

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

Civil suit No	131/1 Neem
Date of institution	04.11.2020
Date of decision	24.01.2024

1. Ahmad Nazeer S/o Muhammad Nazeer
Resident of Kach Banda Hangu presently residing in Village Main Gajar,
District Peshawar.
 2. Nadeem Khan S/o Muhammad Kareem
Resident of Kach Banda, District Hangu.
- (Plaintiffs)

Versus

1. Muhammad Shamim S/O Muhammad Fareed
 2. Muhammad Farhad S/O Muhammad Fareed
 3. Muhammad Rehan S/O Muhammad Fareed
 4. Muhammad Naveed S/O Muhammad Fareed
 5. Mst. Nawshad Bibi W/O Muhammad Fareed
All residents of Kach Banda, District Hangu.
 6. Ilyas Khan S/O Khan Wazeer
Resident of Qoam Mala Khel, Tappa Azceez Khel, Village Kaski Zar, Tehsil
Upper, District Orakzai.
 7. Mst. Gul Jamala D/O Muhammad Nazeer
 8. Qalam Bibi D/O Muhammad Nazeer
 9. Mst. Samina Jan D/O Muhammad Nazeer
All residents of Kach Banda, District Hangu.
-(Defendants)

**SUIT FOR DECLARATION, PERMANENT & MANDATORY
INJUNCTION.**

JUDGMENT:

1. Brief facts of the case are that the plaintiffs have filed the instant suit for declaration and permanent injunction to the effect that the plaintiffs are co-sharers with defendants in the suit property detailed

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in the head note of the plaint. The plaintiffs asserted that the suit property is their ancestral property and are entitled to legal and Sharie shares. That the defendant No.1 to 5 have no right to sell the disputed property to defendant No.6. That the defendants were asked time and again to admit the legal claim of plaintiffs 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 the plaintiffs are estopped to sue?*
3. *Whether the suit of the plaintiffs is time barred?*
4. *Whether the plaintiffs are co-sharer in the disputed property and defendants No.01 to 05 have no right to sellout the same?*
5. *Whether the suit property was purchased by the predecessor of defendants No.01 to 05 namely Muhammad Fareed?*
6. *Whether predecessor of defendants No.01 to 05 namely Muhammad Fareed has himself sold out the suit property to defendant No.06 upon which he has constructed a house?*
7. *Whether the plaintiffs are entitled to the decree as prayed for?*
8. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of their claim and contention produced 01 Witness i.e., plaintiff No.01. Detail of the plaintiff's witness and

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exhibited documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Ahmad Nazeer S/o Muhammad Nazeer Resident of Kach Banda Hangu presently residing in Village Meyan Gajar, District Peshawar.	Iqrar Nama dated 03.04.2003 is Ex.PW-1/1.

Defendants in support of his claim and contention produced three
(03) witnesses. Detail of defendant's witnesses and exhibited
documents are as under;

	WITNESSES	EXHIBITIONS
DW-1	Muhammad Shafiq S/O Sholais Khan, resident of Qoam Mula Khel, Tappa Aziz Khel, District Orakzai, presently residing in Baber Mela Hangu.	Copy of his CNIC is Ex.DW- 1/1.
DW-2	Muhammad Haleem S/o Ghulam Ullah Khan resident of Qoam Mula Khel, Tappa Aziz Khel, District Orakzai, presently residing in Kach Banda, Hangu. (Abandoned, not produced for cross examination)	Copy of his CNIC is Ex.DW- 2/1.
DW-3	Muhammad Shamim S/o Muhammad Fareed resident of Qoam Mula Khel, Tappa Aziz Khel, District Orakzai, presently residing in Kach Banda, Hangu.	Special Power of attorney is Ex.DW-3/1. Copy of his CNIC is Ex.DW- 3/2.

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5. Learned counsel for the plaintiffs Mr. Khursheed Alam Advocate argued that plaintiffs have produced cogent evidence and reliable witnesses to prove that the suit property is jointly owned by plaintiffs and defendant No.01 to 05, being legal heirs of Muhammad Nazir. That the plaintiffs are entitled to their legal share in the disputed property. Further argued that in absence of any documentary evidence in District Orakzai, plaintiffs have proved their case through oral evidence.

6. Learned counsel for the defendants Mr. Zahoor Ur Rehman Advocate argued that the plaintiffs have not produced sufficient evidence in order to prove their case. That the disputed suit property was purchased by father of defendant No.01 to 04 and has sold the same to defendant No.06 long ago. That the suit property is not ancestral property of the plaintiffs and defendants. That defendant No.06 is presently in possession of the suit property. Furthermore; plaintiffs don't have any documentary proof of any Jirga or their verdict and any document which might have proved their stance.

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 plaintiff is estopped to sue?

8. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on

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the part of defendants. Even otherwise, there is nothing on available record which shows that the plaintiffs are estopped to sue the defendants in this court. Therefore, issue is decided in negative and against the defendants.

ISSUE NO.3:

Whether the suit of the plaintiffs is time barred?

9. The onus to prove this issue was on the defendant. The plaintiff filed suit for declaration and permanent injunction. 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. There is nothing available on record which can suggest the fact that the suit is time barred.
10. Moreover, period of limitation for filling declaratory suit Under Article 120 of limitation Act, is six years. Furthermore, after the 25th constitutional Amendment Act, 2018, all federal and provincial law extended to the newly merged Districts in 2018. Therefore, it is held that the suit is well within time. Hence, the issue is decided in negative.

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ISSUE NO.4:

Whether the plaintiffs are co-sharer in the disputed property and defendants No.01 to 05 have no right to sellout the same?

11. The claim of the plaintiffs is that the plaintiffs have filed the instant suit for declaration and permanent injunction to the effect that the plaintiffs are co-sharers with defendants in the suit property. Burden

of proof regarding the issue was on plaintiffs. Plaintiffs in order to discharge this duty produced plaintiff No.1 as their sole witness. The essence of his statement which helped in deciding the issue are as under.

12. Ahmad Nazeer who is plaintiff No.1 in the instant case deposed as PW-1. In support of his claim he stated in his examination in chief that they were three brothers including himself. Out of these three brothers only he is alive and the other brothers have their living legal heirs. The suit property is jointly owned by all the co-sharers and had never be partitioned. That defendant No.1 to 5 have no right to sell the disputed property to defendant No.6. The said PW produced a compromise deed between his father and one of his brother namely Muhammad Kareem which is Ex.PW-1/1. Perusal of the said deed transpires that it pertains to a dispute over a property situated in Peshawar and has nothing to do with the disputed property in the instant suit. The said PW recorded in his cross examination that he lay his claim on 11 fields, however, as per plaint the disputed property consists of 05 fields. He also recorded that the dispute referred in Ex.PW-1/1 pertains to property situated in Peshawar. He also admitted that defendant No.6 has constructed a house on the disputed property. He also admitted the possession of the defendant No.6 on the disputed property. Further admitted that plaintiff No.2 has neither given him power of attorney to file this instant suit nor he has signed wakalatnama in favour of the counsel.

13. The statement of the plaintiffs' witness brought the facts before the

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court, mentioned hereinafter, which provided reason for deciding the issues.

14. That the plaintiffs have not produced a single disinterested witness in support of their claim. Similarly, the plaintiffs have not produced any document in support of their claim that the suit property was ancestral property of the plaintiffs and defendant No.1 to 5 and 7 to 9. Though the plaintiffs have produced a document which is exhibited as Ex.PW-1/1, however, the said document pertain to a dispute between the parties regarding a property situated in Peshawar. Furthermore, no witnesses of even the deed exhibited as Ex.PW-1/1 has been produced before the court in the course of evidence.
15. PW-01 who is plaintiff No.1 in the instant suit has recorded that he lay his claim on 11 fields, however, as per plaint 05 fields has been disputed in the instant suit. Moreover, the said PW/ plaintiff No.01 has admitted possession of defendant No.06 namely Ilyas Khan.
16. The plaintiffs claim that the suit property is ancestral property, however, they have filed a suit for declaration only and no prayer of partition or possession has been sought in the instant suit. It is also pertinent to mention here that plaintiff No.2 has never appeared before the court and neither he has signed wakalatnama nor have given special power of attorney to plaintiff No.1 or any other person.
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.04 is decided in negative and against the plaintiffs.

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ISSUE NO.5 &6:

Whether the suit property was purchased by the predecessor of defendants No.01 to 05 namely Muhammad Fareed?

Whether predecessor of defendants No.01 to 05 namely Muhammad Fareed has himself sold out the suit property to defendant No.06 upon which he has constructed a house?

18. Since both these issues are interlinked, therefore, are taken together for discussion. Defendant No.1 to 5 have asserted in their written statement that the suit property was purchased by father of defendant No.1 to 4 namely Muhammad Fareed by his own and has then sold the same to defendant No.6. That the suit property is not an ancestral one. Burden of proof regarding the issues were on defendants. Defendants in rebuttal of the stance of the plaintiffs produced three witnesses. However, examination in chief of one of the DW-2 was recorded and cross were reserved but the same was not produced before the court for cross examination and was abandoned by the defendant's counsel. Thereafter, defendant's counsel closed their evidence. The essence of the statements of defendants' witnesses is as under.

19. Muhammad Shafiq appeared as DW-01 and recorded in his statement that the suit property was ownership of his paternal grand father namely Kaleem Ullah who has sold the suit property to father of defendant No.1 to 4 namely Muhammad Fareed. That the suit property was not ownership of Muhammad Nazeer who is father of plaintiff No.1. The said DW recorded in his cross examination that the suit property was sold to Muhammad Fareed around 25 years ago,

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who then afterwards sold the same to Ilyas (defendant No.6). Further stated that Ahmad Nazeer was never shareholder in the suit property as the same was purchased by Muhammad Fareed on his own.

20. Defendant No.1 namely Muhammad Shamim appeared as DW-3 and recorded his examination in chief that he is special power of attorney on behalf of defendant No.2 to 5. He recorded in his statement that the suit property was purchased by his father and was then sold to Ilyas Khan (defendant No.6) and defendant No.7 to 9 alongwith the plaintiffs have nothing to do with the suit property. The said DW recorded in his cross examination that plaintiff No.1 has his share in their ancestral property but since the suit property is not an ancestral property, therefore, the plaintiff don't have any share in the same. He admitted possession of defendant No.6 in the suit property, who has also constructed a house about 20 years ago on the same. He also admitted that he don't have any documentary proof regarding the sale of the disputed property to defendant No.6, as it was sold long ago.

21. The statements of the defendants' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues.

22. That the suit property was purchased by father of defendant No.1 to 4 around 25 years ago as mentioned in statement of DW-01 and is not ancestral property of the plaintiffs and defendant No.1 to 5 and 7 to 9. DW-01 is the statement of grand-son of the person namely Kaleem Ullah who has sold the disputed property to father of defendant No.1 to 4 namely Muhammad Fareed.

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23. Similarly, DW-03 has recorded in his statement that their father has further sold the suit property long ago to defendant No.6 namely Muhammad Ilyas and the same has constructed his house around 20 years ago. It is pertinent to mention here that long standing possession of the defendant No.6 has been admitted by plaintiffs and as well as contesting defendants.
24. Keeping in view the above discussion, it is held that defendants have reliable oral evidence in support of their claim, therefore, issue No.05 & 06 are decided in favour of the defendants and against the plaintiffs based on their evidence and admissions made by the witnesses.

ISSUE NO. 1 and 7:

Whether plaintiffs have got cause of action?

Whether plaintiffs are entitled to the decree as prayed for?

25. Both these issues are interlinked, therefore, are taken together for discussion.
26. The discussions on the above referred issues show that plaintiffs have failed to prove his 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.
27. The issues No.01 and 07 are decided in negative and against the plaintiffs.

RELIEF:

28. 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**.

29. Cost to follow the events.

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


Announced

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CERTIFICATE: -

Certified that this judgment consists of eleven (11) pages. Each and every page has been read over, corrected and signed by me where ever necessary.


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