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IN THE COURT OF ABDUL BASIT,
ADDITIONAL DISTRICT JUDGE-II, ORAKZAI

Civil Appeal No.16/13 of 2024

Date of institution: 30.05.2024

Date of decision: 04.09.2024

Date of consignment:

Khan Zadin son of Raza Din resident of Sheikhan Tappa Umar Zai, Mian Khel Tara Tehsil Central, District Orakzai (appellant/defendant)

Versus

Muhammad Saeed son of Ajra Din resident of Lak Kanray, Tappa Umar Zai, Quom Sheikhan Central Orakzai (respondent/plaintiff)

**APPEAL UNDER SECTION 96 OF CPC AGAINST
THE JUDGEMENT AND DECREE OF THE LEARNED SENIOR
CIVIL JUDGE, ORAKZAI**

JUDGMENT

Through this judgment I will decide appeal preferred by appellant against respondent challenging the judgment, decree and order dated 29.04.2024 of the Court of learned Senior Civil Judge, Orakzai whereby he has decreed the suit of respondent/plaintiff.

Concise facts of the case as per amended plaint are that parties at dispute belonged to same family; that three fields namely 1. **Kohi Patay field** measuring around 20 marla bounded from east fields of Rasheed Khan, west fields of Aalim Jan, north fields of Khan Zadin & west fields of Agha Jan 2. **Rehman Mulla Dari field** measuring around 10 marla bounded from east, north, south lands of Rehman Mulla & west house of Rehman Mulla 3. **Sirai field** measuring around 22 marla bounded from east fields of Eidullah Mir, west fields of appellant/defendant and Noor Zadin, north Lak Tara & south house of Eidullah Mir situated at Mian Khel Tarra Tehsil Central Orakzai, the suit property, was the ancestral ownership in possession of respondent/plaintiff; that out of this suit property, the field

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Kohi Patay was delivered by Jehanzeb Khan son of Awal Jan to great grandmother of respondent/plaintiff during her life as charity; that on her demise, their predecessors had partitioned the said field into three parts, the one share was delivered to the ancestor of respondent/ plaintiff, the second share was delivered to ancestor of appellant/defendant and the third share was delivered to ancestor of Noor Zadin and thus the shares in Kohi Patay field devolved on parties at dispute and Noor Zadin as legacy and still in their possessions; that other two disputed fields were inherited by respondent/plaintiff from his ancestors; that suit property was leased out by father of respondent/plaintiff to Yar Jan in 1981, however, its possession was taken back from him in the year 1998 and were delivered to appellant/defendant being close relative; that the suit property remained in possession of appellant/defendant till 2017 and he used to pay the rent in form of kinds; that possession of the suit property was taken back from appellant/defendant in 2017 and was delivered to one Khaleel Khan son of Rehman Mulla, whereat, appellant/defendant raised claim over the suit property; that appellant/defendant has no concern with the suit property; that jirga have been convened between the parties at dispute on different dates and Noor Zadin has withdrew from his claim in favour of respondent/ plaintiff and jirga verdict was passed in his favor; that appellant/defendant refused the jirga verdicts; therefore, yet another official jirga was held between them but appellant/defendant failed to take oath on holy Quran and jirga verdict was passed in his favour; that on 23.11.2018 yet another jirga was held between them wherein lease money for the year 2018 was waived off in favor of appellant/defendant, the jirga was penned down in favour of respondent/plaintiff, signed by the appellant/defendant and attested by the Tehsildar but despite that when respondent/plaintiff wished to lease out the

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suit property to third person, appellant/defendant intervened him and also withdrew from jirga verdicts; that appellant/defendant has no concern with suit property but being an oppressive person, he has occupied & cultivating the suit property claiming it to be his ownership; therefore, respondent/plaintiff has prayed for a decree to declare him owner of the suit property coupled with decree for possession, permanent and mandatory injunctions.

Appellant/defendant was summoned by the learned trial court. He attended the court and submitted written statement, wherein, raised various legal and factual objections *inter-alia* with facts that suit property devolved on him from his ancestors and he was recorded owner in possession of the same since then; that he denied leasing out of suit property by respondent/plaintiff to him and contended that respondent/plaintiff has hatched a false story; that he denied convening of any jirga between them about the suit property and denied ownership & possessory rights of respondent/plaintiff in it; therefore, prayed for dismissal of suit.

Pleadings of the parties were reduced into following issues;

1. *Whether the plaintiff has got a cause of action?*
2. *Whether the plaintiff is estopped to sue?*
3. *Whether the suit of plaintiff is incompetent in its present form due to non-joinder of the necessary parties?*
4. *Whether plaintiff is the owner of the suit property but the same was given on ijara to one Yar Jan s/o Sahib Jan by the father of the plaintiff in the year 1981 but the same was retrieved back in the year 1998 from the said person and was given to the defendant on ijara, who had been cultivating the same till the year 2017 and later on, the same was retrieved and was given on ijara to one Khaleel s/o Rehman Mulla?*

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5. Whether the Kohi Patay (a part of the disputed property) was given to the great grandmother of the parties i.e. the wife of one Saif-ud-Din by the one Jehanzeb Khan s/o Awal Jan in charity, which was later on partitioned between the parties in which both the parties including the one Noor Zadin got equal shares?
6. Whether the suit property is the ancestral property of the defendant and the plaintiff has nothing to do with the same?
7. Whether the plaintiff is entitled to the decree as prayed for?
Relief?

Parties produced the evidence. The learned trial court heard the arguments and on 25.05.2023 passed a preliminary decree in favour of respondent/plaintiff. Being not contended with the verdict, on 05.07.2023 the appellant/defendant has impugned the said judgment, decree and order before the court of learned District Judge, Orakzai in Civil Appeal No. 14/13 of 2023, which was decided on 13.12.2023, the impugned judgment, decree and order of the learned trial court was set-aside and case in hands was remanded to learned trial court with direction to record the statement of Yar Jan being important witness of the case and decide the case afresh. The learned trial court received the case and recorded the statement of Yar Khan as RPW-01, heard the arguments and on 29.04.2024 once again decided the case in favour of respondent/plaintiff.

Appellant/defendant being dissatisfied from the decision, preferred instant appeal & impugned the judgment, decree & order dated 29.04.2024 of the learned trial court. Learned counsel for appellant while arguing narrated above facts of the case with assertion that parties at dispute are not blood relatives & not related to each other having not common predecessor; he argued that order of the learned trial court is illegal, against the law and

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facts, unfounded, suffers from material illegality and irregularity, result of misreading and non-reading of evidence having been ignored the cardinal principles of natural justice, having not considered the record available on file, based on presumptions, speculations and capricious; therefore, prayed that on acceptance of the instant appeal, judgment, decree and order of the learned trial court dated 29.04.2023 may be set-aside and the case may be decided in his favour.

Learned counsel for respondent/plaintiff refuted the arguments of learned counsel for appellant/defendant and argued that learned trial court has properly appreciated the evidence and record on file and committed no illegality or irregularity in passing the impugned order; therefore, prayed for dismissal of appeal with heavy costs.

It would be appropriate to mention that it is a settled principle of law that civil disputes are decided on strength of preponderance of evidence. There is admittedly no land settlement or revenue record of district Orakzai and the disputes between the parties are resolved on basis of oral evidence, possession over lands or agreement deeds, if any, brought before the *jirga* and now the courts; therefore, while deciding this appeal, the court has no other option but to base its findings on pleadings of parties, oral evidence, *jirga* verdicts and documentary proof, if any, brought on file. Coming to the fact that whether parties at dispute are related with each other or not, it is held that the evidence on file leads me to conclusion that parties at dispute have hailed from same lineage and had common predecessor namely Saif-ud-Din, who had three sons namely Islam-ud-Din, Siraj-ud-Din and Shams-ud-Din. Appellant/defendant is heir of Shams-ud-Din, while, respondent/plaintiff is successor of Siraj-ud-Din; therefore, this can safely be hold that parties at dispute are related to each other by blood.

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Now coming to the main controversy, it is observed that respondent/plaintiff contended that suit property was his ancestral property, which was actually devolved on him through legacy; however, the *Kohi Patay field* was given into the ownership of their great grandmother in charity, which was later on divided by their ancestors into three shares, each share was given into the possession of respective ancestors of parties at dispute and Noorza Din and finally it was devolved on them. It was the contention of respondent/plaintiff that his ancestor has leased out the suit property to one Yar Jan in 1981, which leased was terminated in 1997 and the suit property was delivered to appellant/defendant, who remained in possession of it until 2017, where after, it was leased out to Rehman Mulla; however, appellant/defendant was not willing to this and claimed the ownership of suit property in reprisal. Respondent/plaintiff contended that many jirga were convened between them in respect of suit property and all jirga verdicts were passed in his favour and he was declared entitled to the claim of suit property and accordingly the possession of the suit property was delivered to him.

Respondent/plaintiff still contends that he is in possession of the suit property; however, the statements of Khaleel (PW-3), Jehanzeb (PW-4) and Noorza Din (PW-5) explicitly provide that suit property is in possession of appellant/defendant and not with respondent/plaintiff; therefore, this is to be seen that whether ancestor of respondent/plaintiff had actually leased out the suit property to Yar Jan and whether suit property is ancestral ownership of respondent/plaintiff? To answer this, the statement of Yar Jan (RPW-1) studied carefully, who supported the stance of respondent/plaintiff stating that parents, uncle and aunt of respondent/plaintiff had leased out to him four fields for cultivation on *neim-batai*, which remained in his possession for long 17 years, where after, he had returned the possession to parents of

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respondent/plaintiff on their demand. He has even affirmed that the four fields were situated separately and the disputed field was divided into three shares, which avails that the suit property was the ownership of ancestor of respondent/plaintiff, who had leased it out to Yar Jan and on demand of ancestors of respondent/plaintiff, it was retrieved to them.

Similarly, Khaleel (PW-3) stated that there was dispute between the parties at dispute over the suit property, which was resolved in 2018, and respondent/plaintiff had leased out the suit property to him, however, he was restrained by appellant/defendant from cultivating the suit property, whereat, he has terminated the lease. Even, he deposed that the appellant/defendant has sent many jirga to him so that he might not appear before the court as witness against him as well as also forcibly restrained Yar Jan to appear as witness against him that not only fortifies the claim of respondent/plaintiff but also speaks volume about the conduct of appellant/defendant.

Besides above, Sawab Gul (PW-1) and Saifoor Khan (PW-2) were members of jirga verdict dated 23.11.2018, Exh.PW 7/5, who categorically stated that they were members of jirga and had witnessed the jirga verdict dated 23.11.2018, which was awarded in favour of respondent/plaintiff. Although, they admitted that the jirga dated 23.11.2018 was not available on file, nevertheless, it was found on record in the shape of Exh.PW 7/5. In reply to a question, they stated that the jirga verdict, Exh.PW 7/5, did not mention the date but he added that it was held on 23.11.2018 and thus establishes the fact that they were members of jirga verdict, Exh.PW 7/5, which was passed in favour of respondent/plaintiff on 23.11.2018. In reply to a question, PW-1 admitted that before start of jirga, they take written consent of parties at issue, which though not found in their case, however, in this respect a written consent of parties at dispute is found in the shape of

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agreement dated 21.07.2017, Exh.PW 7/1, whereby, parties at dispute and Noorza Din had not only shown their willingness to resolve the issue of suit property through jirga members but have also appointed Omar Gul, Firdos, Jameel Badshah, Islam Khan, Fazal Malik as jirga members. Appellant/defendant (DW-1) in his statement also confirmed that above named persons had intervened between them to resolve the issue, which further provides that the jirga were held between them. To further clarify above position, respondent/plaintiff recorded the statement of Omar Gul (PW-6), who was witness to jirga dated 01.10.2017, Exh.PW 7/2; jirga dated 01.01.2018, Exh.PW 7/3; and jirga dated 01.10/2017, Exh.PW 7/4, which were held between parties at dispute and Noorza Din but the appellant/defendant was not ready to take oath; therefore, all the jirga verdicts were passed against him and it was specifically held in jirga verdict, Exh.PW 7/3, that the landed properties situated in Mian Khan Tarra and Lakh Kanra were the entitlements of respondent/plaintiff and no one else had any right attached in it. Undoubtedly, there is no description of suit property given in the jirga verdict nor the signature of appellant/defendant available on jirga decisions; nonetheless, willingness of the parties at dispute to resolve the issue of suit property (one inherited by them from their parents) through jirga members and their authorization vide agreement, Exh.PW 7/1, is the sufficient to concede a jirga verdict. Even, jirga decision dated 23.11.2018, Exh.PW 7/5, not only suggests that suit property was released in favour of respondent/plaintiff and leased dues were waived off in favour of appellant/defendant but it was also signed by parties at dispute on top of the verdict against their names.

Although, appellant/defendant and his witnesses alleged that there is difference in the suit property situated in Lakh Kanry and Mian Khel Tarra,

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however, details given in heading of the plaint provides that respondent/ plaintiff had claimed the suit property situated in Mian Khel Tarra, whereas, jirga verdict dated 01.01.2018, Exh.PW 7/3, also provides that the properties situated in Mian Khel Tarra and Lakh Kanry will be the right of respondent/plaintiff, which avails that the jirga verdict had already included the suit property as a whole. Likewise, appellant/defendant (DW-1) though stated that suit property had never been in possession of Yar Jan, however, statement of Yar Jan (RPW-1) totally negate his plea. More so, appellant/ defendant (DW-1) has shown ignorance about any partition but endorsed that it was done during the time of their forefathers, which further supports the stance of respondent/plaintiff. Had there been no dispute over the suit property between the parties, then, there had been no jirga between them. On same footings, in para no. 3 of the plaint it is though mentioned that the fields of Kohi Patay was delivered by Jehanzeb Khan to great grandmother of respondent/plaintiff as charity, however, this fact is not only clarified by Jehanzeb Khan (PW-4) but also by the respondent/plaintiff (PW-7) in their statements that the field of Kohi Patay was given to the great grandmother of respondent/plaintiff by grandfather of Jehanzeb as charity.

In the backdrop of above detailed discussion, it is held that the suit property was ancestral property of respondent/plaintiff, which devolved on him (which must include all the legal heirs of Ajra Din including female folks) through legacy and *Kohi Patay field* was given into the ownership of their great grandmother in a charity, which was later on divided by their ancestors into three shares, each share was given into the possession of respective ancestors of parties at dispute and Noorza Din and finally it was devolved on them (which must include legal heirs of Ajra Din including female folks); therefore, it is held that learned trial court has committed no

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illegality or irregularity impugned order, which may warrant interference of this court in its appellate jurisdiction, hence, impugned judgment, decree and order dated 29.04.2024 of the learned trial court is upheld and appeal in hands dismissed being bereft of merits.

Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

The requisitioned record along with copy of this order sent to the learned trial court and file of this court consigned to record room after necessary completion and compilation.



Announced
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CERTIFICATE

Certified that this judgment consists of ten (10) pages, those are signed by me after necessary corrections, if any found.



Announced
04.09.2024

Abdul Basit
Addl. District Judge-II, Orakzai