

IN THE COURT OF ZAHIR KHAN CIVIL JUDGE-I, KALAYA, ORAKZAI

Case No:.....57/1 of 2020.

Date of Institution:.....03.09.2020.

Date of Decision:.....30.04.2024.

Torak Jan S/O Mustajab Khan R/O Qaum Feroz Khel, Tappa Jeesal Khel,
Tori Khawri, Tehsil Lower, District Orakzai.

.....(Plaintiff)

Versus

Sabereen S/O Fazal Rehman R/O Qaum Feroz Khel, Tappa Tori Khawri,
Tehsil Lower, District Orakzai.

.....(Defendant)

**SUIT FOR DECLARATION CUM-PERMANENT INJUNCTION,
POSSESSION OF PATH AND RECOVERY OF RS. 01 LAC.****JUDGMENT****30.04.2024**

Plaintiff present through clerk of counsel. Defendant present in person.

Final arguments already heard and record perused.

Through this judgment, I am going to decide the suit in hand filed by
plaintiff namely Torak Jan against the defendant namely Sabereen.

Brief facts of the case are that plaintiff has filed the instant suit for
declaration cum-permanent prohibitory and mandatory injunction to the
effect that he is lawful owner in possession of suit house measuring 50

Marlas fully detailed in the head note of plaint since his forefathers and that
defendant has got no right to claim ownership of the suit house, make
interference, block its gutter, widen/extend the path and cut/remove trees.

Refusal/denial of defendant in this respect is totally illegal unlawful and thus



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ineffective upon the rights of plaintiff and plaintiff may be declared as owner in possession of the property mentioned above. Plaintiff has also sought possession of path through demolition, unblocking of gutter as alternate and recovery of Rs. 100,000/- as price of trees cut/removed by defendant from the suit property.

After institution of the suit, defendant was summoned, who appeared before the court and contested the suit by filing written statement and reply. He denied the claim of plaintiff contending that plaintiff has got no cause of action. Plaintiff has not come to the court with clean hands and that suit of plaintiff is time barred and liable to be dismissed.

From divergent pleadings of the parties, the followings issues were framed for adjudication of real controversy between the parties.



ISSUES

1. Whether the plaintiff has got cause of action? OPP
2. Whether suit of plaintiff is within time? OPP
3. Whether this court lacks jurisdiction to entertain the suit of plaintiff?
OPD
4. Whether suit of plaintiff is bad due to non-joinder and mis-joinder of the parties? OPD
5. Whether plaintiff is estopped to sue? OPD
6. Whether plaintiff is lawful owner in possession of the dwelling suit house measuring 50 marlas comprising of 05 rooms, 01 washroom, 01 toilet, one gutter, court yard, main gate and trees? OPP

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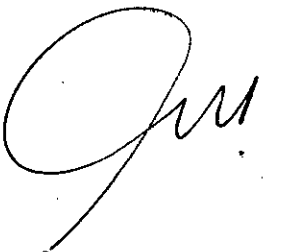
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7. Whether plaintiff is entitled to the possession of suit path through demolition? OPP.
8. Whether defendant has blocked the gutter of the dwelling house owned and possessed by plaintiff and it is liable to be unblocked? OPP.
9. Whether plaintiff is entitled to the recovery of Rs. 100,000/- as price of trees cut/removed by defendant? OPP
10. Whether plaintiff is entitled to decree as prayed for? OPP
11. Relief?

Upon submission of list of witnesses, both the parties on being provided with an opportunity to adduce their respective evidence, the parties produced their evidence. Plaintiff in support of his claim and contention produced 07 witnesses while defendant produced 03 witnesses in defense.

Khurshid Ahmad S/O Abdul Aziz, appeared and deposed as PW-01. He is one of the jirga members held on 29.08.2006 for resolution of controversy between the plaintiff and defendant. Copy of his CNIC is Ex-PW-1/1.

Plaintiff Torak Jan, himself deposed as PW-02. He reiterated the averments of plaintiff. Photographs (04 in number) in respect of the suit property were exhibited as Ex. PW-2/1. Copy of his CNIC is Ex. PW-2/2. Shah Fayaz, son of plaintiff deposed as PW-03. He produced sketch of the suit property as Ex.PW-3/2, copy of jirga decision dated 28.08.2006 as Ex.PW-3/3, picture of disputed path as Ex.PW-3/4, copy of his CNIC as Ex.PW-3/5. Habeeb Khan, Ajmeer Khan, Taj Muhammad and Ghameen Ur Rehman appeared and deposed as PW-04 to PW-07. They supported the stance of plaintiff. Copies

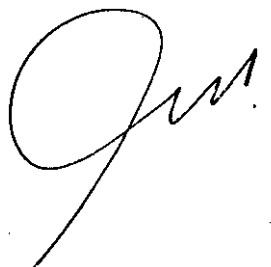

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of their CNICs are Ex. PW-4/1, Ex. PW-5/1, Ex. PW-6/1 & Ex.PW-7/1 respectively. Thereafter, plaintiff closed his evidence.

Defendant, in support of his claim and contention produced three witnesses. Defendant Sabereen himself deposed as DW-01. He denied the claim of plaintiff asserting that the suit property is the joint/un-partitioned ownership of Qaum/Kandi Feroz Khel and he is using the suit path since long. He produced first jirga decision copy of the same is Ex.DW-1/1 and second jirga decision dated 05.03.2020 as Ex.DW-1/2. He lastly requested for dismissal of the suit. Wazeer Janan S/O Abdul Janan and Badshah Meer S/O Taj Meer, who are jirga members appeared and recorded their statements as DW-02 and DW-03 respectively. Copies of their CNICs are Ex.DW-2/1 and Ex.DW-3/1.

Thereafter, evidence of defendant was closed.

After completion of evidence of the parties, arguments of the learned counsel for the parties were heard and record of the case file was gone through with their valuable assistance.



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My issue wise findings are as under: -

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Issue No.02. Whether suit of plaintiff is within time? OPP.

Contention of defendant is that suit of plaintiff is not within time without mentioning any ground in the preliminary objections of his written statement. As per averments of plaintiff, cause of action accrued to the plaintiff when defendant denied legal claims of plaintiff and blocked gutter of the house owned and possessed by him. Per record, different jirgas were held for resolution of controversy between the parties, one of the jirga was held in the

year 2020. Suit in hand was submitted before the learned Senior Civil Judge on 26.08.2020 and it was registered on 03.09.2020 by the court of learned Civil Judge-I, Orakzai (at Baber Mela). Period of limitation for filing declaratory suit under Article 120 of Limitation Act, is six years. Furthermore, after the 25th Constitutional (Amendment) Act, 2018, all Federal and Provincial Laws stood extended to the newly merged districts, therefore, suit of plaintiff is held to be within time. Hence, issue No. 2 is decided in positive.

Issue No.03. Whether this court lacks jurisdiction to entertain the suit of plaintiff? OPD.


This objection has neither been taken in the preliminary objections in the written statement nor brought on record during course of recording evidence and arguments. There is nothing on record which could show that this court lacks jurisdiction to decide the case, hence, issue No. 3 decided in negative.

Issue No.04. Whether suit of plaintiff is bad due to non-joinder and mis-joinder of the parties? OPD.

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 defendant to be improperly or unnecessarily enlisted in the suit. Therefore, issue No. 4 is decided against the defendant.

Issue No. 5. Whether plaintiff is estopped to sue? OPD.

Burden of proof regarding this issue was on defendant. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of



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defendant, therefore issue No. 5 is decided in negative and against the defendant.


Issue No.06. Whether plaintiff is lawful owner in possession of the dwelling suit house measuring 50 marlas comprising of 05 rooms, 01 washroom, 01 toilet, one gutter, court yard, main gate and trees? OPP.

As mentioned above, claim and contention of plaintiff is that he is lawful owner in possession of the dwelling suit house measuring 50 Marlas fully detailed in the head note of plaint since his forefathers and that defendant has got no right to claim ownership of the same, make interference, block its gutter, widen/extend the path and cut/remove the trees in the suit property. Refusal/denial of defendant in this respect is totally illegal, unlawful and thus ineffective upon the rights of plaintiff and plaintiff may be declared as owner in possession of the property mentioned above.

Plaintiff produced 07 witnesses to establish his stance. As per available record, plaintiff is owner in possession of the suit house since his forefathers.

All the PWs are consistent on this point. Defendant, in his written statement has not specifically denied ownership of plaintiff in respect of the suit house.

There is evasive denial of the claim of plaintiff in the written statement of defendant. All the DWs have also admitted possession of plaintiff over the suit house. Even otherwise, there is no land record in this newly merged district and longstanding possession over a property is of very much importance. As far as, the gutter of the dwelling house owned and possessed by plaintiff is concerned, plaintiff failed to establish that he is the exclusive owner of the portion of the land with gutter. Per statements of PWs, the same



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is situated in the joint and un-partitioned land. PW-01, stated in his cross examination that;

میں یہ نہیں کہہ سکتا کہ راستہ متدعو یہ اور جائے گٹر ملکیت مدعی کی ہے یا مد علیہ کی۔

Similarly, PW-03, who is son of plaintiff, stated in his cross examination that;

یہ درست ہے کہ جہاں پر گٹر بنایا گیا ہے یہ ہمارا نہ ہے۔ از خود کہا کہ مشترکہ اراضی پر ہے۔

Hence, keeping in view the above discussion, it is held that plaintiff produced cogent, convincing and reliable evidence in support of his claim to the extent of ownership of the dwelling house measuring 50 marlas comprising of 05 rooms, 01 washroom, 01 toilet, court yard and main gate. Issue No. 06 is decided accordingly.

Issue No.7. Whether plaintiff is entitled to the possession of suit path through demolition? OPP.

Per averments of plaint, defendant has widen/extended the suit path leading to his dwelling house and the same is liable to be demolished/detached and possession thereof be handed over to plaintiff. Defendant has denied this stance of plaintiff. Burden of proof regarding this issue was on plaintiff. Per record, the disputed path is not the exclusive ownership of plaintiff. Evidence on record shows that defendant was allowed to utilize the suit path as the only source of access from main road to his dwelling house. There is no other path from main road to the house of defendant. Even, the PWs have admitted in their statements that the suit pat



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is the only source of access to the house of defendant. PW-07, stated in his cross examination that;

اگر راستہ متدعو یہ بند ہو جائے تو مدعا علیہ کے مکانات تک جانے کا راستہ مین روڈ سے نہیں ہے۔

Plaintiff, who deposed as PW-01, stated in his cross examination that;

یہ درست ہے کہ تحریر میں درج ہے کہ پرانے طریقے پر گٹر اور راستہ کھلا ہو گا۔

Hence, keeping in view the above discussion, issue No. 07 is decided in negative and against the plaintiff.

Issue No.8. Whether defendant has blocked the gutter of the dwelling house owned and possessed by plaintiff and it is liable to be unblocked? OPP.

Claim of plaintiff is that defendant has blocked gutter of the dwelling house owned and possessed by him which has created havoc in the street with unhygienic atmosphere full of rankness. This stance of plaintiff is supported by PWs in their statements. PW-01 and PW-04, who were jirga members of the jirga held to resolve the controversy between the parties, fully supported the stance of plaintiff. Per record, the gutter existed since long and it is very much in line with dwelling house of the plaintiff. The jirga decision Ex. DW-1/1, Ex. DW-1/2, pictures Ex. DW-1/4 and statements of witnesses show that the gutter existed since long and it is in line with the dwelling house of the plaintiff. Per jirga decisions, it was held that the gutter will remain serviceable/unblock and defendant shall not block the same. DW-02, stating in his cross examination that;

یہ درست ہے کہ راستے کے کیساتھ گٹر واقع ہے جس پر مٹی پڑی ہوتی تھی۔ یہ بھی درست ہے کہ گٹر لائن طورک جان کا ہے۔



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Similarly, DW-03 stated in his cross examination that;

جرگہ 05.03.2020 کو کیا تھا۔ تحریر لکھنے کے بعد دونوں فریقین اور جرگہ والوں نے دستخط کئے۔ جرگہ تحریر مدعا علیہ نے خود

تحریر کیا تھا۔ مجھے راستے کے فٹواری کے بابت علم نہ ہے۔ ایک کے لئے ہم نے گٹر کھولا تھا اور دوسرے کے لئے راستہ کھول دیا تھا۔

Keeping in view the above discussion, it is held that gutter is blocked by defendant and the same is liable to be unblocked. Hence, issue No. 08 decided in favor of plaintiff and against the defendant.

Issue No.09. Whether the plaintiff is entitled to the recovery of Rs. 100,000/- as price of trees cut/removed by defendant? OPP.

Per averments of plaint, defendant has cut/removed trees of plaintiff worth Rs. 01 lac. Burden of proof of this issue was on plaintiff. Record shows that neither statement of plaintiff nor statements of other PWs are supportive to the stance of plaintiff regarding cutting/removal of trees of plaintiff by defendant worth Rs. 01 lakh. PW-05 stated in his cross examination, that he has not seen anyone cutting/removing trees of plaintiff;

راستہ مند عویہ میں تقریباً 5/6 درختان تھے۔ چنار اور تھو تان کے علاوہ باقی کاٹے گئے ہیں۔ سفیدے درخت کی کوئی قیمت نہیں۔ اگر کوئی

لے جائے تو کوئی فرق نہیں پڑ سکتا ہے۔ میں نے کسی کو درخت کاٹتے ہوئے نہیں دیکھا ہے۔

Similarly, PW-06 stated in his cross examination that he has not seen anyone while cutting/removing trees of plaintiff.

میں نے کسی کو درخت کاٹتے ہوئے نہیں دیکھا۔ شاید برائی کی وجہ سے ٹوٹ گئے ہو۔ مجھے یہ علم نہ ہے کہ درخت برائی کے وقت ٹوٹ گئے

ہے یا کسی نے کاٹے ہیں۔

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Keeping in view the above discussion, it is held that plaintiff failed to prove that his trees worth Rs. 01 lakh are cut/removed by defendant. Hence, issue No. 09 is decided against the plaintiff and in favor of defendant.

Issue No.1 & 10:

Keeping in view my issue wise findings, it is held that plaintiff has got cause of action and is entitled to the partial decree of the suit as explained in this judgment.

Relief?

Crux of my issue wise discussion is that suit of the plaintiff is hereby partially decreed in his favor against the defendant in the following terms:


Relief claimed in prayer "Alif":

Relief sought in prayer "Alif" is decreed to the extent that plaintiff is owner in possession of the dwelling suit house measuring 50 marlas comprising of 05 rooms, 01 washroom, 01 toilet, court yard with main gate. Defendant is permanently restrained as prayed for. Rest is dismissed.

Relief claimed in prayer "Bay":

Relief sought in prayer "Bay" is decreed to the extent that defendant shall unblock the gutter and he is permanently restrained from blocking the gutter of the dwelling house owned and possessed by plaintiff while relief claimed regarding possession of suit path through demolition is denied.

Relief claimed in prayer "Jeem":

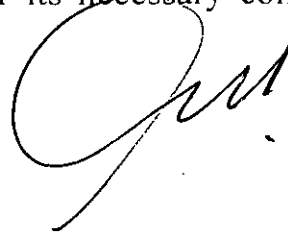


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Relief sought in prayer "Jeem" for recovery of Rs.100,000/- as price of trees is dismissed being not proved. No order as to costs.

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

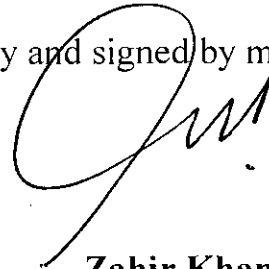
ANNOUNCED
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CERTIFICATE

It is certified that this judgment consists of 11 pages. Each page has been dictated, read, corrected, where necessary and signed by me.



Zahir Khan
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