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

Civil Suit No.	37/1 of 2023
Date of Institution:	15.02.2023
Date of Transfer In:	21.05.2024
Date of Decision:	15.02.2025

1. Manzoor Ali s/o Sardar Ali.
2. Habib Ali s/o Khyal Ba Khan and 10 others.
All R/O Qoum Ali Khel, Tappa Panjam, Tehsil Upper, District Orakzai
..... (Plaintiffs)

VERSUS

1. Asal Badshah s/o Zar Badshah.
2. Haji Khyal Syed s/o Noor Ghulam.
3. Munawar Khan s/o Hawaldar Batak.
All R/O Qoum Ali Khel, Tehsil Upper, District Orakzai
..... (Defendants)

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

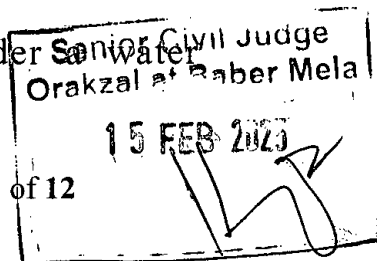
JUDGEMENT:

15.02.2025

This order shall decide instant suit filed by Mr. Manzoor Ali and others, the plaintiffs, for declaration and corresponding injunctive relief against Mr. Asal Badshah and others, the defendants.

Pleadings:

The matter as recounted in the plaint reads that plaintiffs are owners in possession of the subject-matter fully detailed in the headnote of the plaint. It is asserted that four units of cultivable land of the plaintiffs fall under Senior Civil Judge Orakzai at Baber Mela



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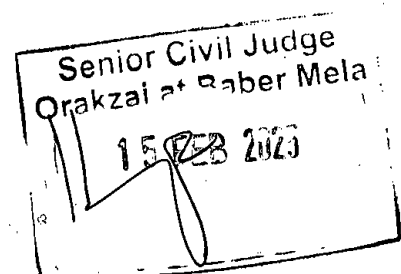
stream, which varies in size due to change in course of the water. Recently when the land resurfaced, defendants unlawfully seized it by turning it into a cricket ground. They were requested extra-judicially to stop their illegal interference with suit land, but to no avail, reportedly. The plaint maintains that defendants have no legal claim or title to suit land, yet continue to interfere. It ends with a prayer for a restraining order.

Defendants rebut the assertions, and deny the claims of the plaintiffs in their written reply to it. They counter assert plaintiffs estate has well defined limits marked by a boundary wall around it, and the disputed land is part of the stream, rather than property of the plaintiffs. They also deny the allegations of forcible occupation of the land in the garb of cricket ground. Defense asserts that subject matter is the base of an ancient water stream, and not private property of any particular person. That it is common land of the community. The written-statement ends with a prayer for dismissal of the suit.

Differences between the sides were reduced into the following issues:

Issues:

- i. *Whether the plaintiffs have got cause of action?*



- ii. *Whether the plaintiffs are estopped to sue?*
- iii. *Whether the suit of the plaintiffs is time barred?*
- iv. *Whether the suit of the plaintiffs is bad for miss-joinder and non-joinder?*
- v. *Whether the suit property measuring 10-12 Jareeb and numbering 10 fields is ownership of the plaintiffs?*
- vi. *Whether the defendants have levelled a portion of suit property for purpose of making a playground?*
- vii. *Whether the disputed suit property is part of river bed and is bot the ancestral property of the plaintiffs?*
- viii. *Whether the plaintiffs are entitled to the decree as prayed for?*
- ix. *Relief.*

Witnesses/Exhibits:

Mustajab Khan s/o Niaz Bat Shah appeared as PW-01, Zakir Ali s/o Gul Ali appeared as PW-02, Ashab Ali s/o Wahab Ali as PW-03, Riqab Ali s/o Mina Gul as PW-04, Rajab Ali s/o Ali Nak as PW-05, Tahir Ali s/o Khyal Bat Khan as PW-06, Said Gul s/o Zareen Gul as DW-01, Khwagmin s/o Zareen Khan as DW-02 and Asal Badshah s/o Haji Zar Badshah as DW-03. They have exhibited the following documents;

- Copy of CNIC of PW-01 as Ex.PW-1/1.

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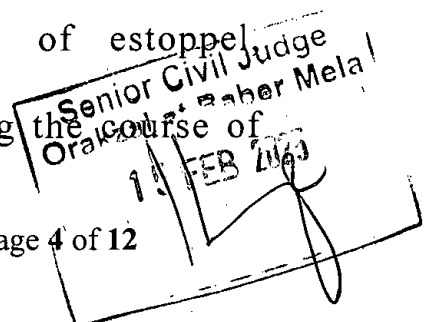
- Copy of CNIC of PW-02 as Ex.PW-2/1.
- Copy of CNIC of PW-03 as Ex.PW-3/1.
- Copy of CNIC of PW-04 as Ex.PW-4/1.
- Copy of CNIC of PW-05 as Ex.PW-5/1.
- Copy of CNIC of PW-06 as Ex.PW-6/1.
- Special Power of Attorney of PW-06 as Ex.PW-6/2.
- Photographic site plan as Ex.PW-6/3.
- Site plan produced by PW-06 as Ex.PW-6/4.
- Copy of CNIC of DW-01 as Ex.DW-1/1.
- Copy of CNIC of DW-02 as Ex.DW-2/1.
- Site plan produced by DW-03 as Ex.DW-3/1.
- Google map as Ex.DW-3/2.
- Special Power of attorney of DW-03 as Ex.DW-3/3.
- Pictures regarding sports as Ex.DW-3/4.

Reasoning:

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

Issue no 02, 03, and 04:

These issues raise the questions of estoppel, limitation, and non-joinder, respectively. During the course of



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trial, no specific grounds were raised in respect of each one of this issue by the defendants. Other than merely being mentioned in the written statement, the court was neither supplied with any material, nor did it detect the infirmities itself in the plaint. The written statement refers to a Jirga between the sides having taken place in the year 2019. Law of limitation sets a period of 06 years for declaration of title. The suit was filed in the year 2023, thus, within the bounds set for it by law. About non-joinder, no particular person who might have been a necessary party for the suit was plausibly reported to the court.

In these circumstances, the court is inclined to decide these issues for the plaintiffs.

Issue No 01, 05 and 07:

Before formally embarking upon the examination of evidence with reference to the issue under consideration, it is pertinent to highlight the peculiar administrative situation existing in the district.

Orakzai became a settled district from a tribal agency after the mainstreaming of FATA in the year 2019. So far, land settlement for the purpose of revenue estimation and administration of lands has not been conducted yet. There is no

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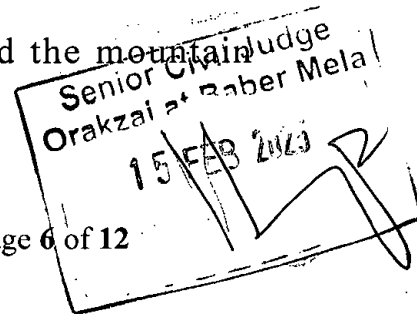
public record, created and maintained by a neutral body in respect of the privately owned estates in the district.

The courts, although being guided by concepts of land revenue in deciding suits, are, in absence of revenue records, thus constrained to decide disputes entirely from pleadings and evidence of the parties. .

After this short but necessary digression, the court returns to the issue under discussion. Plaintiffs claim that suit land is their ancestral property situated on the edge of a water stream which occasionally encroaches upon land thereby decreasing the land-mass of plaintiffs' entitlement.

Defendants, on the other hand, do not claim title over the suit land. They assert that subject matter has surfaced after change in course of the water stream, and is thus a common land to be used by all members of the community/locality.

A broad topographic sketch of the land runs thus that the disputed land falls adjacent to the land of the plaintiffs and Mr. Zakir, who is the owner of a plot by purchase. Both the disputed land, as well as the admitted estate of the plaintiffs is sandwiched between 'Khanki Thoy/stream' and a range of mountains. Below the estate of Mr. Zakir, around the mountain



range, to the other side is the dwellings and lands of the defendants.

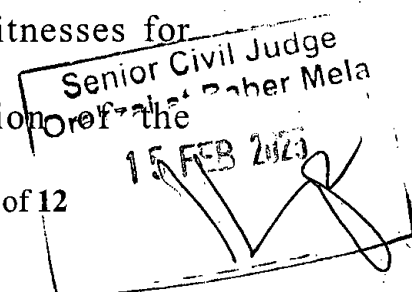
The written statement clearly concedes that on the side of the stream on which land surfaced through change in course of water, the plaintiffs have lands. It however adds that those lands are well protected through a boundary wall, and the disputed land falls outside the circumscribed estate of the plaintiffs.

There is no disputing the fact that on the side of the stream on which the disputed land lies, only Mr. Zakir has privately owned fields, and the plaintiffs have their estate, locally called 'Sardar Rawez'.

Plaintiffs produced six witnesses in support and proof of their claim. Below we shall weigh their evidence in search for its merits and flaws in relation to the stance of the plaintiffs.

Mr. Mustajab appeared and testified as PW-01. He concedes the claim of the plaintiffs in his direct examination. In his cross, the main thrust of the questioning is focused on the fact that property owned by the plaintiffs, prior to the surfacing of the disputed land mass, is within a boundary wall.

This position is conceded by multiple witnesses for the plaintiffs that the land actively in possession of the



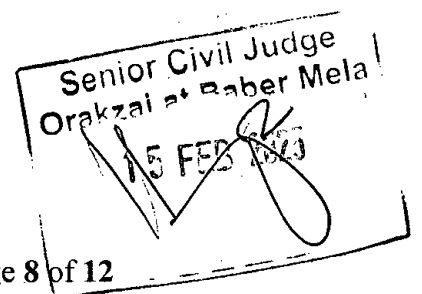
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plaintiffs has been encircled by walls for protection. PW-01 confirms it in his cross examination that disputed land mass was levelled by the plaintiffs after its appearance.

Mr. Zakir Ali, who has land adjacent to the plaintiffs, concedes that defendants have attempted to construct a playground on land belonging to the plaintiffs. Even if suit land is taken to be shamilaat, as the defendants contend, still Mr. Zakir would be well poised to contest for the disputed land on the basis of proximity, but he has testified in favour of the claim of the plaintiffs.

Defense's evidence is quite telling on the controversy under adjudication. Mr. Syed Gul, first witness for defense, asserts in his direct statement that disputed land is common holding of the inhabitants of the locality, and not a private inheritance of any party.

Further, in his cross examination, he concedes that neither he nor any of his relatives has property in the proximity of the disputed land. He reports that their landed estates are at a distance. He adds that a field owned by his uncle in the vicinity of the disputed land is purchased land rather than ancestral land. He further maintains that no person owns the disputed land, and it is to be held commonly by all.



Putting pieces of the picture together, a perspective surfaces that plaintiffs have land adjacent to the disputed land; their lands are ancestral, while other owners in the immediate neighbourhood have purchased lands; and finally, that the defendants do not claim exclusive title to the suit land, rather regard the land as common holding.

Two contesting propositions come to the fore: if the land is taken to be exclusive ownership, defendants have no claim to its title. If it is treated as shamilaat, the only Aa'la owner in closeness to it are the plaintiffs.

Now, under the Land Revenue Act section 59, land mass increased due change in the course of a water body is to be re-assessed by the authorities to determine proprietary rights over it. However, such assessment in the absence of revenue records does not seem feasible in the near future.

Similarly, the facts are conceded by both sides that the last time the disputed land was submerged by the stream is of immemorial antiquity, and beyond the grasp of memory. To declare the land exclusive ownership of the plaintiffs who cannot recall, let alone establish when it went underwater, would be an unsupported extrapolation.

Nonetheless, defendants, who admittedly inhabit lands at a distance on the other side of the mountain, cannot be

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allowed to seize land adjacent to the lands of the plaintiffs. The concept of '*Sar-Seem*' in Shamilaat is of special utility, and was meant to cater for such situations.

Considering the socio-cultural peculiarities of the region, allowing the defendants to seize land closely adjacent to the plaintiffs exclusive estate infringes both on local customs and the doctrine of Sar-Seem.

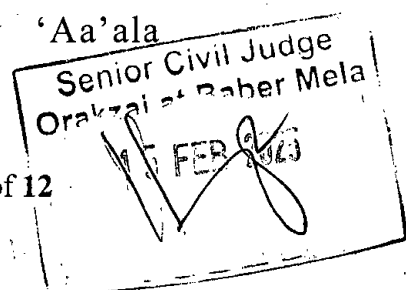
Therefore, plaintiffs are held entitled to the possession of suit land in common with other '*Aa'ala Malikan*' until the means to divide it by metes and bounds have been attained. Issue is decided accordingly.

Issue No 06:

This issue deals with the question of possession of the suit property. Precisely, it poses the question whether the defendants levelled the suit property into a playground.

The question relates more to the legal distinction between the fact of possession, and the legal act of acquiring it to hold it under a title. Mere physical control or dealing with a piece of property does not equate with the legal entitlement to its possession.

During the discussion under issues no 05 and 07, it has been established that plaintiffs are the only '*Aa'ala*



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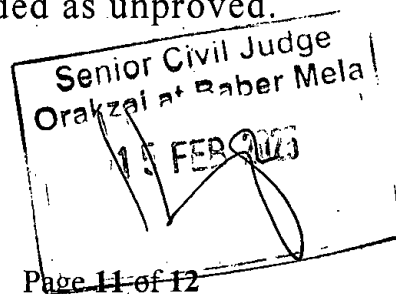
Malikan' with landed property adjacent to the suit land. Sardar Rawez, as it is locally called, is the landed estate of the plaintiffs between the mountains and stream, with no other intervening estate of any 'Aa'ala malik'.

Defendants, clearly, and admittedly, own and inhabit land, around the edge on the other side of Narwoskey Mountain.

Even, if it is established that they pressed and levelled a portion of the disputed land to play cricket, it does not invest them with any title claim to the property. Defendants concede in the written statement, in para 03, that no construction is being carried out on suit land, rather cricket is being played.

It is common for youngsters to use plain, uncultivated grounds for sports activities without manifesting or harboring any design to occupy or appropriate the land. From the corpus of the case file, it is established that cricket ground has been established for the purpose of sports alone, without affecting the title of the suit land in any manner.

As to who exactly began to create the ground, and in fact did create it, is unclear. The issue is decided as unproved.



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Issue No 08 and 09:

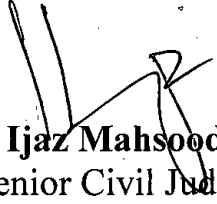
These issues pose the question of legal relief to which the plaintiffs might be entitled under the suit. Under the discussion under issues 05 and 07, the court found that being the only set of adjacent owners to the suit land, they are better entitled to jointly hold them for other co-sharers until partition by metes and bounds.

That since the defendants do not have any adjacent land to the suit property of which they might be A'aala Malikan, therefore, in law, equity and customary propriety, it is appropriate to restrain them from interference with possession of suit land in a manner prejudicial to the interests of the plaintiffs.

The issues are decided accordingly.

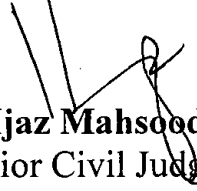
Case file be consigned to the record room after its necessary completion and compilation.

Announced
15.02.2025


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

CERTIFICATE

Certified that this judgment of mine consists of twelve (12) pages, each has been checked, corrected where necessary and signed by me.


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