

IN THE COURT OF SHABEER AHMAD
CIVIL JUDGE-II, TEHSIL COURTS, KALAYA, ORAKZAI

Civil Suit No. 100/1 of 2019
Date of Original Institution: 23.11.2019
Date of Transfer in: 02.07.2022
Date of Decision: 13.10.2022

Rasool Gul son of Saheed Gul, resident of Baqizai, District Kohat.

.....(Plaintiff)

VERSUS

Hameed Gul son of Saheed Gul, resident of Qaum Mishti, Tapa Darvi Khel, Jamadar Masi District Orakzai.

.....(Defendant)

SUIT FOR DECLARATION -CUM- PERPETUAL AND MANDATORY INJUNCTION AND POSSESSION.

JUDGEMENT:

Parties present. Arguments already heard and record perused.

Through this judgment I am going to decide the suit in

hand filed by the plaintiff **Rasool Gul** against the defendant **Hameed Gul**.

1. Brief facts of the case in hand are that the plaintiff has filed the instant suit for Declaration-cum- Perpetual and Mandatory Injunction against defendant to the effect that the plaintiff is the co-owner of the property measuring 30 jeerab situated at Orakzai, fully detailed in the head note of the plaint. That the property is still un-partitioned and until now no private or official/formal partition whatsoever has taken place between plaintiff and defendant. That property situated

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at Baqizai Kohat which comprised of a house and measuring 08 jeerab has been privately partitioned and defendant has sold his share to the plaintiff in lieu of consideration of Rs. 14 lacs and transferred the same in the name of plaintiff. That Education Department has constructed a Government School on undivided property situated at Ganday Pattay and defendant and his wife are employed in that School. That one employment is the right of the plaintiff. That defendant has got no right to make sale and purchase, do construction over the same, to cut down the trees, to take employment in the Government School, to take possession of the property of the plaintiff and transfer possession of the property to the uncles namely Socha Gul and Juma Gul. That defendant has no right to do transaction over the undivided property. That defendant is denying the lawful rights of the plaintiff. That defendant has no right to do so. That defendant be restrained from sale purchase, gifting, constructing and cutting tress in the suit property and plaintiff be declared owner of his shares in property and the house.

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2. The plaintiff has also sought possession of house and Baithak (بايثاك) in the joint inherited property and rendition of accounts of which the defendant was entrusted by father of the plaintiff.

That defendant was asked time and again to admit the legal claim of the plaintiff but in vain, hence, the present suit.



- 3. With due process of law and procedure defendant was summoned, who appeared before the court and contested the suit by filing the written statement and reply. Defendant has raised several legal and factual objections in his written statement.
- 4. From divergent pleadings of the parties, the following issues were framed for adjudication of real controversy between the parties.

Issues:

- i. Whether the plaintiff has got a cause of action? OPP
- ii. Whether the plaintiff is estopped to sue? OPD
- iii. Whether the suit of the plaintiff is time barred? OPD
- iv. Whether the suit property measuring 30 jeerab comprising of one house and Baithak (باٹھاک) situated at Jamadar Nawasi, Orakzai is the joint undivided ownership of the plaintiff and defendant? OPP
- v. Whether the suit property measuring 08 jeerab comprising of one house situated at Baqizai, Kohat was purchased by the father of the plaintiff and defendant and it was partitioned between plaintiff and defendant? OPP
- vi. Whether defendant sold his share in 08 jeerab suit property situated at Kohat was purchased by plaintiff from defendant in lieu of Rs. 14 lacs? OPP
- vii. Whether suit property situated at Jamadar Nawasi is the joint undivided inherited ownership of the parties? OPP

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viii. Whether defendant has illegally and wrongfully occupied the entire inherited property situated at Jamadar Nawasi? OPP

ix. Whether the plaintiff is entitled to half share i.e. 6.5 lacs in the inherited cash amount of Rs. 13 lacs? OPP

x. Whether the inherited property has already been partitioned privately between the parties? OPD

xi. Whether suit of the plaintiff is bad due to mis-joinder and non-joinder of the parties? OPD

xii. Whether predecessor of the parties namely Sajid Gul had transferred 03 jeerab to his grandchildren/sons of the plaintiff namely Aqal Rehman and Meer Rehman and in the name of defendant? OPD

xiii. Whether the sons of the plaintiff and defendant jointly purchased the suit house from their uncle? OPD

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

xv. Relief.

5. Upon submission of list of witnesses, both the parties were provided opportunity to adduce their desired evidence, the parties produced their respective evidence.

6. After completion of evidence, arguments of the learned counsel for the parties were heard and record of the case file was gone through, with their valuable assistance.

7. During course of recording evidence plaintiff in support of his contention produced (03) witnesses.

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8. Plaintiff himself appeared and deposed as PW-01. He reiterated the averments of the plaint and lastly requested for decree of the suit against defendant as prayed for.

9. Mojaffar Khan son of Nasar Khan, an elder from same locality and caste appeared and deposed as PW-02. He recorded his statement to the effect that since both the parties are brothers inter-se and to his knowledge no private partition has taken place between them, therefore, the property be divided amongst them as per Islamic Injunctions (Shariah).

10. Imran Khan son of Rasool Gul (plaintiff) appeared and deposed as PW-03. He stated that his grand-father has two sons namely Rasool Gul and Hameed Gul and has no daughter. That they have land dispute since long but is not decided until now. That the property in Orakzai be divided between plaintiff and defendant.

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Thereafter, plaintiff closed his evidence.

11. Defendant in his support and contention produced 05 witnesses.

12. Defendant Hameed Gul son of Saheed Gul, himself appeared and deposed as DW-01. He denied the claim of the plaintiff asserting that the property has already been partitioned in the presence of their father and elders of the locality on 06th June, 1993. That the property was divided into three parts in which one was given to the plaintiff, one to the defendant and one was retained by their father. That after the demise of their father, on 23.07.2008 they again divided the property which was left/retained by their father. His CNIC is Ex. DW-1/1 and the Jirga decision dated 06.06.1993 is Ex. DW-1/2.

13. Abdul Malik son of Sher Asghar, one of the Jirga member that divided the property in the year 1993 and scribe of the Jirga verdict 06.06.1993 appeared and deposed as DW-02. He stated that he was Jirga member who divided the property of predecessor of the parties among Saheed Gul (predecessor of the parties) and his sons namely Rasool Gul (plaintiff) and Hameed Gul (defendant) and sons of the plaintiff. That he was present in that Jirga, is a witness of that and has scribed the said Jirga verdict. His CNIC is Ex. DW-2/1.

14. Saleem Khan son of Awal Noor, appeared and deposed as DW-03. He stated that he is a witness to the Jirga verdict dated 06.06.1993. That the partition through the said Jirga took place in the presence of the plaintiff, defendant and their father. That the plaintiff, defendant and their father were given shares in the light of Jirga verdict and the sons of the plaintiff were also given shares. His CNIC is Ex. DW-3/1.

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15. Mubasher Ahmad son of Meer Rehman, appeared and deposed as DW-04. He stated that the plaintiff is his grand-father. That the shares in the land which they got through partition is being jointly cultivated by him and his uncle namely Aqal Rehman. His CNIC is Ex. DW-4/1.

16. Ali Kabeer son of Socha Gul, appeared and deposed as DW-05. He stated that on 23.07.2008 they privately partitioned the remaining three fields between the plaintiff and defendant. That the land which was given to Rasool Gul (plaintiff), is in possession of his sons Aqal Rehman and Meer Rehman who have built house on that while cultivating the rest of the land. Copy of the Jirga verdict dated 23.07.2008 is Ex. DW-5/1.

Thereafter, defendant closed his evidence.

17. After completion of evidence of the parties, arguments of the learned counsel for the parties were heard and record of the case file was gone through with their valuable assistance.

My issue wise findings are as under.

Issues No. 02:

Whether the plaintiff is estopped to sue? OPD

18. Burden of proof regarding this issue was on defendant. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendant, therefore, the issue is decided in negative and against the defendants.

Issue No. 03:

Whether the suit of the plaintiff is time barred? OPD

19. Burden of proof regarding this issue was on defendant. Contention of contesting defendant is that the suit of plaintiff is not within time but there is nothing on record which could show that the suit of plaintiff is time barred, hence, the issue is decided in negative and against the defendant.

Issue No. 04 & 07:

a. Whether the suit property measuring 30 jeerab comprising of one house and Baithak (بیت) situated at Jamadar Nawasi, Orakzai is the joint and undivided ownership of the plaintiff and defendant? OPP

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b. Whether the suit property situated at Jamadar Nawasi is the joint undivided inherited property of the parties? OPP

Both these issues are interlinked, hence, taken together for simultaneous discussion.

20. Burden of proof of these issues was on plaintiff. Claim of plaintiff is that the suit property measuring 30 jeerab comprising of one house and baithak (بیت) is the joint undivided ownership of the plaintiff and defendant. During examination in chief plaintiff has stated that property is jointly inherited and is not yet divided and that the defendant has dispossessed him from his property. But during cross examination he has admitted the fact that he has left Orakzai in the year 1992 and is residing in Kohat. There is nothing on record which could show that during the said period he has approached any forum or has conducted any Jirga regarding his dispossession or his claim in the property. Even in cross examination he admitted that he don't know exactly whether the inherited property is 30 jeerab or not?

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21. PW-02 while recording his statement has said that the plaintiff and defendant are brother inter se and that he deems it appropriate that the property be divided between the parties. That he has not conducted any Jirga regarding the property between the plaintiff and defendant. During cross examination he stated that he does not know the exact

measurement of the property. He also stated in cross examination that he does not know where children of the elder wife of the plaintiff live and further stated that one son of the plaintiff lives in Zawan, Orakzai. Further has said that he has no knowledge of any transaction between the parties.

22. PW-03, namely Imran Khan son of Rasool Gul has in his cross examination admitted the fact that his step brothers lives in Zawan and they do not give amount of annual produce to them. He also stated that his step brothers lives in the house at Orakzai and they there-self lives in Kohat.

23. On the other hand, claim of defendant is that the suit property has already been partitioned firstly in the presence of their father vide Jirga verdict dated 06.06.1993 and secondly after the death of their father vide Jirga verdict 23.07.2008. Defendant produced oral as well as documentary evidence in support of his claim. Defendant produced Jirga verdict dated 06.06.1993 which is Ex.DW-1/2. Abdul Malik son of Sher Asghar, another witness of the said Jirga verdict deposed as DW-03 who also supported this version of defendant. Mubasher Ahmad son of Meer Rehman who is the grandson of plaintiff, who deposed as DW-04 stated that he and his other uncle is in possession of the property which his father and uncle acquired after partition. Ali Kabeer son of Socha Gul deposed as DW-05, he produced Jirga verdict as Ex. DW-5/1. He also supported stance of defendant and

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stated that after the death of predecessor of the parties, the remaining inherited property was divided between parties vide Jirga decision dated 23.07.2008 which is duly signed by parties and also by witnesses.

24. On what has been discussed above, it is held that the suit property is not the legacy left by predecessor of the parties as the same has already been partitioned between the parties in the lifetime of the predecessor of the parties, resultantly the issue is decided in negative and against the plaintiff.

Issue No. 05 & 06:

a. Whether the suit property measuring 08 jeerab comprising of one house situated at Baqizai Kohat was purchased by father of the plaintiff and defendant and it was partitioned between plaintiff and defendant?
OPP

b. Whether defendant sold his share in 08 jeerab suit property situated at Kohat was purchased by plaintiff from defendant in lieu of Rs. 14 lacs? **OPP**

Both these issues are interlinked hence taken together for simultaneous discussion.

25. Burden of proof of these issues was on plaintiff. Claim of the plaintiff is that the property situated at Baqizai, Kohat measuring 08 jeerab, comprising of a house was purchased by predecessor of the parties has been privately partitioned and

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defendant sold his share in lieu of a consideration of Rs. 14 lacs to the plaintiff.

26. Plaintiff neither produced any oral nor any documentary evidence in support of his stance. There is nothing on record which could support this claim of plaintiff. Moreover, this assertion was made in the plaint but neither any authentic evidence was produced in this regard nor it was reiterated by plaintiff in his statement. Resultantly, issue no. 05 & 06 are decided in negative and against the plaintiff.

Issue No. 08:

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Whether the defendant has illegally and wrongfully occupied the entire inherited property situated at Jamadar Nawasi? OPP

27. Burden of this issue was on plaintiff. The plaintiff asserted that defendant has illegally and wrongfully occupied the entire inherited property situated at Jamadar Nawasi. On the other hand, defendant has denied this claim of plaintiff.

28. Mubasher Ahmad son of Meer Rehman, who is the grandson of the plaintiff deposed as DW-04 and stated that he and his uncle Aqal Rehman are in possession of the shares in the property which were given to them after partition and are cultivating the same.

29. Ali Kabeer son of Socha Gul, appeared as DW-05 and stated that after the death of predecessor of the parties, the property was divided vide Jirga decision dated 23.07.2008 which is

Ex. DW-5/1. Plaintiff and defendant were given their shares in the light of that Jirga verdict. That the property which was given to the plaintiff is in possession of his son namely Aqal Rehman and Meer Rehman.

30. Nothing was brought on record by plaintiff which could show that the said property devolved upon the plaintiff after death of his father and he was wrongfully and illegally dispossessed by defendant. On the other hand, defendant produced oral and documentary evidence showing that the property has already been privately partitioned in the light of

Jirga decision and defendant is in possession of his own shares.

31. Keeping in view the above discussion, it is held that there is nothing on record which could show that defendant has illegally and wrongfully occupied the entire inherited property, therefore, the issue is decided in negative and against the plaintiff.

Issue No. 09:

Whether the plaintiff is entitled to the half share i.e.

6.5 lacs in the inherited cash amount of Rs. 13 lacs? OPP

32. Burden of proof regarding the issue was on plaintiff. Claim of the plaintiff is that the predecessor of the parties left an amount of Rs. 13 lacs with the defendant and that plaintiff is entitled to half i.e 6.5lacs, of the said amount. During cross examination plaintiff stated that he has witnesses regarding

this claim but they do not come forward due to fear of defendant. But neither they were produced by plaintiff nor requested to be summoned through process of the court. Even names of the alleged witnesses were not mentioned by the plaintiff. There is contradictions in the averments of plaintiff and statement of plaintiff as in the plaint it is averred that the said amount is Rs. 13 lacs while in his examination in chief he stated that the amount is Rs. 14 lacs.

33. On what has been discussed above, it is held that plaintiff failed to prove his claim regarding the said amount, therefore, the issue is decided in negative and against the plaintiff.

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Issue No. 10 & 12:

- a. **Whether the inherited property has already been partitioned privately between the parties? OPD**
- b. **Whether the predecessor of the parties namely Saheed Gul had transferred 03 jeerab to his grandchildren/sons of the plaintiff namely Aqal Rehman and Meer Rehman and in the name of the defendant? OPD**

Both the issues are interlinked therefore, jointly taken for simultaneous discussion.

34. Burden of proof regarding these issues was on defendant. Contention of defendant is that the suit property has already been partitioned privately during life time of their father vide Jirga verdict dated 06.06.1993. That the property was divided into

three parts in which one was given to the plaintiff, one to the defendant and one was retained by their father. That after the demise of their father, on 23.07.2008 they divided the said portion of inherited property which was retained by their father. Defendant in his support produced Jirga verdict dated 06.06.1993 which is already exhibited as Ex. DW-1/2. In the said Jirga verdict complete detail of the property and partition is mentioned which is duly signed by the predecessor of the parties and the parties their-self. The scribe of the Jirga verdict dated 06.06.1993 namely Abdul Malik who is also a witness to the said Jirga verdict deposed as DW-02 who recorded his statement to the effect that Jirga verdict is correct and true. That the

Jirga verdict was scribed in the presence of the father of the parties. Nothing tangible was extracted out of him during cross examination.

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Saleem Khan son of Awal Noor appeared as DW-03 and stated that he is a witness to the Jirga verdict dated 06.06.1993. According to Jirga verdict the plaintiff, defendant, their father and sons of the plaintiff were given shares. Nothing tangible was extracted out of him during cross examination. Mubasher Ahmad son of Meer Rehman who is the grandson of the plaintiff appeared as DW-04. He stated that the property which was given to his father and uncle is in their possession and not in the possession of the defendant. Ali Kabeer son of Socha Gul resident of Mishti Mela Orakzai appeared as DW-05 who stated that on 23.07.2008 after the death of the father of the parties they partitioned the inherited portion of property vide Jirga deed dated 23.07.2008 which is exhibited as Ex. DW-5/1. He further stated that

the land which was given to the plaintiff is in possession of his sons namely Aqal Rehman and Meer Rehman. During cross examination the full detail of the partition which took place between plaintiff and defendant is given.

35. Before merger of erstwhile FATA into Khyber Pakhtunkhwa, there was a mechanism of conflict resolution through the Jirga system in FATA. The Jirga system was a conflict resolution body in the tribal areas in the absence of formal legal and justice system. Elders of the locality would act as Jirga members to resolve the matter in controversy. The parties would be abided by the Jirga system. In the

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instant case suit property was first privately partitioned during life time of predecessor of the parties and a Jirga verdict was scribed dated 06.06.1993 and then the inherited property was partitioned vide Jirga verdict dated 23.07.2008. Both the Jirga verdicts are duly signed by the parties and witnesses of the said Jirga verdicts are also appeared before the court and recorded their statement to that effect.

36. Keeping in view the above discussion, it is held that the suit property has already been partitioned between the parties, resultantly both these issues are decided in positive and in favor of the defendant.

Issue No. 11:

Whether the suit of the plaintiff is bad due to mis-joinder and non-joinder of the parties? OPD

37. Defendant has asserted that suit of the plaintiff is bad due to mis-joinder and non-joinder of the parties. Perusal of the record shows that defendant has in his written statement took

the plea that the property has already been privately partitioned between plaintiff and defendant and sons of the plaintiff are in possession of the same. But no re-joinder was submitted by the plaintiff, therefore, the issue is decided in positive and against the plaintiff.

Issue No. 13:

Whether the sons of the plaintiff and defendant jointly purchased the suit house from their uncle? OPD

38. Burden of proof regarding the issue was on the defendant.

Defendant has not put forward any evidence or documents regarding the purchase of the suit house from their uncle,

therefore, the issue is decided in negative.

Issue No. 1 & 14:

a. **Whether the plaintiff has got a cause of action? OPP**

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

Both these issues are interlinked and jointly taken for discussion.

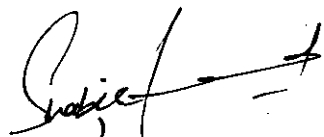
39. As sequel to my above issue wise findings, the plaintiff has got no cause of action and therefore, not entitled to the decree as prayed for. Hence both these issues are decided in negative.

Relief

As sequel to my above issue-wise findings, suit of the plaintiff is hereby **dismissed**. Costs shall follow the event.

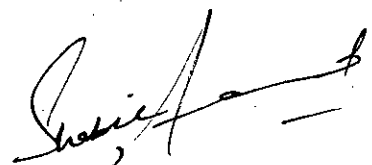
File be consigned to the District Record Room, Orakzai after its completion and compilation.

Announced
13.10.2022


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CERTIFICATE

Certified that this judgment of mine consists of **Seventeen (17)** pages, each has been checked, corrected where necessary and signed by me.


Shabeer Ahmad,
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