

**IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,
ORAKZAI (AT BABER MELA).**

Original Civil suit No.....117/1 of 2021

Date of institution07.09.2021

Date of decision27.10.2023

1. Muhammad Yousaf S/O Eid Badshah

2. Syed Umar S/O Meer Basheer

Both residents of Qoam Aakhel Tappa Shamali Nawasi, Khwaga Cheri, Tehsil
Ismialzai District Orakzai.

..... (Plaintiffs)

Versus

1. Fazal Wali S/O Ghanam Shah

2. Abdul Wali S/O Ghanam Shah

Both residents of Qoam Aakhel Tappa Shamali Nawasi, Khwaga Cheri, Tehsil
Ismialzai District Orakzai.

.....(Defendants)

**SUIT FOR DECLARATION-CUM-PERMANENT INJUNCTION AND
POSSESSION THROUGH PARTITION**

JUDGMENT:

- Brief facts of the case are that plaintiffs have filed the instant suit for declaration-cum-permanent injunction and possession through partition to the effect that plaintiffs are co-sharers in the suit property, which is fully detailed in the headnote of plaint. That the suit property is jointly owned and yet to be partitioned. That the defendants be restrained from taking into possession and raising construction over the disputed

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property. That defendants were asked time and again to admit the legal claims of plaintiffs and refrain from interference but in vain, hence, the present suit.

2. After due process of summons the defendants appeared in person and contested the suit by submitting written statement in which contention of the plaintiffs were resisted on many legal as well as factual grounds.
3. The divergent pleadings of the parties were reduced into the following issues.

ISSUES.

1. *Whether the plaintiffs have got cause of action?*
2. *Whether this court has got jurisdiction to entertain the suit of plaintiff?*
3. *Whether the plaintiffs are estopped to sue?*
4. *Whether the suit of the plaintiffs is time barred?*
5. *Whether the plaintiffs are co-sharers in the suit property which is yet to be partitioned?*
6. *Whether defendants alongwith other co-sharers are owners in possession of the suit property?*
7. *Whether the plaintiffs are entitled to the decree as prayed for?*
8. *Relief.*

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4. Parties were afforded with ample opportunity to adduce evidence. Detail of the plaintiff's witnesses and exhibited are documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Muhammad Yousaf S/O Eid Badshah Qoam Aakhel, PO	Copy of CNIC is Ex.PW-1/1.

	Ghiljo, Tehsil Ismail Zai District Orakzai.	
PW-2	Muhammad Basheer S/O Meer Basheer Qoam Aakhel, PO Ghiljo, Tehsil Upper District Orakzai	Copy of CNIC is Ex.PW-2/1.
PW-3	Muhammad Qasim S/O Alimat Shah Qoam Aakhel, Ghiljo, Tehsil Upper District Orakzai.	Copy of CNIC is Ex.PW-3/1.

Detail of defendant's witnesses and exhibited documents are as under;

WITNESSES		EXHIBITIONS
DW-1	Shandi Gul S/O Ghazali Khan Qoam Aakhel, PO Ghiljo, Tehsil Ismail Zai District Orakzai.	Copy of CNIC is Ex.DW-1/1.
DW-2	Fazal Shah S/O Nooran Shah Qoam Aakhel, PO Ghiljo, Tehsil Ismail Zai, District Orakzai.	Copy of CNIC is Ex.DW-2/1.
DW-3	Baloch Khan S/O Khial Gul Qoam Aakhel, PO Ghiljo, Tehsil Upper District Orakzai.	Copy of CNIC is Ex.DW-3/1.
DW-4	Abdul Wali S/O Ghanam Shah Qoam Aakhel, PO Ghiljo, Tehsil Upper District Orakzai.	Copy of Iqrar Nama/Jirga Deed is Ex.DW-4/1. Copy of Halaf Nama is Ex.DW-4/2.

5. Arguments by learned Counsel for the parties heard.
6. Learned Counsel for the Plaintiffs, Mr. Khan Amir Advocate, argued

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and stressed upon the facts averted in the plaint that the plaintiffs are co-sharers in the suit property alongwith the defendants. That although the plaintiffs have not produced any document in support of their claim but the oral evidence deduced in shape of statements of the PWs are in favour of the plaintiffs.

7. Learned Counsel for the Defendants Mr. Abid Ali Advocate, argued that the suit property was joint ownership of the plaintiffs with Kandi (family) Molyaan and the same has been partitioned between them. That the plaintiffs were never joint owners of the suit property alongwith the defendants. That the plaintiff's close relative is Fazal Haleem and if they had any share in property, that would have been in the property of the aforementioned person. That the suit property is in possession of the defendants from quite a long time. That there are many admissions in the statements of the PWs in favour of the defendants. That the plaintiffs have not produced any documents in support of their claim and on the other hand the defendants have produced two documents in their favour. That the suit of the plaintiff is liable to rejection.

8. After hearing arguments and after gone through the record of the case with valuable assistance of learned Counsels for both the parties, my issue-wise findings are as under:

ISSUE NO.2:

Whether this court has got jurisdiction to entertain the suit of plaintiffs?

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9. This objection was raised in preliminary objections in the written statement and the issue was framed keeping in mind the aforementioned objection. Burden of proof regarding the issue was on defendants, however, defendants failed to discharge their duty in this respect. Moreover, there is nothing available on record which suggests bar of jurisdiction of this court to decide the instant suit. Hence, the issue is decided in negative.

ISSUE NO.3:

Whether the plaintiffs are estopped to sue?

10. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendants, therefore issue is decided in negative and against the defendants.

ISSUE NO.4:

Whether the suit of the plaintiffs is time barred?

11. The onus to prove this issue lies on the plaintiffs. The plaintiffs filed suit for possession through partition. As per averments of the plaint, cause of action accrued to the plaintiffs few days prior to the institution of this suit, when the defendants refused the share of the plaintiffs in the disputed property. But even without considering this fact, the suit for partition can be sought without the ambit of limitation. Wisdom is drawn from the judgments of Superior Courts and reliance is made on 2015 SCMR 869.

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Hence, the issue is decided in negative and in favour of the plaintiffs.

ISSUE NO.05.

Whether the plaintiffs are co-sharers in the suit property which is yet to be partitioned?

12. The claim of the plaintiffs is that they are the co-sharers in the disputed property and defendants have no right to deny the legal right of the plaintiffs. That the suit property is jointly owned and yet to be partitioned. Burden of proof regarding the issue was on plaintiffs. Plaintiffs in order to discharge this duty, produced three witnesses. The essence of their statements which helped in deciding the issue are as under.
13. Muhammad Yousaf, who is plaintiff No.1 in the instant case and recorded his statement on oath as PW-01. While supporting the claim of the plaintiffs he stated in his examination in chief that the suit property is joint ownership of plaintiffs and defendants, which is yet to be partitioned. That the plaintiffs belong to Qoam Aakhel, sub-section Shomali Nawasi, Kanday Ghairay Kor and in Ghairay Kor there are four families which are; our family, defendant's family, Aliman Shah and Abdul Haleem family. He further stated that defendants are possessor of our share in the property. The said PW admitted in his cross examination that Aliman Shah and Abdul Haleem family are close to ours in ancestral lineage. The said PW also admitted that the suit property was partitioned between defendants and Molyaan, who are now in possession of their respective shares. The said PW also

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admitted that he has a brother and the same is not party in the present suit. He also recorded in his statement that the plaintiff No.02 is grandson of Abdul Haleem and beside him no other person from his family is party in the instant suit. He also admitted that the father of plaintiff No.02 is alive.

14. Muhammad Basheer recorded his statement on oath as PW-02 in support of the stance and contention of plaintiffs in his examination in chief and stated that being a member of family of Abdul Haleem, Ghairay Kor (Kanday), we also have share in the disputed property. The said PW recorded in his cross examination that neither my uncles and brothers are party to the instant suit nor they have laid any claim through the instant suit. He also admitted that partition between the defendants and Molyaan has taken place.
15. Muhammad Qasim who deposed on oath as PW-03 recorded his statement in support of the claim and contention of the plaintiffs. He recorded in his cross examination that he also lay claim in the disputed property. He further stated that beside Rehmat Ullah, no other person from Kandee has filed suit for partition.
16. The statements of the plaintiffs' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues against their favor. Firstly, there is no documentary proof of whatsoever, which might have established the claim of the plaintiffs. On the other hand, defendants have produced certain documents which are Ex.PW-4/1 and Ex.PW-4/2 which shows their ownership and

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possession of the suit property. Secondly, the plaintiffs have not mention in their plaint as to how they are co-sharers in the suit property and to how much shares they are entitled to. Thirdly, the suit property consists of shops and defendants have not contended anywhere in the instant file that they ever received any rent regarding the same, so much so that the plaintiff No.01 in his statement as PW-01 recorded ignorance of the fact that who are the tenants of the disputed shops. Fourthly, all the PWs admitted the fact that the disputed property has already partitioned between the defendants and family of Molyaan. Moreover, all the PWs admitted that family of Abdul Haleem is more close to the plaintiffs in ancestral lineage then that of defendants. PW-01 stated in his cross examination that Abdul Haleem family hold its own share in Ghiljo Bazar. Fifthly, the instant suit for partition is bad in its form due to non-joinder of necessary parties. The plaintiff No.01 stated in his statement that he has another brother who is not party to the instant suit. Similarly, PW-01 recorded in the statement that father of plaintiff No.02 is alive. PW-02 and PW-03 also claim shares in the suit property and is not a party to the instant suit. It is also pertinent to mentioned here that PW-02 is the brother of plaintiff No.02 who also claimed his share being grandson of Abdul Haleem but PW-01 stated in his statement that share of Abdul Haleem has already been partitioned and the family is in possession of the same. Sixthly, defendants are in possession of the suit property which is admitted by plaintiffs and the PWs.

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17. Keeping in view the above discussion, it is held that plaintiffs failed to produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.05 is decided negative and against the plaintiffs.

ISSUE NO. 6:

Whether defendants alongwith other co-sharers are owners in possession of the suit property?

18. Defendants in their written statement have contended that the suit property is in ownership and possession of the defendants with other co-sharers since long and plaintiffs have no shares in the disputed property. The burden of proof regarding the issue was on defendants. Defendants in order to prove their stance, produced four witnesses in their favour.
19. Shandi Gul recorded his statement on oath as DW-01 and stated that he was jirga member in which sittings on various dates has taken place without any verdict. That at last we had scribed a Halaf Nama on 10.09.2021, regarding shareholders of Ghiljo Bazar whose shares were determined in 1928. Nothing incriminating regarding the stance of defendants and in favour of the stance of the plaintiffs were recorded in his cross examination.
20. Fazal Shah recorded his statement on oath as DW-02 and stated that a jirga has taken place between the parties in which he was a member. On a given date of the jirga the plaintiffs had to take an oath but the plaintiffs did not appear before the jirga. The jirga members then wrote

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their verdict and declared the plaintiffs "Parh" (don't have any stance). Nothing incriminating against the stance of defendants and in favour of the stance of the plaintiffs were recorded in his cross examination.

21. Baloch Khan who deposed on oath as DW-03 and recorded in his statement that in the year 2022 a jirga has taken place between the parties and the jirga has directed the plaintiffs to produce two witnesses in their favour and directed the defendants to produce ten witnesses who would take an oath in their favour. But the plaintiffs did not produce two witnesses and the jirga gave its verdict against the stance of the plaintiffs. The said DW recorded in his statement that he was a member of jirga and not a witness. He also testified that the jirga verdict on stamp paper was written in his presence.

22. Abdul Wali who is defendant No.2 in the instant case and recorded his statement on oath as DW-04 and stated therein that he is owner in possession of the suit property from the time of his ancestors. That the plaintiffs had raised claim on the suit property through a jirga and were then to produce any witnesses in his favour and the jirga decided the matter in our favour through its verdict written on stamp paper dated 23.10.2021, copy of which is Ex.DW-4/1. Similarly, an Iqrar Nama/ deed was also written on 10.09.2021 regarding the fact that who are shareholders in property of Ghiljo Bazar, which is Ex.DW-4/2. According to Ex.DW-4/1, the plaintiffs don't have any share in the property Ghiljo Bazar. He also stated that half shares of the disputed property is in our possession and the remaining half is with family of

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Molyaan. He also recorded that the plaintiffs reside in district Hangu and have never paid any expense in reconstruction/ maintenance of Ghiljo Bazar. He further stated that Ghiljo Bazar was partitioned in to sixty shares in 1928 and in which the defendants have twenty shares, regarding which Iqrar Nama/ Deed which is Ex.DW-4/2. The said DW recorded in his cross examination that the plaintiffs don't have any share in our property. He also stated that our family consist of two sub-sections, one is ours and the other is of a family of Molyaan.

23. The statements of the defendants' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issue in favour of the defendants. Firstly, the defendants have documentary proof in support of their stance that they are owner in possession of the suit property. Both the documents are exhibited in course of evidence and are discussed in detail in statement of DW-04. This newly merged district Orakzai don't have any revenue record, therefore, the documents produced by the defendants coupled with statement with their witnesses on oath are instrumental in deciding the instant issue in their favour. Secondly, the defendants' as well as plaintiffs' witnesses have admitted in their statements that the suit property is partitioned between the defendants and family of Molyaan. Thirdly, the jirga verdict which is also reduced in writing and which is Ex.DW-4/1 has decided the matter in favour of the defendants. Perusal of the said jirga verdict also stated that the plaintiffs don't have any share in sixty shares of Ghiljo Bazar as was partitioned in 1928. It also

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states that three dates were given to the plaintiffs to produce any witness in their favour but they failed to do so. Fourthly, the document exhibited as Ex.DW-4/2 embody names and signatures of owners/shareholders of Ghiljo Bazar according to the partition taken place in 1928. The defendant No.2 and a member of Molyaan family is declared as shareholder while there is no mention of plaintiffs in the same.

24. Keeping in view the above discussion, it is held that defendants have produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.06 is decided in positive and in favour of the defendants.

ISSUE NO. 1 & 7:

Whether the plaintiffs have got cause of action?

Whether the plaintiffs are entitled to the decree as prayed for?

25. The discussions on the above referred issues show that plaintiffs have failed to prove their case by fulfilling the requirements of law and by producing cogent and confidence inspiring evidence; therefore, they have got no cause of action. Therefore, the plaintiffs are not entitled to the decree as prayed for.

The issues No.01 and 07 are decided in negative and against the plaintiffs.

RELIEF:

26. The detailed discussion on issues mentioned above transpires that the plaintiffs have failed to prove their case against the defendants by


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proceedings cogent and confidence inspiring oral or documentary evidence. Hence, suit of the plaintiffs is **Dismissed**.

27. Costs to follow the events.


28. File be consigned to record room after its necessary completion and compilation.

Announced
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CERTIFICATE: -

Certified that this judgment consists of thirteen (13) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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