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

Civil Suit No.	345/01 Neem OF 2020.
Date of Original Institution:	15.10.2020.
Date of Remand In:	25.08.2022.
Date of Decision:	23.04.2024.

*Muhammad Sajid S/O Gul Syed R/O Qaum Mamozai, Tappa Ado Khel,
Tehsil Upper, District Orakzai*
.....(Plaintiff)

VERSUS

1. *Muhammad Rauf S/O Muhammad Rafeeq,*
2. *Muhammad Saeed S/O Muhammad Kamal,*
3. *Muhammad Rafeeq S/O Usman Khan,*
4. *Muqadar Shah S/O Gul Syed,*
5. *Nazia Bibi W/O Sabir Gul,*
6. *Shakiba W/O Muhammad Zia Ul Haq all residents of Qaum
Mamozai, Tappa Ado Khel, Tehsil Upper, District Orakzai*
.....(Defendants)

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

JUDGEMENT:

23.04.2024

1. Plaintiff Muhammad Sajid brought the instant suit for declaration cum-perpetual and mandatory injunction and possession of the suit house by demolition of illegal construction forcibly made/started by defendants No. 1 to 3. According to plaintiff, he is owner of the suit house situated at Mamozai, District Orakzai, the description of which is as under;

a. Towards east of the suit house—four fields of the plaintiff.

b. Towards west—three fields of the plaintiff

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- c. Towards north—vacant plot of the plaintiff and
 d. Towards south—houses of Muhammad Younas and Ghani Shah.

2. The plaintiff alleged that the suit house is his ancestral property and has been devolved upon him, his brothers and sisters through inheritance and defendants No. 1 to 3 have got no concern with the ownership of the same. It is alleged that during Talibanization, the plaintiff along with his family shifted to District Hangu and defendants in absence of the plaintiff started illegal construction in his house which is affecting the rights of the plaintiff, therefore, the defendants be restrained from illegal occupation, construction and changing nature of the house. That on 01.09.2019, vide form No. 146512, CLCP survey of the house was conducted and an amount of Rs. 400,000/- was paid to the plaintiff as compensation through cheque No. 39874604, which is proof of the fact that defendant No. 1 to 3 has got no concern with the suit house. That during Talibanization and operation of Pakistan Army, the people of District Orakzai including the plaintiff shifted to District Hangu along with their families. That defendants No. 1 to 3 in absence of the plaintiff have started illegal construction in the suit house, therefore, they be restrained from illegal occupation, construction and changing nature of the house. He alleged that the defendants were asked time and again to refrain from illegal occupation and construction, but they refused and hence the instant suit.

Defendants were summoned. Defendant No. 1 in person and as special attorney for defendant No. 2 while defendant No. 3 through his counsel appeared. Defendants No. 4 to 6 were placed and proceeded ex-

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 parte. Counsel for defendant No. 1 & 2 stated at the bar that he does not want to submit amended written statement and relied upon the already submitted written statement dated 16.02.2021 and written statement of defendant No. 3 submitted on 29.03.2023.

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 suit of the plaintiff is based on malafide?*
3. *Whether the suit of the plaintiff is within time?*
4. *Whether the suit house is the ownership and possession of the plaintiff and is their inherited property?*
5. *Whether the suit house was given to the predecessors of the plaintiff namely Yar Zada for temporary residence by the predecessors of the defendants in lieu of his services being "Nayan Family" (Barber) and the plaintiff has got no right of ownership in the area?*
6. *Whether the suit house was declared to be the ownership of the defendants, according to the decision of Jirga dated 05.08.1999 between Yar Zada and defendant No. 3 and the same is inherited property of the defendants?*
7. *Whether the defendants shifted to Peshawar during the operation of Pak Army and the plaintiff in collusion with concerned authorities/committee has received an amount of Rs. 400,000/- fraudulently as compensation against the disputed house?*
8. *Whether plaintiff is entitled to the decree as prayed for?*
9. *Relief?*

Parties were given opportunity to produce evidence in support of their respective claims. Previously before submission of amended pleadings and framing of amended issues, the parties had already

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produced their evidence, the gist of which is as under;

5. **PW-01: Muhammad Ajmal**, record keeper, DC office Orakzai, appeared as PW-01, who produced CLCP form of the plaintiff, through which the plaintiff has received compensation for the damaged house/suit house. The form along with pictures of the team and copy of the CNIC of the plaintiff are Ex. PW-1/1.

6. **PW-02: Khan Syed**, a family member of the plaintiff, appeared as PW-02, who narrated the same story as alleged in the plaint.

7. **PW-03: Muqaddar Shah**, brother of the plaintiff appeared as PW-03, who also supported the stance of the plaintiff by narrating the same facts as alleged in the plaint. During cross examination he has stated that after military operation, the plaintiff went back to the area and constructed a room in the suit house. He also stated that his father died in the year 2009 and has been buried in their ancestral graveyard.

8. **PW-04: Muhammad Sajid** plaintiff himself repeated the contents of the plaint in his examination in chief. During cross examination, he stated that on the east of the suit house there are four fields owned by them and on the other side of the house there is a vacant plot owned by them. He stated that defendant No. 1 & 2 are not doing any construction rather they were intended to do the same. He further stated that during CLCP survey of the suit house, the Maliks of the area were present and at their verification, the compensation amount was disbursed on him.

9. **PW-05: Fazal Badshah**. He is uncle of the plaintiff and deposed in support of the contents of the plaint.

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On the other hand, the contested defendants in order counter the claim of the plaintiff, produced the following DWs.

10. **DW-01: Muhammad Rauf.** He is defendant No. 1. He denied the claim of the plaintiff during his examination in chief, but he admitted during cross examination that the construction of the suit house was done by the one Yar Zada (predecessor of the plaintiff) and his sons. He stated that they have not filed any recovery suit against the plaintiff on account of receiving the CLCP amount and that they have not filed any application before the concerned Tehsildar/committee for cancelation of the survey in the name of the plaintiff in respect of the suit house.

11. **DW-02: Muhammad Jalil.** He supported the stance of the contesting defendants during his statement, but admitted during his cross examination that so far as, he remembers, the grandfather of the plaintiff namely Yar Zada was residing in the suit house. He admitted that the plaintiff belongs to Adho Khel tribe and that he is not witness to the Jirga taken place between the predecessor of the parties regarding the suit house.

12. **DW-03: Shah Fahad Qureshi.** He admitted during his cross examination that he has not seen the suit house and he is not witness to the fact that the suit house was given to the plaintiff by contesting defendants for temporary residence. He stated that no Jirga regarding the suit house has taken place in his presence.

13. **DW-04: Aziz Ur Rehman.** He appeared in support of the stance of the contesting defendants, but during his cross examination he admitted that he is not witness to a Jirga taken place between the parties in respect

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of the suit house. He also stated that so far as he remembers, one Yar Zada has been residing in the suit house. He also admitted that the contesting defendants were present at the time of CLCP survey and that there is a separate graveyard of the "Qaum Nayan" (Barber caste) in the vicinity of the suit house.

14. After conclusion of the evidence of the parties my learned predecessor in office decreed the suit in favour of the plaintiff vide his order and judgement dated 31.05.2022. Feeling aggrieved from the said judgement and decree dated 31.05.2022, the defendants/appellants preferred civil appeal No. 6/13 dated 22.06.2022 which was decided by the then Hon'ble District Judge, Orakzai vide his judgement and order dated 05.08.2022. He set aside the impugned judgement and decree and remanded the case back to this court with the directions to decide the case afresh on the basis of merits after receiving amended pleadings of the parties and giving opportunity of additional evidence to both the parties.

15. After receiving the remand order dated 05.08.2022, the plaintiff was directed to submit amended plaint, which he submitted on 22.12.2022. Vide order No. 15, dated 25.05.2023 and order No. 24, dated 18.10.2023, the contesting defendants No. 1 & 2 relied upon the already submitted written statement dated 16.02.2022 and written statement submitted by defendant No. 3 on 29.03.2023.

16. In view of the divergent pleadings of the parties the above-mentioned amended issues were framed on 18.10.2023 and as per remand order dated 05.08.2022 of Hon'ble District Judge, Orakzai, the

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parties were given opportunity of producing additional evidence in support of their respective claims.

The plaintiff produced and recorded the statements of following PWs as additional witnesses.

17. *APW-01*: Khaista Akbar presently posted as Tehsildar Hangu, the then member Citizen Losses Compensation Program (CLCP) stated on oath that he was posted as Tehsildar Orakzai in the year 2019 and was member of CLCP survey team. He stated that he visited along with survey team on 01.09.2019 for survey of the plaintiff's house. He verified the survey documents already Ex. PW-1/1. He was cross examined by the counsel for the defendants.

18. *APW-02*: Plaintiff Muhammad Sajid again appeared as APW-02 and he relied upon his examination in chief already recorded as PW-04. He was again subjected to lengthy cross examination by the counsel for the defendants. Counsel for the plaintiff closed the plaintiff's additional evidence.

19. On the other hand, the defendants recorded the statement of Muhammad Saeed, who is defendant No. 2 himself and is attorney for defendant No. 4, as RDW-05 who produced the copy of the Jirga decision dated 05.08.1999 which is Ex. RDW-5/2. He was cross examined by the counsel for the plaintiff at length.

20. 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: -

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ISSUE NO. 2:

21. The defendants in their written statements have alleged that suit of the plaintiff is based on malafide, but they failed to produce any evidence in this respect, furthermore, the same is not pressed during the course of arguments by the counsel for the defendants. Issue is decided in negative.

ISSUE NO. 3:

22. The perusal of record shows that prior to the institution of the instant suit, survey of CLCP vide form No. 146512, dated 01.09.2019 was completed in the name of the plaintiff and after that the defendant has made attempt to raise construction in the suit house in absence of the plaintiff, regarding which the instant suit is instituted on 15.10.2020 which is well within time. Issue is decided in positive.


ISSUE NO. 4 & 5:

Both these issues are linked hence taken together for discussion.

23. It is alleged in the written statement that predecessor of the plaintiff namely Yar Zada was barber by profession/caste and the suit house was given to him temporarily by the defendants in lieu of his services according to customs of the area.

24. The plaintiff has alleged that he along with other brothers and sisters are the owners of the suit house while on the other hand, the contesting defendants alleged that plaintiff is not the owner of the suit

house, rather the plaintiff belongs to barber family (Nayan family) whose grandfather namely Yar Zada was given the land of the suit house temporarily for construction of house over the same in lieu of his


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services rendered to the predecessors of the contesting defendants. It is alleged that plaintiff has now shifted to District Hangu and the house constructed by the plaintiff has completely damaged and now plaintiff has got no right to assert himself as the owner of the land on which the suit house was constructed.

25. PW-01 is the statement of Ajmal Khan S/O Muhammad Akbar, Record Keeper of Deputy Commissioner, Orakzai, who produced the CLCP form through which the plaintiff has received compensation for the damaged/suit house. The survey form is accompanied by pictures of the team conducting survey and copy of the CNIC of the plaintiff and Qabz Ul Wasool which are Ex. PW-1/1. The said document is the only authentic document which reflects that the possession of the suit house was with the plaintiff even in the year 2019 at the time of CLCP survey. There is no revenue record in the erst-while FATA and the said document i.e., Ex. PW-1/1 is the only available authentic document having presumption of truth attached to the same and prima facie shows that the plaintiff was owner in possession of the suit house.

26. PW-03 brother of the plaintiff asserted that after military operation, the plaintiff went back to the area and constructed a room in the suit house. This statement of PW-03 has remained unrebutted and supports the version of the plaintiff regarding the possession and ownership of the suit house. It is also stated by PW-03 that his father died in the year 2009 and has been buried in their ancestral graveyard at Orakzai, meaning thereby that the family of the plaintiff have their own separate graveyard in the area which denotes that there are no

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restrictions of ownership on barber families and they have got ownership at District Orakzai. It is categorically mentioned in the plaint and description of the suit property as well as in the evidence of the plaintiff that plaintiff owns property at eastern and northern side of the suit property, but the same has not been rebutted by the defendants in their written statement and during the course of evidence. Furthermore, the documents produced by PW-01 i.e., Ex. PW-1/1 which were later on authenticated by the then Tehsildar Orakzai namely Khaista Akbar during his statement as APW-01 and the statement of PW-03 regarding the presence of family graveyard of the plaintiff establishes the fact of ownership and possession of the plaintiff regarding the suit house. It is worth mentioning here that PW-04 during his statement has stated that they have no "Lokhay" (Lokhay is tradition in the area under which protection/shelter is sought/given by a resident of erst-while FATA to the outsider or to any person who seeks such shelter or protection) meaning thereby that plaintiff has not remained under the shelter of any person. This fact has also remained unrebutted.

27. On the other hand, DW-01 has admitted the fact during his cross examination that the suit house was built by the grandfather of the plaintiff. It is also admitted that till now neither the defendants and their sons have objected the CLCP survey, nor they have filed any recovery suit against the plaintiff. DW-02 also admitted during cross examination that as far as he remembers, the grandfather of the plaintiff has been residing in the suit house and that the plaintiff belongs to Adho Khel tribe. DW-01, during his statement has stated that the suit house will be

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approximately 20 marlas, but Ex. PW-1/1 clearly shows that the suit house is only 10 marlas. DW-02 also stated that no Jirga in respect of suit house has taken place between the plaintiff and the defendants. DW-03, Shah Fahad Qureshi is a student of Kohat University and has been residing for the last 10 years in Kohat. He admitted that he has not seen the suit house and that the same was not given to the plaintiff for residence in his presence, meaning thereby that he is not the relevant witness. DW-04, admitted during his cross examination that at the time of CLCP survey, defendant Rauf and Saeed were present in the area, but astonishingly they have not raised any objection regarding ownership of the suit house before the CLCP survey team. DW-04 also admitted that one field of the plaintiff is adjacent to their village which also denotes that the plaintiff has got ownership of property in the area. He also admitted that "Nayan caste" have got their own graveyard in the area. He further stated that as far he remembers, Yar Zada (predecessor of the plaintiff) has been residing in the suit house.

28. From above statements of PWs and admissions of DWs, it is established that although the predecessor of the plaintiff Yar Zada was barber by profession but there is no evidence brought on record by the defendants in support of their claim that barber family (Nayan Family) have got no right of ownership at Orakzai rather the plaintiff established that "Nayan Family" have their separate entity in Adho Khel tribe and are not under the protection (Lokhay) of someone else. The plaintiff along with his brothers and sisters are the owners of the suit property while defendants badly fail to prove the fact that the suit land was given

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by their predecessors to the predecessors of the plaintiff temporarily for construction of house. Issue No. 04 is decided in positive and issue No. 5 negative.

ISSUE NO. 6:

29. The defendants have alleged in their written statements that the suit house was given to the predecessor of the plaintiff namely Yar Zada temporarily by the predecessor of defendants and in this respect a Jirga took place between the predecessor of plaintiff namely Yar Zada and defendant No. 3 on 05.08.1999. The defendants alleged that it was decided in the said Jirga that the suit house is the ownership of the defendants and whenever the defendants demanded, the plaintiff will be bound to hand over possession of the suit house to them. The defendants during the course of evidence have produced as many as five DWs, but none of them is the witness or member of Jirga dated 05.08.1999. The defendants have not even bothered to annex the Jirga decision dated 05.08.1999 with their written statement. The Jirga decision dated 05.08.1999 was exhibited as RDW-5/2 under the objection by the counsel for the plaintiff and such objection is valid on the ground that neither the defendants have produced the original document nor any of its marginal witnesses or Jirga members and its scribe has been produced before the court for proving its genuineness in accordance with

the Qanon-E-Shahadat Order, 1984. The photostat copy of the alleged Jirga decision bears the names of Jirga members i.e., Haji Akbar Khan, Haji Ghazi Marjan, Haji Ghani Shah, Haji Noormat Khan, Haji Gul Akbar, Mir Salam Khan, Haji Noor Rehman, Mehmood Khan, Fazl E

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Wahab and Taj Badeen, but the defendants failed to show that why they have not been produced before the court in support of the Jirga decision dated 05.08.1999. One these scores the alleged Jirga decision dated 05.08.1999 being not proved is hereby discarded. Issue No. 6 is decided in negative.

ISSUES NO. 7:

30. The defendants have alleged in their written statement that they shifted to Peshawar and settled there during the Army operation in the area and the plaintiff in collusion with the concerned authority fraudulently received an amount of Rs. 400,000/- as compensation in respect of the suit house, but neither any evidence has been produced by the defendants in respect of any collusion or fraud committed by the plaintiff, nor a single question has been put in respect of any collusion or fraud during cross examination of APW-01 Khaista Akbar, Tehsildar who was the then CLCP member. Defendant Muhammad Rauf himself is not sure about any fraud committed by the plaintiff in getting compensation in respect of the suit house. He during his cross examination as DW-01 has stated that

یہ درست ہے کہ مکان متدعو یہ کے سروے کر رقم کی نسبت ہم نے مدعی کے خلاف کوئی دعویٰ دائر نہیں کیا ہے از خود کہا کہ اگر انھوں نے فراڈ کر کے معاوضہ لیا ہے تو غلط طور پر لیا ہے۔ یہ درست ہے کہ ہم نے سروے کے خلاف تحصیلدار وغیرہ کو بھی بابت

منسوخی کوئی درخواست نہیں دی ہے

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He further stated during the cross examination that a survey was also conducted in respect of his burnt house and the same was done at the instance of defendant No. 2, Saeed. DW-04, confirmed during his

cross examination that at the time of survey, defendant Muhammad Rauf and Muhammad Saeed were present in the area. This admission of DW-01 and DW-04 has confirmed that the defendants were in the knowledge of the alleged survey in respect of the disputed house, but they have neither raised any objection nor they have submitted any application for cancelation of the same before the proper forum, therefore, the question of collusion and fraud in obtaining the compensation of Rs. 400,000/- is hereby ruled out. Issue is decided in negative.

ISSUES NO. 1 & 8:

31. As sequel to my above issue-wise findings, the plaintiff proved his case through cogent evidence that the suit property is in his ownership and possession since his forefathers, therefore, they have got cause of action and are entitled to the decree as prayed for. Issues No. 1 & 8 are decided in positive.

RELIEF:

32. As sequel to my above issue-wise findings, the plaintiff proved his case through cogent and confidence inspiring evidence, therefore, his suit is hereby decreed as prayed for. No order as to cost.

33. 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 fifteen (15) pages, each has been checked, corrected where necessary and signed by me.

Bakht Zada
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