

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

Civil Suit No. 61/1 of 2019
Date of Original Institution: 30.08.2019
Date of Transfer in: 02.07.2022
Date of Decision: 31.10.2022

- 1. Saif Ali son of Zawar Hussain and
 - 2. Ghulam Jaffar son of Yousaf Hussain, both residents of Qaum Sepoy, Tapa Lakhkari Khel, Naka Mela, Tehsil Lower District Orakzai.
-(Plaintiffs)

VERSUS

- 1. Awal Meer son of Sardar Ali,
 - 2. Feroz Ali son of Muhammad Ameer Shah,
 - 3. Zulfiqar Ali son of Muhammad Agha Shah and
 - 4. Sajan Ali son of Gulab Sher, all residents Oti, Sepoy, Tehsil Lower District Orakzai.
- (Defendants)

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

JUDGEMENT:

Shabeer Ahmad
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Civil Judge/JJA-II
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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.

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 owners in possession of land measuring 20 Marlas known as *Jawar Ali*

Patay (پٹای) situated at village Oti, Tehsil Lower Orakzai, fully detailed in the head note of the plaint. That defendants have got nothing to do with the suit property, therefore, are not entitled to take possession of the property, restrain defendants from usage of the property, raise construction over the property or take ownership of the property. That the suit property is the inherited property of the plaintiffs. That defendants be restrained from interfering in the suit property during the pendency of the suit. And if during pendency of suit, defendants raised any construction, it is liable to be demolished, therefore, an order to that effect be passed. That defendants have took possession of another field of plaintiffs

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known as Cheera (چیرا) for which a separate suit would be filed. That defendants are trying to raise construction in the suit property and when plaintiffs got knowledge of that they immediately reported the matter to Ghakhi Check-post. The levies/police personnel prevented defendants from construction but defendants are trying to raise construction at any cost. That some lands was required for expansion of the adjacent Imam Bargah which was also given by the plaintiffs and the suit property is adjacent to Imam Bargah. That defendants were asked time and again to stop construction and interfering in the suit property, and to not interfere

peaceful ownership and possession of plaintiffs but in vain, hence, the present suit.

1. With due process of law and procedure defendants were summoned, they appeared before the court and contested the suit by filing the written statement and reply. Defendants have raised several legal and factual objections in their written statement.
2. From divergent pleadings of the parties, the following issues were framed for adjudication of real controversy between the parties.

Issues:

- i. Whether plaintiffs have got a cause of action to file instant suit against defendants?
 - ii. Whether suit of plaintiffs is incompetent in its present form?
 - iii. Whether plaintiffs are estopped to file instant suit?
 - iv. Whether plaintiffs are owner in possession of disputed property and defendants are illegally interfering in the same?
 - v. Whether defendants are owner in possession of disputed property since time of their ancestors?
 - vi. Whether the plaintiffs are entitled to the decree as prayed for?
 - vii. Relief.
3. It is pertinent to mention here that firstly the suit was instituted by Saif Ali i.e. Plaintiff no. 1 only but later Ghulam Jaffar, a cousin of the plaintiff moved an application for impleadment as a plaintiff which was allowed vide order no. 06 dated 24.10.2019. After

impleadment of Ghulam Jaffar as plaintiff, plaintiffs filed an amended
plaint but defendants relied on the already submitted written
statement. Thereafter, the above issues were framed.

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
claim and contention produced their witnesses as PW-01 to PW-
04. Thereafter plaintiffs closed their evidence.
7. Defendants in support their claim produced their witnesses as
DW-01 to DW-03. Defendant no. 04 who is also special
attorney for rest of defendants deposed as DW-03. Special
power of attorney is Ex. DW-3/1. Ex. DW-3/1 was objected
by counsel for the plaintiffs contending that the same does
not bears the signatures of defendants who assigned the
special power of attorney. Ex. DW-3/1 is thumb impressed by
defendants no. 1, 2 & 3, therefore, objection does not have
any weight. Thereafter defendants closed their evidence.
8. Learned counsel for the parties heard and record gone through. In the
light of available record and arguments of counsel for the parties, my
issue wise discussion is as under.

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Issue No. 2

Whether suit of the plaintiffs is incompetent in its present form?

- 9. Law requires that plaintiffs should claim entire relief. Suit has to be framed so to afford ground for final decision upon the subject in dispute and to prevent further litigations. Nothing has been brought on record which could show that suit of the plaintiff is incompetent in its present form. No formal defects has been established, hence, suit of the plaintiffs is held to be competent in its present form. Issue decided in negative.

Issue No. 3

Whether plaintiffs are estopped to file instant suit?

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

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Issue No. 4 & 5

Whether plaintiffs are owner in possession of disputed property and defendants are illegally interfering in the same?

Whether defendants are owner in possession of disputed property since time of their ancestors?

Both these issues are interlinked and interconnected, hence to avoid the repetition of facts, both the issues are taken together for discussion.

11. Claim and contention of the plaintiffs is that the plaintiffs are owner in possession of the suit property since their forefathers and defendants are illegally interfering in the suit property. On the other hand defendants denied the claim of the plaintiffs and contended that the disputed property is their ancestral property and plaintiffs have no concern with that.

12. Plaintiff in support of their contentions produced Ghulam Jaffar son of Yousaf Hussain as PW-01, who stated in his examination in chief that defendants got no concern to take possession of the suit property called *Jawar Ali Patay* (جوار علی پٹے). That for extension of nearby Imam Bargah land was needed which was also given by plaintiffs. That after sometime enmity arose due to which plaintiffs left the area and went to Alizai. That after their departure their other land alongwith disputed property remained uncultivated/unoccupied. That now after 50 years when they patched up the matter, defendants are denying their ownership on suit property. Defendants started constructing toilets/bathrooms of Imam Bargah some 20 to 25 meters away from Imam Bargah, on which they objected that since the property belongs to plaintiffs that's why their permission was necessary. That Hon'ble Court passed a status quo order in their favor but despite of that plaintiffs constructed toilets. And since that the suit is pending before Hon'ble Court. He lastly requested for the decree of the suit as prayed for.

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13. Ameer Gul Hussain son of Ameer Hussain was produced as PW-02 by plaintiffs, who stated that the suit property is the paternal property of the plaintiffs and to his knowledge is in the possession of the plaintiffs. That some time ago plaintiffs left the area due to enmity thereafter, suit property remained unoccupied and when plaintiffs came back defendants started interference in the suit property.

14. Gulam Hassan son of Sultan Asghar appeared as PW-03. He narrated the same story of enmity of plaintiffs and leaving the area. That on coming back to their land, defendants started interference in the disputed area. He further stated that the disputed area remained in the possession of predecessors of plaintiffs for the last 200 years and now plaintiffs are owners in possession of the suit property.

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15. Zahid Hussain son of Ali Man Shah was produced as PW-04 by plaintiffs. He stated in his examination in chief that to his knowledge the suit property is in possession of plaintiffs, however, he do not know whether the suit property belong to the predecessors of plaintiffs or of defendants. That the suit property remained in the possession of the plaintiffs and defendants never claimed the suit property. That defendants are now claiming the suit property.

16. On the other hand defendants objected claim of the plaintiffs stating that defendants are owner in possession of suit property since their ancestors and plaintiffs have got nothing to do with the suit property.

17. Defendants in support of their claim produced witnesses in whom Malak Yaqoot Ali son of Faqir Ali appeared and deposed as DW-01.

He supported the claim of defendants and lastly requested for dismissal of the suit.

18. Rehmat Ali son of Malak Muhammad Nazir deposed as DW-02. He also supported claim of defendants.

19. Malak Sajan Ali son of Gulab Sher, defendant no. 4 and as attorney for rest of the defendants deposed as DW-03. He stated that claim of plaintiffs regarding Imam Bargah, Mosque and land is wrong. That for Imam Bargah and Mosque, land was given by defendants and are constructed by defendants. That plaintiffs have no right whatsoever with them. That the suit of the plaintiffs against them is wrong. That the suit property is their own property. That the plaintiffs are not from their family. That defendants have constructed houses on the disputed area. That there is no house of plaintiffs on the disputed area. That their Imam Bargah and graveyard are on the disputed area. That the suit of the plaintiffs is wrong, therefore, it be dismissed.

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20. From analysis of the available record, it is evident that defendants wanted to construct some toilets for Imam Bargah on the nearby land which plaintiffs claimed to be their property while defendants claimed their property.

21. It is well settled principal of law that the one who asserts has to prove. Onus to prove a fact is on the shoulder of a person who raised the same. Claim of the plaintiffs is that the suit property is their inherited property. That they are owner in possession of the suit property. Plaintiffs in support of their claim produced witnesses. PW-01 in his examination in chief has stated that due to enmity they left

the area some 50 years ago, and then the suit property remained uncultivated. In his cross examination he has stated that during these 50 years their cousins allowed no one to interfere in the suit property but none of those cousins were produced by plaintiffs to support claim of the plaintiffs. It is not appealing to prudent mind that if in their non-presence their cousins allowed no one to interfere in the suit property, how in the presence of plaintiffs someone would interfere in the suit property. PW-02 in his cross examination has stated that he has no knowledge that who gave the land for Imam Bargah and also that Imam Bargah constructed by predecessor of the defendants.

Further in cross examination PW-02 has only stated views/opinion of

the plaintiffs and defendants regarding the suit property. That

plaintiffs claims the suit property as their inherited property while

defendants claims it as purchased property. He also stated that he has

heard these views from villagers and he has not visited the spot

whether defendants have took possession of the suit property or not.

He also stated that he has no knowledge whether defendants have

constructed toilets for Imam Bargah. Similarly PW-03 in his cross

examination stated that Imam Bargah was constructed by defendants.

He also stated in his cross examination that defendants have not took

possession of the suit property in his presence but have started

claiming the suit area. He also stated that plaintiffs are still residing in

Kohat and that he is not a witness to taking possession by defendants.

Similarly PW-04 in his cross examination has stated that the Imam

Bargah was constructed by defendants. That he has no knowledge if

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the dispute arose because of construction of toilets. That he has no knowledge whether toilets are constructed on disputed property. That in his presence defendants have not took possession of disputed property. Even in his examination in chief PW-04 has stated that he has no knowledge whether the suit property was that of predecessors of the plaintiffs or of the defendants.

22. Keeping in view the above discussion it is held that plaintiffs failed to produce reliable evidence in support of their claim. Nothing was brought on record which could show that the suit property are ownership in possession of the plaintiffs. Nor anything was brought on record which could show that defendants took possession of the plaintiffs property.

On the other hand in spite of lengthy cross examination of defendants, plaintiffs failed to bring on record any adverse possession on part of defendants. While cross examining DW-03 it is suggested by plaintiffs that defendants sent a Jirga to plaintiffs that they want to purchase the suit property but no witness was produce in that regard who could support that claim of the plaintiffs. It is further suggested in cross examining DW-03 that when the plaintiffs returned to their land in 2016-2017, defendants through a *Karegar* (کارجار) namely Ijad Ali informed the plaintiffs that the suit property is the ownership of the defendants but there is nothing on record which could show that plaintiffs brought the matter before the Political Administration of Erstwhile FATA. It is further suggested that defendants wanted to

purchase the suit property in lieu of a consideration Rs. 03 lacs but nothing is brought on record which could support this claim of the plaintiffs.

On what has been discussed above the Issue No. 4 decided in negative and Issue No. 5 decided in positive.

Issue No. 1 & 6

Whether plaintiffs have got a cause of action to file instant suit against defendants?

Whether plaintiffs are entitled to the decree as prayed for?

Both these issues are interlinked and interconnected, hence, both the issues are taken together for discussion.

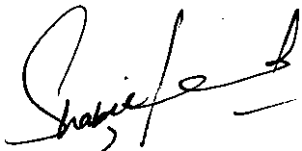
24. On what has been discussed above that plaintiffs failed to bring on record any cause of action and hence are not entitled to the decree of the suit. Hence both the issues are decided in negative.

Relief

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

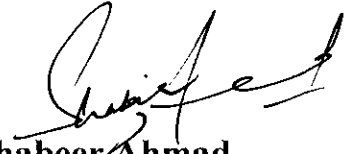
File be consigned to the District Record Room, Orakzai after its completion and compilation.

Announced
31.10.2022


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Civil Judge-II,
Tehsil Courts, Kalaya, Orakzai

CERTIFICATE

Certified that this judgment of mine consists of **Twelve (12)** pages, each has been checked, corrected where necessary and signed by me.



Shabeer Ahmad,

Civil Judge-II,

Tehsil Courts, Kalaya, Orakzai