

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

Civil suit No	33/1 of 2022
Date of original institution	03.02.2022
Date of transfer in	04.07.2022
Date of decision	28.11.2023

1. **Muhammad Younas S/O Muhammad Sabib**

Residents of Qoam Mula Khel, Tappa Char Khel, Village Kharkay, PO,
Ghiljo, Tehsil Upper, District Orakzai.

..... (Plaintiff)

Versus

1. **Muhammad Tariq S/O Khan Sabib**

Residents of Qoam Mula Khel, Tappa Char Khel, Village Kharkay, PO,
Ghiljo, Tehsil Upper, District Orakzai.

.....(Defendant)

SUIT FOR SPECIFIC PERFORMANCE

JUDGMENT:

- 1: Brief facts of the case are that plaintiff has filed the instant suit for specific performance of contract between the parties dated 03.03.2012. That the agreement is based on the decision of jirga dated 27.09.2003 according to which the partition of the land had been agreed upon and measurement of the suit property will be done afterwards and possession will be handed over to the parties. That defendant was asked time and again for performing his part of the contract but in

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vain and finally refused to do so few days prior to the institution of the suit, hence, the present suit.

2. After due process of summons the defendant appeared in person and contested the suit by submitting written statement in which contention of the plaintiff was 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 plaintiff has got cause of action? OPP*
2. *Whether suit of plaintiff is time barred? OPD*
3. *Whether the plaintiff is estopped to sue? OPD*
4. *Whether res-judicata is applicable to the present suit? OPD*
5. *Whether the plaintiff is entitled to partition of the suit property as per jirga decision dated 03.03.2012 scribed by the parties? OPP*
6. *Whether both the parties are bound to observed the terms of decision of jirga? OPP*
7. *Whether the jirga decision is factious, fraud and bogs? OPD*
8. *Whether the plaintiff has affected a compromise through a subsequent jirga decision dated 17.02.2021 in continuation of previous compromise through jirga dated 03.03.2012 regarding the suit property? OPD*
9. *Whether the plaintiff has exchanged his share in the suit property with another property in shape of a field? OPD*
10. *Whether Plaintiff is entitled to the decree as prayed for?*
11. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence.

Plaintiff in support of their claim and contention produced 04

Witnesses. Detail of the plaintiff's witnesses and exhibited documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Peer Afzal S/o Gul Afzal Resident of Qoam Mula Khel, Tappa Char Khela, District Orakzai.	Nil
PW-2	Habib Ur Rehman S/o Naiz Wadar Resident of Shana Wori, Tehsil and District Hangu.	Nil
PW-3	Nabi Bakhsh S/o Meer Alam Khan presently, residing Tishino Khel, Kohat City Kohat.	Copy of Jirga decision is Ex.PW-3/1
PW-4	Muhammad Younas S/o Muhammad Sabib Resident of Gul Bagh, Hangu, Pakistan.	Nil

5. Defendant in support of his claim and contention produced no witnesses. Perusal of case file transpires that after closing of evidence of plaintiffs, case was fixed for defendant's evidence but the defendant didn't produce any witness in support of his claim and contention. Thus, notice under order 17 Rule 3 CPC was given to the defendant for production of their witnesses. The said notice was extended six times with fine but of no avail. In such situation, the court was left with no other option but to proceed and decided the suit with available record on file under powers conferred to this court

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Under Order 17 Rule 3, CPC. Hence, the defense of defendant was struck off and case was fixed for final arguments. Moreover, defendant fails to argue the case and remain absent on two dates on which the case was fixed for final arguments. Summons were issued to the defendant and were served properly but the defendant remained absent and the court was left with no other option but to decide the case on available record.


6. Learned counsel for the plaintiff Mr. Shah Hussain Advocate argued that plaintiff has produced cogent evidence and reliable witnesses to prove that the suit property is joint ownership of plaintiff and defendant and that an agreement has taken place between the parties regarding determination of their share. The witnesses are consistent in their statements in support of the stance of the plaintiff and nothing incriminating has been recorded in their statements. Further argued that defendant has failed to produce any witness regarding proving his stance taken in the written statement.

7. 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 the suit of the plaintiff is time barred?

8. The onus to prove this issue was on the defendant. The plaintiff filed suit for specific performance of contract. As per averments of the plaint, cause of action accrued to the plaintiff few days prior to the institution of this suit, when the defendant refused to perform his


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obligation according to the contract. Since there is nothing in rebuttal of the same in absence of defendant evidence. Hence, the issue is decided in negative and in favor of the plaintiff.

ISSUE NO.3:

Whether the plaintiff is estopped to sue?

9. 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 res-judicata is applicable to the present suit? OPD.

10. Contesting defendant has not taken this objection in preliminary objections of their written statement. There is nothing on record which could show that suit of plaintiffs is hit by res-judicata hence, this issue is decided in negative and against the defendants.

ISSUE NO.5 & 6:

Whether the plaintiff is entitled to partition of the suit property as per jirga decision dated 03.03.2012 scribed by the parties? OPP

Whether both the parties are bound to observed the terms of decision of jirga? OPP

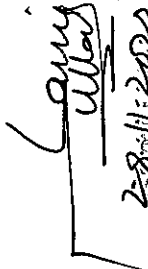
11. The claim of the plaintiff is that they are entitled to the specific performance of contract dated 03.03.2012 based on the jirga decision 27.09.2003 regarding the partition of the joint property. Burden of

proof regarding the issue was on plaintiff. Plaintiff in order to discharge this duty, produced four witnesses. The essence of their statements which helped in deciding the issue are as under.

12. It is pertinent to mention here that the evidence of the PW-01 and PW-02 was recorded through commission for the reason that both the witnesses was of extreme old age and were sick and bound to bed. According to the local commissioner report the chief examination of the PW-01 and complete statement of the PW-02 was recorded. However, due to absence of defendant's counsel on the date fixed for cross examination of PW 01, the same was not recorded and the said PW-01 died in the meanwhile.

13. Pir Afzal, marginal witness deposed as PW-01, while supporting the claim of the plaintiff stated in his examination in chief that he was the Salis/ jirga member in which the parties to the suit agreed upon the terms and conditions and which was scribed and assented upon in the agreement dated 03.03.2012 written on the stamp paper and of which he is signatory. The cross examination of the said PW was not recorded for the reason mentioned in the above paragraph.

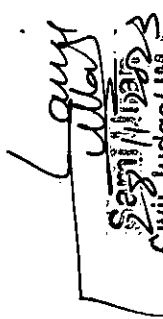
14. PW-02 is the statement of Habib Rehman, who is also marginal witness and salis/ jirga member. The said PW supported the stance and contention of plaintiff in his examination in chief and stated that he along with others has resolved the issue between the parties and has brought the agreement of the parties vide stamp paper no. 1368 and 1369 dated 03.03.2012 to which he is signatory. The said PW recorded in his cross examination that he has not brought in writing


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any jirga which they have conducted regarding the dispute between the parties. However, no question was put to the said PW regarding the stamp paper scribed between the parties. No material discrepancy was brought forward in the cross examination.

15. Nabi Bakh, petition writer was produced before the court for recording his evidence as PW-03. The said PW stated in his examination in chief that the stamp paper is in his handwriting and has also brought the register with himself in which the relevant portion is EX.PW 3/1. Nothing incriminating regarding the stance of the plaintiff is recorded in the cross examination of the plaintiff.

16. Muhammad Younas who is plaintiff in the instant suit deposed as PW-04 and recorded in his examination in chief that our dispute regarding the shares was first resolved in the year 2003 and in 2012 certain issues arose which was resolved through jirgas and regarding which a deed was scribed in 2012. According to the said jirgas and agreement, khasadari falls in favor of the defendant and Malikana in our favour and the defendant is not fulfilling his obligations and the person who was appointed for measuring the suit property was restrained by the defendant to perform his function. Further stated that he has received only one lac rupees in lieu of the compensation for damages to the house and the rest of his share is remaining. He admitted in his cross examination that he has not produced any jirga member of the jirga conducted in 2003. He also stated that he has not produced the person appointed for the measurement of the land. He also recorded that he has not made other siblings, parties to the present


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suit. it is pertained to mention here that it is not the suit for partition rather specific performance between the parties. He has also admitted that the deed is not registered one.

17. The statements of the plaintiff' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues. Firstly, the witnesses were consistent in their statement that the plaintiff and the defendants has scribed the deed based on their oral agreement and based on the decision of the jirga. Statement of Two marginal witnesses and deed writer was recorded in evidence and who affirm the authenticity of the deed on stamp paper. Although, the stamp paper was written in District Hangu and was not registered in the concerned quarters due to lack of governmental setup in the Orakzai agency and hence, the technicalities of law in absence of proper governmental setup must be dispense with in order to do substantial justice. Secondly, two marginal witnesses who were also jirga member/ salis in the jirgas and affirmed the contents of the deed. Thirdly, the defendant has not produced any witness in support of his stance despite grant of ample opportunity to the same by the court. Moreover, the defendant has also not recorded his statement in evidence despite provided opportunity on more than 10 counts and extension of notice under order 17 rule 3 CPC for 8 consecutive date of hearing of the case. The court was then left with no other option but to decide the case on available record in absence of any rebuttal/ proving of the stance of the defendant.

18. Keeping in view the above discussion, it is held that plaintiff produced

cogent, convincing and reliable evidence in support of their claim, therefore, issue No.02 is decided in favor of plaintiff based on their evidence and admissions made by the defendant's witnesses.

ISSUE NO.7,8 and 9:

Whether the jirga decision is factious, fraud and bogs? OPD

Whether the plaintiff has affected a compromise through a subsequent jirga decision dated 17.02.2021 in continuation of previous compromise through jirga dated 03.03.2012 regarding the suit property? OPD

Whether the plaintiff has exchanged his share in the suit property with another property in shape of a field? OPD

19. Defendant in their written statement have contested the stance of the plaintiff and the contention of the defendant was reduced into the above stated issues. The burden of proof regarding the issue was on defendant. Defendant has failed to produce his evidence despite providing ample opportunity by the court, therefore, issue No.07,08 and 09 are decided in negative and against the defendant.

ISSUE NO. 1 and 10:

Whether plaintiff has got cause of action?

Whether plaintiff is entitled to the decree as prayed for?

20. Both these issues are interlinked, therefore, are taken together for discussion.
21. Keeping in view my issue wise discussion, it is held that plaintiff have


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got cause of action and are entitled to the decree as prayed for. Both these issues are decided in favor of plaintiff and against the defendant.

RELIEF:


22. As a result of issue wise findings, suit of the plaintiff succeeds. It is therefore, decreed as prayed for.
23. Cost to follow the events.
24. File be consigned to record room after its necessary completion and compilation.

Announced
28.11.2023


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CERTIFICATE: -

Certified that this judgment consists of Ten (10) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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