

IN THE COURT OF BAKHT ZADA
ADDITIONAL DISTRICT JUDGE-I, ORAKZAI
AT BABER MELA

CIVIL APPEAL NO. : 01/13 OF 2024
DATE OF ORIGINAL INSTITUTION : 02.05.2024
DATE OF TRANSFER IN : 09.10.2024
DATE OF DECISION : 21.05.2025

1. NIKMAT ALI
 2. HIKMAT ALI
 3. NOBAT ALI ALL SONS OF SAFDAR ALI
 4. TARIQ ALI S/O GULFAR ALI
 5. ZAHIR S/O GULFAR ALI ALL RESIDENTS OF BAKHKANI,
ANDKHEL BALA, DISTRICT ORAKZAI.
-(APPELLANTS)

-VERSUS-

1. MASTAN ALI S/O ALI MEHDI,
 2. AWAN ALI S/O MUHAMMAD ALI,
 3. ANGOR ALI S/O ALI NABI,
 4. MEER NABI S/O ALI NABI,
 5. RIZWAN ALI S/O MUHAMMAD ALI
 6. GULSHAN ALI S/O RISHWAN ALI,
 7. EIDATH ALI,
 8. NOSHIR ALI,
 9. SHER SHAH,
 10. TAJID ALI ALL SONS OF RIZWAN ALI,
 11. KHAPOOR ALI,
 12. SHAMIM ALI ALL SONS OF NADAR ALI,
 13. YASMIN ALI S/O GHULAB ALI,
 14. HUSSAIN GHULAM S/O MUHAMMAD GHULAM,
 15. RAZIM ALI S/O HASSAN GHULAM AND
 16. JAMIL HASSAN S/O DAWOOD ALI ALL RESIDENTS OF
BAKHKANI, ANDKHEL BALA, DISTRICT ORAKZAI.
- (RESPONDENTS)

**CONSOLIDATED APPEAL U/S 96 CPC AND CROSS OBJECTION
AGAINST THE CONSOLIDATED JUDGMENT AND DECREE OF THE
LEARNED CIVIL JUDGE-I, ORAKZAI AT BABER MELA**

JUDGEMENT

21.05.2025

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Addl. District & Sessions Judge
Orakzai at Hargu

Through this consolidated judgement I shall decide an appeal filed the appellants Nikmat Ali etc against the respondents Mastan Ali etc and cross-objection filed by the

appellants/petitioners Mastan Ali etc, both challenging the consolidated judgement, decree and order dated 12.03.2024 of the learned Civil Judge-I, Orakzai at Baber Mela, whereby the said court has dismissed suit No. 12/01 of the appellants/plaintiffs titled "Nikmat Ali etc Vs Mastan Ali etc" and suit No. 13/01 titled "Mastan Ali etc Vs Nikmat Ali etc".

2. Concise facts of the case are that initially appellants/plaintiffs of suit No. 12/01 titled "Nikmat Ali etc Vs Mastan Ali etc" filed suit for declaration, permanent and mandatory injunctions against the respondents/defendants wherein they alleged that appellants/plaintiffs are owners in possession of 1/7 shares, as per annexed site plan in the whole property situated at Bakhkani Andkhel Bala, Tehsil and District Orakzai on the strength of a jirga dated 03.11.1992. It was decided in the Jirga decision dated 03.11.1992 that if the defendants take special oath regarding non-entitlement of plaintiffs to the extent of 1/7th share in the suit property then plaintiff's ownership in the suit property will cease to exist. As per Jirga decision, another sitting was arranged for administering oath to the defendants On 10.11.1992 which was refused and consequently plaintiffs on the basis of jirga decision dated 03.11.1992 became owners of the suit property. Plaintiffs also alleged that in consequence of the Jirga decision dated 03.11.1992,

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one Qambar Ali acted upon the jirga decision and surrendered 1/7th share of plaintiff in his property/land on 27.08.1994. Plaintiffs further contended that defendants in violation of the jirga decision dated 03.11.1992, refused to acknowledge the rights and are bent upon to get forcible possession by resorting to illegal interference in the suit property. Hence, suit No. 12/01 was filed.

3. On the other hand, a counter suit No. 13/01 titled "Mastan Ali etc Vs Hikmat Ali etc" was filed on 02.10.2020 through which the appellants/plaintiffs Mastan Ali etc sought declaration, permanent and mandatory injunctions in respect of the suit property, fully detailed in the headnote of the plaint and alleged that they are co-sharers in the suit property. The predecessor of the defendants/respondents were "karigar" by profession and they used to help the predecessor of the plaintiffs in their daily work and in recognition of the mentioned service, the predecessor of the plaintiffs gave the suit property for use to the defendants and that the defendants have got no concern with the ownership of the suit property. The plaintiffs of suit No. 13/01 while denying the ownership of defendants states that the suit property was handed over to the predecessor of defendants in lieu of the "services" they rendered. It is also highlighted that plaintiffs belong to caste Stori Khel, village Andkhel and they being in large number it was not possible for the

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plaintiffs to make all the members of Stori Khel caste as plaintiffs in the suit; therefore, application under order I, Rule 8 CPC is being filed to consider the same as representative suit. It is further pointed out that predecessors of the defendants belong to village Mani Khel and since they refused to render their services, hence not entitled to retain the possession and so the instant suit No. 13/1.

4. Both the parties of suit No. 12/01 and 13/01 filed their written statements and a similar assertions were made as mentioned in their respective complaints. However, defendants of suit No. 13/01 made an addition in para 6 of preliminary objections that they are owner in possession of the suit property for the last 150 years and the plaintiffs of suit No. 13/01 or their predecessors have got no concern with the suit property.

5. The learned trial court, after perusing the pleadings of both the suits and considering the request of the learned counsel for the parties, consolidated the same on 08.02.2023 and consolidated issues were framed on 15.02.2023.

6. Both the parties availed their respective rights of producing evidence in support of their contentions. After conclusion of evidence, arguments were heard and the learned trial court dismissed both the suits. Plaintiff of suit No. 12/01 filed the present appeal, while plaintiff of suit No.

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13/01 could not file appeal rather opted to file cross objections.

7. It is contended in appeal No. 01/13 that the impugned judgements are contradictory and as a result of misreading and non-reading of evidence available on file. The appellant also agitated the legal competence of the jirga decision by referring to the refusal of respondents to take special oath as per jirga decision dated 03.11.1992. The appellant concluded that findings on issue No. 05 are not in line with the evidence available on file and decision on the remaining issues is contradictory and without any legal justification. It is further alleged that decision of the learned trial court on issues No. 6, 7 and 8 are also incorrect as the appellant/plaintiffs are owner in possession of the suit property since their forefathers.

8. Respondents of appeal No. 01/13 as stated earlier could not file appeal and opted to file cross-objections. It is alleged that findings of the learned trial court on issue No. 05 are correct. Issue No. 08 and 05 are interconnected being related ^{to} jirga decision dated 03.12.1992 and the learned trial court was supposed to decide issue No. 05 and 08 together, but issue No. 08 is decided together with issues No. 06 and 07 and decision of the learned trial court on issues No. 05 and 08 are contradictory to each other which needs rectification.

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Arguments heard and available record perused.

9. Before dilating upon the merits of the instant appeal, it seems appropriate to decide the fate of cross-objections filed by the respondents. Remedy of appeal is a statutory right provided by law to each and every person who is aggrieved from the judgements and decrees of fora below. Appellants/plaintiffs availed this remedy by filing appeal against the impugned consolidated judgement and decree dated 12.03.2024. The respondents of the present appeal could not avail this remedy and relied on the cross objections. When a remedy of appeal is provided and not availed then the same remedy cannot be agitated in cross objections. The scope of cross objections is limited only to the extent of challenging a finding on a particular issue while supporting the decree. The contents of cross objections if perused would reveal that the same has been filed to replace the remedy of appeal which is not permissible under the law. Similarly, it appears from the record that the respondents made recourse to cross objections when the remedy of appeal was time barred. The cross objections are thus not maintainable and cannot be considered. Reliance is placed on 2014 SCMR 1365 and 2017 CLC 52. Citation "c" of the ibid judgement is reproduced for ready reference

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"Civil Procedure Code (V of 1908)

---O.XII, R.22---Decree---Cross objections, filing of purpose--- cross objections were not meant for the purpose of challenging the decree as a whole or for having the same set aside--- Cross objections were only relevant and meant to have (challenging) a finding on particular issue, which had been decided against a party to the lis, while supporting the decree in favour of the party filing cross objections"

10. As issue No. 05 & 08 are identical then the same are taken together for discussion/decision. The appellants/plaintiffs claimed ownership and possession of 1/7th share on the strength of Jirga decision dated 03.11.1992 and 27.08.1994. The burden of proof of these issues solely lies on the appellants/plaintiffs and to prove a document, Qanon-e-Shahadat Order, 1984 require the testimony of two attesting/marginal witnesses. Among the attesting/marginal witnesses, one Ghafil Rehman appeared as PW-01, son of Mir Syed namely Muhammad Ameer Jan appeared as PW-02, son of Ghulam Rashid namely Kamil Khan appeared as PW-03, Wahid Ali as PW-04 and one Ashraf Hussain as PW-05. Appellants/plaintiffs failed to prove the jirga decision dated 03.11.1992 and 10.11.1992 on the touch stone of Article 79 of the Qanoon-e -Shahadat Order, 1984. Both the deeds does not contain the signatures of the parties; PWs admit that no consent (Wak Ikhtiar) was obtained from

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the parties and the persons who refused to take special oath were mentioned in the deed Ex. PW-1/1. PW-02 & PW-03 states that they are neither aware about the contents of the deed Ex. PW-1/1 nor they were present at the time of Jirga decisions. Similarly, they failed to produce a document with which the signatures of their respective fathers can be compared. PW-04, has blood-feud with the respondent party and his statement cannot be relied upon. PW-05 is Ashraf Hussain, who states that on Ex. PW-1/1 his thumb impression is available, while during cross examination his CNIC was placed on file as Ex. PW-5/X-1 which contained his signatures. The deed Ex. PW-1/1 contained the name of one Ashraf Ali without parentage, while PW-05 is Ashraf Hussain S/O Ahmad Ali. The evidence produced by the appellants/plaintiffs regarding the jirga decision dated 03.11.1992 is not confidence inspiring and fails to meet the requirements of law.

11. The jirga decision dated 03.11.1992 and the overleaf proceedings regarding taking of special oath were placed on file as Ex. PW-1/1 and Ex. PW-6/2. The contents of the said deed would reveal that the fate of a portion of Bakhkani Land known as "Lalmy Watan" had been decided and not the entire land of Bakhkani Land. The appellant/plaintiffs in their plaint claim 1/7th share in the entire land of Bakhkani. On this ~~case~~ ^{score} alone, the suit of plaintiff is liable to be

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dismissed as appellants/plaintiffs were supposed to claim what had been statedly decided in their favour. Similarly, the description of property is vague and ambiguous. It is indeed the requirement of law that description of property must be given in clear terms and cannot be assumed or presumed.

12. The jirga decision dated 03.11.1992 and 10.11.1992 were thus rightly discarded by the learned trial court. Findings on issue No. 05 & 08 are maintained.

13. As stated earlier that the appellants/plaintiffs claim ownership and possession of 1/7th share in the suit property on the strength of Jirga decision dated 03.11.1992 and 10.11.1992. Since, appellants/plaintiffs could not prove their entitlement over the suit land on the basis of Ex. PW-1/1 hence, their claim of ownership of the house and land becomes redundant. The assertion that the predecessor of the appellants/plaintiffs and now the appellants/plaintiffs are owner in possession of the suit land for the last 150 years is a departure from their plaint in suit No. 12/01.

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Appellants/plaintiffs can either claim the suit land on the strength of the jirga decisions or on the basis of their continued and uninterrupted possession for the last 150 years. No such evidence is available on file which substantiate the claim of appellants/plaintiffs regarding their ownership and possession over the suit land for the last 150

years. Mere assertion of such claim can be a wishful thinking, but not legally tenable.

14. The observations of the learned trial court in para-No. 28, lines No. 03 to 06 of the impugned judgement and decree dated 12.03.2024 are reproduced for ready reference as the same require interference of this court

“—Firstly, the possession and ownership of the plaintiffs regarding the house is admitted by all witnesses of defendants. Admittedly, as per record, the plaintiffs have possession of the disputed house”

15. The above observations if perused in juxtaposition of the written statement filed in suit No. 12/01 and plaint of suit No. 13/01 then it becomes crystal clear that the respondents of the present appeal never ever admitted the claim of ownership of appellants/plaintiffs regarding the suit house and the suit land, rather they consistently agitated that only possession of the suit house was given in lieu of the

specific services rendered by the predecessor of appellants/plaintiffs and no ownership rights were given.

The same contention was reiterated by DWs in their respective examination in chief and cross examinations.

Even the suggestions regarding ownership of the suit house/suit land were specifically negated. The observations of the trial court regarding ownership of the suit house are thus not maintainable, while possession of the suit house is

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admitted by the respondents in their pleadings and statements and that too for the services they or their predecessor rendered. The observations regarding ownership of the suit house of appellants/plaintiffs is thus set aside and to the extent of possession is maintained.

16. So far as the improvements are concerned, no evidence of any sort was produced by the appellants/plaintiffs and so in absence of evidence, the claim for improvements is not tenable. Consequently, it is held that appellants/plaintiffs are in possession of the disputed house only on the strength of the services they rendered, while ownership regarding the suit house and ownership and possession of the suit land is not established on record. Similarly, the respondents of the instant appeal also failed to prove their ownership over the suit house and ownership/possession over the suit land through confidence inspiring evidence. Issue No. 06 & 07 are decided in negative.

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Observations on issue No. 1 to 4 and 9 to 11 are maintained.

18. In view of what has been discussed above, the observations of the learned trial court regarding ownership of the suit house of appellants/plaintiffs is set aside and the impugned judgement and decree dated 12.03.2024 is

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maintained. Consequently, the instant appeal as well as
cross objections stands dismissed with no order as to cost.

19. File be consigned to the record room after its
necessary completion and compilations.

Announced
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(Bakht Zada)
Addl: District Judge-I, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of twelve (12)
pages. Each page has been read, corrected wherever
necessary and signed by me.

Dated: 21.05.2025

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(Bakht Zada)
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