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IN THE COURT OF IJAZ MAHSOOD,
SENIOR CIVIL JUDGE, ORAKZAI AT BABER MELA

Civil Suit No. 66/1 of 2021
Date of Institution: 12.06.2021
Date of Transfer In: 21.05.2024
Date of Decision: 21.01.2025

1. Nasir Orakzai
2. Israaf Ali Shah
3. Riaz Ali Shah *sons of Noor Zali Shah*
4. Taslim Bibi
5. Shamima Bibi
6. Tajmin Bibi
7. Shehnaz Bibi
8. Shabnam Bibi
9. Manza Bibi
10. Azmat Ali Shah, legal heirs of Noor Zali Shah
*R/O Qoum Ali Khel, Tappa Sher Khel, Village Abdul Khel,
Zakhtaan, Tehsil Upper, District Orakzai*
..... (Plaintiffs)

VERSUS

1. Janab Ali s/o Muzamil Shah
2. Mir Zali Shah s/o Zareen Shah
*R/O Qoum Ali Khel, Tappa Sher Khel, Village Abdul Khel,
Zakhtaan, Tehsil Upper, District Orakzai*
..... (Defendants)

**SUIT FOR RECOVERY OF POSSESSION OF SUIT LAND
THROUGH REDEMPTION OF MORTGAGE**

JUDGEMENT:

21.01.2025

This order shall decide instant suit filed by Mr. Nasir Aurakzai and others, the plaintiff, for recovery of possession of suit land through redemption of mortgage from Mr. Janab Ali, the defendant.


IJAZ MAHSOOD
Senior Civil Judge, JM
Orakzai at Baber Mela

Pleadings:

The claim as recounted in the plaint reads that suit land is the entitlement of the plaintiffs since the time of their ancestors. It was mortgaged with the defendant for a credit of Rs. 75,000/-. Subsequently, the plaintiffs approached the defendant for redemption of mortgage and recovery of suit land, but the latter refused to honor the agreement, and began to misappropriate the land. A jirga of local elders held for amicable resolution of the matter found and ruled in favor of the plaintiffs on 13/08/2020, reportedly.

Plaintiffs submit their willingness to pay the amount due against them, and request for recovery of suit land through redemption, and for demolition of any structures raised on it. They also pray for restraining orders against the defendant to prevent him from prejudicial use or disposal of suit property.

Written statement of the defendant begins with the regular objections to the legal validity of the suit, standing of the plaintiffs and competence of the forum for its trial. On facts, the defendant plainly denies the claim and version of the plaintiffs. On the contrary, he claims it to be his patrimony and entitlement. In respect of the Jirga, the defendant denies any participation or relation in the one alleged by the plaintiff i.e. 13/08/20. However, the defendant asserts that a tribal jirga was

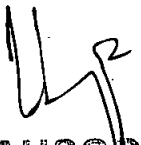
held on 30/09/2020, wherein 05 persons swore on the Holy Book in affirmation of the veracity of his position. In short, he claims to have owned the suit land since ages, and denies the claim of the plaintiffs as self-serving lies and fabrications.

Defendants no 03, Mr. Meer Zali Shah, who was subsequently added through order no 03 of the court has also submitted his written reply. He has pleaded that the suit property is joint ownership of him and the plaintiff, and that the latter was never entitled to mortgage it with the defendant in excess of his share. He has also denied the claims of the defendant no 01 in respect of suit land, and has prayed for a restraining order against use or disposal of suit property prejudicial to his rights.

Points of dispute in the pleadings were distilled into the following issues by our predecessor in interest.

Issues:

- i. *Whether plaintiffs have got cause of action?*
- ii. *Whether disputed property is the inherited ownership of plaintiffs and the same was mortgaged with defendant in lieu of Rs. 75,000/- (seventy five thousand)?*
- iii. *Whether disputed property is owner in possession of the defendant since time of his ancestors?*
- iv. *Whether plaintiffs are entitled to the decree as prayed for?*
- v. *Relief.*



IJAZ MAHSOOD

Senior Civil Judge, JM
Orakzai or Zuber Mela

Thereafter, all sides were invited to produce evidence in respect of their respective claims.

Witnesses/Exhibits:

Tajbar Khan s/o Nabi Shah appeared PW-01, Israf Ali Shah, plaintiff No. 02 as PW-02, Nasir Orakzai, plaintiff No. 01 as PW-03, Janab Ali, defendant No. 01 as DW-01, Zareef Khan s/o Mustajab Ali as DW-02, Muhammad Nahid s/o Muhammad Aman as DW-03. They have exhibited the following documents;

- i. Special Power of Attorneys of Israf Ali Shah Ex.PW-are 2/1 to Ex.PW-2/3.
- ii. Special Power of Attorney of Muhammad Naheed is Ex.PW-3/1.

Reasoning/Rulings:

Issue wise reasoning of the court followed by a ruling on each issue, and finally, on the suit, is as follows:

Issue No 02:

The first issue digs into the presence of cause of action for the plaintiff, which, essentially, is hinged on the principal factual issue. Therefore, discussion on the issue is deferred until the merits of the claim are discussed and determined under the present issue.

The instant issue examines the claim of the plaintiff about his entitlement of suit property. He has alleged that suit land was his ancestral property which devolved on him as patrimony. It was mortgaged with defendant no 01 for a credit of Rs. 75,000/-. He claimed its redemption by payment of the mortgaged amount.

The issue under consideration has two limbs: plaintiff is the owner of suit land; and, it was mortgaged with defendant no 01 for an amount of Rs. 75,000/-.

The burden to prove the issue naturally fell on the plaintiff. Plaintiff has produced three witnesses including him. Below is a brief assessment of the merits or otherwise of the evidence for the plaintiff.

Mr. Tajbar Khan barely qualifies as witness, far from being one on the point of ownership of the plaintiffs. His direct statement, in paraphrase, reads that he had heard the grandfather of defendant no 01 say *that whenever you manage money proceed with the redemption of the mortgage*. He further adds that defendant no 02 retains title to the extent of his share, and *he has not sold it*. (Author's emphasis)

Two things float on the surface of the testimony of PW-01: first, his knowledge of some mortgage is hearsay;

second, he is silent about entitlement of the plaintiffs as owners of the suit land.

Mr. Israf Ali Shah, witness no 02 and attorney holder for plaintiffs no 01, 03-10 states that his father mortgaged suit land for a credit of Rs. 75,000/- to defendant no 01. He adds on the point of mortgage that out of Mr. Speen Gul and Tajbat Khan, the latter is still alive.

He explains that after the demise of their father, the plaintiffs approached defendant no 01 for redemption of suit land, but the latter refused. That they engaged local elders in a jirga that decided in our favour. He further alleges that when the defendant refused to honor the ruling of the jirga, plaintiffs knocked at the court's door.

Strictly stated, he shed no light on the accrual of title on the plaintiffs. His statement is mainly concerned with the alleged mortgage of the suit land. A discrepancy with pleadings occurred in respect of the mortgagor of the suit land. Pleadings hold that plaintiffs mortgaged it, while PW-02 maintains that their father entered into the agreement.

Mr. Nasir Orakzai is witness no. 03 for the plaintiffs. He restates the position as held by witness no 2 that suit land was mortgaged by their father with defendant no 01.

He further confirms the presence of witnesses, and the death of one of them.

He explains that when they managed the redemption amount, they approached the defendant, but he refused to honor their agreement. Next, two jirgas were held for resolution of the dispute. When defendant no 01 was required by the Jirga to produce witnesses on his title, or bring persons to swear upon his rights, he withdrew from the proceedings.

An aggregate estimation of the merits of the evidence in proof of claim seems a convenient way forward.

In addition to being a hearsay witness, PW-01's statement is vague and ambiguous. As highlighted above, it is unclear as to whom the statement 'when you manage' money was addressed. Still, the witness confirms that this statement was made before him, and not that he stood witness to the actual agreement of mortgage, which makes his knowledge of the mortgage based on hearsay.

He confirms that the father of plaintiffs never filed any suit for redemption and recovery of suit land. The pleadings and evidence attempt to justify this omission by stating that the delay occurred due to financial constraints. However, the record is silent as to what precisely was the

nature of the constraints, for how long they remained in force, and when and how they were shaken off.

At another point in the cross examination, the witness states that the defendant held the possession of suit land on 'Ijara/tenancy'. He informs that suit land has been in possession of defendant no 01 since the times of his grandfather.

Attorney for plaintiffs, who took the stand as PW-02, made some interesting remarks. On the basis of his claim, he reiterated his plaint, and other witnesses. In the details he conceded that their deceased father purchased a house in Kohat. This statement runs counter to the position held earlier that due to weak financial conditions their father could not redeem suit land in his lifetime. He also admits that the incidence of the Jirga of 30/09/20.

In his cross-examination by defendant no 02, he admits that another suit filed by the former is true and valid. Defendant no 01 has alleged that defendant no 02, and the plaintiffs are colluding the matter only to unlawfully acquire suit land from him.

Mr. Nasir Orakzai, witness no 03, is 30 years old per his statement. Clearly, even if the incidence of the mortgage is conceded, he could not possibly be a witness to the

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mortgage, as he was 03 years old at the time. He concedes that his deceased father never engaged in any Jirga in respect of suit property with the defendant. He also concedes that a jirga did take place in which the defendant was required to bring forth 05 persons to swear upon his rights vis-a-vis suit land.

He claims innocence of any knowledge about whether such persons for plaintiff did meet the requirement of the Jirga or not. He does not deny it either.

To sum up, about the mortgage, the particulars of its when, where and how are missing from the pleadings as well as the evidence. The only designated witness on its incidence, PW-01 reported he heard grandfather of the defendant no 01 admit to it, which makes him a hearsay witness on the actual fact.

The delay in making the claim, and the omission of the father of the plaintiffs to do it, is also not plausibly explained. The pleadings and the evidence mutually contradict on the point whether it was the plaintiffs or their father who mortgaged the land. Plaintiff's witness admits that suit land has been in the possession of the defendant since the time of his grandfather. All these observations, cumulatively taken, fatally damage the claim of the plaintiff

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The issue is decided in the negative, against the plaintiff.

Issue No 03:

This issue poses the question as to whether the defendant has been the owner in possession of suit land from the time of his ancestors. Of the three witnesses produced by the plaintiffs, the one chronologically best suited to inform on the point is Mr. Tajbat Khan. He was aged 74-74 years at the time of his statement.

In his statement in chief he reports that he heard grandfather of defendant no 01 say that he would hand over suit land once the amount is paid. It is safe to infer that suit land was in his possession then.

Next, the same witness, in the cross examination, confirms that grandfather of defendant no 01 used to cultivate suit land. A little ahead in his statement he directly concedes that grandfather of defendant no 01 was in possession of suit land.

So, since a claim for recovery of possession is under consideration, and a witness for the claimants has conceded that defendant no 01 has been in possession since the time of his grandparents, the court is not inclined to expend more ink on

the proof of the fact. Admission dispenses with the need for proof.

About ownership of defendant no 01, it is pertinent that in a suit for recovery of possession through redemption of mortgage, the thrust of defendant's evidence was on defeating the opponent's claim, rather than proving his own title.

Secondly, the matter being one from a recently merged district, where land revenue settlement is yet to be done, there is nothing documentary of neutral origin recorded by a public authority on the question of ownership or possession.

In such circumstances, the court is constrained to side with the party in whose favor evidence preponderates. There are no means available to the court to ascertain whether any third person is or possibly could be interested in the suit property. In such circumstances, declaration, which generally is a remedy in rem, assumed the character of a remedy in personam.

Clearly, possession is 9/10th of ownership. It is good against anyone except the person holding the title. In absence of title deeds, unencumbered possession is as good as a title. But it is a shield, rather than a sword. With these remotely

relevant but necessary observations the matter is decided for the defendant.

Issue is disposed accordingly.

Issue No 01 and 04:

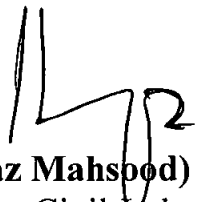
These issues are jointly taken because the former digs into the presence of cause of action for the plaintiffs, while the latter concerns his entitlement to relief consequent to having successfully established his cause.

The principal issue in this judgment is issue no 02 in which the claim of the plaintiffs that they are owners of suit land, and that the land was mortgaged with defendant no 01, has already been decided against the plaintiffs.

So, plaintiffs have failed to prove their cause of action for the suit satisfactorily. Consequently, the decision in issue no 02 renders moot the question of entitlement to any relief. The issues are decided in the negative, and against the plaintiffs.

Case file be consigned to the record room after its necessary completion and compilation.

Announced
21.01.2025


Ijaz Mahsood)
Senior Civil Judge,
Orakzai (at Baber Mela)

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CERTIFICATE

Certified that this judgment of mine consists of thirteen (13) pages, each has been checked, corrected where necessary and signed by me.



(Ijaz Mahsood)
Senior Civil Judge,
Orakzai at (Baber Mela)