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

Civil suit No 34/1 of 2020
Date of institution 10.03.2020
Date of decision 07.03.2024

1. Said Hakeem S/o Haji Sher Akbar
2. Mufti Afzal S/o Haji Jalandar Khan
Residents of Qoam Khadizai, Tehsil Upper, District Orakzai.
..... (Plaintiffs)

Versus

1. Sher Muhammad S/o Ismail Shah
2. Muhammad Janan S/o Abdul Khanan
3. Wali Khan S/o Muhammad Kareem
4. Karam Deen S/o Ismail Khan
5. Abdul Wahab S/o Salman Shah
6. Sawabir Shah S/o Syed Mir Shah
All residents of Qoam Esa Khel/ Ali Khel, Tehsil Upper, District Orakzai.
.....(Defendants)

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Orakzai at (Babar Mela)

SUIT FOR DECLARATION, PERMANENT & MANDATORY
INJUNCTION

JUDGMENT:

1. Brief facts of the case are that plaintiffs have filed the instant suit for declaration and permanent injunction to the effect that plaintiffs are owner in possession of suit property fully detailed in the head note of the plaint. That the suit property consists of forests, streams and western Panidhal of the mountain by name of Madorhi Pahar situated in

Khadizai. That the defendants have got no concern with suit property as they are residents of Ghotak, Ali Khel and are interfering in the suit property by cutting forests, using the water from springs and illegally changing the nature of the suit property. That defendants be restrained from interference in the suit property. That the defendants were asked time and again to admit the legal claims of plaintiffs but in vain, hence, the present 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.
3. The divergent pleadings of the parties were reduced into the following issues.

ISSUES.

1. *Whether plaintiffs have got cause of action?*
2. *Whether the plaintiffs are estopped to sue?*
3. *Whether suit of plaintiffs is time barred?*
4. *Whether the suit property is the ownership in possession of the plaintiffs since long and the defendants have got nothing to do with the same?*
5. *Whether Plaintiffs are entitled to the decree as prayed for?*
6. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of their claim and contention produced 16 Witnesses. Detail of the plaintiff's witnesses and exhibited documents are as under; -

	WITNESSES	EXHIBITIS
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PW-1	Muhammad Ishaq SI/IO presently posted at PS Dabori District Orakzai.	Abstract copy of FIR is Ex.PW-1/1.
PW-2	Zulfiqar Ali Forester, District Orakzai.	Agreement for Shajarkaari is Ex.PW-2/1. Agreement Deed is Ex.PW-2/2. Cost Estimate of Block Plantation is Ex.PW-2/3. Site plan/ Quadrantes is Ex.PW-2/4. Copy of letter extract office order dated 24.12.2020 is Ex.PW-2/x-1.
PW-3	Shahid Noor Divisional Forester Officer, District Orakzai.	Copy of letter extract office order dated 24.12.2020 is Ex.PW-3/x-1.
PW-4	Saleem SHO PS Ghiljo, District Kohat.	Report of SHO is Ex.PW-4/1.
PW-5	Khawagmin S/O Zarin Khan Resident of Qoam Ali Khel, Ghiljo, District Orakzai.	Copy of Iqrar Nama is Ex.PW-5/1.
PW-6	Mastali Jan S/O Abdul Salaam Resident of Qoam Ali Khel, Ghiljo, District Orakzai.	Copy of Iqrar Nama is Ex.PW-6/1.
PW-7	Taj Muhammad S/O Ajmir Khan Resident of Qoam Ali Khel, Ghiljo, District Orakzai.	Copy of Iqrar Nama is Ex.PW-7/1.
PW-8	Mufti Afzal S/O Jalandar Khan Resident of Qoam Ali Khel, Sher Nawasi, Ghiljo, District Orakzai.	Copy of application on behalf of Mashran of Qoam Khadizai is Ex.PW-8/1.

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PW-9	Izat Gul S/O Sahib Hussain Resident of Qoam Sheikhan, Tappa Samozai, Mishti Mela, District Orakzai.	Copy of Decision regarding dispute consist of two sheets is Ex.PW-9/1.
PW-10	Nosherwan S/O Abdul Salam Resident of Qoam Ali Khel, Jasrat Khel, District Orakzai.	Nil
PW-11	Zaliman Shah S/O Gulman Shah Resident of Qoam Rabia Khel, Tappa Ayaz Khel, District Orakzai.	Nil
PW-12	Hibaad Shah S/O Kasteer Khan Resident of Qoam Ali Khel, Ghiljo, District Orakzai.	Nil
PW-13	Muhammad Raheem S/O Mulvi Fazal Kareem Resident of Qoam Ali Khel, Tappa Jasrat Khel, Ghiljo, District Orakzai.	Copy of CNIC of father of PW-13 is Ex. PW -13/x-1.
PW-14	Said Hakeem S/O Haji Sher Akbar Resident of Qoam Khadizai, Tappa Nosher Nawasi, District Orakzai.	Copy of CNIC is Ex. PW-14/x-1.
PW-15	Shakeel Ahmad S/O Muhammad Tahir Resident of Qoam Aa Khel, District Orakzai.	Nil
PW-16	Isam e Azam S/O Muqarab Khan Resident of Qoam Ali Khel, District Orakzai.	Nil

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Defendants in support of his claim and contention produced three

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(03) witnesses. Detail of defendant's witnesses and exhibited documents are as under;

WITNESSES		EXHIBITIONS
DW-1	Khowaja Gul S/O Zarin Gul resident of Qoam Ali Khel, PO Ghiljo, Tehsil Upper District Orakzai.	Copy of CNIC is Ex. DW-1/1.
DW-2	Mehnat Khan S/o Gul Ajab Khan Resident of Qoam Ali Khel, PO Ghiljo, Tehsil Upper District Orakzai.	Copy of Jirga Deed regarding the dispute forest as Ex. DW-2/1.
DW-3	Sher Muhammad S/o Ismial Shah Resident of Qoam Esa Khel, Ali Khel, Tehsil Upper District Orakzai.	Special Power of attorney is Ex. DW-3/1.

5. Learned counsel for the plaintiffs Mr. Malik Muhammad Farooq Khattak Advocate argued that plaintiffs have produced cogent evidence and reliable witnesses to prove that the suit property is ownership of Qoam Khadizai. The witnesses are consistent in their statements that the suit property is owned by Qoam Khadizai and defendants being member of Qoam Ali Khel have nothing to do with the suit property. Furthermore, in order to prove their possession, the plaintiffs produced official witnesses of forest department who had entered into contract with the plaintiffs for plantation scheme. Moreover, the disputed Nika Chashma and other springs has always been in possession of the plaintiffs and they have from time to time sold portion of water to others, in this respect they have produced three witnesses. Most

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importantly, a jirga was convened by the APA before merger of FATA for determination of the same controversy and the Official jirga decided that the plaintiffs being member of Qoam Khadizai are owners in possession of the suit property. Further argued that in absence of any documentary evidence in District Orakzai, plaintiffs have proved their case.

6. Learned counsel for the defendants Mr. Javid Muhammad Punji Advocate argued that the plaintiffs have not produced sufficient evidence in order to proof their case. That the Jirga decision which is exhibited as Ex.PW-9/1 can't be made rule for court as it don't fulfill the requirement of Law. That residing near the disputed property does not mean that only plaintiffs have ownership right over the same. Furthermore, plaintiffs don't have any documentary proof in support of their stance.

7. 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 plaintiffs are estopped to sue?

8. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendants. Even otherwise, there is nothing on available record which shows that the plaintiffs are estopped to sue the defendants in this court. Therefore, issue is decided in negative and against the defendants.

ISSUE NO.3:

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Whether the suit of the plaintiffs is time barred?

9. The onus to prove this issue was on the defendants. The plaintiffs filed suit for declaration and permanent injunction. As per averments of the plaint, cause of action for the last time accrued to the plaintiffs few days prior to the institution of this suit, when the defendants denied ownership of plaintiffs and interfered in the disputed property. There is nothing available on record which can suggest the fact that the suit is time barred.
10. Moreover, period of limitation for filling declaratory suit Under Article 120 of limitation Act, is six years. Furthermore, after the 25th constitutional Amendment Act, 2018, all federal and provincial law extended to the newly merged Districts in 2018. Therefore, it is held that the suit is well within time. Hence, the issue is decided in negative.

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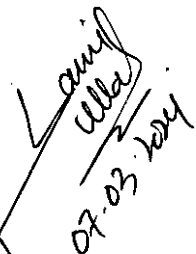
ISSUE NO.4:

Whether the suit property is the ownership in possession of the plaintiffs since long and the defendants have got nothing to do with the same?

9. The plaintiffs have filed representative suit on behalf of residents of Khadizai, Upper Orakzai. The claim of the plaintiffs is that they are the owners in possession of the disputed property and defendants have no right to deny the legal right of the plaintiffs. The plaintiffs asserted that the disputed property is their ancestral property and are in their possession from last one thousand years. Burden of proof regarding the issue was on plaintiffs. Plaintiffs in order to discharge this duty, produced five witnesses. The essence of their statements which helped

in deciding the issue are as under.

- 10. Zulfiqar Ali, Forester District Orakzai who deposed as PW-02, stated in his statement that his department has signed an agreement which is Ex.PW-2/1 with Said Hakeem regarding the Madorhi Block plantation Scheme. The said PW admitted in his cross examination that detail of property is not mentioned in the Ex.PW-2/1, moreover, the said document can't create any title.
- 11. PW-03 is the statement of Shahid Noor, Divisional Forest officer Orakzai. PW-03 in his examination in chief testified that Ex.PW-2/1 correctly bears his signature and confirmed the said agreement with the plaintiff No.01. The said PW also admitted in his cross examination that detail of property is not mentioned in the Ex.PW-2/1, moreover, the said document can't create any title.
- 12. PW-05 is the statement of Khawagmin Khan who stated on oath that his father Zarin Khan has purchased water of Nika Chashma from Nazbat Khan for the purpose of drinking and cultivation. Iqrar Nama to the said deed with Darya Khan is Ex.PW-5/1. The said PW admitted in his cross examination that exhibited Iqrar Nama was scribed on 18.12.2019. Moreover, there is no detail of land which would be irrigated through the said purchased water nor there is any mention of amount by which the said water is purchased.
- 13. Mastali Jan deposed as PW-06 and recorded in his statement that his ancestors have purchased spring water from Qaom Khadizai and Nika Chashma also belong to Khadizai. The said PW admitted in his cross examination that although the water was purchased by my father but


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Iqrar Nama Ex.PW-6/1 is scribed on 18.12.2019.

14. PW-07 is the statement of Taj Muhammad, who supported the stance and contention of plaintiffs in his examination in chief and stated that the suit property is ownership of plaintiffs. My father has also purchased water of Nika Chashma for irrigation purpose from Qoam Khadizai. The Iqrar Nama to that effect is Ex.PW-7/1. The said PW recorded in his cross examination that my father has not scribed any agreement of the above-stated fact rather it was oral agreement. He further stated that their property is cultivated by water of the said Nika Chashma, the water of which was purchased by his grandfather. He further admitted that the Iqrar Nama Ex.PW -7/1 is scribed on 18.12.2019.

15. PW-08 is the statement of Mufti Afzal who stated on oath that he knows both the parties and Panidhal on Madorhi Hill towards west is property of Qoam Khadizai and toward east is property of Qoam Essa Khel. He stated that the dispute was pending before the court of Learned APA but due to merger of Erst while Fata, the case was transfer to regular Courts. In support of contention of the plaintiffs, the said PW recorded that the forest, spring, pipeline, water reservoir and the road also come within the property of Qoam Khadizai. He further stated that he also belongs to Qoam Khadizai. The said PW recorded in his cross examination that during pendency of the case in the court of the then APA, there also held two jirgas on the disputed property among which one decided the matter in our favour and other decided in favour of the defendants. The said PW further stated that Nika

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Chashma is in our possession, the water of which is used for irrigation of our lands and we also sell the said water. The said Spring water irrigate approximately 02 Km land which is our Qoami property.

16. Izat Gul, who deposed as PW-09, stated that he was amongst the Jirga members appointed by the then Political Agent for settlement of dispute between the two parties. The PW stated that the Jirga members have given their opinion on the disputed property in favour of the plaintiffs. The opinion of Jirga members is exhibited as Ex.PW-9/1. The said PW testified his signature on the said opinion. The said PW stated in his cross examination that I was official jirga member, verdict of which is Ex.PW-9/1. Our opinion Ex.PW-9/1 was submitted to then APA and was placed on file after attestation by the APA.

17. Noshawan who deposed as PW-10, stated on oath that he was the second official member of the Jirga convened by the then APA for deciding the dispute between the parties. The said PW also stated the same facts as recorded in the statement of PW-09, who were also an official member of the Jirga. The said PW also testified his signature on the Ex.PW-9/1. The said PW admitted in his cross examination that he belongs to Qoam Ali Khel. It is pertinent to mentioned here that the said PW testified in favour of the plaintiffs rather than in favour of his own cast which are defendants in the instant suit. Similarly, he also decided the matter in favour of the plaintiffs in the jirga convened by APA. He further stated in his cross examination that the defendants had refused the verdict of our Jirga.

18. Another Jirga member namely Zaliman Shah who deposed as PW-11,

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testified the contents of jirga decision exhibited as Ex.PW-9/1. The said PW gave detail of the Jirga sitting for disposal of issue between the parties. He stated that the jirga convened its meeting and both the parties were directed to give their evidence regarding their ownership. Qoam Khadizai come up with many reasons and instances of their possession over the property. Thereafter defendants were directed to give their evidence regarding their ownership and possession and when they come up with the reason that once the plaintiffs had constructed a water reservoir and we stopped the operation of the same. The said fact was rejected by the plaintiffs so we gave our verdict on this particular issue in shape of ten oaths from each party. The said PW testified his signature on the Jirga opinion Ex.PW-9/1.

19. Similarly, Khibad Shah who was also a Jirga member deposed in favour of the plaintiffs. No new fact was recorded in examination in Chief of the said PW. In his cross examination, he admitted that jirga decision was not acted upon as the case was pending in the court of APA. He also admitted that he belongs to Qoam Ali Khel. He further admitted that the Jirga was regarding ownership of land, mountain and water resources.

20. Plaintiffs produced Muhammad Raheem as PW-13 regarding another fact which pertains to a dispute between the parties in 1971 regarding a Madrassa situated in the disputed property, within the boundary of Qoam Khadizai and the same was settled in favour of the plaintiffs. The document pertains to the jirga decision dated 10.08.1971 is placed on file and is perused. The said document reveals that defendants were

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restrain from interference in the property of plaintiffs.

21. Plaintiff No.01 himself deposed as PW-14 and recorded his statement in favour of the plaintiffs. The said PW stated that Nika Chashma is our ownership and is in our uninterrupted possession since long and water from said springs irrigates our lands. He further stated that in 1981 we had laid a water pipeline on our own, afterwards in 2003-04 government scheme was approved for the said water supply. Moreover, the beneficiary of the said water pipeline is people of Qoam Khadizai only. In the rest of his statement the said PW reproduced and confirmed the facts of their plaint. In his cross examination the PW stated that after transfer of our case from the court of APA to regular Civil Courts in wake of merger of Fata we had withdrawn our case and filed the fresh one. He further stated that we have longstanding dispute with Qoam Ali Khel regarding which various Jirgas has been convened which decided in our favour and restrained the defendants from interfering in the disputed property, which is in our possession since one thousand years. Forest Department has taken Lease of a portion of land amongst the disputed property from us instead of Qoam Ali Khel/ Essa Khel for five year, for the purpose of plantation. He further stated that a portion of water from Nika Chashma has been sold to some members of Qoam Ali Khel sixty years ago. Furthermore, denied that all Qoam Ali Khel is using water from the same, as we had sold the water to Khawagmin, Mastali Jan and others. He further stated that the construction of road in 2009 was in property of Qoam Khadizai and compensation of which is also received by Qoam Khadizai.

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Furthermore, there are three water reservoirs in the disputed property among which one was constructed by us and the other two by the government.

22. PW-15 is the statement of Shakeel Ahmad, who is the son of the member/ signatory of jirga decision namely Muhammad Tahir. He testified the signatures of his father. Moreover PW-16 also testified signatures of his father namely Muqarab Khan on Ex.PW-9/1.

23. Plaintiffs closed their evidence after production of 16 witnesses in the instant case.

24. In rebuttal of the stance of the plaintiffs, defendants have produced three witnesses in support of their claim and contention.

25. Khawaja Gul appeared before the court as DW-01 and recorded in his statement that he belongs to Qoam Essa Khel, Ghotak. That a mosque and springs situated in the disputed property are ownership of Qoam Essa Khel, Ghotak. He recorded in his cross examination that I and the defendants belong to Qoam Ali Khel. He admitted jirga of 1971 regarding a disputation/ mosque which was decided in favour of the plaintiffs.

26. Mehnat Khan who deposed as DW-02 stated in his statement that there was a dispute between the party over the hill. A jirga was convened but it remained unsuccessful.

27. Defendant No.1 himself recorded his statement as DW-03. He stated that the disputed property is our ancestral property and is in our possession since long. He further stated that no Sarkari Jirga has ever taken place between us however, private jirga was convened and it

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remained unsuccessful and the suit of the plaintiffs is wrong and baseless. He recorded in his cross examination that he don't know about jirga members appointed by Political Agent. He further stated that jirga award recommended by jirga members was not announced by political Administration due to merger of Erst While Fata and transfer of the case in regular court. He denied the entire claim and contention of the plaintiffs.

28. The statements of the plaintiffs' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issue in their favour. Firstly, the witnesses were consistent in their statement that the plaintiffs are residents of Khadizai and defendants resides away from the disputed property. In the recently merged District Orakzai, in absence of any revenue record, long standing possession has due importance in determination of ownership. In the instant case, it has brought on record in shape of statement of PWs that Qoam Khadizai has long standing possession of the suit property and are residing in the area from more than one thousand years. Secondly, plaintiffs have produced two official witnesses of forest department who confirmed that agreement regarding plantation on Madorhi Mountain was signed with plaintiff No.01 being elder of locality. Although this deed can't create any right over the property but it can strengthen the contention of plaintiffs that they are owners in possession of the disputed portion of the Madorhi Mountain, that's why forest department have signed the contract with plaintiffs and not with defendants. The agreement was exhibited in course of evidence as

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Ex.PW-2/1. Moreover, as far as ownership of the springs particularly Nika Chashma is concerned, the plaintiffs have produced three witnesses i.e. PW-05, 06 & 07 who stated on oath that some portion of water was purchased by their father from members of Qoam Khadizai long ago. The said fact established that the plaintiffs were in possession of the disputed springs. Furthermore, plaintiffs have produced jirga members among which two were official jirga members appointed by the then Political Administration who submitted their opinion/ jirga decision to the then APA. It is pertinent to mention here that a case on same disputed property was pending between the same parties in the court of APA before merger of FATA, and the aforementioned official jirga was convened upon direction of the APA. The Jirga has submitted its decision in the court of APA but before announcement of judgement FATA was merged into province of Khyber-Pakhtunkhwa and the case was transferred to the regular court. The plaintiffs had then withdrawn their case in order to file a fresh one according to pleadings of the regular court. The aforementioned jirga decision was exhibited in course of evidence as Ex.PW-9/1, which is in favour of the plaintiffs by majority decision of six jirga members out of total ten members. Perusal of Ex.PW-9/1 reveals that the Jirga decided the disputed property which is also mentioned in detail in the said document in favour of plaintiffs. The aforementioned document also states that a madrassa regarding which dispute has already been decided in the year 1971, the decision regarding the same stands intact. The plaintiffs also produced PW-13 who recorded his statement and testified that the Jirga

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decision dated 10.08.1971 declared the Madrassa with, in the area of Qoam Khadizai. Furthermore, PW-14 also brought the fact before the court that the construction of road in 2009 was in property of Qoam Khadizai and the compensation of which is also received by members of the same. Therefore, in absence of revenue record and documentary evidence in cases of this newly merged district Orakzai, preponderance of evidence is evaluated based on statement of witnesses on oath and Jirga decision regarding the subject matter. In this case preponderance of evidence tilted in favour of plaintiffs for the reason mentioned above.

29. Keeping in view the above discussion, it is held that plaintiffs produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.04 is decided in favor of plaintiffs based on their evidence and admissions made by the defendant's witnesses.

ISSUE NO. 1 and 5:

Whether plaintiffs have got cause of action?

Whether plaintiffs are entitled to the decree as prayed for?

30. Both these issues are interlinked, therefore, are taken together for discussion.

31. Keeping in view my issue wise discussion, it is held that plaintiffs have got cause of action and are entitled to the decree up to extent of permanent injunction and declaration of disputed suit property in favour of residents of Qoam Khadizai. Both these issues are decided in favour of plaintiffs and against the defendants.

RELIEF:


32. As a result of issue wise findings, suit of the plaintiffs succeeds. It is

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therefore decreed and plaintiffs are entitled to the decree up to extent of permanent injunction and declaration of disputed suit property in favour of residents of Qoam Khadizai. As far as relief sought in shape of making the Jirga decision which is Ex.PW-9/1 as a rule of court, the same is not granted, as it do not fulfill the requirements of Law.

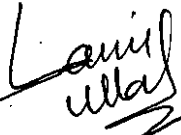
33. Cost to follow the events.
34. File be consigned to record room after its necessary completion and compilation.

Announced
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CERTIFICATE: -

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


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