

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

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

Civil Appeal No. CA-20/13 of 2023

Date of institution: 09.06.2023

Date of decision: 06.11.2023

Abdul Jameel son of Naryab Gul resident of Darvi Khel (Garhi) Zawan,
Qaum Rabia Khel, Mishti Orakzai..... **(Appellant/plaintiff)**

...Versus...


Waziristan son of Israr Gul and 07 others, all residents of Tappa Darvi
Khel, Village Zawan, and Tehsil lower, District Orakzai.
..... **(Respondents/defendants)**

**Appeal against Judgement, Decree and Order dated 23-05-2023,
passed in Civil Suit No. 09/1 of 2023.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/plaintiff
against the Judgment, Decree & Order dated 23.05.2023, passed by
learned Senior Civil Judge, Orakzai in Civil Suit bearing No.09/1 of 2023;
whereby, suit of the appellant/plaintiff with the title of "Abdul Jameel vs
Waziristan etc" was dismissed.

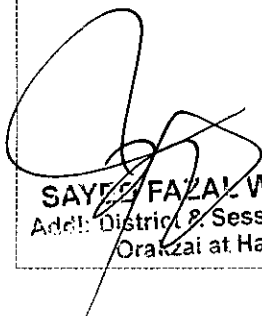
2. Briefly stated facts of the case are such that the plaintiff (appellant
herein) has filed civil suit against the defendants (respondents herein) for
declaration, redemption of mortgage, possession and perpetual injunction.
It is in averments of the plaint that plaintiff being owner in possession of
suit property containing 04 fields, located in Zwan, Mishti had delivered
vacant possession to the defendants against mortgage money of PKRs.
2500/- annually. Defendants were regularly paying the mortgage amount


FAYEZ FAZAL WADOON
Addl. District & Sessions Judge
Orakzai at Mangu

(41)

till 2012. It was 2013 when the defendants have stopped the payment and gradually claimed ownership over the suit property. The defendants were asked time and again to pay the outstanding amount or handover the possession of the suit property to the plaintiff but they failed to do so which necessitated presentation of Civil Suit.

3. On appearance, the defendants had submitted written statement, stating therein that the plaintiff has got no nexus with the ownership and possession of the suit property. It was specifically pleaded that the Judgement dated 26-10-2018, passed by Assistant Commissioner Lower Orakzai speaks about the ownership of the defendants over the suit property as well. It was added that the matter in issue is falling within the definition of decided matter and thus prayed rejection of plaint in petition submitted under Order-7 Rule-11 of the Code of Civil Procedure, 1908 (Code hereinafter). The same application was contested by the plaintiff on submitting his written reply. After hearing arguments of learned counsels for both the parties on such application, the learned Trial Court vide Order No.16 dated 11.04.2020, dismissed such application. Feeling aggrieved the defendants had filed Civil Revision in the Court of Hon'ble the District & Sessions Judge, Orakzai. It was directed in Judgement in Revision dated 23-01-2023 that res-judicata being mixed question of law and fact shall be part of separate issue to be framed for inviting evidence. Consequently, additional issue on res-judicata was framed which was decided along with other issues and dismissed the suit as a whole. Plaintiff feeling aggrieved, filed instant Civil Appeal which is under consideration.



SAYED FAZAL WAJID
Addl. District & Sessions Judge
Orakzai at Hangu

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4. Divergent pleadings of the parties have been reduced into following issues including an issue framed additionally.

- i. Whether the plaintiff has got cause of action?
- ii. Whether the suit of the plaintiff is time barred?
- iii. Whether the plaintiff is estopped to sue?
- iv. Whether the suit property is the ownership of the plaintiff and the defendants were only cultivating the same as tenants?
- v. Whether the suit property is the ownership in possession of the defendants since there forefather and the plaintiff has nothing to do with the same?
- vi. Whether the suit controversy has already been decided by the AC Lower Orakzai on 26-10-2018 through FIGR, that is why the present suit is hit by Res-judicata?
- vii. Whether the plaintiff is entitled to the decree as prayed for?
- viii. Relief.

5. Parties had adduced evidence in support of their respective claims. Seizing the opportunity, plaintiff produced as much as five (05) witnesses. PW-1 is the statement of Assistant Record-Keeper of the Record Room who produced case file of Kashmir Khan vs Waziristan bearing No. 48/1 decided by Assistant Commissioner Lower Orakzai as Ex.PW-1/1. Taimur Syed being Muharrir of the AC Lower Orakzai was examined as PW-2 who produced correspondence reflecting transfer of cases to District Judiciary from District Administration which Ex.PW-2/1. Kashmir Khan has been examined as PW-3 who is the witness of ownership of plaintiff and spoke about mortgage. Muzaffar Khan

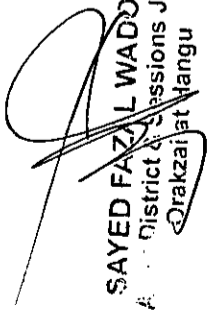

SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu

recorded his statement as PW-4 testifying the mortgage transaction. PW-5 is the plaintiff who repeated the story of the plaint claiming ownership and terming the possession of defendants as mortgage base. On turn, defendants examined Waziristan as DW-1 relying on Judgement of AC Lower Orakzai Ex.PW-1/1. Ameen Khan is the DW-2 exhibited power of attorney, CNIC as Ex.DW-2/1 to 2/2 and death certificate of his father as Annexure-A. Record Keeper of District Record Room Orakzai produced record of the earlier litigation as Ex.DW-3/1.

6. On closure of evidence, the suit was dismissed which is impugned herein.

7. Mr. Insaf Ali Advocate representing appellant argued that there is sufficient cogent evidence adduced by the plaintiff while defendants had neither produced documentary proof of the ownership nor oral evidence of the sufficient degree to rebut. Other brothers and sisters being necessary party of both the plaintiff and defendants have not been arrayed in the list of the parties which necessitates remand of the case with the direction to implead all necessary and proper parties for trial afresh. The principle of res-judicata has wrongly been attracted as parties before the forum of Assistant Commissioner Lower Orakzai were not the same and thus res-judicata is not applicable. It was prayed that the appeal may be allowed and case may be remanded to the Trial Court for impleading the necessary and proper parties for reaching to the just conclusion of the matter.

8. Mr. Sana Ullah Advocate for respondents/defendants contended that the Judgement of Assistant Commissioner Lower Orakzai was within

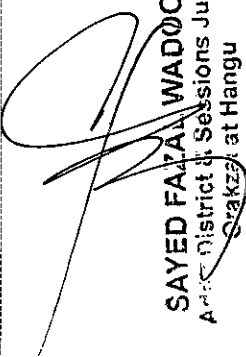

SAYED FAZAL WADOOD
District Sessions Judge
Orakzai Wangu

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the competence at that time and was within the knowledge of the plaintiff who was party to the proceedings and this fact was willfully concealed in the plaint with mala fide. The Judgement of the Assistant Commissioner Lower Orakzai dated 26-10-2018 is lawful order still intact in favor of defendants. Plaintiff was required to prefer appeal against that decree which was omitted and has got finality. He concluded that the suit has rightly been dismissed for being barred by law and on its merits.

9. There are two points for determination in instant Civil Appeal; one is, whether plaintiff is real owner and delivered the landed property to defendants on mortgage? And the second point is that whether the principle res-judicata has wrongly been attracted to the circumstances of the case?

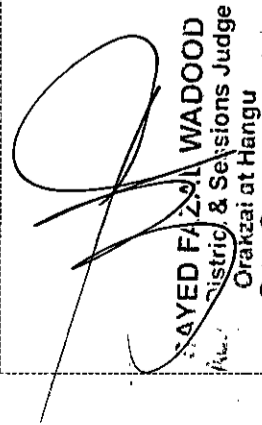
10. The description of property in dispute has not been fully mentioned which is a legal requirement of paramount importance but as the same has neither been disputed nor matter in issue; therefore, can lightly be deprecated. Plaintiff has claimed ownership of the disputed land without producing any documentary or sufficient and cogent oral evidence to support this plea of ownership. Let it be ignored again as this is region where people are having no such documentary proofs of their ownership; but, the fact of delivering possession to the defendants on the basis of mortgage is fact that requires documentary evidence or at least oral evidence of highest degree of cogency. The plaintiff failed to produce evidence of the direct source to prove the fact that any verbal mortgage agreement has been finalized either amongst the parties or their predecessors in interest. Plaintiff also failed to testify that he or his


SAYED FAZAL WADOOD
Assistant District & Sessions Judge
Orakzai at Hangu

45

representative had ever been received the mortgage money from the date of mortgage allegedly transacted about seven decades back. Plaintiff was under the liability to discharge the burden of proof as postulated in Article-117 of the Qanun-e-Shahadat Order 1984 which he fails to discharge. When plaintiff fails to prove what he asserts, the question of rebutting the probability by the defendants is out of question at all. Even then, the possession of the defendants over the property is admitted fact which has rightly been considered by learned Trial Judge as none of the parties are having title document in their hands.

11. Both the parties admits that the subject property of the suit was matter in issue before the then Assistant Political Agent later on changed with the nomenclature of Assistant Commissioner. Record of the earlier litigation before the Assistant Commissioner Orakzai has been exhibited as PW-1/1 containing two hundred and seventeen (217) pages. Parties and property are the same in earlier round of litigation and justice requires that there must be an end of litigation and parties should not be vexed twice for the same subject matter in the same cause of action. One aspect of the case is debatable that is whether Assistant Commissioner was competent like the Assistant Political Agent to resolve the Civil Disputes? The answer is obviously "yes" and for this inference, reference can be made to concluding and operating part of case Ali Azeem Afridi vs Federation of Pakistan and others in Writ Petition No. 3098-P/2018 decided by Hon'ble the Peshawar High Court, Peshawar vide Judgement dated 30-10-2018. The same is reproduced herein below for ease of reference and comprehension: "*Indeed the separation of executive from the judiciary is*


SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangu

46

a hectic exercise, which should have been done before the 25th Amendment (Act No. XXXVII of 2018) therefore, we feel it appropriate to give some time to the concerned to have the same exercised but not later than one month, from the date of the judgement, as any law/regulation made or action taken in violation of principles contained in article-25 is liable to be struck down and the same is the power with this Court. Mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedure of criminal law of civil law, trial and detention etc, which is enforceable in the entire country. In the view of above, we while allowing the writ petition as prayed for, declared the notification dated 29-05-2018 whereby FATA Interim Governance Regulation, 2018 was promulgated, as ultra vires of the Constitution, to the extent of allowing the Commissioners to act as Judges; Council of Elders deciding Civil and Criminal matter; constitution of Qaumi Jirga; Modified applications of Chapters VIII and XLII of the Code for Security; Third Schedule; Administered area, and after one month from the date of judgement, any decision of Civil or Criminal nature would be void ab-initio. The Judgement of learned Assistant Commissioner Orakzai dated 26-10-2018 is within the time frame which the law presumed to be competent and within jurisdiction; therefore, the principle of res-judicata has rightly been attracted by the learned Trial Court.

12. In the light of above discussed facts and circumstances of the case, this Court holds the view that learned Trial Court has correctly appreciated the evidence and rightly applied the law; therefore, it is held

SAYED FAZAL WAHID
 District Sessions Judge
 Orakzai, FATA
 Hangu

47

that the impugned order/judgment of the learned Trial Court needs no interference of this Court; hence, maintained. Consequently, instant appeal being devoid of any merits stand dismissed. Costs shall follow the events.

13. Requisitioned record be returned back with the copy of this Judgement while file of this Court be consigned to the District Record Room after completion and compilation within the span allowed for.

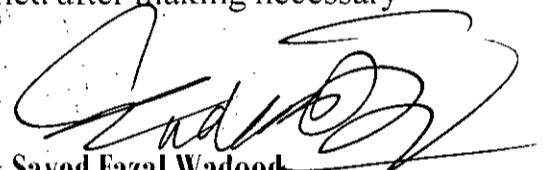
14. Announced in the open Court
06-11-2023



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment is consisting upon eight (08) 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