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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-2/13 of 2021

Date of institution: 07.08.2021

Date of decision: 23.11.2021

Shaheed Khan son of Malak Zabta Khan, Akbar Khan son of Gherat Khan, Rafi Ullah son Haleem Ullah, Rehman Akbar son of Gul Akbar, all residents of Qaum Afghan Mishti, Tappa Darvi Khel, Mooza Sray Gary village, District Orakzai. **(Appellants/defendants)**

...Versus...

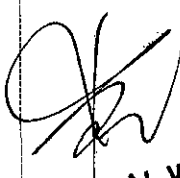
Minawar Khan son of Mazar Khan, Sanab Khan son of Mazar Khan, Mojafar Khan son of Nasar Khan, Majid Ullah son of Haneef Khan, Sharbat khan son of Umar Khan, Muhib Ullah son of Nawab Khan, Ateeq Ullah son of Naqeeb Ullah, all residents of Qaum Afghan Mishti, Tappa Darvi Khel, Shoaib Khel, Khair ullah Gary village, District Orakzai..... **(Respondents/plaintiffs)**

Appeal against Judgement, Decree and Order dated 10-07-2021, passed in Civil Suit No. 70/1 of 2019.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants/defendants against the Judgment, Decree & Order dated 10.07.2021, passed by learned Civil Judge, Orakzai in Civil Suit bearing No.70/1 of 2019; whereby, the suit of the respondents/plaintiffs with the title of Minawar Khan etc. vs Eid Bar Khan etc. was decreed.

2. Briefly stated facts of the case are such that the plaintiffs Minawar Khan etc. (respondents herein) have filed suit against the defendants (appellants herein) for declaration and injunction with consequential relief of recovery of possession to the effect that plaintiffs are owner in possession of the landed property in shape of hilly area reflected in the sketch annexed with the plaint. Defendants/appellants being owners in possession of the adjacent property had encroached into the


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

property of the plaintiffs/respondents and started construction which necessitated to drag them into litigation.

3. Defendants/appellants on appearance objected the suit on various legal as well as factual grounds in their written statement. It was specifically pleaded that plaintiffs are resident owners of the village Khairullah Gary; whereas, defendants are resident owners of the village Sray Gary; while, the property shown in dispute is falling within the area of Sray Gary which is ownership in possession of defendants. The proposed construction of the defendants is within the boundary of the village Sray Gary and that is why the plea of plaintiffs is baseless and therefore denied.

4. The material proposition of facts and law asserted by one party and denied by other have separately been put into following issues by the then learned Trial Judge.

- i. *Whether plaintiffs have got cause of action?*
- ii. *Whether the suit of the plaintiffs is incompetent in its present form?*
- iii. *Whether plaintiffs are estopped to file instant suit?*
- iv. *Whether plaintiffs are owner in possession of disputed property since time of their ancestors and defendants are illegally interfering and encroaching the disputed property?*
- v. *Whether defendants are owners in possession of disputed property?*
- vi. *Whether defendants have constructed their houses in disputed property which were later on demolished due to Army Operation?*
- vii. *Whether disputed property is situated in Sray Gary while plaintiffs are resident of Khairullah Gary? If so its effect.*
- viii. *Whether plaintiffs are entitled to the decree as prayed for?*
- ix. *Relief?*

5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiffs produced as much as three persons in evidence and thereafter closed it. On turn, defendants had also produced three persons in support of their plea taken in defense. Meanwhile, on application, Tehsildar Central Orakzai was appointed as commissioner for local investigation as well as getting on the spot information of the matter in issue with the following directions of learned Trial Judge.

- i. *whether defendants have encroached upon the land of the plaintiffs by trespassing over the boundary line (demarcated for partition) exists between the parties?*
- ii. *To prepare the proper site plan/sketch.*
- iii. *Submit detail report regarding the property that plaintiffs are in possession.*
- iv. *Submit detail report regarding the property that defendants are in possession.*
- v. *Record the statement of the elders of the locality as convenient for just determination and amicable solution of the issue.*

6. It is worth mentioning that one elder of the locality namely Mr. Mehraban Khan was also consented by the parties to be associate in the proceedings of local commission for reaching to the amicable settlement of the issue as reflected in order No. 13 dated 12.02.2020 of learned Trial Judge. Tehsildar submitted Commission Report dated 16-01-2021 mentioning therein that due to non-availability of the Revenue Record in the region, the matter cannot be probed. The amicable settlement of issue was also failed.

7. It was 20th of January, 2021 when the learned Trial Judge, with mutual consent of the parties appointed Mr. Abid Ali Advocate as Local Commissioner with the following directions.

- i. *Whether a boundary/demarcation line exists on the spot between the village Khair Ullah Gary and Sray Gary?*
- ii. *Whether disputed property is situated in village Khair Ullah Gary or Sray Gary?*
- iii. *Whether any construction are remains of previous construction exist in disputed property, if so, who have raised the construction?*
- iv. *Prepare the site plan/sketch of disputed property.*
- v. *Record statements of the elders of the locality.*

8. Commission Report was presented followed by examination of Mr. Abid Ali Advocate as CW-1. Report Commission was exhibited as Ex.CW-1/1; sketch of the disputed property as Ex.CW-1/2 and photographs of the property as Ex.CW-1/3 to Ex.CW-1/6. Objection of the parties have been invited and determination thereof was deferred for final judgement. On hearing arguments, the suit was decreed vide Judgement and Decree dated 10-07-2021. Feeling aggrieved, the defendants preferred instant appeal, which is under consideration.

9. The parties have admitted some facts either in their pleadings or in evidence. Parties are admittedly belonging to Tribe of Mishti Orakzai. They are belonging to the same sub tribe of Darvi Khel. This sub tribe of Darvi Khel has further been divided into Shoaib Khel and Mandra Khel. Plaintiffs are belonging to Shoaib Khel and defendants are admittedly Mandra Khel; both sharing common predecessor in interest of Darvi Khel. Shoaib Khel (Plaintiffs) are residing in village Khairullah Gary and Mandra Khel (Defendants) are residing in village Sray Gary since decades; whereas, both the sects of single sub tribe Darvi Khel are residing in two parallel located villages adjacent to each other. Partition between two sects of same sub tribe had been done some centuries back and every one of the particular sects are residing in two different villages of Khairullah Gary

and Sray Gary. All these facts are admitted in pleadings or evidence and determination thereof is neither necessary nor warranted.

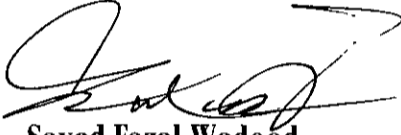
10. The apple of discord between the parties that had given birth to instant litigation, is that defendants/appellants had started preparations for raising construction in disputed land which is out of the village Sray Gary, owned and possessed by sub tribe Mandra Khel and termed it as encroachment in the village of Khairullah Gary, owned and possessed by Shoaib Khel, the Plaintiffs. On contrary, the defendants claimed the site of construction is located within the limits of Sray Gary, that is owned and possessed by Mandra Khel, the defendants. This is the prime point of determination in pending appeal.

11. Keeping in view the admitted facts discussed in paragraph No.9 followed by point for determination mentioned in paragraph No.10 of this Judgement, the evidence of the parties, when assessed, is reflecting that butte like hill is bifurcating the village Khairullah Gary from Sray Gary. All of the plaintiffs witnesses examined as PW-1 to PW-3 have categorically stated that this butte, while bifurcating both the villages, is jointly owned by the parties and natural flow of water towards each side is its demarcating line. This crucial point has not been subjected in cross examination of plaintiff's witnesses, which amounts to admission of part of defendants. The Report Commission Ex-CW 1/1, sketch of the area prepared during local investigation by commissioner exhibited as Ex-CW 1/2 and photographs of the disputed area exhibited as Ex- CW 1/3 to 1/6 are also confirming the fact that there is hill dividing both the villages and natural flow of water is demarcating the ownership and possession of both the sects of sub tribe Darvi Khel. The principle of PANI-DAAL as demarcating line applied by learned Trial Judge is derived from local customs of the area and is seemingly in the fitness of things in a natural course. Similarly, defendants had taken specific plea of defense in shape that the questioned construction is rehabilitation of earlier

dwelling houses damaged in operation conducted by arm forces but failed to establish this plea in evidence. Thus the preponderance of probability established by plaintiffs has not been shattered.

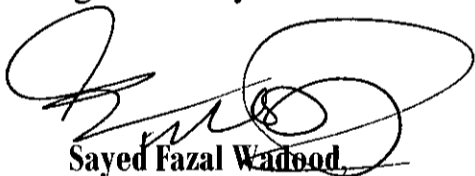
12. For what has been above, it can safely be concluded that the learned Trial Court has properly appreciated the evidence and rightly passed the impugned Judgement and Decree dated 10.07.2021. Consequently, as the Judgement under appeal does not warrant interference; therefore, the appeal in hand stands dismissed. Costs shall follow the events. Requisitioned record be returned with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

Announced in the open Court
23.11.2021


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment is consisting upon 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