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IN THE COURT OF SYED ABBAS BUKHARI
CIVIL JUDGE - II, KALAYA
ORAKZAI

Suit No. 22/1 of 2021

Date of Original Institution.....13.09.2021
Date of transfer to this court.....08.03.2023
Date of Decision of the suit.....13.03.2024

Ali Akbar son of Abdul Akbar, resident of Qom Mishti, Tapa Darvi Khel village Zawan Tehsil Central District Orakzai.
.....Plaintiff

Versus

1. Shahbaz Khan,
2. Muhammad Khan and
3. Azram Khan all sons of Umar Khan, all residents of Qom Mishti Tappa Darvi Khel village Zawan, Tehsil Central, District Orakzai.....Defendants

SUIT FOR DECLARATION AND
PERMANENT INJUNCTION


Counsel for plaintiff: Mr. Sana Ullah Khan Advocate
Counsel for defendants: Mr. Abid Ali Advocate

JUDGMENT

13.03.2024

Vide this judgment I intend to dispose of suit captioned above.

2. It is a suit from plaintiff against defendants for declaration and perpetual injunction to the effect that plaintiff is owner in possession of the suit property situated at Zawan Mishti since the time of his predecessors and thus the defendants have got


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no right to claim their ownership over the suit property or to dispossess the plaintiff.

3. Brief facts of the case as narrated in the plaint are that plaintiff is owner in possession suit property situated at Zawan Mishti since the time of his predecessors. Defendants have got no right to claim their possession over the suit property and further to deny the stance of plaintiff. Furthermore, plaintiff had previously exchanged his property situated at karghan with one Gul Man Shah in the year 1995 and after said exchange plaintiff is in possession of the suit property. Defendants illegally interfered with the suit property and in this respect defendants were time and again asked not to interfere with the suit property or claim their ownership over the same but they refused, hence the instant suit has been instituted.

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4. After institution of the suit, the defendants were summoned and accordingly defendants appeared and submitted their respective written statement with legal and factual objections raised therein.
5. Out of controversies of the parties, as raised in their respective pleadings, the then incumbent Court has framed the following issues on 31.08.2022.

1. Whether the plaintiff has got a cause of action?
2. Whether suit of plaintiff is within time? OPD

- 3. Whether this court has got jurisdiction to entertain the suit of plaintiff? OPD
- 4. Whether suit of plaintiff is hit by res-judicata? OPD
- 5. Whether suit of plaintiff is bad due to non-joinder and mis-joinder of the parties? OPD
- 6. Whether plaintiff is estopped to sue? OPD
- 7. Whether plaintiff is owner in possession of the suit property on the strength of exchange of land with one Ghulam Shah effected in the year 1995? OPP
- 8. Whether defendant purchased the suit property from one Mirawas Khan? OPD
- 9. Whether the plaintiff is entitled to the decree as prayed for?
- 10. Relief.



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6. Both the parties were directed to produce their evidence, which they did accordingly. Plaintiff produced as many as four witnesses and thereafter closed his evidence. Contrary to this, defendants produced three witnesses and thereafter closed their evidence with a note.

7. Both the learned counsels for the parties to the suit then advanced arguments. Learned counsel for the plaintiff opened the arguments and argued that plaintiff is owner in possession of suit property situated at Zawan, Mishti since the time of their predecessors. Defendants have got no right to claim their possession over the suit property or further to deny the stance of plaintiff. In this respect the defendants were time and again requested that they should not interfere with the suit property or claim their ownership as well as possession over the same but they refused, hence the instant suit has been instituted. He further argued that the plaintiff

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succeeded to prove his stance through cogent, convincing and reliable evidence and further nothing in rebuttal is available on the record, hence prayed that the suit in hand may kindly be decreed in favor of plaintiff and against the defendants for the relief as prayed for.

8. Contrary to this learned counsel for the defendants argued that plaintiffs have got no cause of action. He further adduced that suit property is the ownership in possession of defendants. Moreover, suit property had been neither exchanged with one Gulman Shah nor its boundaries have been mentioned in the plaint. Learned counsel for defendants further contended that defendants previously purchased the suit property from one Mirwas Khan. He further argued that plaintiff failed to prove his stance through cogent and convincing evidence. On the other hand, the defendants succeeded to produce evidence in light and support of their stance previously alleged in their written statement. Hence, prayed that as plaintiff failed to prove his case, accordingly the suit in hand may kindly be dismissed.

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9. Now on perusal of record, available evidence and valuable assistance of both the learned counsels for the parties my issue wise findings are as under.

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ISSUE NO. 2 TO ISSUE NO. 06:

Whether suit of plaintiff is within time? OPD

Whether this court has got jurisdiction to entertain the suit of plaintiff? OPD

Whether suit of plaintiff is hit by res-judicata? OPD


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

Whether plaintiff is estopped to sue? OPD

Issue no. 02 to issue no. 06 being interlinked are hereby decided as under:

Defendants have previously alleged in their written statement that suit of plaintiff is not filed within time, this court has got jurisdiction to entertain the instant suit, suit of plaintiff is hereby res-judicata, suit is bad for non-joinder and mis-joinder of the parties and plaintiff is estopped to sue by his own conduct. To prove their stance defendants produced three DWs. In given circumstances perusal of the statements of all the DWs would reveal that none of the DWs uttered a single word regarding the issues in hand and thus deviated from the stance of defendants alleged in the written statement.

In light of what has been discussed above, as defendants miserably failed to prove issue no.02 to issue no. 06 through their cogent, reliable and convincing evidence, hence the aforementioned issues are hereby decided in negative against defendants and in favour of plaintiff.


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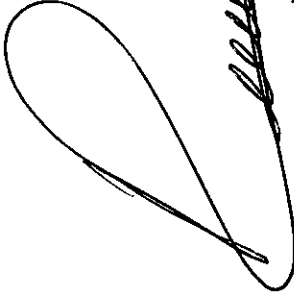
ISSUE NO. 7:

Whether plaintiff is owner in possession of the suit property on the strength of exchange of land with one Ghulam Shah effected in the year 1995? OPP

Plaintiff had previously alleged in his plaint that he had previously exchanged his property with one Gulman shah in the year 1995 and thus in exchange received the suit and since than till date he is in possession of the same. To prove his stance plaintiff personally as PW-01 in the witness box and deposed in tight and support of his previous stance alleged in the plaint. During cross examination nothing such contradictory has been brought on the record.

PW-02 was produced and examined as one Gul Man Shah s/o Khayal Mat Shah, who deposed on oath that he received property situated at Karghan from plaintiff and in exchange handed over the possession of his property situated at Zawaan to plaintiff. Plaintiff has given him land at Karghan while he had given land to plaintiff at Zawan Mishti. This exchange took place in the year 1995. During cross examination he deposed that at the time of exchange he was about 14 years old. Exchange took place on 01.06.1995. They had exchanged both the properties situated over and below the mountain. Suit property is not being cultivated by the defendants rather same is in possession of plaintiff.

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PW-03 was produced and examined as one Muhammad Dar Khan s/o Hameed Ullah Khan, who deposed on oath in light and support of the stance of plaintiff previously alleged in the plaint. During cross examination he deposed that at the time of exchange Gul Man Shah was aged about 15 years. At the time of exchange other elders were also present, who are dead now. Suit property is not in possession of Shahbaz Khan etc rather same is in possession of plaintiff Ali Akbar.

PW-04 was produced and examined as one Hussain Muhammad s/o Doran Shah, who stated on oath in light and support of stance of plaintiff previously alleged in the plaint. During cross examination he deposed that exchange had taken place 28 years ago, however he does not remember the exact date. The exchange took place at the residence of father of Muhammad Dar Khan.

In light of the above evidence produced by plaintiff to prove the issue in hand, it has been noticed that all the PWs deposed in light and support of the stance of plaintiff previously alleged in the plaint and furthermore, during cross examination the opposite party failed to contradict the witnesses in material particular and thus nothing in rebuttal or contradictory has been brought on the record. Moreover, such questions were put to the witnesses which were otherwise admissions on the part of defendants.


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In light of the above discussion, as plaintiff succeeded to prove issue in hand through cogent, convincing and reliable evidence, hence accordingly the issue in hand is hereby decided in positive in favour of plaintiff and against the defendants.

ISSUE NO. 08

Whether defendant purchased the suit property from one Mirawas Khan? OPD

Defendants had previously alleged in their written statement that they had previously purchased suit property from one Mirawas Khan. To prove their stance defendants produced one Mehraas Khan s/o Azam Khan as DW-01, who deposed on oath that he was owner of the suit property. He sold suit property to Shahbaz Khan in lieu of Rs-13000/-. During cross examination he deposed that Azam Khan was his father, who had two sons. One of them is he himself while the other one is named as Sher Alam Khan. His father had four fields. He had partitioned the property with his brother. Again stated that his father had seven fields. It is correct that out of said seven fields, three fields are in his possession while four are in possession of his brother. It is correct that whenever a sale transaction take place, besides the parties the witnesses are also present. Self-stated that there is no witness of their sale transaction. It is correct that khayal mat shah etc had exchanged their property with plaintiff. It is correct that property


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situated at Karghan was given to Khayalmat shah while that situated at Mishti was given to plaintiff.

One Juma Khan s/o Zarat Shah was produced and examined as DW-02, who deposed in light and support of issue in hand. During cross examination he deposed that it is correct that today outside the court room he was told by defendants that Rs-13000/- was sale consideration of the alleged sale transaction. He is in knowledge of the exchange that had previously taken place between plaintiff, Gulman Shah and Khayalmat shah. It is correct that he is not in knowledge of the date, year or witnesses of the alleged sale transaction between Mehras Khan and Shahbaz.

DW-03 was produced and examined as one Muhammad Khan s/o Omer Khan, special attorney for defendants, who deposed in light and support of the stance of defendants as well as issue in hand. During cross examination he deposed that it is correct that there is no witness of the alleged sale transaction. It is correct that plaintiff and Khayalmat shah etc had exchanged their properties.

Now in light of the above evidence produced by defendants to prove the issue in hand, it has been noticed that all the DWs had supported the stance of defendants in their respective examination chief but in their cross examination some material contradiction and admissions were brought on the record by the opposite party.

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DW-01 had stated in his examination in chief that he was the owner of suit property, which he had subsequently sold to Shahbaz Khan (defendant) in lieu of Rs-13000/- as sale consideration. However during his he stated that his father had 07 fields and after partition of the same 03 are in his possession while the remaining 04 are in possession of his brother. In circumstances the question arise that when all the seven fields are still in possession of DW-01 and his brother and further they had not sold the same to anyone, how DW-01 allege in his examination in chief that suit property was previously owned by him and he had sold the same to defendants.

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Furthermore, as for as exchange transaction, which has previously taken place between plaintiff and Khayalmat Shah etc, is concerned, same has been admitted by all the DWs in their respective cross examinations. Similarly as for as witnesses of the alleged sale transaction between defendants and Mehras Khan are concerned, this fact has also been admitted by all the DWs in their respective cross examinations that there is no witness of the alleged sale transaction. Moreover, the defendants failed to produce any documentary or oral proof in support of their stance and hence mere alleging a fact does not mean that same has been proved rather the party alleging the same has to prove it through cogent, convincing and reliable evidence.

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In light of the above discussion as defendants failed to prove the issue in hand through their cogent, convincing and reliable evidence, hence issue in hand is hereby decided in negative against defendants and in favour of plaintiff.

ISSUE NO. 01

Whether the plaintiff have got cause of action? OPP

In wake of issue wise findings above, the plaintiff has got a cause of action, hence the issue in hand is decided in positive in favour of plaintiff and against the defendants.

ISSUE NO.09:

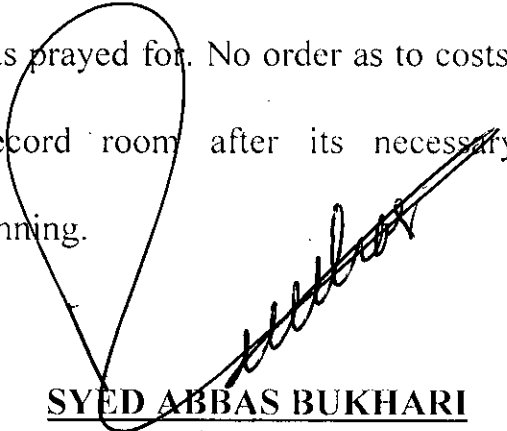
Whether plaintiff is entitled to the decree as prayed for? OPP

In wake of my issue wise findings above, plaintiff is entitled to the decree as prayed for, hence the issue in hand is decided in positive in favour of plaintiff and against the defendants.

Relief:

As per issued wise findings above the instant suit of plaintiff is hereby decreed for the relief as prayed for. No order as to costs. File be consigned to the record room after its necessary completion, compilation and scanning.

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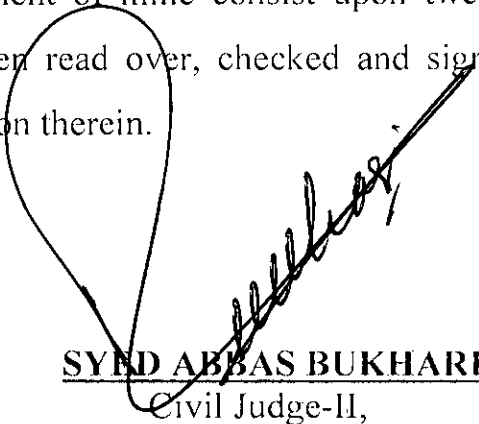

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CERTIFICATE

Certified that this judgment of mine consist upon twelve (12) pages. Each page has been read over, checked and signed after making necessary correction therein.

Dated: 13.03.2024



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