

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

CIVIL APPEAL NO. : 15/13 OF 2023
DATE OF INSTITUTION : 26.11.2022
DATE OF TRANSFER-IN : 11.07.2023
DATE OF DECISION : 22.08.2023

1. SAIF ALI S/O ZAWAR HUSSAIN
2. GHULAM JAFFAR S/O YOUSAF HUSSAIN
BOTH R/O NAKA MELA, SEPOYE, TAPA LAKHKARY KHEL,
NADAR NAMASI TEHSIL LOWER, DISTRICT ORAKZAI

.....(APPELLANTS)

-VERSUS-

1. AWAL MIR S/O SARDAR ALI
2. FERUZ ALI S/O MUHAMMAD AMEER SHAH
3. ZULFIQAR ALI S/O MUHAMMAD AGHA SHAH
4. SAJAN ALI S/O GULAB SHAIR
ALL R/O OTEE, SEPOYE TEHSIL LOWER, DISTRICT ORAKZAI

..... (RESPONDENTS)

Present: Fazal Malik Kakakhel Advocate, the counsel for appellants.
: Javid Muhammad Advocate, the counsel for respondents.

JUDGEMENT
22.08.2023

Impugned herein is the judgement/decreed dated 31.10.2022 of learned Civil Judge-II, Tehsil Court Kalaya, District Orakzai vide which suit of the appellants/plaintiffs has been dismissed.

- (2). The appellants/plaintiffs through a suit before the learned trial court, sought declaration-cum-perpetual and mandatory injunctions with possession as alternate to the effect that they are owners in possession of the suit property named as *Jawar Patey* measuring 20 Marlas situated at village *Otti* District Orakzai adjacent to Imam Bargah, boundaries of which are detailed in the headnote of the plaint, being devolved upon them

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
27/08/23

from their predecessor while the respondents/defendants, having got no concern with the same, are bent upon making interference by raising construction over the suit property. The respondents/defendants were summoned who appeared before the court and submitted written statement wherein they besides raising various legal and factual objections, contented that the suit property is their ancestral property where their houses, graveyard and Imam Bargah are located and that the suit property adjacent to Imam Bargah is part of it.

Pleading of the parties were culminated by the trial court into the following issues;

1. Whether the plaintiffs have got a cause of action to file instant suit against defendants?
2. Whether the suit of the plaintiffs is incompetent in its present form?
3. Whether the plaintiffs are estopped to file instant suit?
4. Whether the plaintiffs are owner in possession of disputed property and defendants are illegally interfering in the same?
5. Whether defendants are owner in possession of disputed property since time of their ancestors?
6. Whether the plaintiffs are entitled to the decree as prayed for?
7. Relief.

Parties were given opportunity to produce evidence.

Accordingly, the appellant/plaintiff No. 2 as attorney for appellant/plaintiff no. 1 appeared in the witness box as PW-1 while Ameer Gul, Ghulam Hassan and Zahid Hussain were also examined as PW-2 to PW-4 respectively in support of their

Shaukat Ahmad Khan
District & Sessions Judge,
Prakazai at Baber Mela

contention. On the other hand, respondents/defendants examined Malak Yaqoot Ali, Rehmat Ali as DW-1 and DW-2 respectively while appellant/defendant no. 4 as attorney for respondents/defendants no. 1, 2, and 3 appeared in the witness box as DW-3.

After conclusion of evidence of both the parties, the learned trial heard the arguments and dismissed the suit of the appellants/plaintiffs. The appellants/plaintiffs, being aggrieved of the impugned judgement/decree filed the instant appeal.

- (3). I heard arguments and perused the record.
- (4). Perusal of case file shows that issues No. 2 and 3 are formal in nature. Both these issues have been decided against respondents/defendants, which have not been impugned by respondents/defendants through appeal or cross-objections. Issues No. 4 and 5 relate to the matter in issue between the parties. As both these issues involved common questions of law and facts; therefore, both are taken together for discussion. As per contents of plaint coupled with the evidence led by the appellants/plaintiffs, they are owners in possession of the suit property; however, due to blood feud enmity they had migrated to village Alizai by abandoning their houses and land at their native village *Otti*. After about 50 years the appellants/plaintiffs effected a compromise with their opponents and they returned to their village. That out of the landed property of appellants/plaintiffs, the suit property named as *Jawar Patey*

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela

22/08/23

measuring 20 Marlas, boundaries of which are detailed in the headnote of the plaint, is tried to be occupied by respondents/defendants by making construction of bathrooms for Imam Bargah over there. On the other hand, respondents/defendants as per written statement claimed the suit property to be their ancestral property where they have constructed Imam Bargah, graveyard and now they are going to construct a bathroom for the Imam Bargah over the suit property. They further claimed that the suit property being adjacent to Imam Bargah is part of the same.

The appellants/plaintiffs in order to prove their case, examined Ameer Gul Hussain, Ghulam Hassan and Zahid Hussain as PW-2 to PW-4 respectively while the appellant/plaintiff no. 2 as attorney for appellant/plaintiff no. 1 appeared in the witness box as PW-1. The respondents/defendants in order to discharge their burden examined Yaqoot Ali and Rehmat Ali as DW-1 and DW-2 respectively while respondent/defendant no. 4 as attorney for respondents/defendants no. 1, 2, and 3 appeared in the witness box as DW-3.

It is evident from the pleadings, coupled with the evidence of parties that the claim of the appellants/plaintiffs to the extent of migration of the appellants/plaintiffs from the locality is not disputed between the parties rather admitted by the respondents/defendants. In the very first line of the cross

Shaukat Ahmad
District & Sessions Judge,
Orakzai at Baber Wala
22/08/23

examination of PW-1, the appellant/plaintiff has explained that he is of the age of 54/55 years, that about 50 years prior they had migrated from the area and settled in village Alizai and that due to blood feud enmity in the family of appellants/plaintiffs inter se, they had migrated from the area. He has also been put a positive suggestion to the fact that due to their enmity they have not visited their locality for 50 years.

"یہ درست ہے کہ دشمنی کی وجہ سے ہم 50 سال تک اپنے گاؤں نہیں گئے۔"

Similarly, it is also admitted on record that the houses of appellants/plaintiffs and their other landed property are also situated in the locality. PW-1 in his cross examination has also explained that one of their houses is situated at a distance of 500 yards from Imam Bargah while the other house is situated at a distance of 200 /300 yards away from Imam Bargah.

"امام بارگاہ سے ہمارا ایک گھر جو کہ اب مسمار ہو چکا ہے تقریباً 500 گز کے فاصلے پر ہے جبکہ دوسرا گھر 200/300

گز کے فاصلے پر ہے۔"

This PW has also been put a suggestion i.e.,

یہ درست ہے کہ میرے اراضیات پر مدعا علیہم نے مکانات تعمیر نہیں کیے ہیں اور نہ ہی مکانات تعمیر کرنے کی کوشش

کی ہے۔"


The aforementioned positive suggestion on one hand shows that the respondents/defendants admit the other landed property of the appellants/plaintiffs while on the other hand, it also shows that the said land is not in possession of the respondents/defendants. This PW has also turned wrong the suggestion that the suit property is in possession of the


Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
28/08/23

respondents/defendants. He has explained that their cousins (opponents) were not allowing anyone to enter upon the suit property and that the respondents/defendants have tried to occupy the suit property after the factum of compromise of the appellants/plaintiffs with their opponents, i.e.,

"یہ غلط ہے کہ جائیداد متدوعمویہ پچھلے 50 سال سے مدعا علیہم کے زیر قبضہ ہے۔ از خود کہا کہ ہماری غیر موجودگی میں ہمارے تر بوران کسی کو جائیداد متدوعمویہ کے نزدیک نہیں چھوڑے تھے۔ مدعا علیہم نے جائیداد متدوعمویہ ہمارے راضی نامہ ہونے کے بعد شروع کی ہے۔"

PW-2 Ameer Gul Hussain, PW-3 Ghulam Hassan and PW-3 Zahid Hussain have also supported the claim of the appellants/plaintiffs in their statements. All the three PWs are not the relatives of any of the parties and they belong to village *Otti* where the suit property is situated. All the three PWs in their cross examination are unanimous on all the material points regarding the claim of the appellants/plaintiffs i.e., that they had migrated from the locality about 50/60 years prior due to enmity, that they have returned to the locality after a compromise with their cousins, that the appellants/plaintiffs besides the suit property have houses and other landed property in the area, that Imam Bargah is situated adjacent to the suit property where the respondents/defendants have raised a bathroom over the suit property belonging to the appellants/plaintiffs. Similarly, attorney for the respondents/defendants, in his cross examination has neither denied the factum of migration of the appellants/plaintiffs from the locality nor he has denied the other


Chaukat Ahmad Khan
District & Sessions Judge,
Orakzai, Peshawar
27/08/23

property of the appellants/plaintiffs in their locality. In cross examination he has showed ignorance regarding the matter of enmity of appellants/plaintiffs i.e.,

"لوگ کہتے ہیں کہ مدعیان کا کافی عرصے سے دشمنی رہی ہے۔ البتہ میں اتنا چھوٹا تھا کہ مجھے اس بات کا کوئی علم نہیں ہے۔ مجھے یاد نہ ہے کہ مدعیان علاقہ سرکار میں کب منتقل ہوئے۔"

Similarly, he has also shown ignorance regarding the other property of appellants/plaintiffs i.e.,

"مجھے اس بات کا علم نہیں ہے کہ اراضی متدعوئیہ کے مغرب میں مدعیان کی کوئی دیگر ملکیتی زمین ہے یا نہیں۔ از خود کہا کہ جس کے پاس ہے اس سے لے لیں۔ مجھے اس بات کا علم نہیں ہے کہ اراضی متدعوئیہ 20 مرلے ہیں۔"

The other witnesses of the respondents/defendants i.e., Malik Yaqoot Ali and Rehmat Ali on one hand are the resident of other villages and on the other hand, they are interested witnesses for, both in their cross examination have admitted that they have disputes of land with the appellants/plaintiffs i.e., DW-1 Malik Yaqoot Ali in his cross examination has stated;

"یہ درست ہے کہ میرے مدعیان فریق کیساتھ ایک تنازعہ گزرا ہے۔ یہ درست ہے کہ میں نے پیسے مدعیان سے لیے تھے۔ میرے خاندان کے ایک فرد حکیم نے بھی مدعیان سے پیسے لیے تھے۔ از خود کہا کہ تنازعہ ہمارے خاندان اور مدعیان کے درمیان تھا۔"

Similarly, DW-2 Rehmat Ali in his cross examination has admitted;

"یہ درست ہے کہ میری اپنی اراضی اوٹی میلہ میں نہیں ہے اراضی متدعوئیہ پر پہلے آفریدیان بطور کاشتکاران نہیں تھے۔ اور جس اراضی پر آفریدیان بطور کاشتکاران تھے وہ ہمارے علاقے کے قریب تھے۔ یہ درست ہے کہ وہ کاشتکاران مدعیان کے کاشتکاران تھے۔ از خود کہا کہ وہ پورے ٹبر کے کاشتکاران تھے۔ یہ درست ہے کہ ان کے خاندان سے ایک بندہ ہم نے قتل کیا تھا۔ یہ بھی درست ہے کہ وہ کاشتکاران یہاں سے چلے گئے۔ یہ بھی درست

Shaukat Ahrizad Khan
District & Sessions Judge,
Orakzai at Baber Mela
27/08/23

ہے کہ ہم نے مدعیان وغیرہ کو کہا کہ جب بھی آپ اپنے اراضیات پر کاشتکاران لاؤ گے تو ہم سے پوچھ کر کاشتکاران لاؤ گے۔ از خود کہا کہ ہم سے پوچھے بغیر پھر مدعیان نے اراضیات پر کاشتکاران کو ہمارے مرضی کے بغیر آباد کیا۔ یہ تقریباً دس سال پہلے کی بات ہے۔ جوئے کاشتکاران مدعیان نے اپنے اراضی پر آباد کئے ہیں دیگر کاشتکاران کو چار پانچ مہینے بعد آباد کیا۔ یہ درست ہے کہ مدعیان فریق کیساتھ ہمارا تعلق اب بھی اچھا نہیں ہے"


In view of aforementioned discussion, it is held that none of the parties has any written documents in respect of the ownership of the suit property. The suit property is adjacent to the other properties of both and each of the parties claim the suit property as their ancestral property. The claim of the appellants/plaintiffs to the extent of the factum of their migration from the locality and after the compromise their return to their locality, the fact that they belong to the village *Otti* where the suit property is situated, the fact that the suit property is measuring about 20 Marlas, the fact that besides the suit property appellants/plaintiffs have other landed property and their houses adjacent to the suit property and that they are in possession of the suit property except the suit property measuring 20 marlas where the respondents/defendants have raised bathrooms for Imam Bargah, are proved on the record. Moreover, the preponderance of evidence also tilts in favour of the appellants/plaintiffs.

Hence, issue no. 4 is decided in affirmative in favour of appellants/plaintiffs while issue no. 5 is decided in negative against the respondents/defendants.

27/08/23

(5). Hence, in view of what is discussed above, it is held that the learned trial court has failed to appreciate the evidence available on file; therefore, on acceptance of the instant appeal of the appellants/plaintiffs, the impugned judgment/decreed dated 31.10.2022 of the learned Civil Judge-II, Tehsil Kalaya, District Orakzai is set aside and the suit of the appellants/plaintiffs is decreed as prayed for. File of this court be consigned to Record Room while record be returned. Copy of this judgement be sent to learned trial court.

Pronounced
22.08.2023



(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of nine (09) pages.

Each page has been read, corrected wherever necessary and signed by me.

Dated: 22.08.2023


(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
at Baber Mela

