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

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

**Civil Appeal No. CA-06/13 of 2023**

**Date of institution: 01.02.2023**

**Date of decision: 18.07.2023**

Izzat Muhammad son of Geedarh Shah and 06 others, residents of Qaum Mala Khel, Tappa Aziz Khel, Fareed Khan Mela, PO Ghiljo, Tehsil Upper, District Orakzai. .... **(Appellants/Defendants)**

...**Versus**...

Syed Muhammad son of Geedarh Shah resident of Qaum Mala Khel, Tappa Aziz Khel, Fareed Khan Mela, PO Ghiljo, Tehsil Upper, District Orakzai.


..... **(Respondent/plaintiff)**

**Appeal against Judgement, Order and Decree dated 13.01.2023 in Civil Suit No. 7/1 of 2020.**

### **JUDGMENT**

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 13.01.2023, passed by learned Civil Judge-I, Orakzai in Civil Suit bearing No. 7/1 of 2020; whereby, the suit of the plaintiff/respondent with the title of "Syed Muhammad vs Izzat Muhammad etc." was decreed.

2. It is in the plaint that plaintiff and defendants are co-sharers in the agricultural property measuring 49 fields along with two dwelling houses located in Fareed Khan Mela, Daboori on the score of inheritance in legacy of late Geedarh Shah; the common predecessor in interest of the parties. Late Geedarh Shah was survived by three sons and three daughters. Plaintiff, Defendant No. 1 and father of defendants' No. 2 to 7 (Niaz Muhammad late) are his sons and defendants No. 8 to 10 are his daughters. The defendants are utilizing the agricultural land as well as the dwelling houses excluded the plaintiff from the legacy. Continuation in joint ownership is impossible for different reasons which necessitated presentation of suit for declaration, injunction and possession through partition.

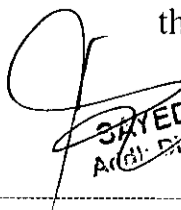
  
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3. Defendants/appellants on appearance objected the suit on various legal as well as factual grounds in their written statement. The defendants (appellants herein) had initially raised so many factual objections over the description of property and claimed other expenses incurred on medical followed by funeral expenses of the parents. On submitting written statement to the amended plaint, the objections have squeezed to as a whole denial and specifically pleaded that the late Geedarh Shah was survived by four sons as Fida Muhammad (Defendant No.4) was real son of Geedarh Shah and has wrongly been shown son of late Niaz Muhammad (alleged father of defendant No.2 to 7).

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 suit of the plaintiff is time barred?
- iii. Whether the plaintiff is estopped to sue?
- iv. Whether the plaintiff is entitled to his share in the suit property including the suit houses being the legal heir of the predecessor of the parties namely Geedarh Shah?
- v. Whether 04 of the fields are purchased by the defendants and they are not the ancestral property of the parties.
- vi. Whether the plaintiff has withdrawn an amount of Rs. 300,000/- from the joint Account No. 1902 of the predecessor of the parties in the Muslim Commercial Bank, Hangu and the defendants are entitled to the recovery of their shares in the amount after rendition of accounts?
- vii. Whether plaintiff is 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 two persons in evidence. Plaintiff

  
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himself in support of his claim and contention appeared as PW-01 and secondly as APW-01 after amendment in the plaint. He repeated the story of the plaint. Similarly, PW-02 is the statement of Muhammad Ibrahim who supported the contention of the plaintiff. On turn, defendants had produced one person namely Shal Muhammad son of Geedarh Shah in support of their plea taken in defense, who narrated the same story as was in the written statement and produced the Date Registration Certificate (Ex.DW-1/1), copy of new CNIC of Fida Muhammad (Mark-A), Fard of Jamabandi for year 1995-96 (Mark-B), copy of old CNIC of Fida Muhammad (Ex.DW-1/(X-1)) and power of attorney of Fida Muhammad (Ex.DW-1(X-2)). Learned counsel representing parties have been heard and suit was decreed which is impugned by the defendants in instant Civil Appeal being under consideration.

6. Muhammad Shoaib Khan Nasrat Khel Advocate for appellants argued that the plaintiff has refused to be examined on oath and his statement as APW-1 was recorded without administration of oath which is irrelevant and defective. The prime issue raised by the defendants regarding the parentage of Fida Muhammad is one of the prime controversy that has not been put into issue by the learned Trial Judge which is miscarriage of justice needs to be based for remand of the case. He added that the evidence so produced by the plaintiff is contradictory and has wrongly been believed by the Trial Court. The evidence of the plaintiff was deficient and grant of decree was result of non-reading and misreading of evidence. The impugned Judgement is based on non-appreciation of evidence and wrong application of law and may be set aside for being illegal and appeal in hand may be allowed.

7. Mr. Ihsan Ullah Khan Advocate representing respondent resisted the stance of opponent by stating that the status of plaintiff as co-sharer and the property being legacy are facts proved by the plaintiff through cogent evidence and admitted by



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the defendants. The plaintiff has rightly approached the competent forum of Civil Court Orakzai for redressing grievances which was allowed in shape of decree. The appellants have indulged the plaintiff in rounds of litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal.

8. Whether plaintiff has wrongly been granted decree and the real point of controversy regarding status of Defendant No.4 has not been put into issue are the prime points for 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 admittedly, the disputed property was ownership in possession of common predecessor in interest of the parties. The apple of discord between the parties is that the defendant No.4 is being termed grandson of late Geedarh Shah by plaintiff; whereas, the defendants has alleged him the real son of Geedarh Shah late, the common predecessor in interest of the parties.

10. Order-14 of Code of Civil Procedure, 1908 is dealing the subject of settlement of issues and determination of suit on issues of law or on issues agreed upon. Framing separate issue on parentage of one legal heir is one of the points of determination in instant appeal. It is worth mentioning that the appellants being defendants have not objected the frame of issue regarding parentage of one of the legal heir and thus this objection is not entertainable at the stage of appeal as was settled in 1990 MLD 355. However, the later part of Rule-5 of the Order-14 is mandatory in nature as duty is cast upon the Court to amend, frame, strike out, delete or reframe an issue with the object to determine the real point of controversy. The Issue(s) No. 5 and 6 framed in present case is beyond the pleading as there is no such objection or plea taken in defense by the defendants in their written statement submitted against the amended plaint. These Issue(s) No.5 and 6 being beyond the pleadings have wrongly been framed and are deleted at appellate stage

by attracting jurisdiction under Order-14 Rule-5 of Code of Civil Procedure, 1908 read with Judgement reported as 1999 SCMR 786. As for as the objection pertaining to parentage of one of the legal heir being not put into separate issue is concerned, the Issue No.4 describing the share of the plaintiff is obviously carrying the controversy of the quantum of share which covers the issue of the parentage of Fida Muhammad. Learned Trial Court has discussed and judicially determined the issue on the basis of evidence under Issue No. 4 of the Judgement which is sufficient and need no reframe or addition. Similarly, evidence on parentage of Fida Muhammad has sufficiently been procured; therefore, neither resettling of Issue No. 4 is required nor remand of the case is necessary.

11. Article 117 of the Qanoon-e-Shahadat Order 1984 postulates that who asserts must prove and the initial burden of proof lies on plaintiff. Plaintiff alleged that he is co-owner of the property in dispute on the score of inheritance as a legal heir of Geedarh Shah. Plaintiff himself has been examined by the learned Trial Court as APW-1 without administering him oath as he refused to do so. Section-5 of the Oaths Act 1873 is dealing the subject of oaths or affirmations to be made by all witnesses and their interpreters. Plaintiff has bluntly refused to be examined on oath and thus his examination in Court as witness was not permissible under the law. The omission of administering oath to a witness as curable irregularity postulated in Section-13 of the Oaths Act 1873 is not attracted in circumstances of the case as this was neither omission nor irregularity. The plaintiff himself has refused to record his statement on oath which is excluded from consideration; however, can be looked into as examination of the parties prescribed in Order-10 of Code of Civil Procedure, 1908. PW-2 and PW-3 are testifying the plaintiff as legal heir of late Geedarh Shah the common predecessor in interest of the parties.


They also consistent about the property being ancestral one. The defendants are unequivocally admitting the fact that plaintiff is legal heir and property is joint one.

  
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 District Court at Hangu

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. Defendants alleged that Fida Muhammad arrayed as Defendant No. 4 is the real son of Geedarh Shah late. They have produced the public documents record of which is maintained by NADRA as well as Revenue Department Hangu which reflects the parentage of Defendant No. 4 Fida Muhammad as late Geedarh Shah which has further been confirmed by defendant witnesses in their depositions recorded under oath. The copies of Judicial Proceedings conducted in the Court of Senior Civil Judge, Hangu is further strengthening the plea that Defendant No. 4 is the real son of late Geedarh Shah and has wrongly been mentioned as son of Niaz Muhammad in the head note of the plaint.

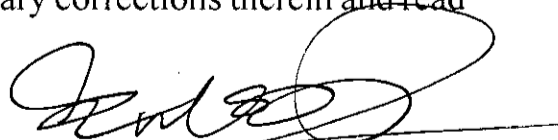
13. For what has been above, it can safely be concluded that the learned Trial Court has properly appreciated the evidence and rightly passed the impugned Judgement and Decree dated 13-01-2023. Consequently, as the Judgement under appeal does not warrant interference; therefore, the appeal in hand stands 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.

14. Announced in the open Court  
18-07-2023

  
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ADJ, Orakzai at Baber Mela

**CERTIFICATE.**

Certified that this Judgment consists of six (06) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.

  
Sayed Fazal Wadood,  
ADJ, Orakzai at Baber Mela