of the plaintiffs is not maintainable in its present form?
5. Whether the plaintiffs and defendant no. 07 To 13 are owners in possession of the mountain Mosooma Mashal since long and the defendants have got nothing to do with the same and they are not entitled to assert themselves as the owners of the same and utilize the same in any manner?
6. Whether the plaintiffs are entitled to the recovery of the amount of Rs. 28,20,000/- from the defendants for cutting trees and excavating stones from the suit mountain?
7. Whether the plaintiffs are entitled to the specific performance of the jirga decision dated: 03.01.2019, against the defendants?
8. Whether the plaintiffs are entitled to the possession of the suit mountain in the alternate?
9. Whether the defendants no. 01 To 03 have constructed houses upon the suit mountain by spending a huge amount and they are the owners of the suit property as confirmed from the survey in their favour?
10. Whether the plaintiffs are entitled to the decree as prayed for?
11. Relief.



 Rehmat Ullah Khan
 Civil Judge/Judicial
 Magistrate at (District Muzaffargarh)

Parties were given an opportunity to produce evidence. The plaintiffs produced witnesses in whom the one Nourang Khan S/O Warook Khan, the plaintiff no. 02, appeared as PW-01, who stated that the defendant no. 01 and his relatives are Karegaran (Qasabdar). That the one Malak Muhammad gave them 01 room for living. That after some time, their family increased in number and they requested us that they cannot live in one room that is why your property may kindly be sold out to us. Resultantly, my uncle Gidar Shah, the elders of the other families Khan Wazir, Qadir

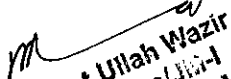
Shah and Haji Samand Ali sold out their properties to the defendants. That in 1992, the defendants began to take possession of the mountain in addition to the sold land. That many jirgas were conducted but the same failed. That later on the defendants migrated from the area but in 2013, they came back and purchased the suit mountain from a person amongst the Talibans. That since 1992 To 2000, the defendants have cut down and sold out the trees of worth Rs. 25,20,000/-.

That later on, another jirga was conducted between the parties, wherein 10 persons from the plaintiff's side took oath. He produced copy of the jirga decision dated: 11.04.2017, which is Ex.PW-1/1 and copy of another jirga decision dated: 13.01.2019 as Mark "A". At the end, he prayed for recovery of Rs. 25,20,000/- and possession of the


suit mountain. During cross examination, he admitted that no decision was made in the first jirga of 1992. That it is correct that we sold out 02 fields to the defendants. That we have never cut any tree of the suit mountain. That he got knowledge of the selling out of trees by the defendants when he came back after 2015. That before 1992, he was residing in Zerha and in 2000, he got knowledge that the defendants are selling out trees of the suit mountain. That it is correct that in the document which is Mark "A" there is only mention of a dispute while neither the disputed mountain nor the selling of trees is mentioned. That the 10 persons mentioned


 Rahmat Ullah Wasti
 Civil Judge/JM-1
 Orakzai (Khyber Pakhtunkhwa)

in the Mark "A" have not been produced as witnesses. The one Khan Ameer, a deed writer appeared as PW-02, who produced register Araiz Nawesi for the year 2017, wherein on serial no. 439/J315277, a deed has been issued, which is Ex.PW-2/2. That the same has been scribed by him and the arbitrators namely Gul Qadar and Alim Khan and the witness Mian Farid Gul signed the same in his presence. He also produced Perth Register, the copy of which is Ex.PW-2/1. He admitted that the witnesses which were sent to the defendants are not mentioned in Ex.PW-2/1 (inadvertently mentioned as Ex.PW-1/1). That in Ex.Pw-2/1 (inadvertently mentioned as Ex.PW-1/1), the name of the third arbitrator namely Gul Qadar is mentioned without mentioning the name of his father and his CNIC Number and the name of the arbitrator Alim Khan is written with a pen but the same is not my hand writing. Further, Mr. Mian Farid Gul appeared as PW-03 and stated that he only told the mode of oath to the parties. That Ex.PW-2/1(inadvertently mentioned as Ex.PW-1/1) was scribed and signed in his presence. Admitted in his cross examination that he is not the witness of anything and that he does not know what was scribed by the deed writer in the deed. Further, Mr. Gul Qadar Khan appeared as PW-04 and stated that he was the third arbitrator between the parties and he decided in favour of the plaintiffs after fulfilling all the traditional formalities. But admitted in his cross examination


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that the jirga was conducted on 13.09.2015. That he does not know the fact that when and how much property was purchased by the defendants from the plaintiffs. That no fight has ever taken place between the parties. That he does not know the fact that the defendants have ever cut and sold trees of the suit mountain. Further, Mr. Khyal Man Shah appeared as PW-05 and stated that there was a dispute of land between the parties which was resolved through a decision according to which the plaintiffs were bound to produce 02 witnesses and take oath by 10 persons. But after that the plaintiffs filed an application before the then APA, Orakzai, who appointed a jirga, who upheld the decision of the previous jirga but the defendants refused to give oath as there was a dispute over the mode of taking oath and resultantly, the defendants were considered as the losers. But admitted in his cross examination that the 10 persons have not taken oath in his presence. Further, that he does not know that when and who conducted the previous jirga. That he has not seen the disputed place and that APA, Orakzai has not given any decision in this respect. Further, Mr. Izat Gul appeared as PW-06 and stated that a jirga decision was made between the parties but thereafter an application was made to the then APA, Orakzai, who appointed a new jirga between the parties and I was a member of that jirga but no decision was made in this jirga. Also admitted in his cross examination that the 10


 Referring to the above
 Civil Judge/Judge
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persons who were bound to take oath have neither appeared before the jirga nor known to him. That no decision has been effected between the parties according to Pashto traditions till date. *Further, admitted that no example is there in the entire tribal area where someone is forcibly dispossessed from his land.*

The contesting defendant no. 01 himself appeared as DW-01, who produced a jirga decision Dated: 16.03.2016 which is Ex.DW-1/1, a Survey Report which is Ex.DW-1/2, Iqrar Nama Dated: 16.10.2015, which is Ex.DW-1/3, statements of the parties which is Ex.DW-1/4 and statements of the arbitrators Dated: 27.03.2019, which is Ex.DW-1/5 and further narrated the same story as in the written statement. He has been cross examined but nothing tangible has been extracted out of him during cross examination. Further, 04 witnesses have been produced by the contesting defendant no. 01, who all deposed in favour of the defendant no. 01 and in support of the documents produced by him.

My issue wise findings are as under;


Issues No. 02:

The defendants in their written statement raised the objection that the plaintiffs are estopped to sue but later on failed to prove the same, hence, the issue is decided in negative.


Fahim Ullah Khan
Chief Justice
Orakzai (Bakher Nela)

Issue No. 03

The contesting defendant No. 01 alleged in his written statement that the suit of the plaintiff is time barred but I am of the opinion that limitation is a mixed question of law and fact. There are 03 parts of the plaint. The first one is for declaration cum perpetual and mandatory injunction and possession in the alternate. According to Article 120 of the Limitation Act, 1908, there is a period of 06 years for filing a declaratory suit and every fresh denial gives rise to a fresh cause of action. The second part of the plaint is w.r.t specific performance of a jirga decision in the shape of a contract Dated: 03.01.2019 and the limitation period for a specific performance of a contract according to Article 113 of the Limitation Act, 1908 is 03 years, while the instant suit has been filed on 08.04.2019, thus the same is also well within time. The third part of the plaint is w.r.t recovery of the amount of Rs. 28,20,000/- and the limitation period according to Article 64 of the Limitation Act, 1908 is 03 years but admittedly the trees and stones out of the suit mountain have been sold upto the year 2000 and the plaintiffs got knowledge of the same in the year 2015 while filed the instant suit on 08.04.2019, thus after the lapse of the period of limitation. Thus in the light of the aforesaid findings, the issue is decided accordingly.


 Mohd. Ullah Wani
 Civil Judge J.J.-I
 Orakzai (Bakht Mata)

Issue No. 04

The contesting defendant No. 01 alleged in his written statement that the suit of the plaintiff is not maintainable in its present form but the same has neither been pressed nor proved, hence, left redundant.

Issue No. 05, 06, 07 & 08

All these issues are interlinked, hence, taken together for discussion.

The plaintiffs alleged in their plaint that they and the proforma defendants no. 07 To 13 are the owners in possession of the suit mountain since their forefathers while the defendant no. 01 To 03 have nothing to do with the same. That the defendant no. 01 To 03 have got no right to insist themselves as the owners of the suit mountain and take possession of the same. That these defendants have illegally and forcibly cut down and sold out trees and have excavated stones from this mountain worth Rs. 28,20,000/-. That they are not entitled to cut down trees over the same, excavate stones in this mountain. That a jirga was conducted between the parties and a decision dated: 13.09.2015 was made whereby the plaintiffs were declared as owners in possession of the suit mountain and the defendants were restrained from interference in the same.

That the defendants were asked not to interfere in the suit mountain and to pay the amount of Rs. 28,20,000/- of

the sold trees and stones and act upon the decisions of the arbitrators dated: 11.04.2017 and 13.01.2019 but they refused, hence, the present suit.

After detailed discussion upon the evidence produced by the plaintiffs, I am of the opinion that firstly, it is an admitted fact as per the statement of PW-01, that some of the suit land has been sold out by the plaintiffs to the defendants before the initiation of the present dispute in 1992. Secondly, the Iqrar Nama/Jirga decision which is produced as Ex.PW-1/1 and upon which the whole claim of the plaintiffs is based, has not been proved in line with Article 17 of the Qanun-e-Shahadat, 1984 as neither both of the witnesses have been produced nor both of the arbitrators have been produced. The only one attesting witness namely Mian Farid Gul when appeared as PW-03, has admitted in his cross examination that he is not the witness of anything and that he does not know what was scribed in the deed. Further, there is no other piece of evidence in the shape of signatures of both the parties etc which might have suggested the genuineness of the said document. Thirdly, the other document which is available on case file as Mark "A" has no evidentiary value as neither the same has been in original nor any witness of the same has been produced. Also, the PW-01, the plaintiff No. 02 has admitted that it is correct that in the document which is Mark "A", there is only mention of a

dispute while neither the disputed mountain nor the selling of trees is mentioned. That the 10 persons mentioned in the Mark "A" have not been produced as witnesses. Fourthly, the PW-04 has admitted in his cross examination that he does not know that whether the trees have been cut down by the defendants or not and when and to whom the same have been sold out. Fifthly, the PW-05 despite being witness of the plaintiffs and despite being member of the *Sarkari Jirga* has admitted that the 10 persons have not taken oath in his presence and also the PW-06 has admitted in his cross examination that no decision has been effected between the parties till date according to the Pashto Traditions. So far as, the recovery of the suit amount is concerned, the PW-01 being plaintiff No. 02 has admitted that he was not present at the time when the defendants were cutting and selling the trees rather he got the knowledge of the same after 2015 when he went there. Also, there is no other tangible piece of evidence in respect of the claim of recovery in the entire evidence of the plaintiffs. Thus, the plaintiffs badly failed to establish the claim that they are the owners of the suit mountain. The only document on which they rely is the jirga deed which is Ex.PW-1/1 but the same appears to be a fake and concocted document, which they badly failed to prove.

In the light of the aforesaid findings, all these issues are decided in negative.

Issue No. 09

The contesting defendant No. 01 alleged in his written statement that they have constructed houses upon the suit property by spending a huge amount and they are the owners of the suit property as confirmed from the survey conducted in their favour. He produced a survey document in the shape of a chit, which is Ex.DW-1/2 but there is no mention of the fact that the defendants have built up houses upon the suit property and the same is by no means sufficient to establish the fact that the defendants have built up houses upon the suit property rather the same is a type of a receipt. Further, the defendant has produced some deeds/ iqrar namas but the same cannot be construed as a proof of the houses of the defendants upon the suit property. No other solid piece of evidence is available on case file in this respect. Thus, in the light of the aforesaid findings, the issue is decided in negative.

Issue No. 01 & 10

Both these issues are interlinked, hence, taken together for discussion.

As sequel to my above issue wise findings, the plaintiffs have got no cause of action and therefore not entitled to the decree as prayed for. Hence both these issues are decided in negative.

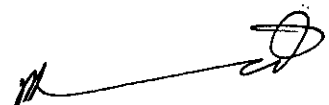
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Relief

As sequel to my above issue-wise findings, suit of the plaintiff is hereby dismissed. Costs shall follow the event.


File be consigned to the Record Room after its completion and compilation.

Announced
21.12.2020


(Rehmat Ullah Wazir)
Civil Judge-I,
Orakzai at Baber Mela.

CERTIFICATE

Certified that this judgment of mine consists of 13 pages, each has been checked, corrected where necessary and signed by me.


(Rehmat Ullah Wazir)
Civil Judge-I,
Orakzai at Baber Mela.