

IN THE COURT OF BAKHT ZADA,
SENIOR CIVIL JUDGE, ORAKZAI AT BABER MELA

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| Civil Suit No. | 04/01 OF 2020. |
| Date of Original Institution: | 20.07.2020. |
| Date of Transfer In: | 03.01.2023. |
| Date of Decision: | 19.03.2024. |

*Ayub Khan S/O Miandad Khan R/O Bezote, Tappa Qambar Khel,
 Chawar Khel, District Orakzai*
(Plaintiff)

VERSUS

1. *Malang Jan S/O Shah Wali,*
 2. *Mir Akbar S/O Muhammad Akbar,*
 3. *Akram Khan S/O Azan Khan,*
 4. *Daulat Khan S/O Ashraf Khan,*
 5. *Aka Khel S/O Musa Khan,*
 6. *Muhammad Din S/O Aleel Khan,*
 7. *Samand S/O Shah Wali,*
 8. *Malik alias Malikay S/O Shah Wali,*
 9. *Abbas Ali S/O Shah Wali,*
 10. *Tila Muhammad S/O Hussain Gul*
(Defendants)

**SUIT FOR DECLARATION, POSSESSION THROUGH
 PARTITION AND MANDATORY INJUNCTION**

JUDGEMENT:

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1. Plaintiff Ayub Khan S/O Miandad Khan has brought the instant suit against the defendants Malang Jan S/O Shahab Ud Din and nine others for declaration, possession through partition of his 1/4th share in the suit property along with share of defendant No. 3 to 6 in the suit property, by demolition of construction in shape of boundary wall,

rooms, etc.

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2. According to the plaintiff, the suit property measuring about 10 Jerab is situated near check post, Said Khalil Baba, Zerra road, towards west beneath the road towards left of the road. That plaintiff along with defendants No. 3 to 6 & 10 are cousins inter-se and the suit property is their joint ownership being inherited property. The plaintiff claiming that he is entitled for one share out of total four shares, defendants No. 3 to 6 & 10 are entitled for two shares out of the said four shares, while possession of one share out of the total four shares has already been given to defendant No. 2 by the parties in lieu of compromise. The plaintiff alleged that previously on 19.09.2020, suit for declaration and possession was submitted, but later on vide order dated 08.03.2021 the application of plaintiff for amendment in plaint was accepted and the instant amended plaint was filed. It is alleged that domestically in presence of witnesses measurement of the whole suit property i.e, all the four shares was carried out, wherein the share of the plaintiff was determined as 26030 and that of defendants No. 3 to 6 were determined as 81316, but defendants No. 3 to 6 & 1, 7 to 9 refused to hand over the possession of the share of the plaintiff and hence the instant suit for possession of 1/4th share of the plaintiff in the suit property through partition was submitted. That proper measurement of the suit property has not yet taken place, however, for the purpose of Jirga, the property was determined to be 10 Jerab (40 Kanals). That defendants No. 3 to 6 in collusion with defendant No. 2 in the year 2018 secretly sold their two shares in favour of defendant No. 1 and handed over possession of all the three shares including share of the plaintiff and share of defendant

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No. 10. That a Jirga took place between the parties on 21.04.2018, wherein apparently the sale transaction was reversed by the defendants, but later on defendant No. 1 and 3 to 6 took defendant No. 2 in confidence and in absence of the plaintiff, again oral transaction took place between them in respect of the suit property. That the plaintiff got the knowledge about the sale transaction when defendant No. 1 started gathering bricks etc for construction at road side in the way of the suit property. The defendants were asked not to raise construction without domestic partition. An application was also submitted to DPO, Orakzai, but the defendants refused and hence the instant suit.

3. Defendants were summoned, who appeared. Defendant No. 1, 3 to 6 had already submitted their written statement on 05.09.2020 to the initial plaint, while defendant No. 2 submitted cognovit to the same on 21.09.2020. After submission of the instant amended plaint on 29.03.2021 with prayer for declaration, possession through official partition of the 1/4th share in the suit property. Defendants No. 2 and 10 again submitted cognovits to the suit of the plaintiff on 21.04.2021, while defendants No. 1, 3 to 9 relied upon the already submitted written statement vide order sheet No. 05 dated 31.07.2021.

4. Divergent pleadings of the parties were reduced into the following issues;

Issues:

1. *Whether the plaintiff has got cause of action?*
2. *Whether the plaintiff is estopped to sue?*
3. *Whether the suit of the plaintiff is time barred?*
4. *Whether the suit property is the ancestral ownership of the*

parties?

5. Whether the plaintiff is co-sharer in the suit property measuring 10 Jerab detailed through boundaries in the plaint?
6. Whether defendants No. 1, 7, 8 and 9 acquired through purchase five Jerab land including share of the plaintiff from defendants No. 3 to 6 without formal partition between the parties?
7. Whether defendants No. 1, 7, 8 and 9 are an illegal possession of the suit property?
8. Whether the defendants No. 3 to 6 are the cultivators of the suit land?
9. Whether defendant No. 1, 3 to 6 have made improvements in the suit property by constructing hospital?
10. Whether plaintiff is entitled to the decree as prayed for?
11. Relief?

Parties were given opportunity to produce evidence in support of their respective claims. The plaintiff produced and recorded the statements of following PWs;

5. **PW-01: Mir Akbar** S/O Muhammad Akbar recorded his statement being defendant No. 2. He had already submitted cognovit in favour of the plaintiff. He supported the stance of the plaintiff. He was thoroughly cross examined by the counsel for the defendants.

6. **PW-02: Itbar Gul** S/O Hussain Gul is the brother of defendant No. 10. He has also submitted cognovit to the suit of the plaintiff and supported his stance during his statement. His statement was also subjected to cross examination.

7. **PW-03: Asad Khan** S/O Muqem Khan. He is the nephew of the plaintiff and during fight with defendant No. 2, he got injured and later one share in the suit property was given to defendant No. 2 in lieu of compromise. He stated that defendant No. 3 to 6 without informing the

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 plaintiff has sold the property to defendant No. 1 and now they are resisting the partition of the suit property. He was cross-examined by the counsel for defendants No. 01, 07 to 09.

8. **PW-04: Malak** Yaqoot Ali s/o Faqeer Ali. He stated that he was member of the jirga dated: 26.01.2003, wherein the shares of the co-sharers in the suit property were determined however partition of the suit property at the spot was yet to take place. Copy of the jirga decision is Ex.PW-4/1 duly signed by him along with other marginal witnesses. He further stated that another jirga after institution of this suit in respect of partition of the suit property took place between the parties on 12.02.2022 in order to act upon the decision of jirga Ex.PW-4/1 and to hand over possession to the co-sharers of their respective shares in the suit property through partition but the defendants refused to conduct partition. Iqrar nama in respect of jirga dated: 12.02.2022 is Ex.PW-4/2 duly signed by him. He stated that defendants Akram Khan, Dowlat Khan, Aka Khel etc have sold their shares in favour of defendant No. 01 and now the official partition of the suit property has become indispensable in order to separate due shares of the co-sharers. He was cross-examined by the counsel for the defendants No. 01, 07, 08, 09 and 03 to 06.

9. **PW-05: Moeen Ali** S/O Manzar Ali. He is Naib Chairman of UC Paloosi. He was also a jirga member of jirga dated: 12.02.2022. He verified his signatures on Ex.PW-4/1 and also verified the contents of the jirga deed dated: 12.02.2022. His statement was also subject to cross examination by the counsel for the defendants.

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10. **PW-06: Khana Badshah** S/O Tor Khan. He stated that with the consent of the parties, he carried out the measurement of the suit property on 10.12.2020. Detail of measurements of suit property duly signed by him is Ex. PW-6/1. Copy of his CNIC is Ex. PW-6/2. He was also cross examined by the counsel for the defendants.

11. **PW-07: Mir Kalam Khan** S/O Mir Abdullah Khan. He stated that he was present at the time of measurement of the suit property. That beside him, Malak Khana Badshah and other Jirga members were also present with the parties at the spot. He verified his signatures on Ex. PW-6/1. Copy of his CNIC is Ex. PW-7/1.

12. **PW-08: Noor Muhammad** S/O Muqem Khan. He stated that he is scribe of the Jirga deed dated 21.04.2018. He verified his signatures along with signatures of other Jirga members over the same. Copy of the Jirga decision is Ex. PW-8/1.

13. **PW-09: Plaintiff Ayub Khan** S/O Miandad Khan. He stated that the suit property is their ancestral property and defendants Aka Khel S/O Musa, Daulat Khan S/O Ashraf Khan, Muhammad Din S/O Lal Khan and Tila Muhammad and Itbar Gul sons of Hussain Gul are his cousins and co-sharers in the suit property. That Muhammad Akbar S/O Mir Akbar was father of defendant No. 2 and tenant in the suit property. That in the year 2003-04, a dispute took place with Muhammad Akbar over the suit property and during fight, nephew of the plaintiff was stabbed. That a Jirga took place, during which the Jirga members Mir Kalam Khan etc made four shares of the suit property, out of which one share was given to Muhammad Akbar. That in the remaining 03 shares, one

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 share was given to the plaintiff and two shares were given to defendants No. 3 to 6 and 10. That again the whole suit property was given to Mir Akbar (defendant No. 2) in possession for cultivation. That in the year 2018, he got the knowledge that defendant No. 3 to 6 have secretly sold their two shares in the suit property in favour of defendant No. 1 and now defendant No. 1 has also got possession of some partial share of the plaintiff at the spot. He was also cross examined by counsel for the defendants at length.

14. On the other hand, defendants also produced and recorded the statements of 05 DWs. The gist of their evidence is as under;

15. **DW-01: Habib Ullah Khan** S/O Afriday Khan. He stated that there was disputed between the plaintiff and defendants No. 1, 7 to 9 over the suit property. He stood as surety in Jirga held for partition of the suit property between plaintiff and defendants No. 3 to 6 and 10. He stated that he partitioned the suit property into three portions, wherein each party was held entitled for one portion i.e., 30 shares. He also admitted that the suit property was ancestral property of Jawar Khel. He alleged that at the time of sale of their shares by defendants No. 3 to 6 he had asked the plaintiff that if he want to purchase the shares of defendants No. 3 to 6 let him inform within 25 days, but the plaintiff did not respond and the suit property was purchased by defendant No. 1.

That the property on which the hospital is being constructed, the same is inherited property of defendant No. 1, Malang Jan. That he was present at the time of Jirga between the defendant No. 1 and defendant No. 3 to 6 and a document was scribed which is Ex. DW-1/1. He stated during

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his cross examination that he has conducted the partition proceedings between the parties to the extent of shares. He admitted that at the time of partition, defendant No. 10 and plaintiff were not present at the spot.

16. **DW-02: Zarmela Khan** S/O Yar Khan. He stated that he was Jirga member between the plaintiff and defendant No. 1 in respect of the dispute over the suit property. That other members were Ghulam Habib, Khana Badshah and Gul Jabbar etc. That a Jirga decision was scribed at the time of Jirga which is Ex. DW-1/1 and correctly bears his signatures.

17. **DW-03: Aka Khel** is defendant No. 5 in the instant suit and is party No. 1 to deed dated 05.10.2017 which is Ex. DW-3/1. Copy of his CNIC is Ex. DW-3/2. He stated that he along with other defendants have sold their shares in the suit property on the strength of deed dated 05.10.2017 in favour of defendant No. 1 Haji Malang Jan and have received the entire sale consideration.

18. **DW-04: Daulat Khan** is defendant No. 4 in the instant suit. He is also party to and signatory of deed dated 05.10.2017 Ex. DW-3/1. He also repeated the same facts as described by DW-03 during his statement.

19. **DW-05: Samad Khan.** He is attorney for rest of the defendants except defendants No. 2 and 10. His power of attorney is Ex. DW-5/1 and his CNIC is Ex. DW-5/2. He stated that partition of the suit property took place in the year 2004. The property was divided into three shares, out of which Muhammad Din, Daulat Khan and Aka Khel have sold their share vide deed Ex. DW-3/1 in favour of defendant No. 1 Malang Jan. He stated that the plaintiff is bent upon damaging the business of

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defendant No. 1, who is constructing hospital over his property. He stated that he has prepared sketch of the property which is Ex. DW-5/3 wherein, the property purchased by the defendants has been shown with red graph.

20. Statements of all the DWs were cross examined by the counsel for the plaintiff and defendants No. 2 and 10.

21. After closing of evidence of the parties, arguments of the learned counsel for the parties were heard and available record perused.

My Issue wise findings are as under: -

ISSUE NO. 2 & 3:

22. The burden of proving of both these issues lies at the shoulders of the defendants. The defendants in preliminary objections of their written statements have alleged that the plaintiff is estopped to sue and his suit is barred by limitation, but except averments in their written statement neither they have lead any evidence on these issues, nor the same were pressed during the course of arguments, therefore, both these issues are decided in negative.

ISSUE NO. 9:

23. The plaintiff has alleged that defendant No. 1 has started construction over the suit property, while defendants No. 1, 7 to 9 have stated in their written statement that they have made construction over their ancestral property situated adjacent to the property purchased by them from defendants No. 3 to 6, however, no evidence has been produced regarding the specification of the portion of property, where the construction is being carried out, that whether the same is ancestral

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 property of the plaintiff or is part of the property purchased by them from defendants No. 3 to 6. As the burden of proving this issue is at the shoulders of the plaintiff, but he has not discharged the same, therefore, this issue No. 9 is decided in negative.

ISSUES NO. 1, 4, 5, 8 & 10:

All these issues are interlinked, hence taken together for discussion.

24. It is the case of the plaintiff that the suit property measuring about 10 Jerab (40 Kanals or whatever proved after proper measurement), situated near check post, Said Khalil Baba, Zerra towards west on left side beneath the road, is inherited property of the plaintiff and defendants No. 3 to 6 and 10. That out of the suit property, 01 share is already given to defendant No. 2 in lieu of compromise by the parties and he is still in possession of the same. That out of remaining 03 shares, plaintiff is entitled for one share, defendants No. 3 to 6 and 10 are entitled for two shares, but the defendants No. 3 to 6 without formal partition sold their shares in favour of defendant No. 1, 7 to 9 secretly without informing the plaintiff. That according to mutual agreement and customs of the area, the plaintiff was entitled to right of preemptive purchase being co-sharer, but he was deprived. That defendant No. 3 to 6 handed over the possession of the suit property, in favour of defendants No. 1, 7 to 9, including the shares of the plaintiff and defendant No. 10 and now defendant No. 1 has started construction over the same. Now, the plaintiff through the instant suit is seeking declaration and possession of his share through official partition of the

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suit property.

25. The perusal of record shows that plaintiff initially on 20.07.2020 submitted the instant suit, wherein he prayed for declaration, possession, permanent and mandatory injunctions in respect of the suit property. The plaintiff on 19.09.2020 submitted amended plaint at the order of the court by impleading some more defendants. Defendants No. 1, 3 to 6 on 05.09.2020 submitted written statements to the initial plaint dated 20.07.2020 and defendants No. 1, 7 to 9 also relied upon the same.

26. That plaintiff submitted another application for amendment in plaint by including prayer for possession of the suit property through official partition which was accepted by my learned predecessor in office vide order sheet No. 16, dated 08.03.2021 and the plaintiff was directed to submit amended plaint. The plaintiff submitted fresh amended plaint on 29.03.2021 containing prayer for possession through official partition in respect of the suit property. The defendants were asked to submit amended written statement, but vide order sheet No. 5, dated 31.07.2021, counsel for the defendants stated at the bar that he does not want to file amended written statement and replication and they relied upon the already submitted written statement dated 05.09.2020. Defendant No. 7 to 9 also relied upon the said written statement submitted by defendants No. 1, 3 to 6, while defendants No. 2 and 10 have already submitted cognovit in favour of the suit of the plaintiff.

According to law, the facts asserted by the plaintiff in the plaint, if not denied specifically and expressly by the defendant in the written statement shall be considered admitted and proved in favour of the

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plaintiff. In the present case, the defendants have not submitted a written statement to the amended plaint and thus they have not denied and rebutted the prayer of the plaintiff for possession through partition in respect of the suit property. The statements of PWs are also fully supporting the stance of the plaintiff regarding the status of property that the same is inherited property and has not been officially partitioned as yet. This stance of the plaintiff has remained unrebutted during cross-examination. The DWs also admitted in their statements that the suit property is inherited and the plaintiff along with defendant No. 2, 3 to 6 and 10 are co-sharers in the same, however, according to stance of the defendants, the suit property has been partitioned back in the year 2004.

DW-01 stated during his examination-in-chief that;

"جب مابین مدعیہ اور مدعا علیہم نمبر 3 تا 6 اور 10 تقسیم ہو رہا تھا تو میں موقع پر موجود تھا اور میں نے مابین مدعی اور مدعا علیہم نمبر 3 تا 6 اور 10 اراضیات کی، جس میں اراضی متدعو یہ بھی شامل ہے، کی تقسیم کی تھی۔ یہ اراضی 3 حصوں یعنی 30 "برخوں" پر تقسیم ہوئی۔ جب تقسیم ہوئی تو ہر ایک کو اپنا اپنا حصہ وصول ہوا۔"

But during cross-examination DW-01 admitted that;

تقسیم میں نے "برخوں" کی حد تک کی تھی۔

Meaning thereby that respective shares of the parties were not handed over to co-sharers at the spot after proper measurement. The statement of DW-01 was further shattered during the cross-examination as he categorically admitted that defendant No. 10 and plaintiff were not present at the time of partition. He also stated that;

یہ درست ہے کہ میں نے اپنے بیان میں یہ نہیں کہا کہ میں نے اراضی متدعو یہ کے کس حصے کا قبضہ کس فریق کو دیا۔

Which denotes that he is neither aware of the details of the shares allotted to the co-sharers during the partition proceedings, nor he has any

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supporting oral or documentary evidence in this respect.

27. DW-02, Zarmela Khan has admitted during cross-examination that whole of the suit property is in possession of defendant No. 01. This statement of DW-02 is alone enough for striking down the plea of defendants regarding the alleged partition. DW-03 who is defendant No. 5 in the instant suit has stated during examination in chief that partition of the suit property took place between them/co-sharers in the year 2004, but during cross examination he stated that partition took place between Daulat Khan and Ayub Khan beside him and he ignored the shares of defendant No. 2 and 10. He categorically admitted that he does not know about the exact measurement of the suit property. His lacking of knowledge about details of the partition denotes that no partition has taken place in his presence. PW-04 also admitted during cross examination that measurement of the property has never taken place through Patwari. In absence of amended written statement to the amended plaint, the prayer of plaintiff for possession through partition has not only remained unanswered and unrebutted, but all the evidence produced by the defendants in respect of the partition is departure from pleadings.

28. It is crystal clear from the above discussion that it is admitted fact that the suit property is the ancestral ownership of the plaintiff and defendants No. 3 to 6 and 10, while defendant No. 2 being cultivator of the suit property has already been given one share in the suit property in lieu of compromise by the defendants and he is still in possession of his share. Issue No. 4 is decided in positive.

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29. Issue No. 5 also decided in positive to the extent of co-sharership of the plaintiff to the extent of one share in the suit property, however, the exact authentic measurement of the total property is not available on the case file.

30. Similarly, as per above discussion defendants No. 3 to 6 and 10 are also co-sharers in the suit property to the extent of two shares and defendant No. 2 was admittedly cultivator of the suit property. Issue No. 8 is decided in negative.

31. As it has been established by the plaintiff through cogent evidence that the suit property is ancestral property of the plaintiff, defendant No. 3 to 6 and 10, while defendant No. 2 being cultivator has already been given one share in the suit property by the plaintiff and defendants No. 3 to 6 & 10 with mutual consent in lieu of compromise, furthermore, the plaintiff also succeeded to prove that no official partition of the suit property has taken place through metes and bounds between the plaintiff, defendants No. 3 to 6 and 10, therefore, in view of the evidence produced by the plaintiff, he is entitled for one share, while defendant No. 3 to 6 and 10 are entitled for two shares. As such no official partition has yet taken place, therefore, the plaintiff has got a cause of action and is entitled to the decree for possession through partition in respect of the suit property. Issue No. 1 & 10 are decided in positive accordingly.

ISSUES NO. 6 & 7:

Both these issues are interlinked, hence taken together for discussion.

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32. It is alleged in the plaint that defendants No. 3 to 6 have sold their share, in the suit property, in favour of defendant No. 1, 7 to 9. It is also alleged that possession of the share of the plaintiff and defendant No. 10 is also handed over by defendants No. 3 to 6 in collusion with defendant No. 2. Defendants No. 1, 7 to 9 have affirmed in their written statement that they have purchased the share of defendants No. 3 to 6 in the suit property at the strength of deed dated 05.10.2017 Ex. DW-3/1 and defendants No. 3 to 6 have nowhere denied this fact. As discussed vide my detailed discussion over issue No. 1, 4, 5, 8 & 10, no official partition of the suit property has taken place and defendants No. 1, 7, 8 & 9 being purchasers have stepped into the shoes of defendants No. 3 to 6. As per averments in the plaint at para No. 3, the plaintiff has categorically mentioned that possession of share of defendants No. 3 to 6 (about 05 Jerab) was handed over to defendants No. 1, 7 to 9, therefore, issue No. 6 is decided in positive, while issue No. 7 is decided in negative accordingly as per discussion above.

RELIEF:

33. As sequel to my above issue-wise findings, the plaintiff proved his case through cogent evidence that the suit property is ancestral of the plaintiff and defendants No. 3 to 6 & 10, while defendant No. 2 being cultivator has already been given one share in the suit property in lieu of compromise by the parties and he is still in possession of the same. In the remaining property no official partition has taken place as yet and the plaintiff along with defendants No. 3 to 6 (Defendant No. 1, 7 to 9 stepped into the shoes of defendants No. 3 to 6 being purchasers) and

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legal heirs of Hussain Gul are co-sharers in the suit property, therefore, preliminary decree for partition of the suit property is hereby granted in favour of the parties. No order as to cost.

34. File be consigned to the record room after its completion and compilation.

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CERTIFICATE

Certified that this judgement of mine consists of sixteen (16) pages, each has been checked, corrected where necessary and signed by me.

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