

36

**IN THE COURT OF ABDUL BASIT,  
ADDITIONAL DISTRICT JUDGE-II, ORAKZAI**

Civil Appeal No. 09/13 of 2023

Date of institution: 10.03.2023

Date of decision: 03.02.2024

Date of consignment:

Sardar Khan son of Jamal Hussain r/o Tribe Mishti Tapa Darwi Khel, Shalzara, Post Office Ghaljo, Tehsil Central, District Orakzai and two others (appellants/plaintiffs)

Versus

Akhtar Gul son of Ajaba Gul r/o Tribe Mishti Tapa Darwi Khel, Shalzara, Post Office Ghaljo, Tehsil Central, District Orakzai and one other (respondents/defendants)

**APPEAL UNDER SECTION 96 OF CPC AGAINST  
THE JUDGEMENT AND DECREE OF THE LEARNED CIVIL  
JUDGE-I, KALAYA ORAKZAI**

**JUDGMENT**

Through this judgment I will decide appeal preferred by appellants against respondents challenging the judgment, decree and order dated 28.02.2023 of the Court of learned Civil Judge-I, Kalaya Orakzai whereby he has dismissed the suit of appellants/plaintiffs.

On 16.10.2020, appellants/plaintiffs have filed a civil suit no. 126/1 of 2020 with assertion that they were the permanent residents of district Orakzai but resided at district Kohat; that landed properties 1. Khatori Patay bounded from east kacha road, west field of Malook, north public passage, south house of Sadiqullah; 2. Ghoz Patay bounded from east field of Khaista Gul, west & south fields of Maieen, north passage; 3. Khaista Gul Patay bounded from east field of Mosam, west Ghoz Patay, north Moieen Patay; 4. Mailay/Muhammad Hussain field and abandoned house bounded from east field of Qadir Khan, west house of Akhtar Gul, north public

ayll  
03/02/2024  
Abdul Basit  
District & Sessions Judge-II  
Orakzai at Baber Mela,  
Hangu

passage and south field of Mastan Asghar, the suit properties, were the ownership in possession of Jamal Hussain etc., that on demise of their ancestor, the suit properties were devolved on them and they have become owners in possession of same; that district Orakzai was tribal area, where the military operation was conducted due to which appellants along with family members had temporarily migrated to Kohat but now reside there often; that they have visited their village frequently but respondents while taking advantage of their absence have forcibly occupied the suit properties three years ago without any legal justification because they had no concern or right attached with it; that respondents were asked to concede the claim of appellants but they have refused; therefore, appellants have prayed for declaration that suit properties were their ownership in possession and respondents have no concern or right attached with the same; that they have also prayed for decree for possession coupled with decree for the permanent and mandatory injunctions.

Respondents were summoned by learned trial court. They appeared and filed joint written statement, wherein, raised various legal and factual objections *inter-alia* with facts that suit properties were their ownership in possession and appellants have no concern with it; that all the matters have already been decided between the parties through jirga decision in 2017; therefore, they have prayed for dismissal of suit. Divergent pleadings of the parties were reduced into different issues by the learned trial court as under;

*Issues:*

1. *Whether plaintiff has got a cause of action? OPP*
2. *Whether suit of plaintiff is within time? OPP*
3. *Whether this court has got jurisdiction to entertain the suit of plaintiff? OPP*
4. *Whether suit of plaintiff is hit by res-judicata? OPD*

*Handwritten:*  
03/02/2024

Abdul Basit  
Addl. District & Sessions Judge-II  
Orakzai at Baber Meta,  
Hangu

5. *Whether suit of plaintiff is bad due to non-joinder and misjoinder of the parties? OPD*
6. *Whether plaintiff is estopped to sue? OPD*
7. *Whether the suit property is the ancestral ownership of plaintiff? OPP*
8. *Whether defendants illegally and forcibly took possession of the suit property in absence of plaintiff? OPP*
9. *Whether plaintiff is entitled to the decree as prayed for? Relief?*

Parties produced pro and contra evidence. The learned trial court heard the arguments & dismissed the suit of appellants on 28.02.2023. Appellants being not contended with the decision, preferred instant appeal. Learned counsel for appellants while arguing narrated above facts of the case with assertion that order of the learned trial court is illegal, against the law and facts, unfounded, suffers from material illegality and irregularity, result of misreading and non-reading of evidence having been ignored the cardinal principles of natural justice, having not considered the record available on file; that appellants are owners in possession of the suit properties and respondents have no concern with it; therefore, prayed that on acceptance of instant appeal, judgment, decree and order of the learned trial court dated: 28.02.2023 may be set-aside and they may be granted decree as per prayer.

Learned counsel for respondents refuted the arguments of learned counsel for appellants and argued that learned trial court has properly appreciated the evidence and record on file and committed no illegality or irregularity in passing the impugned order; therefore, prayed for dismissal of appeal with heavy costs.

Arguments heard and record perused.

*ayy*  
*03/02/2024*  
**Abdul Basit**  
 Addl. District & Sessions Judge-II  
 Orakzai at Baber Mela,  
 Hangu

Before parting with my findings and the assistance furnished by learned counsel for parties, I would like to mention that it is settled principle of law that civil disputes are decided on the basis of preponderance of evidence. There is admittedly no land settlement/revenue record of district Orakzai and the disputes between the parties are resolved on basis of oral evidence, possession over lands or agreement deeds, if any, brought before the *jirga* and now the courts; therefore, while deciding this appeal, the court has no other option but to base its findings on pleadings of parties, oral evidence and documentary proof, if any, brought on file.

Pleadings of parties provide that suit properties except Khaista Patay are in possession of respondents; whereas, appellants claim ownership and possession of suit properties being devolved on them from their ancestor; thus, they were burdened to prove their ownership and possession over it. To prove this, appellants have relied on statements of Sardar Khan (PW-1), Fazak Asghar (PW-2) and Mastan Asghar (PW-3), however, Sardar Khan is appellant himself, whereas, remaining witnesses are relatives of appellants. They have not produced any independent person or elder of the locality to support their stance. More so, there is glaring contradiction noted in the statement of Sardar Khan, who deposed that he has cultivated the suit properties himself from 2011 to till 2017, whereas, at another place deposed that his children have used to come from Kohat to Orakzai for cultivation of the same. Similarly, para no. 4 of the plaint provides that respondents while taking benefit of absence of appellants have made forcible possession over suit properties but PW-1 in his examination-in-chief stated that he had cultivated suit properties until 2017 but later on respondents have forcibly stopped them from cultivating the same and made possession over it, which both stances are contradictory to each other.

Abdul Basit  
 Addl. District & Sessions Judge-II  
 Orakzai at Baher Mees  
 Hangu  
 12/2024

This is also strange to observe that appellants allege the taking over the forcible possession of suit properties by respondent; however, PW-1 alleged that he has made jirga with other rival parties, which does not appeal to mind and leads to inference that the suit properties alleged by appellants might have been forcibly invaded by someone else. Likewise, PW-2 though supports the claim of appellants; however, it is silent about fact that whether respondents have allegedly made forcible possession over the suit properties while taking benefit of the absence of appellants or they have forcibly restrained appellants from cultivating the suit properties and made forcible possession over it. In reply to a question, he explained that respondents have made possession over the suit properties through use of gun but complete record is silent about this fact. On the other side, PW-2 though alleged that the suit properties were the ancestral properties of appellants but he did not know that from whence it was in possession of appellants.

Importantly, PW-3 stated that Khatori field was in possession of respondents since 2011, which avails that if that field was in possession of respondents from 2011, then, which property appellants have used to visit and cultivated from 2011 to 2017 and thus leads to adverse inference that the contention raised by appellants was not the depiction of true facts. On another place, PW-3 stated that appellants have used to cultivate the suit properties from 2008 to 2017 but he admitted that he has not witnessed single standing crops over the suit properties.

Similarly, respondents have denied the plea of appellants and alleged that they are owners in possession of suit properties except Khaista Gul fields, which seems to be convincing because PW-3 in his statement conceded that appellants had won a field through jirga decision.

*Handwritten signature*  
03/02/2024

**Abdul Basit**  
Addl. District & Sessions Judge-II  
Orakzai at Baber Mela,  
Hangau

41

This is also noted that respondents have also led the evidence of three witnesses; however, appellants have failed to shatter their stance by contradicting them on single point. Appellants have not cross-examined them on material issues and made attempt to take benefits of their weak stance, which is not warranted under the law.

In view of above facts, it is held that admittedly respondents are in possession of suit properties, which is dominant factor in deciding the cases between parties in absence of any cogent, reliable & documentary evidence on file; therefore, it is held that appellants have got no cause of action and learned trial court has rightly dismissed their case, hence, I see no force in the appeal in hands and conclude that no irregularity or illegality has been committed by the learned trial court while passing the impugned order dated 28.02.2023, which is upheld and appeal in hands being bereft of merits **dismissed**. Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

The requisitioned record along with copy of this order sent to the learned trial court and file of this court consigned to record room after necessary completion and compilation.



**Announced**  
03.02.2024

**Abdul Basit**  
Addl. District Judge-II, Orakzai

**CERTIFICATE**

Certified that this judgment consists of six (06) pages, those are signed by me after necessary corrections, if any found.



**Announced**  
03.02.2024

**Abdul Basit**  
Addl. District Judge-I, Orakzai