

IN THE COURT OF BAKHT ZADA,
ADDL: DISTRICT JUDGE-I, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 04/13 OF 2024
DATE OF INSTITUTION : 20.09.2024
DATE OF TRANSFER IN : 15.10.2024
DATE OF DECISION : 19.04.2024

1. SAKHI BADSHAH
2. RAZI BADSHAH
3. PHOOL BADSHAH.
ALL SONS OF JAN BADSHAH
R/O QAUM MISHTI, TAPA DARWI KHEL ZAWAN, P/O
MISHTI MELA, TEHSIL LOWER, DISTRICT,
ORAKZAI.
..... (Appellants)

-VERSUS-

1. AQAL SHAH S/O ZAMAN SHAH
2. IMAM SHAH S/O ZAMAN SHAH
3. MUHAMMAD NAZIR SON OF ZAMAN SHAH
4. BIHAS ALI SHAH S/O EID BADSHAH
5. FATIH KHAN S/O EID BADSHAH
6. MUHAMMAD KARIM S/O EID BADSHAH
7. RAYAT SHAH S/O EID BADSHAH
8. AQAL SAID S/O EID BADSHAH
9. JAMAL S/O EID BADSHAH
10. HANAN S/O EID BADSHAH
11. ABDUL BADSHAH S/O LAL BADSHAH
12. MUHAMMAD AYUB KHAN S/O LAL BADSHAH
13. KHAN SAID S/O MAST ALI SHAH
14. KHAFI UR REHMAN S/O MAST ALI SHAH
15. KHAQAL BADSHAH S/O MAZHAR SHAH
16. SHAHEEN KHAN S/O MAZHAR SHAH
17. TAJ MUHAMMAD S/O MAZHAR SHAH
18. MUHAMMAD AYAZ S/O MUAZ GUL
19. RAB NAWAZ S/O MUAZ GUL
20. GUL NAWAZ S/O MAWEEZ GUL
21. MUHAMMAD NAWAZ S/O MAWEEZ GUL
ALL R/O QAUM MISHTI, TAPA DARWEE KHEL ZAWAN,
P/O MISHTI MEAL, TEHSIL LOWER, DISTRICT ORAKZAI.

..... (RESPONDENTS)

JUDGEMENT
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Impugned herein is the order dated 05.09.2024

rendered by the court of learned Civil Judge-II, Kalaya District
Orakzai vide which the said court has dismissed suit No. 82/1
dated 22.04.2024 of the appellants/plaintiffs.

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- (2). Brief facts of the case are that the appellants/plaintiffs Sakhi Badshah and two others instituted suit against respondents Aqal Badshah and 23 others for declaration, possession through partition, permanent injunctions and rendition of accounts. It is alleged that the parties are legal heirs of one Muhammad Rasool and out of his six (06) sons, one Mastan Gul s/o Muhammad Rasool was issueless. That the appellants/plaintiffs and defendants had enmity with another group in the year 2001, due to which the tribal elders imposed fine (ٲوان) of Rs. 200,000/- upon the parties. It was decided that whoever paid the said fine (ٲوان) will be entitled for the legacy of Mastan Gul s/o Muhammad Rasool after his death. It is alleged that plaintiff No. 1 Sakhi Badshah along with other plaintiffs arranged and paid the said amount and now after death of Mastan Gul in the year 2016, the plaintiffs are entitled for *Sharia* share of deceased Mastan Gul on the basis of mutual oral agreement between the parties. That the appellants/plaintiffs migrated to Kohat being affectees of insurgency in the year 2010 and returned back to Orakzai in the year 2011. That Mastan Gul s/o Muhammad Rasool was residing with respondents/defendants No. 1 to 3 and died in the year 2016, whereafter the appellants/plaintiffs demanded the share of deceased Mastan Gul, but respondents/defendants No. 1 to 3 were reluctant to hand over his share as per agreement. It is also prayed that the respondents/defendants No. 1 to 3 are cultivating the suit property and are getting mesne profit/income of Rs. 400,000/- per annum and the

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appellants/plaintiffs are entitled for recovery of the same through rendition of accounts and the respondents/defendants be restrained from alienation and changing the nature of the suit property.

(3). The respondents/defendants were summoned, respondents/defendants No. 1 to 3, 5 to 11 and 15 to 16 appeared before the court and contested the suit of the appellants/plaintiffs by submitting written statement. The learned trial court framed the following issues in the light of divergent pleadings of the parties;

- I. Whether the plaintiffs have got cause of action?
- II. Whether predecessor of the parties namely Muhammad Rasool had six sons, out of whom one Mastan Gul died issueless in the year 2016?
- III. Whether in the year 2001, the whole family of plaintiffs and defendants engaged into enmity with someone else and later on a fine of Rs. 200,000/- was imposed upon the plaintiffs and defendants by elders of Orakzai tribe and due to poor financial condition of the parties to the suit, it was internally agreed by them that the person who would pay the fine of Rs. 200,000/- would be entitled to inherit the share of Mastan Gul after his death and accordingly the said fine was paid by plaintiff No. 1 Sakhi Badshah?

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IV. Whether the plaintiffs are entitled to the decree as prayed for?

V. Relief?

After framing issues both the parties were offered opportunity for producing their respective evidence. In response to which appellant/plaintiff No.1 produced and recorded the statements of six PWs including his own, while on the other hand the defendants produced and recorded the statements of three DWs and after closing of evidence of the parties arguments of the learned counsel for the parties were heard and suit of the appellants/plaintiffs were dismissed by the learned the learned Civil Judge-II, Kalaya vide the impugned order and judgment dated 05.09.2024 and hence the instant appeal.

The respondents were summoned, who appeared along with counsel Mr. Sana Ullah Khan Advocate and the instant appeal was fixed for arguments on 25.10.2024, but later on learned counsel for the appellants Mr. Abid Ali Advocate submitted an application for withdrawal of the case with permission to file fresh one on the ground of formal defect u/o 23 Rule, 1 CPC. Reply to the said application was submitted by the opposite party and arguments on both the application u/o 23 Rule, 1 CPC and on the main appeal were heard together.

Learned counsel for the appellants/petitioners argued that the plaint in the instant case was scribed by some other counsel and that he has not mentioned the material grounds and evidence in

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the plaint. He further argued that the appellants/plaintiffs are entitled for withdrawal of the suit at any stage of the proceedings and the mistake of the counsel should not affect the precious rights of the appellants/plaintiffs. While arguing the main appeal, learned counsel for the appellants/plaintiffs stated that plaintiff No. 01 Sakhi Badshah has deposited the fine, imposed by the elders of Orakzai upon the parties, after mutual oral agreement between the parties to the effect that the property of Mastan Gul after his death will be given to him. He further argued that plaintiff No. 1 has deposited the said fine by withdrawing his pension, but now after the death of Mastan Gul in the year 2016, the defendants refused to hand over the property to plaintiff No. 1.

On the other hand, learned counsel for the respondents argued that no formal defect has been pointed out by the learned counsel for the appellants/petitioners in his application, while arguing on the main appeal, he argued that the appellants/plaintiffs have badly failed to prove on record any such agreement between the parties. He argued that neither the appellants/plaintiffs have mentioned in their pleadings and evidence that with whom the parties were involved in enmity, nor they have mentioned the names of elders of Orakzai who imposed and received the fine of Rs. 200,000/-. That the appellants/plaintiffs have badly failed to prove their case and that the impugned order by the learned trial court is based on proper appreciation of evidence and law.

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He prayed for dismissal, of the application u/o 23 Rule, 1 CPC as well as, of the main appeal.

After hearing arguments of the learned counsel for the parties, available record perused which shows that application u/o 23 Rule, 1 CPC for withdrawal of the suit with permission to bring fresh one is submitted by the counsel for the appellants/petitioners at this stage after dismissal of the main suit by the learned trial court. The appellants/plaintiffs were bound under the law to have mentioned in his application u/o 23 Rule, 1 CPC, the details of formal defect by the reason of which there is likelihood of failing of the suit, but no such ground are mentioned in the application of the appellants/petitioners. The learned counsel for the appellants/plaintiffs has categorically mentioned in his application that plaint in the instant case was scribed by some other counsel, which is defective and that the appellants/plaintiff cannot be held responsible for the mistakes of the counsel, but this arguments of the learned counsel are not sustainable under the law because it is not the counsel rather it is the party, who describe the facts of their case in shape of the plaint. Furthermore, a certificate at the foot of the plaint has been thumb impressed by plaintiff No. 2 /attorney for the plaintiffs regarding correctness of the averments in the plaint. As far as withdrawal of the suit with permission to bring fresh one at appellate stage is concerned the same can be allowed in exceptional circumstances. It must not cause prejudice to the other party, but, if the trial court has already passed decree,

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withdrawal of the suit become meaningless and in such case grant of permission for filing fresh one will amount to offer a kind of fresh round of litigation to the petitioner. On the other hand, it will definitely cause prejudice to the respondents/defendants because they had already disclosed their defense in shape of their written statement and evidence, therefore the application of the appellants/petitioners for withdrawal of the suit with permission to bring fresh one, being devoid of merits is hereby dismissed.

Now, coming to the main appeal filed against the Judgement and decree dated 05.09.2024 of the learned Civil Judge-II, Kalaya, Orakzai. It is alleged in the plaint that parties to the suit were having enmity with some third party in the year 2001 and elders of Orakzai imposed fine of Rs. 200,000/- upon the parties to the suit. The appellants/plaintiffs of the suit were bound to have brought on record evidence of alleged enmity, but contrarily the respondents/defendants have denied the existence of any such enmity and imposition of alleged fine in their written statement. The appellants/plaintiffs were burdened to prove through oral or documentary evidence not only the existence of such enmity, but also the fact with whom they were having alleged enmity. They were also bound to have produced the Jirga *Masharan* before the court, who had imposed and received the alleged fine from plaintiff No. 1. Secondly, the appellants/plaintiff were also duty bound to have proved the existence of any such agreement/contract between the parties

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that after death of Mastan Gul his legacy will be handed over to the person, who had paid the alleged fine, but in this connection no confidence inspiring evidence has been produced and brought on record and hence the alleged oral agreement between the parties is not proved in accordance with law. The appellant/plaintiff has also alleged that he has withdrawn his pension from the bank for the payment of alleged fine, but despite of the fact that process of withdrawal of pension from the bank involves documentation and receipt, but no such document or receipt has been produced before the court at the time of evidence. The alleged enmity as per averments in the plaint is pertaining to the year 2001 and death of Mastan Gul as per plaint has taken place in the year 2016. The appellant/plaintiff has filed the suit for declaration instead of specific performance of agreement/contract and the suit of the appellant/plaintiff is also bad in its present form. The limitation provided under article 113 of the Limitation Act, 1908 for filing suit for specific performance is three (03) years. Furthermore, limitation provided for filing declaratory suit is six (06) years under article 120 of the Limitation Act, 1908. In both the eventuality i.e. in case of filing declaratory suit and suit for specific performance, the suit of the appellants/plaintiffs is barred by limitation. The learned trial court has correctly dismissed the suit of the appellants/plaintiffs which needs no interference from this court. Consequently, the application for withdrawal of the suit with

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permission to bring fresh one, as well as the main appeal being devoid of merits are hereby dismissed.

Requisitioned record be sent back to quarter concerned.

Copy of this order be placed in original record while record of this court be consigned to record room within the stipulated time.

Pronounced:
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CERTIFICATE

Certified that this judgment consists of nine (09) pages.

Each page has been read, corrected wherever necessary and signed by me.

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