

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

Original Civil suit No.....21/1
Date of institution07.09.2019
Date of decision21.12.2022

1. Bismillah Khan S/o Hassan Khan
2. Naseeb Gul S/o Alaf Khan
3. Jalat Khan S/o Aziz Khan
4. Baqar Khan S/o Aleem Haider
5. Mir Ajab Khan S/o Dost Muhammad
6. Speen Muhammad S/o Bidar Khan

All residents of Qoam Mala Khel, Tappa Char Khela, PO Ghiljo, Upper Orakzai.

..... (Plaintiffs)

Versus

1. Qasim Gul S/o Shah Wali
2. Safeer Asghar S/o of Noor Asghar
3. Arbab S/o Mir Azam
4. Feroz S/o Rasool Khan
5. Noorak S/o Khyber
6. Ayub Khan S/o Nawar Khan

All residents of Qoam Mala Khel, Malalay, Oat Mela, Upper District Orakzai.

.....(Defendants)

SUIT FOR RECOVERY OF POSSESSION THROUGH PARTITION

JUDGMENT:

1. The leading facts of the case are that the plaintiffs are seeking declaration, perpetual and mandatory injunction to the extent that they are owners of 2/3 shares in the suit property fully detailed in the headnote of the plaint. That the defendants are illegally cutting

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the precious trees grown on the suit property and despite their request the defendants have refused either to except the plaintiffs as owners or to stop the illegal cutting of the trees, hence the instant 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. The defendants claimed that they along with plaintiffs are co-owners in the suit property and no partition has ever taken place and plaintiffs have no right to claim 2/3 shares in the suit property.
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 suit of plaintiffs is incompetent in its present form?*
3. *Whether plaintiffs are owner in possession of 2/3 share in disputed forest?*
4. *Whether disputed forest is jointly owned by the parties?*
5. *Whether plaintiffs are entitled to the decree as prayed for?*
6. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Detail of the plaintiff's witnesses and exhibits are documents are as under; -

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	WITNESSES	EXHIBITIS
PW-1	Zaheen Ullah S/o Zewar Khan Qoam Mala Khel, Tehsil Upper District Orakzai.	CNIC of PW-01 as ExPW-1/1.
PW-2	Jalat Khan S/o Aziz Ullah Qoam Mala Khel, Tehsil Upper District Orakzai.	CNIC of PW-02 as ExPW-2/1.
PW-3	Bismillah Khan S/o Qasim Gul Qoam Mala Khel, Tehsil Upper District Orakzai.	Power of attorney as Ex. PW- 3/1, Pictures of trees as Ex. PW 3/2 to 3/17.
PW-4	Sadar Khan S/o Alaf Khan Qoam Mala Khel, Tapa Char Khel, District Orakzai.	Nil

Detail of defendant's witnesses and exhibited documents are as under;

	WITNESSES	EXHIBITIONS
DW-1	Muhammad Qasim S/o Shah Wali Qoam Mala Khel, Ghiljo, Tehsil District Orakzai.	CNIC of DW-01 as ExPW- 1/1.
DW-2	Daulat Shah S/o Mir Badshah Qoam Mala Khel, Tapa Char Khel, Ghiljo, District Orakzai.	CNIC of DW-01 as ExPW- 2/1.

5. Arguments by learned Counsel for the parties heard.
6. Learned Counsel for the Plaintiffs, Mr. Abid Ali Advocate, argued and stressed up the facts averted in the plaint and requested for decree of the instant suit in favour of the plaintiffs.
7. learned Counsel for the Defendants Mr. Sana Ullah Advocate, argued that the plaintiffs have failed to produced cogent evidence

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in shape of documentary proof and statements of the plaintiffs' witnesses are also not consistent and there are gross contradictions in the same. He lastly requested for dismissal of suit in favour of the defendants.

8. 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 suit of plaintiffs is incompetent in its present form?

9. The onus of proving the issue was on defendants. The defendants contended that since the suit property consists of large piece of land and contains a large number of co-owners. The plaintiffs have neither instituted representative suit nor they have included all the co-owners in the list of plaintiffs or defendants. Hence, the suit is bad due to misjoinder and non-joinder.

10. The said fact was brought on record in the statements of plaintiffs witnesses whereby they firstly claimed that they also have share in the disputed suit property as recorded by PW-01 and PW-02 in their statements and secondly, the suit property is jointly owned by large number of people besides plaintiffs. Hence, the fact brought on record that the suit property is jointly owned by large number of people, therefore, this court is of the view that neither the suit is instituted in representative capacity nor all the necessary parties are made part of the instant suit. In view of what is discussed

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above the issue is decided in positive i.e. the suit is incompetent in its present form.

ISSUE NO.3 &4:

Whether plaintiffs are owner in possession of 2/3 share in disputed forest?

Whether disputed forest is jointly owned by the parties?

11. Both these issues are interconnected and material, therefore are discussed and decided together.

Plaintiffs are seeking declaration, perpetual and mandatory injunction to the extent that they are owners of 2/3 shares in the suit property fully detailed in the headnote of the plaint. And that the defendants are illegally cutting the precious trees grown on the suit property without the permission of plaintiffs and even after their request for not cutting the trees on the suit property.

The foremost controversy to be resolved in the light of the issue No. 3 & 4 is the ownership of the plaintiffs and defendants in the suit property and that whether the plaintiffs are owners of the 2/3 shares in the suit property. The defendants have admitted the ownership of the plaintiffs alongwith themselves and contended that the suit property is joint ownership between them. However, defendants contended that no partition of the suit property has ever taken place.

12. The onus of proving the above stated fact contained in issue No.03 was on plaintiffs. Plaintiffs produces as many as four witnesses in their favour. It is pertinent to mention that two of plaintiff's witnesses, including the plaintiff namely Bismillah who appeared

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as PW-03, refused to record their statements on oath. All the PWs have recorded in their statement that the plaintiffs are owner of 2/3 of the suit property but they have not relied on any document which can ascertain the facts that any partition of the suit property has taken place. Plaintiffs have not produced any document by which it can firstly be ascertain that they have share in the suit property and secondly, they are owner of 2/3 of the suit property. Moreover, PW-03, who is one of the plaintiffs in the instant suit and is attorney of all the plaintiffs, in his cross examination recorded the statement that he does not know whether any partition of the suit property has taken place and then self-stated that no partition has taken place.

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13. Defendants produced two witnesses in their favour who recorded their statements. The onus of proving issue No.04 was on defendants, to ascertain the fact that the disputed property is jointly owned by plaintiffs and defendants and defendants have share in the suit property. But issue No.04 is not contested in the instant suit, as in the plaint, the plaintiffs admit the share of defendants in the suit property. Also, in the statement of PWs, they have admitted the ownership of the defendants in the suit property but only up to the extent of 1/3 shares in the same.

14. Since, partition of the suit property remained un proven by the plaintiffs, hence, issue No.03 is decided in negative and against the plaintiffs.

15. As far as the statements of DWs as concerned, they have straightly denied any partition of the suit property. And since, the ownership

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of defendants remained un contested and being admitted by the plaintiffs hence, the issue No.04 relating joint ownership of both the parties is decided in positive.

16. Hence, in view of above discussion, issues No. 03 is decided in negative and issue No.04 being admitted fact is decided in positive.

ISSUE NO. 1 & 5:

Whether plaintiffs have got cause of action?

Whether plaintiffs are entitled to the decree as prayed for?

17. Both these issues are interconnected and material, therefore are discussed and decided together.

18. The discussions on the above referred issues show that plaintiffs have failed to prove their 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.

The issues No.01 and 05 are decided in negative and against the plaintiffs.

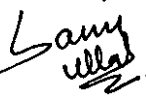
RELIEF:

19. As sequel to the above issue-wise discussion, suit of the plaintiff fails and is hereby dismissed.

Costs to follow the events.

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

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CERTIFICATE: -

Certified that this judgment consists of Seven (07) pages. Each and every page has been read over, corrected and signed by me where ever necessary.

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