

IN THE COURT OF HAQ NAWAZ,
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO.	:	09/13 OF 2025
DATE OF INSTITUTION	:	12.04.2025
DATE OF TRANSFER-IN	:	29.05.2025
DATE OF DECISION	:	09.09.2025

GHANI AKBAR S/O MST. NIAZ MANDA W/O AIN AKBAR,
CASTE SHEIKHAN, WOOT MELA, TAPPA UMARZAI,
PRESENTLY RESIDING ON HANGU ROAD PORANA TABLEGHI
MARKAZ KOHAT AND OTHERS

.....(APPELLANTS)

-VERSUS-

NOOR AKBAR S/O ALI SARDAR, R/O WAM PANRA, DISTRICT
ORAKZAI AND OTHERS

.....(RESPONDENTS)

Present: Shoaib Nasrat Khel Advocate for appellants.

: Javid Muhammad and Insaf Ali Advocates for respondent No. 1.

JUDGEMENT

09.09.2025

This civil appeal was preferred by the appellants against the judgment and decree dated 10.03.2025 passed by the Court of learned Civil Judge-II, Tehsil Courts Kalaya, District Orakzai, whereby Civil Suit No. 56/1 of 2021 was dismissed.

2. The suit was brought by the plaintiffs for declaration with permanent and mandatory injunction to the effect that they are owners of ten numbers of the suit properties along with a residential house situated at Wot Mela, described with full details in headnote of the plaint, whereas the defendants are their tenants and cultivators. They also prayed for possession of the suit properties through dispossession of the respondents/defendants in relief 'B' of the plaint.

3. According to averments of the plaint, the suit properties are the ownership of appellants since their forefathers. The plaintiffs

migrated to Kohat about 15 years ago due to their enmity and the suit properties remained in possession of the respondents/defendants as tenants against the payment of half share of produce (نصف بٹائی). However, the respondents/defendants have stopped to pay half share of the produce to the plaintiffs by claiming ownership of the suit properties. The defendants have got no concern with the ownership of suit properties and their claim, in this respect, is illegal which is ineffective upon the rights of appellants/plaintiffs. The defendants were repeatedly asked to refrain from their illegal acts, but they refused; therefore, the suit was filed.

The suit was contested by the defendants by submitting their written statement. Pleadings of the parties were reduced to the following 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 due to miss-joinder and non-joinder of parties?*
- V. *Whether the suit property situated at Wot Mela is the ownership in possession since their*

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*forefathers of the plaintiffs and the defendants
is the cultivator of the plaintiffs?*

VI. *Whether the plaintiffs received annual produce
up till now and about 02 years ago the same
has been stopped by the defendants?*

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

VIII. *Relief.*

5. After recording pro and contra evidence and hearing both the parties, the learned trial Court dismissed the suit through his impugned judgment and decree; hence, this appeal was filed.

6. I have heard learned counsel for the parties and perused the record.

During the course of evidence, the plaintiff No. 1 appeared before the Court as PW-1. He produced a sole witness in his favour as PW-2. After recording the examination in chief, the plaintiff could not produce the PW-2 for his cross examination.

On the other hand, the defendant No. 1 appeared before the Court as DW-2. He also produced Pir Gul and Khan Shah before the Court as DW-1 and DW-3.

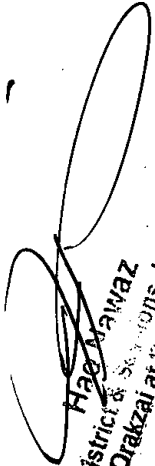
8. Keeping in view the fact that the appellant could not produce any witness in his support, the learned trial Court dismissed the suit through his impugned judgment; therefore, the present appeal was preferred.

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9. The perusal of written statement shows that the defendants have taken the plea of protection of their rights under Section 41 Transfer of Property Act, 1882. The said Section is reproduced as follows;

“Transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”


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10. Besides the said fact, the DW-1 as well as the DW-2 have submitted that the defendants belong to Caste Bazid Khel who are settled at Wam Panra. Whereas the plaintiffs are Umarzai by caste and they are settled at Wot Mela at a distance of 05 km as stated by DW-1 in his cross examination. The said facts were also admitted by the defendant No. 1 in his cross examination as DW-2. The DW-1 further stated in his cross examination that the defendants have a claim in respect of the

suit properties on the basis of its purchase by their grandfather from the grandfather of plaintiffs.

11. Though the defendant No. 1, in his statement before the Court as DW-2, has submitted that he does not know the plaintiffs but at the same time he admitted the jirga proceedings between the parties in respect of the dispute in question. He further submitted that the properties in dispute are their hereditary ownership.

12. There is a jirga deed dated 14.12.2018, available on record, which was conducted by Malak Zaliman Shah, Malak Nazir Manshah, Malak Niaz Bahadar, Malak Muslim, Malak Noor Anjum, Malak Nana Gul, Malak Shafi Ullah and Malak Muhammad Ghani. Though the defendant No. 1 has denied any jirga with the plaintiffs through the said jirga members in his statement before the Court, but the DW-3 has admitted that the last jirga between the parties was conducted by Malak Zaliman Shah, Malak Nazir Badshah and Malak Bahadar etc. The perusal of said jirga proceedings also depict that the respondents/defendants had alleged the purchase of the suit properties for consideration before the jirga members.


13. In such situation, the said jirga members were called before this Court. Only two of them namely Niaz Bahadar Khan and Muhammad Ghani appeared and recorded their joint statement in which they denied to have conducted any jirga proceedings.


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The other jirga members were not served properly and some of them were reported to have shifted their residences and some have died.

14. In such circumstances, it is incumbent upon the Court to dig out the following facts;

- a. *Whether Bazid Khel have hereditary ownership at Wot Mela or only Umarzai have hereditary ownership at Wot Mela where the properties in dispute are situated?*
- b. *Whether the above mentioned jirga members have participated in the jirga proceedings dated 14.12.2018?*
- c. *Whether the defendants had claimed the ownership of suit properties on the basis of purchase before the said jirga members?*
- d. *If point C is replied in positive, then which party shall discharge the burden of proof of their ownership in respect of the suit properties?*


Fayyaz Ahmad
District & Sessions Judge
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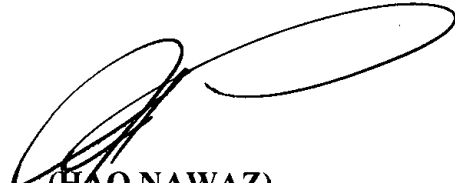
15. In view of the above facts, the appeal is accepted. The impugned judgment and decree are set aside and the suit is remanded back to the trial Court with directions to call all the available jirga members and determine the above points as additional issues in the matter. The parties may also produce their additional evidence, if they want so. They are directed to

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appear before the trial Court on 16.09.2025 for further proceedings. File of this Court be consigned to record room after its necessary completion and compilation. Copy of this judgment be sent to the trial Court for information and compliance.

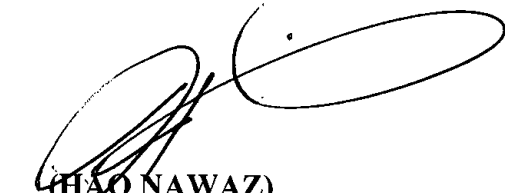
Announced:
09.09.2025


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CERTIFICATE

Certified that this judgment consists of seven (07) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 09.09.2025


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at Baber Mela