

(H) (79)

**IN THE COURT OF SHABEER AHMAD**

CIVIL JUDGE-II, TEHSIL COURTS, KALAYA, ORAKZAI

Civil Suit No. 27/1 of 2019  
Date of Original Institution: 22.10.2019  
Date of Transfer in: 28.06.2022  
Date of Decision: 25.10.2022

1. Mawali Khan,
2. Misal Khan,
3. Meri Khel,
4. Rafi Ullah,
5. Anwar Ul Haq,
6. Muhammad Ishfaq,
7. Khalil,
8. Mst: Masta Bibi,
9. Mst: Patina Bibi,
10. Mst: Dosta Bibi,
11. Mst: Hashmata Bibi,
12. Mst: Zari Khaila Bibi, legal heirs of Nobat Khan
13. Moqem Khan,
14. Zahid Khan,
15. Iftikhar Khan,
16. Ihsan Ullah,
17. Khalid Usman,
18. Mst: Ruqaia Bibi,
19. Mst: Tuwaiba Bibi and
20. Mst: Nasrina Bibi, legal heirs of Bahadar Khan, all residents of Qaum Feroz Khel, Tapa Jaisal Khel, Tehsil Lower, District Orakzai.

.....(Plaintiffs)

VERSUS

1. Jan Muhammad,
2. Sultan Muhammad, both sons of Speen Gul Afridi, resident of Qaum Shalobar, Orakzai
3. Mansoor Orakzai son of Aman Ullah Khan,
4. Major Saad Khan son of Khalid Khan Orakzai,
5. Amir Ihsan son of Ihsan Ullah Khan and
6. Khizar Hayat son of Hashmat Khan, all legal heirs of Nasar Ullah Khan, all residents of Abdul Aziz Khel, Sultanzai, Tehsil Lower, District Orakzai.

.....(Defendants)

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

*Shabeer Ahmad*  
Shabeer Ahmad  
Civil Judge/JM-II  
25/10/2022  
Orakzai, Kalaya

80

**JUDGEMENT:**

Parties present. Arguments already heard and record perused.

Through this judgment I am going to decide the suit in hand filed by the plaintiffs against the defendants.

1. Brief facts of the case in hand are that the plaintiffs have filed the instant suit for declaration-cum-perpetual and mandatory injunction and possession in alternate against defendants to the effect that the plaintiffs are owner in possession of 09 joint fields, fully detailed in the head note of the plaint and defendants have no right whatsoever to interfere in the possession of the plaintiffs or deny their title. That predecessors of the plaintiffs purchased the suit land some 28 years back from 1. Subidar Iman Shah, 2. Muhammad Marjan, 3. Zakria Khan, 4. Safi Ullah Khan and 5. Meer Hassan Jan, of Qaum Feroz Khel, Kandai Jaisal Khel and since then plaintiffs are owner in possession of the same.

That in the year 2012, defendants no. 1 & 2 started illegal interference in the suit property, on which plaintiffs filed a petition before the court of then Political Tehsildar. The then APA constituted a Jirga and on the findings of the said Jirga, the APA vide order & Judgment dated 09.04.2015 accepted petition of the plaintiffs and recovered the possession of the said land from defendants no. 1 & 2. That after 02 years of that order/judgment, defendants no. 03 to 05 on the basis of

81

collusion filed an appeal before the Commissioner FCR, Kohat Division, Kohat praying therein that they were not made party in the suit. The Commissioner FCR, Kohat Division, Kohat vide order dated 09.02.2017 remanded back the suit with directions to constitute a fresh Jirga after framing of proper issues as required under section 08 FCR. The trial re-commenced on 10.03.2017, but during pendency of suit FCR courts were abolished and the case was transferred to Civil Court. The learned CJ-II, Orakzai through impugned order, after pointing out the concluding remarks of AC Lower Orakzai in order sheets dated 13.03.2019, declared the case as past & closed transaction. That being aggrieved of the said order, plaintiffs filed an appeal before the Worthy District Judge, Orakzai, the appellate court accepted appeal and remanded the case back with directions to proceed further with case in accordance with applicable law. That defendants were asked time and again not to interfere in the peaceful possession of plaintiffs but they refused, hence, the present suit.

2. With due process of law and procedure, defendants were summoned, of whom defendants no. 1 to 5 appeared and contested suit by filing written statement and reply.

Contesting defendants raised several legal and factual objections in their written statement.

3. From divergent pleadings of the parties the following issues were framed for adjudication of real controversy between the parties.

Issues:

- i. Whether the plaintiffs have got a cause of action? OPP
- ii. Whether the plaintiffs fathers and fore-fathers bought property from elders of defendants (Qaum Feroz Khel, Kandai Jaisal Khel, Orakzai) comprising of 09 fields?  
OPP
- iii. Whether competent forum in the time of Erst-While FATA has decided issues between parties and attained finality? OPD
- iv. Whether proper court fee has been affixed? OPD
- v. Whether the suit of the plaintiff is bad for joinder and mis-joinder for the parties? OPD
- vi. Whether plaintiffs are of Afridi caste and were tenants on different properties of Orakzai Tribes and have got no ownership land of the District Orakzai area? OPD
- vii. Whether the plaintiffs are entitled to the decree as prayed for? OPP
- viii. Relief

*Shabeer Ahmad*  
 Shabeer Ahmad  
 CTS/10/2022-11  
 Orakzai at (Kalaya)

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



5. 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.

6. During course of recording evidence plaintiffs in support of their contention produced four (04) witnesses.

7. Malik Abdul Mat Khan son of Malik Muhammad Marjan, appeared and deposed as PW-01. He recorded his statement to the effect that he is the son of Malik Muhammad Marjan, Feroz Khel and that his father and others have sold the suit property to the predecessors of the plaintiffs and that they will have no objection if the suit of the plaintiffs is decreed in their favor.

8. Sami Ullah son of Safi Ullah, resident of Qaum Feroz Khel, Tehsil Lower Orakzai, appeared and deposed as PW-02. He recorded his statement to the effect that their elders have sold the suit property to the elders of the plaintiffs some 40 years ago. That they will have no objection if suit is decreed in favor of plaintiffs.

9. Taj Wali Khan son of Aman Shah, resident of Qaum Feroz Khel, Orakzai, appeared and deposed as PW-03. He recorded his statement to the effect that about 40 years ago their elders sold the suit property to the elders of the plaintiffs in lieu of a consideration of Rs. 85,000/-.

10. Moqem Khan son of Bahadar Khan, resident of Qaum Feroz Khel, Orakzai, plaintiff no. 13 and as attorney for the

84

rest of the plaintiffs, appeared and deposed as PW-04. Power of attorney is Ex. PW-4/1. He recorded his statement to the effect that their elders have purchased the suit property from Tapa Jaisal Khel some 35-40 years ago. That their elders purchased the suit land from 1. Muhammad Marjan, 2. Zakria Khan, 3. Safi Ullah, 4. Subidar Iman Shah, and 5. Mir Hassan Jan. When Sultan Muhammad and Jan Muhammad started interference in their possession, they moved a petition to Political Administration and in the year 2015/2016 the FCR Court decided in their favor. Certified copies of application, Jirga decision, order/judgment dated 09.04.2015 and information report dated 01.05.2015 are exhibited as Ex. PW-4/2 (comprising of 05 pages). That after order/judgment of APA dated 09.04.2015, a new party namely Mansoor Khan appealed before the Commissioner FCR. On acceptance of appeal, case was remanded back to the court of APA and on merger of FATA the suit is transferred to Civil Courts. He lastly requested for decree of the suit against defendants as prayed for.

Thereafter, plaintiffs closed their evidence.

11. Defendants in support of their claim and contention produced only one (01) witness.
12. Mansoor Amin son of Aman Ullah Khan, defendant no. 03 appeared and deposed as DW-01. He stated that suit property is their ancestral property and besides the suit

83

property their other property is located at Tehsil Kalaya. That in the year 1984, their elders scribed a private partition deed, in which alongwith other property, the suit property is also mentioned. That they are successors of Nasrullah Khan and the said private partition is signed and thumb impressed by elders of Qaum Feroz Khel. That the original of that private partition deed is before the court and copy of the same is Ex. DW-1/1. That their elders hired services of Patwari for measurement and sketch to this effect has also been drawn.

Copy of the same is provided which is annexed/placed on file

as Mark-A. That in the sketch the suit property is mentioned

with red pen. That similarly on the said sketch/map 30 Jeerab

land is mentioned which is given for stadium by their elders.

That the suit property is in their possession since their

ancestors and on which their farmer Qadeem son of Speen

Gul is cultivating and before him his predecessor cultivated

the suit land for them. That suit property never came in

possession of plaintiffs. That around the property their trees

in the form of *Walla* (ج) are grown. That the suit property is

bounded on three sides by their properties and on the fourth

side i.e. to the north is bounded by property of Qaum Feroz

Khel. He lastly requested for dismissal of the suit.

Thereafter defendants closed their evidence.

13. After completion of evidence of the parties, arguments

of the learned counsel for the parties were heard and record

76

of the case file was gone through with the help of their valuable assistance.

My issue wise findings are as under.

**Issues No. 03:**

**Whether competent forum in the time of Erst-While FATA has decided the issue between the parties and attained finality? OPD**

14. Burden of proof regarding this issue was on defendant.

But perusal of the record shows that the court of Worthy Additional District Judge-I, Orakzai in civil appeal no. 5/19

of 2019 has decided the issue vide judgment/order dated

12.10.2019 whereby the learned ADJ-I, Orakzai has held that

the present case cannot be considered as a past & closed

transaction, it was remanded back with the direction to

proceed in accordance with law. This judgement has not been

challenged before any forum, hence, the issue is decided in

negative and against the defendants.

**Issue No. 02:**

**Whether the plaintiffs fathers and fore-fathers bought**

**property from elders of defendants (Qaum Feroz Khel,**

**Kandai Jaisal Khel, Orakzai) comprising of 09 fields?**

**OPP**

15. Per averments of the plaint, claim of plaintiffs is that

they are owner in possession of land consisting of 09 fields

through purchase, which they purchased from 1. Subidar



87

Iman Shah, 2. Muhammad Marjan, 3. Zakria, 4. Safi Ullah Khan and 5. Mir Hassan Jan of Qaum Feroz Khel, Kandai Jaisal Khel, Orakzai some 28 years ago. That in the year 2012 defendants no. 1 & 2 started illegal interference on which plaintiff filed a petition before the learned APA, Orakzai who decided in favor of plaintiffs vide judgment/order dated 09.04.2015 and recovered the possession of said land from defendants no. 1 & 2 and since then plaintiffs are in possession of the suit land.

16. On the other hand contesting defendants alleged that the suit property is their ancestral property and they are owners in possession of the suit property. That in the year 1984 proper private partition took place between the predecessors of defendants no. 01 to 05 and the suit land came in the lot of defendants predecessors. That the suit property never came in possession of the plaintiffs.

17. Plaintiffs in support of their contention produced evidence in which Malak Abdul Mat Khan son of Malak Muhammad Marjan deposed as PW-01. He stated that their fathers etc. have sold the suit property to the fathers of the plaintiffs.

Sami Ullah son of Safi Ullah deposed as PW-02. He also supported the claim of the plaintiffs and stated that their elders sold the suit property to the elder of the plaintiffs.

Taj Wali Khan son Iman Shah who deposed as PW-03, also supported claim of the plaintiffs and stated that about 40 years ago their elders sold the suit property to the elders of the plaintiffs in lieu of a consideration of Rs. 85,000/-.

Similarly, Moqem Khan son of Bahadar Khan, plaintiff no. 13 and as a attorney for rest of the plaintiffs deposed as PW-04. He stated that their elders have purchased the suit property some 35-40 years ago. That when defendants no. 1 & 2 started illegal interference in the suit property, they moved a petition before the Political Administration and on the findings of Jirga, the then APA passed an order/judgment

dated 09.04.2015 in their favor and recovered possession of the suit land from defendants no. 01 & 02. He produced application/petition tendered to Political Administration, Jirga decision, order/judgment dated 09.04.2015, information report dated 01.05.2015 which are Ex. PW-4/2 (comprising of 05 pages).

18. Defendants objecting claim of the plaintiffs produced only one witness namely Mansoor Amin son of Aman Ullah Khan Col (R) who deposed as DW-01. He stated that the suit property is their ancestral property. That in the year 1984, proper private partition took place among their elders and in which along with other property, the suit property is also mentioned. He produced private partition deed which is Ex.

84

DW-1/1 and sketch of the whole property which is annexed as Mark-A.

19. Although DW-01 claim that they are owner in possession of the suit property cultivated through farmer namely Qadeem son of Speen Gul and before him his predecessors cultivated the suit property but none of the said farmers appeared before the court who could support claim of the defendants. Further defendant has stated in his cross examination that defendants no. 1 & 2 who are sons of Speen Gul were his farmers but per written statement in para 5 it is held that the suit property is the ancestral property of defendants no. 1 & 2.

20. Defendants in support of Ex. DW1/1 and Mark A have not produced any witness or evidence which could show that when the said deed was scribed or the said sketch is drawn and who scribed the said deed or sketch.

21. Counsel for defendants objected Ex. PW-4/2 on the ground that these were ex-parte proceedings which were set-aside by order of the Commissioner FCR, Kohat. Although the judgment/order dated 09.04.2015 were set-aside by Commissioner FCR, Kohat but page 2 of Ex. PW-4/2 which is Information Report dated 01.05.2015 shows that possession was handed over to the plaintiffs.

22. Pertinent to mention here that neither other contesting defendants nor their attorney appeared before the court to

record their statement to support the claim of defendant no. 3 (DW-01).

23. Keeping in view the above discussion, it is held that plaintiffs acquired the suit land through purchase and they are owner in possession of the suit property. Plea of plaintiffs is supported by evidence, resultantly, the issue is decided in terms that plaintiffs are owners in possession of the suit property, hence, decided accordingly.

**Issues no. 04**

**Whether proper court fee has been affixed? OPP**

24. Record shows that court fee has not been affixed till date. Per averments of plaint, value of the subject matter for the purpose of court fee is:

*Shabir Ahmad*  
Shabir Ahmad  
Civil Judge/JM-II  
02/5/2022  
Oran/10/2022  
(Malaya)

- a. For relief A= Rs. 200/-
- b. For relief B= Rs. 200/-
- c. For relief C= Rs. 1000/-

Therefore, plaintiffs are directed to submit requisite court fee within one month. Issue decided accordingly.

**Issue no. 05**

**Whether suit of the plaintiff is bad for joinder and misjoinder of the parties? OPD**

25. Burden of proof regarding the issue was on defendants. All the parties which are necessary to be impleaded in the instant suit are rightly and correctly arrayed in the plaint. Similarly, no party has been detected by the defendants to be

98

improperly or unnecessarily enlisted in the suit. Therefore, issue is decided against defendants.

**Issue no. 06**

**Whether plaintiffs are of Afridi caste and were tenants on different properties of Orakzai tribes and have got no ownership land of the district Orakzai area?**

26. Burden of proof regarding this issue was on defendants.

Claim of defendants is that the plaintiffs being Afridi caste were tenants on different property of Orakzai tribes and they have got no ownership land in the Orakzai area.

27. Defendants neither produce any oral nor any documentary evidence in support of their stance. There is

nothing in record which could support this claim of the

defendants. More so this assertion was made in the written

statement but neither any authentic evidence was produced

nor it was reiterated by defendants in his statement.

Resultantly issue is decided in negative and against the defendants.

**Issue no. 01 & 07**

**Whether the plaintiffs have got a cause of action? OPP**

**Whether the plaintiffs are entitled to the degree as prayed for?**

28. In the light of foregoing discussion, plaintiffs have proved their stance through cogent, convincing and reliable oral and documentary evidence, therefore, they have got a

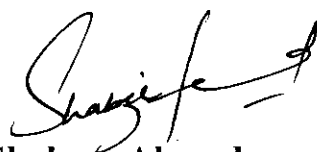
92

cause of action and are entitled to the decree in their favor against the defendants. Hence, both the issues are decided in positive and in favor of the plaintiffs.

**Relief**

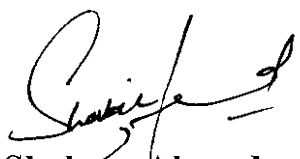
29. As a sequel to my above issue wise discussion suit of the plaintiffs is hereby decreed in their favor as prayed for against the defendants. No order as to cost.
30. File be consigned to District Record Room after its necessary completion and compilation.

**Announced**  
**25.10.2022**

  
**Shabeer Ahmad,**  
Civil Judge-II,  
Tehsil Courts, Kalaya, Orakzai

**CERTIFICATE**

Certified that this judgment of mine consists of **Fourteen (14)** pages, each has been checked, corrected where necessary and signed by me.

  
**Shabeer Ahmad,**  
Civil Judge-II,  
Tehsil Courts, Kalaya, Orakzai