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IN THE COURT OF REHMAT ULLAH WAZIR,
SENIOR CIVIL JUDGE, ORAKZAI AT BABER MELA

Civil Suit No.	09/1 of 2023
Date of Original Institution:	07.10.2019
Date of Transfer In:	03.01.2023
Date of Decision:	23.05.2023

Abdul Jameel s/o Naryab Gul
R/O Darwi Khel (Garhi) Zawan, Qoum Rabia Khel, Mishti, Orakzai.

(Plaintiff)

VERSUS

Waziristan s/o Isar Gul and 07 others
All R/O Tappa Darwi Khel, Village Zawan, Tehsil & District Orakzai.

(Defendants)

SUIT FOR DECLARATION-CUM-PERPETUAL & MANDATORY INJUNCTION AND POSSESSION

JUDGEMENT:

The Plaintiff has brought the instant suit for declaration-cum-Perpetual & mandatory injunction and possession against the defendants, seeking therein that plaintiff is the owner of 04 fields situated at Zawan, which were given to the defendants on ijara. That the defendants were paying the ijara worth Rs. 2500/year till before 2012 but they stopped the said payment in the year 2013 and began asserting themselves as the owners of the suit property and now they have completely refused to admit the ownership of the plaintiff despite the fact that the plaintiff is the owner of the suit property since his forefathers and have never sold the

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same to any person including the defendants. That the defendants were asked time and again to admit the ownership of the plaintiff and hand over the possession of the same to the plaintiff and not to do any construction etc over the suit property but they refused, hence, the present suit.

Defendants were summoned through the process of the court, who appeared before the court and contested the suit by filing written statement, wherein they raised some factual and legal objections.

Divergent pleadings of the parties were reduced into the following issues;

Issues:

1. Whether the plaintiff has got a cause of action?
2. Whether the suit of the plaintiff is time barred?
3. Whether the plaintiff is estopped to sue?
4. Whether the suit property is the ownership of the plaintiff and the defendants were only cultivating the same as tenants?
5. Whether the suit property is the ownership in possession of the defendants since their forefathers and the plaintiff has nothing to do with the same?
6. Whether the suit controversy has already been decided by the AC, L/Orakzai on 26.10.2018 through FIGR, that is why the present suit is hit by Res Judicata?
7. Whether the plaintiff is entitled to the decree as prayed for?

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8. Relief. (345)

Parties were given ample opportunity to produce their evidence, which they accordingly availed.

The plaintiff produced witnesses, in whom Mr. Zahir Ali, Assistant Record Keeper, Judicial Record Room, Orakzai appeared as PW-01, who produced a suit file No. 48/1, titled as "Kashmir Khan Vs Waziristan", which is Ex.PW-1/1 and stated that the same was received from the then APA, L/Orakzai to the District & Sessions Judge, Orakzai, which was later on consigned to the judicial record room of Orakzai on 18.09.2019. Mr. Taimoor Syed, Muharrir to AC, L/Orakzai appeared as PW-02, who produced the letter No. 74 of the AC, L/Orakzai, Dated: 09.05.2019 vide which the suit titled as "Kashmir Khan Vs Waziristan" was transferred to the District & Sessions Judge, Orakzai, which is Ex.PW-2/1. Mr. Kashmir Khan, the special attorney for the plaintiff appeared as PW-03, who stated that he is the cousin of the plaintiff. That due to some compulsions, the plaintiff migrated to the village Garhi of Rabia Khel. That in his presence, the father of the plaintiff told his father to give away the suit property for cultivation to someone and then the father of the plaintiff gave the suit property for cultivation to the defendants on Nisf Battai in the year 1970/71. That later on, the suit property was given to the

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defendants on ijara. That in the year 2013, the plaintiff wanted to cultivate the suit property because the defendants stopped the payment of ijara and asserted themselves as the owners of the same. That he began to conduct jirgas with the defendants, who lost the same and later on they asserted themselves as the owners of the suit property and in the meanwhile, the plaintiff entered in the proceedings and denied the sale of the suit property to anyone. That the proceedings of the said dispute were going on with the then APA, L/Orakzai but later on the case was shifted to this court. But he admitted in his cross-examination that he does not remember the migration of the plaintiff etc because it was before his birth. That there was no witness at the time of handing over the suit property on ijara to the defendants except themselves. That there was written document regarding neemkara with the defendants and that he filed an application against the defendants before the then APA, Orakzai regarding the suit property in which he won the case but the APA didn't decide in his favour. Further that the jirga made a decision for the parties whereby the plaintiff was directed to produce witnesses and the defendants were directed to take oath. That he did not file any application before the commissioner, Kohat for setting aside the decision of the AC, L/Orakzai, whereby the defendants won the case

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from the plaintiffs. Further, Mr. Muzafar Khan, a witness of the ijara appeared as PW-04, who stated that the agreement of ijara was executed in his presence whereby it was fixed as Rs. 2500. But admitted in his cross-examination that the defendants have never paid the amount of ijara in his presence and that the agreement of ijara was not converted into a written form. That the place of the agreement of ijara has not been mentioned in his statement and that he does not know whether the suit property is the ownership of the plaintiff or the defendants. Further, Mr. Abdul Jameel, the plaintiff himself appeared as PW-05, who narrated the same story as in the plaint. But admitted in his cross-examination that no written document exist between the parties regarding ijara/neemkara. Further, that he has not mentioned the location/boundaries of the suit property in the plaint. Further, that he does not know the boundaries of anyone of the fields because they have migrated to Rabia Khel since long. Further, that he has no witness in whose presence the defendants paid the amount of ijara. That according to CNIC, his address i.e Qoum Rabia Khel and that he has no Domicile regarding his relation to Qoum Mishti because his grandfather migrated to Qoum Rabia Khel. That he filed an application before the administration of Kalaya, Orakzai on 26.04.2016 and that he paid Rs. 50,000/- as Machalka/ Ganra

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to the jirga members, who determined Lyara for the parties, whereby he was ordered to produce 02 witnesses but the jirga members rejected his witnesses. That he didn't file any application to the AC, L/Orakzai against jirga Rai and rejection of the witnesses by them. That the said witnesses were also rejected by the AC, L/Orakzai. That he has not challenged the decision of the AC, L/Orakzai before the commissioner, Kohat rather he challenged the jirga decision before this court. That, except the present suit, he has not filed any application before this court. That the suit property is in the possession of the defendants. That he belongs to Qoum Rabia Khel, Tappa Piawo Khel Garhi, Preshan Tang, Tehsil Ismail Zai while the suit property is situated in Tehsil Central, Qoum Mishti. Further, that he is not the eye-witness of the alleged neemkara/ijara.

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In order to counter the claim of the plaintiff, the defendants produced witnesses in whom the defendant No. 01 for himself and as a special attorney for the defendant No. 03 appeared as DW-01, who fully denied the claim of the plaintiff rather claimed the suit property as his ancestral property, with which no one including the plaintiff has anything to do. That on 26.10.2018, the AC, L/Orakzai decided a case regarding the suit property in their favour which is Annexure-A. Further, that the plaintiff belongs to

Qoum Rabia Khel and not to Qoum Mishti. During cross-examination, it has been further authenticated that a jirga was conducted between the parties regarding the suit property, whereby the witnesses of the plaintiff were rejected and the defendants were ready to take oath and accordingly the case was decided in favour of the defendants and that the decision of the AC, L/Orakzai was accepted by the plaintiff. Further, Ameen Khan one of the defendants and the special attorney for the rest of the defendants appeared as DW-02, who narrated the same story as in the written statement. He has been cross-examined but nothing tangible in favour of the plaint has been extracted out of him during cross-examination. Further, Mr. Zahir Ali, Record Keeper, Sessions Record Room, Orakzai appeared as DW-03, who produced the suit file No. 48/1, titled as "Kashmir Khan Vs Waziristan" which is Ex.DW-3/1. Further, Mr. Safar Gul appeared as DW-04, who fully supported the stance of the defendants and also Mr. Muhammad Arafat appeared as DW-05, who also fully supported the stance of the defendants. They both were cross-examined but nothing tangible in favour of the plaint have been extracted out of them during cross-examination.

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Arguments heard and record perused.

My issue-wise findings are as under;

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Issues No. 02:

The defendants in their written statement raised the objection that suit of the plaintiff is time barred but I am the opinion that as per Article 120 of the Limitation Act, 1908 there is a period of 06 years for the institution of such like suits but the aforesaid Limitation Act, 1908 is extended to the erstwhile FATA on 31/05/2018 through the 25th constitutional amendment and the same has become operational from the aforesaid date while the instant suit has been filed on 07.10.2019. Thus, the same is well within time. The issue is decided in negative.

Issues No. 03:

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The defendants alleged in their written statement that the plaintiff is estopped to sue but later on failed to prove the same, hence, the issue is decided in negative.

Issues No. 04 & 05:

Both these issues are interlinked, hence, taken together for discussion.

The plaintiff alleged in his plaint that he is the owner of 04 fields situated at Zawan, which were given to the defendants on ijara. That the defendants were paying the ijara worth Rs. 2500/year till before 2012 but they stopped the said payment in the year 2013 and began asserting themselves

as the owners of the suit property and now they have completely refused to admit the ownership of the plaintiff despite the fact that the plaintiff is the owner of the suit property since his forefathers and have never sold the same to any person including the defendants. That the defendants were asked time and again to admit the ownership of the plaintiff and hand over the possession of the same to the plaintiff and not to do any construction etc over the suit property but they refused, hence, the present suit.

The burden to prove all these facts is upon the plaintiff but his special attorney and witness in the shape of PW-03 have admitted that neither there is any witness nor any document of the alleged handing over the suit property to the defendants for neemkara/ijara. The other witness namely Mr. Zafar Khan, who appeared as PW-05, who alleged that he is the witness to the ijara of the parties, have admitted in his cross-examination that neither the ijara has ever been paid by the defendants to the plaintiff in his presence nor the same was converted into a written deed. Also he admitted that he does not know whether the suit property is the ownership of the plaintiff or the defendants. The plaintiff himself when appeared as PW-05, have admitted in his cross-examination that neither the boundaries of the suit property are known to him nor the same are mentioned in the plaint because he has

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migrated to Rabia Khel since long. Also he has admitted that there exist no written document between the parties regarding neemkara/ijara. Also, that the address mentioned in his CNIC is that of Qoum Rabia Khel and he has no Domicile regarding his residence at Qoum Mishti.

In the light of the aforesaid findings, the plaintiff failed to discharge his burden of proof regarding his ownership of the suit property rather admittedly the boundaries of the suit property are neither known to him nor mentioned by him in the plaint, meaning thereby that he has not even seen the suit property and rather he may have heard someone. Also, he failed to produce any other piece of cogent and reliable evidence regarding the fact that he is the owner of the suit property and the same was given to the defendants neemkara/ijara. Thus, both these issues are decided accordingly

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Issues No. 06:

This issue was framed as per the directions of the Worthy District & Sessions Judge, Orakzai vide his order/judgment, Dated: 23.01.2023, in a revision petition whereby it was directed to frame an issue, whether the present suit is hit by Res Judicata?

The burden to prove this issue was upon the defendants. During evidence the one Zahir Ali, Record

Keeper, Sessions Record Room, Orakzai as DW-03, produced the suit file No. 48/1, titled as "Kashmir Khan Vs Waziristan" as Ex.DW-3/1, wherein the order Dated: 26.10.2018 of the AC, L/Orakzai is available, whereby the suit controversy has been decided between the parties, against the present plaintiff and in favour of the present defendants. Also, the special attorney of the plaintiffs as PW-03 have admitted that he filed an application before the then APA, L/Orakzai and the present plaintiff also joined later on, wherein it was directed to the present plaintiff to produce witnesses and it was directed to the present defendants to take oath. That the plaintiff produced witnesses but were rejected by the jirga and the defendants won the case from the plaintiff and that he did not file any application before the commissioner, Kohat against the decision of the AC, L/Orakzai. The plaintiff himself as PW-05, admitted the filing of application before the administration of Kalaya, Orakzai on 26.04.2016 and the payment of Machalka/Ganra worth Rs. 50,000/- to the jirga members and the determination of the Lyarar by the jirga for the parties and the rejection of his witnesses by the jirga and then by the AC, L/Orakzai and the fact that he did not challenge the said decision before the commissioner, Kohat.

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All these clearly establish the fact that the present suit controversy was decided by the then AC, L/Orakzai under FIGR on 26.10.2018 and when the said FIGR was in field while the judgment passed in the Writ Petition No. 3098-P/2018, Dated: 30.10.2018, titled as "Ali Azim Afridi Vs Federation of Pakistan and others", it was held in its last para that after one month of any decision of civil or criminal nature by the executive authorities would be void ab-initio. As such the order Dated: 26.10.2018, being prior to the above-cited judgment of the August Peshawar High Court, Peshawar and is well within the powers of the AC, L/Orakzai under the prevailing law for the time being and the same has admittedly not been appealed against. Also admittedly parties before the then AC, L/Orakzai were the same and admittedly the property in question before this court was also directly substantially the same before the then AC, L/Orakzai, therefore, the suit controversy falls clearly within the ambit of Res Judicata and is hit by the same. The issue is decided in positive.

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Issues No. 01 & 07:

Both these issues are interlinked, hence, taken together for discussion.

As sequel to my findings on issue no. 04, 05 & 06, the plaintiff has got no cause of action and thus, he is not

entitled to the decree as prayed for. Hence, both these issues are decided in negative.

Relief

As sequel to my above issue-wise findings, suit of the plaintiff is hereby **dismissed** with costs.

File be consigned to the Record Room after its necessary completion and compilation.

Announced
23.05.2023

(Rehmat Ullah Wazir)
Senior Civil Judge,
Orakzai (at Baber Mela)

CERTIFICATE

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

(Rehmat Ullah Wazir)
Senior Civil Judge,
Orakzai (at Baber Mela)