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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-19/13 of 2023

Date of institution: 09.06.2023

Date of decision: 12.09.2023

1. Noor Muhammad son of Muhammad
2. Gulab Khel son of Abdul Jalil both residents of Shadalay Tambai, Tehsil Lower, District Orakzai. (**Appellants/Defendants**)

...**Versus**...

1. Aqal Jafar son of Noor Jafar resident of Qaum Ali Khel, Tappa Panjam, Zanka Khel, presently resident at Shadalay Tambai, Tehsil Lower, District Orakzai.
2. Civil Judge-II Kalaya Orakzai. (**Respondents/plaintiff**)

Appeal against Judgement, Order and Decree dated 25.05.2023 in Civil Suit No. 59/1 of 2021.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 25.05.2023, passed by learned Civil Judge-II, Orakzai in Civil Suit bearing No. 59/1 of 2021; whereby, the suit of plaintiff/respondent with the title of "Aqal Jafar vs Noor Muhammad etc." was decreed.

2. It is in the plaint that plaintiff is owner in possession of suit property named as Rewand Pattay on the ground of inheritance since the time of his predecessors. The defendants being strangers and having no authority are interfering in the property by way of constructing wall and trying to dispossess the plaintiff. They have time and again been asked not to interfere in the property of the plaintiff but they refused; which, necessitated presentation of suit for declaration perpetual injunction and possession in alternative.

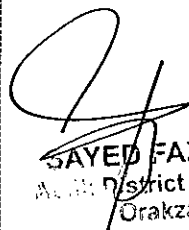

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3. Defendants/appellants on appearance objected the suit on various legal as well as factual grounds in their written statement. The defendants (appellants herein) had specifically pleaded that the property in dispute has been acquired ownership followed by possession through exchange transaction documented in the year, 2014. The elder brother of the plaintiff has exchanged the disputed land against the landed property known as Anar Baig Patay and now the parties are enjoying peaceful ownership and possession of each property exchanged.

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 owner in possession of the 01 field known as Rewand Patay since his predecessor and defendants have nothing to do with the suit property?
- v. Whether the suit of plaintiff is bad due to misjoinder and non-joinder of parties?
- vi. Whether the predecessor of the plaintiff have exchanged the suit property with the defendants according to agreement deed dated 23-12-2014?
- vii. Whether the suit property is in possession of defendants and plaintiff has nothing to do with the same?
- viii. Whether plaintiff is entitled to the decree as prayed for?
Relief?

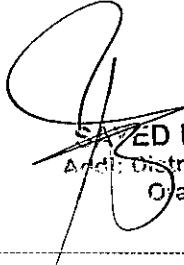
5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiff produced as much as three persons in evidence. Plaintiff himself in support of his claim and contention appeared as


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PW-01 who repeated the story of the plaint. Similarly, PW-02 is the statement of Khial Akbar and PW-03 is the statement of Sayed Ahmed who supported the contention of the plaintiff. On turn, defendants had produced two persons; wherein, the defendant Noor Muhammad appeared himself and recorded his statement as DW-01 in support of their plea taken in defense. He produced Exchange Deed as Ex.DW-1/3. Ajab Khan appeared as DW-02, who is witness of the exchange transaction. 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. Afzal Khan Afridi Advocate assisted by Khan Kareem Advocate for appellants argued that the impugned judgement is against the facts in circumstances of the case and settled principle of law. It is result of misleading and non-reading of evidence passed in hurry. It was argued on fact that Wazeer Jafar is the brother of the plaintiff who being *Mashar* is dealing the matter pertaining to property and other matters in the locality and had validly entered the exchange transaction with the defendants. He was not arrayed as party on mala fide as he would have categorically admitted the ownership, possession and exchange transaction. Other brothers and sisters of plaintiff have also not been made parties despite being necessary. The property in dispute is surrounded by the property owned by the defendants and it was in the fitness of things to exchange the landed properties for convenience of both the parties. The parties are enjoying ownership followed by peaceful possession of pieces of land exchanged since 2014 and thus suit was based on mala fide which has wrongly been decreed. They 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-


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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. Mr. Sana Ullah Khan Advocate representing respondent resisted the stance of opponent by stating that the status of plaintiff as owner and the property being legacy are facts proved by the plaintiff through cogent evidence and admitted by the defendants. The plaintiff has rightly approached the competent forum of Civil Court Orakzai for redressing grievances which was allowed in shape of decree. He added that plaintiff is owner, possessor and is utilizing the property since decades as co-owner with other siblings whose have no issues interse which is justified reason for their non-joinder. The plaintiff has neither signatory nor beneficiary of the exchanged deed and the same is fake prepared for grabbing the property. It was further added that 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 that non-joinder of the parties is on justified ground? 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 plaintiff and his siblings. The apple of discard between the parties is that the alleged exchange has either been made in the year 2014 or not.

10. Before discussing merits of the case, an error and irregularity in shape of non-joinder of the parties is of pivotal importance in instant case to be discussed at the very outset. The defendants had specifically pleaded in Para-2 of the written statement that the disputed land known as Raiwand Patay has been


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exchanged against piece of land known as Anar Baig Patay through Exchange Deed Ex.PW-1/3 dated 23-12-2014, entered between the brother of the plaintiff; who was *Mashar* of the extended family of the plaintiff and the defendants. This plea of defense was put into Issue No. 6 framed on 27-08-2022. This issue is the core issue of the suit being the prime controversy. The person who entered exchange transaction with the defendants is alive, competent to appear before the Court and his status being brother of the plaintiff as well as co-sharer in the disputed land is also admitted. He was neither arrayed as plaintiff nor proforma defendant despite the fact that controversy is deeply linked with him. Ordinarily, the Court of appeal is neither reversing nor modifying the decree on the score of error or irregularity as is postulated in Section-99 of Code of Civil Procedure, 1908; however, when it goes to the root of the case affecting its merits, the remand is the first and last available solution. The Order-I of the Code of Civil Procedure, 1908 deals the subject of parties to the suit. Rule-10 of such Order empowers the Court to add a necessary party or proper party and delete a person wrongly impleaded. Plaintiff categorically admitted in his evidence that the property in dispute is joint ownership of his siblings including the brother who allegedly entered into exchange transaction which is the root of the case affecting its merits and thus single score of non-joinder is sufficient for remanding the case.

11. For what has been above, it can safely be concluded that the learned Trial Court has committed error and irregularity by way of not impleading the necessary party which error is obviously goes to the root of the case affecting its merits. Consequently, the impugned Judgement and Decree dated 25-05-2023 is set aside; the case is remanded back to the Hon'ble Trial Court with the direction to implead the necessary parties in line with the determination recorded above to be followed by the decision afresh after provision of hearing


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opportunity including procuring evidence, if so desired. Costs shall follow the events. Requisitioned record be returned with copy of this Judgment; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

12. Announced in the open Court
12-09-2023


Sayed Fazal Wadood,
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