

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-3/13 of 2022

Date of institution: 20.12.2021

Date of decision: 06.07.2022

Sayed Marjana daughter of Dost Ali, Qaum Mamo Zai, Tappa Adoo Khel,
District Orakzai. **(Appellant/plaintiff)**

...Versus...

- 1. Fazal Muhammad son of Sher Muhammad
- 2. Muhammad Ghani son of Gul Asghar
- 3. Saleem son of Jabir, all residents of Aakhel, Tehsil Upper and District Orakzai.

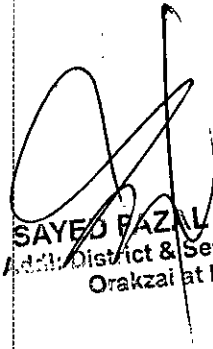
.....**(Respondents/defendants)**

**Appeal against Judgement, Decree and Order dated 20.11.2021,
passed in Civil Suit No. 83/1 of 2020.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/plaintiff against the Judgment, Decree & Order dated 20.11.2021, passed by learned Civil Judge, Orakzai in Civil Suit bearing No.83/1 of 2020; whereby, suit of the appellant/plaintiff with the title of Syed Marjana Vs Fazal Muhammad etc. was dismissed.

2. Briefly stated facts of the case are such that the plaintiff Sayed Marjana (Appellant herein) has filed suit against the defendants (respondents herein) for declaration, injunction and recovery of possession against the defendants to the effect that a dwelling house measuring 20 marlas with the adjacent landed property measuring 1 Jirab, situated at Moza Dagoo, Ghiljo is the ancestral property of the plaintiff and defendants have no nexus with it. Suit property was in her possession and she was peacefully living in the dwelling houses utilizing the adjacent


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land before the arrival of the militants in the area. Due to law and order situation, the plaintiff had shifted to the settled area by placing the vacant possession of the property. On return back to the area, the suit property was found in possession of defendants, which is illegal and ineffective upon the rights of the plaintiff.

3. Defendants/respondents objected the suit on various legal as well as factual grounds in their written statement. It was specifically pleaded that defendants are owners of the suit property and the brothers of plaintiff were residing in the house under tenancy at will. The property was left unattended during the militancy and when law and order situation has been restored, the vacant possession was taken by the defendants. The plaintiff is belonging to Qaum Mamozai and defendants are hailing from Qaum Aakhel; whereas, property is situated in Aakhel, to which, plaintiff is alien.

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

- i. *Whether plaintiff has got a cause of action?*
- ii. *Whether the plaintiff is estopped to sue?*
- iii. *Whether the suit of the plaintiff is time barred?*
- iv. *Whether the suit house measuring 20 Marla is the ownership of the plaintiff and was in her possession along with other family members before the arrival of the militants and the area?*
- v. *Whether the suit house is taken into possession by the defendants which is illegal and ineffective upon the rights of the plaintiff?*


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vi. Whether the suit house is the ownership of the defendants while the plaintiff was residing in it as a tenant?

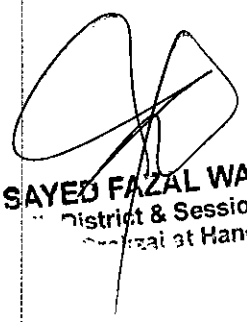
vii. Whether the plaintiff is entitled to the decree as prayed for?

viii. Relief?

5. Opportunity of leading evidence was accorded to both the parties. Seizing the opportunity, plaintiff produced as much as two witnesses in evidence and thereafter closed it. On turn, defendants had also produced two persons in support of their plea taken in defense. Learned counsel representing parties have been heard and suit was dismissed which is impugned by the plaintiff in instant civil appeal.

6. Mr. Saeed Marwat Advocate for appellant argued that suit was barred on account of non-joinder. The evidence was sufficient and dismissal of decree was result of non-reading and misreading of evidence. The impugned judgement is based on non-appreciation of evidence and wrong application of law. He concluded that the Judgment in question may be set aside for being illegal and appeal in hand be allowed. He added that the matter in issue remained the subject of Jirga earlier conducted and therefore evidence of Jirga members is necessary; for which, application for additional evidence is annexed with the main appeal. Similarly, plaintiff is owning the suit property on the basis of inheritance and thus other nephews namely Hazrat Bilal and Abdu Raziq shall be impleaded on the acceptance of second application enclosed with the appeal.

7. Mr. Shaheen Muhammad Advocate representing respondents resisted the stance of opponent by stating that defendants have handed over the vacant possession of the suit property to the brothers of plaintiff for protection which was continued by the plaintiff without payment of




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rent under tenancy at well. The appellant has indulged the defendants in litigation and protracting it for no justifiable reason with mala fide. He prayed for dismissal of appeal.

8. The parties have admitted some facts either in their pleadings or in evidence. Plaintiff is admittedly belonging to Tribe of Mamozai and defendants are belonging to the tribe of Aakhel. The plaintiff was residing in the dwelling house and was controlling the adjacent land before militancy and the suit property was remained in the possession of none during militancy period. The defendants have taken into possession the suit property when law and order situation has been restored.


9. The apple of discord between the parties that had given birth to instant litigation, is that defendants occupied vacant possession of the suit property on restoration of peace in the area. The ownership of appellant is being claimed on the basis of inheritance; whereas, ownership of the respondents/defendants has been denied. Defendants/respondents termed it as sole ownership for being ancestral property; whereas, possession of plaintiff was named with tenancy at well. Whether plaintiff is owner in possession of suit property and defendants have no nexus with the ownership and that plaintiff has wrongly been refused grant of decree, is the prime point of determination in pending appeal.

10. Keeping in view the admitted facts discussed in paragraph No.8 followed by point for determination mentioned in paragraph No.9 of this Judgement, the pleadings and evidence of the parties, when assessed, is reflecting that the ownership of plaintiff is based on mere assertion in the plaint. The witness examined as PW-01 is hearsay as he is neither the witness of the possession nor ownership of the plaintiff. PW-2 is the


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statement of the plaintiff where she introduced a new story alien to the
 plaint. Plaintiff categorically admitted in such statement that she has
 having no documentary or oral evidence of her ownership. The nephew
 of the plaintiff have not been produced despite the fact that if the Court
 would have granted the decree, they were expecting benefits more than
 the plaintiff. Adverse inference in line with Article 129 of the Qanoo-e-
 Shahadat Order 1984 can be drawn in circumstances. Similarly, it is the
 case of no evidence on part of the plaintiff and principle of *onus probandi*
 is single available option for the Court to find the issue against the
 plaintiff. On the other hand, defendants have examined two witnesses;
 one of them is independent witness belonging to the Qaum of Aakhel (the
 owners of the area where disputed property is located), who stated that
 tenancy at well without payment of rent amount is prevailing custom and
 the plaintiff was residing in the disputed property as tenant.

11. As far as legal questions raised in Appeal are concerned, question
 of non-joinder or mis-joinder is not fatal per se. The Court is empowered
 by law to add or delete the person wrongly impleaded or not arrayed as
 party. There was no need of either adding or deleting any party as all the
 necessary parties are on panel and objection so raised is liable to be over
 ruled. More so, every material preposition of fact and law asserted by one
 party and denied by other has separately been put into issue and
 determined by learned Trial Judge and thus ground of Appeal regarding
 non-determination of every issue is just fabrication of paper having no
 factual and legal background. So far additional evidence is concerned, the
 Jirga is having no nexus with the pleading of the parties and thus Jirga
 members as additional is groundless. The requirement of additional

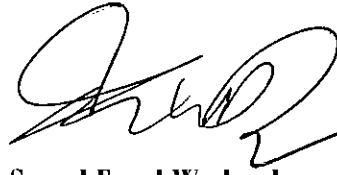

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evidence must the requirement of the Court not of the party. It is being allowed to where a party is unable to produce evidence through no fault of its own. In present case, the production of additional evidence is patching up of weakness which is not allowed under the law.

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 20-11-2021. 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.

13. Announced in the open Court
06.07.2022



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 red over.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela