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IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,
ORAKZAI (AT BABER MELA).

Civil suit No	**104/1 of 2021**
Date of original institution	**14.07.2021**
Date of decision	**23.05.2023**

1. **Shah Sawar S/o Sultan**
2. **Qudrat Ullah S/o Sadiq Shah**
3. **Abdul Qayyum S/o Hais Ullah Jan**
4. **Haroon S/o Kamil Badshah**

All residents of Qoam Biland Kheil, Tappa Peeran, District Orakzai.

..... (Plaintiffs)

Versus

1. **Ayaz S/o Taj Ali Khan**
2. **Younas S/o Muhammad Ayoub**
3. **Shakeemat Khan S/o Gulmat Khan**
4. **Aman Ullah S/o Muhabbat Ali Khan**
5. **Naeem Khan S/o Gulmar Jan**
6. **Ayoub Khan S/o Awal Khan**

All residents of Qoam Biland Kheil, Tappa Palmat Kheil, District Orakzai.

.....(Defendants)

SUIT FOR DECLARATION CUM PERMANENT AND MANDATORY INJUNCTION

JUDGMENT:

1. Brief facts of the case are that the plaintiffs have filed the instant suit for declaration and permanent injunction to the effect that the plaintiffs are owners in possession of suit property measuring 12 Jareeb land (fully detailed in the headnote of the plaint). The plaintiffs claimed that the defendants are possessor of an adjacent land, a sketch of which is annexed with the plaint and that after diversion of the

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water flow of a stream away from the suit property, the defendants are interfering in the land measuring 3.5 to 4 Jareeb in the land owned and possessed by the plaintiffs. That the defendants were asked not to interfere in the disputed land, but they refused, hence in the present suit.

2. After due process of summons the defendants appeared in person and contested the suit by submitting written statement in which contention of the plaintiffs were resisted on many legal as well as factual grounds. They denied the claim of plaintiffs, contending that the suit property was given by their ancestors to the ancestors of the plaintiffs in mortgage.

3. The divergent pleadings of the parties were reduced into the following issues.

ISSUES.

1. ***Whether the plaintiffs have got cause of action?***
2. ***Whether the plaintiffs are estopped to sue?***
3. ***Whether the suit of the plaintiffs is time barred?***
4. ***Whether the suit property is the ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated with suit property?***
5. ***Whether the ancestors of defendants had mortgaged the suit property to the ancestors of the plaintiffs?***
6. ***Whether the plaintiffs are entitled to the decree as prayed for?***
7. ***Relief.***

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4. Parties were afforded with ample opportunity to adduce evidence. Plaintiffs in support of their claim and contention produced 03

Witnesses. Detail of the plaintiff's witnesses and exhibited documents are as under; -

	WITNESSES	EXHIBITIS
PW-1	Qudrat Ullah S/o Sadiq Shah Resident of presently Peer Dara, Ormar Payan District Peshawar.	Power of Attorney is Ex.PW-1/1. Sketch Scale Map is Ex.PW-1/2.
PW-2	Said Muhamad Younas S/o Ibrahim Shah Resident of Qoam Biland Kheil, Tappa Peeran, District Orakzai.	Nil
PW-3	Peer Wali Shah S/o Hussain Shah Resident of Qoam Biland Kheil, District Orakzai.	Nil

Defendants in support of his claim and contention produced four (04) witnesses. Detail of defendant's witnesses and exhibited documents are as under;

WITNESSES		EXHIBITIONS
DW-1	Malak Mushk Alam Bangash S/O Nazim Meer Resident Qoam Biland Kheil, Tappa Awizai, District Orakzai.	Copy of CNIC as Ex.DW-1/1.
DW-2	Waheeb Noor S/o Maza Noor Resident of Qoam Biland Kheil, Tappa Palmat Kheil, District Orakzai.	Copy of CNIC as Ex.DW-2/1.
DW-3	Muhammad Raeel Khan S/o Azmat Khan Resident of Qoam Biland Kheil, Tappa Palmat	Power of attorney as Ex.DW-3/1. Copy of CNIC as Ex.DW-3/2.

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	Kheil, District Orakzai.	Copy of documents of property as Ex.DW-3/3
DW-4	Niaz Wali Khan S/o Muhabbat Ali Khan resident of Qoam Biland Kheil, Tappa Palmat Kheil, District Orakzai.	Copy of CNIC as Ex.DW-4/1. Record related to Qoams as Ex.DW-4/2.

5. Learned counsel for the plaintiffs Mr. Shoaib Nusrat Kheil Advocate argued that plaintiffs have produced cogent evidence and reliable witnesses to prove that the suit property is ancestral ownership of plaintiffs. The witnesses are consistent in their statements that the suit property is owned and possessed by the plaintiffs. Possession of the plaintiffs over the suit property is admitted by the defendants in the written statement and statements of DWs in the evidence. Further argued that the defendants have deviated from their stance taken in the written statement. In written statement the defendants have contended that the suit property was given to the forefathers of plaintiffs in mortgage whereas, in evidence all the Defendants' witnesses recorded in their statements that the same is the ownership of the defendants and no witnesses said that the suit property was mortgage with plaintiffs. The learned counsel sited 2002 SCMR 1173, 2023 SCMR 344, 2019 CLC 2008, 2020 SCMR 202 and 2023 CLC 543 in support of his stance.

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6. Learned counsel for the defendants Mr. Farhan Ullah Advocate argued that the plaintiffs have not produced sufficient evidence in

order to proof their case. That the plaintiffs don't have any documentary proof in support of their stance. That the suit property as per statements of witnesses is the ownership of the defendants. Moreover, the ancestors of the plaintiffs don't originally belong to the Tappa Palmat Kheil, Qoam Biland Kheil.

7. After hearing arguments and after gone through the record of the case with valuable assistance of learned Counsels for both the parties, my issue-wise findings are as under:

ISSUE NO.2:

Whether the plaintiffs are estopped to sue?

8. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendants, therefore issue is decided in negative and against the defendants.

ISSUE NO.3:

Whether the suit of the plaintiffs is time barred?

9. The onus to prove this issue was on the defendants. The plaintiffs filed suit for declaration and permanent injunction. Defendants neither produced any evidence nor the point was agitated before the court at the time of arguments. Even otherwise, there is nothing available on record which suggests that the suit is time barred.

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10. Moreover, period of limitation for filling declaratory suit Under Article 120 of limitation Act, is six years. Furthermore, after the 25th constitutional Amendment Act, 2018, all federal and provincial law extended to the newly merged Districts in 2018. Therefore, it is held that the suit is well within time. Hence, the issue is decided in

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negative.

ISSUE NO.4:

Whether the suit property is the ownership of the plaintiffs and the plaintiffs are entitled to enjoy all the rights associated with suit property?

11. The claim of the plaintiffs is that they are owner in possession of the suit property from the time of their predecessors and are enjoying quite possession of the same. That there was a water way/stream which passed in the suit property but the same was diverted through human efforts in order to save the suit property from the wrath of flood in the same. That after doing so, the defendants begin to claim and interfere in the portion of the suit property situated to the east of the old water way. Burden of proof regarding the issue was on plaintiffs. Plaintiffs in order to discharge this duty, produced three witnesses. The essence of their statements which helped in deciding the issue are as under.

12. Qudrat Ullah, who himself is plaintiff No.02 and power of attorney for the rest of the plaintiffs, deposed as PW-01, while supporting the claim of the plaintiffs stated in his examination in chief that the suit property is ownership of plaintiffs from time of our predecessors. Further stated that the water way/stream was diverted by us plaintiffs, defendants and Tappa Molyan on joint expense. The said PW admitted in his cross examination that sale purchase and any kind of alienation of property is registered by person known as Qazi in our area, however I don't have any search documents. Further stated that the suit property is not Shamilat land. And lastly sated that the suit

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property was not given to us as Hadya for the reason that we are Syed by Cast.

13. PW-02 is the statement of Syed Muhammad Younas, who supported the stance and contention of plaintiffs in his examination in chief and stated that the suit property is ownership of plaintiffs from time of their predecessors. The said PW recorded in his cross examination that the suit property is ancestral ownership of the plaintiffs and was not given to them in Hadya.

14. PW-03 is the statement of Peer Wali Shah, who supported the stance and contention of plaintiffs in his examination in chief and stated that the suit property is ancestral ownership of plaintiffs from time of their predecessors. The said PW recorded in his cross examination that he is relative of the plaintiffs. He also stated that suit property is ancestral ownership of the plaintiffs and was not given to them in Hadya.

15. The statements of the plaintiffs' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues in their favor. Firstly, the witnesses were consistent in their statement that the plaintiffs belongs to Tappa Peeran, Qoam Biland Kheil. The defendants had contended that the plaintiffs belongs to Tappa Peeran and the same is not a sub-cast of Qoam Biland Kheil. Defendants in their evidence in the instant case recorded that they don't accept Tappa Peeran as a sub-cast of Qoam Biland Kheil. However, the DWs had admitted in their cross examination that Tappa Peeran has land and houses in Biland Kheil. The fact that Tappa Peeran has other property than the disputed property and have

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houses in Biland Kheil, strengthen the stance of the plaintiffs that the suit property is their ancestral property. Secondly, the defendants have stressed in evidence that sale purchase and alienation of property in Biland Kheil is documented and its record is maintained by a local Qazi. However, the plaintiffs never claimed to have purchase the suit property but have claimed the same as their ancestral ownership. Thirdly, possession of the plaintiffs over the suit property is admitted by defendants in their written statement as well as in statements of the defendant's witnesses. Moreover, no fact was brought before the court which indicates any dispute over the suit property or any jirga taken place on the same, which shows quite possession of the plaintiffs over the suit property.

16. Keeping in view the above discussion, it is held that plaintiffs produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.02 is decided in favor of plaintiffs based on their evidence and admissions made by the defendant's witnesses

ISSUE NO.05:

Whether the ancestors of defendants had mortgaged the suit property to the ancestors of the plaintiffs?

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17. Defendants in their written statement have contended that the suit property was given to the predecessors of the plaintiffs in mortgage by our predecessors. That the plaintiffs are not owners of the suit property. The burden of proof regarding the issue was on defendants. Defendants in order to prove their stance, produced four witnesses in

their favour. The essence of their statements which helped in deciding the issue are as under.

18. Malak Mashq Alam recorded his statement as DW-01 and stated that Qoam Biland Kheil consists of four sub-casts (Tappa) namely Palmat Kheil, Lodhiani, Mani Kheil and Adhi Zai. That sale purchase and alienation of property is documented in our area and its record is maintained by a Qazi. The said DW recorded in his cross examination that he knows the plaintiffs, who belong from the cast Peeran. He admitted that Qoam Peeran is residing in our area and have property and houses there.

19. Waheeb Noor recorded his statement as DW-02 in favour of the defendants and stated that a Qoam of Biland Kheil consists of four Tappas and property of Wesh Khawary is ownership of Biland Kheil. The said DW admitted in his cross examination that cast Palmat Kheil of Biland Kheil consists of further sub-casts namely Molyan, Palmat Kheil and Surghulay.

20. Muhammad Raeel Khal, who is power of attorney for the defendants deposed as DW-03 and recorded in his statement that the plaintiffs don't have any property in Wesh Khawary. The said DW admitted in his cross examination that huge number of people belonging to Tappa Peeran are residing in Biland Kheil and they have property in the area. He also admitted that the expenses of diverting the water way/stream was borne by the plaintiffs, defendants and Tappa Molyan. He also admitted that Tappa Peeran have property in Wesh Khawary, Biland Kheil.

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21. Naiz Wali Khan deposed as DW-04 and recorded in his statement that plaintiffs have no share in the suit property and defendants are owners of the same. Further stated in his examination in chief that the plaintiffs are cultivators of 12 Jareeb land. The said DW admitted in his cross examination that plaintiffs have houses in Biland Kheil which may be less than hundred in number. He also admitted that the expenses of diverting water way/stream was borne by the plaintiffs, defendants and Tappa Molyan.

22. The statements of the defendants' witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues. Firstly, the defendants have contended in their written statement that the suit property is not the ancestral ownership of the plaintiffs rather it was mortgaged with predecessors of the plaintiffs by our predecessors. But the stance was not stressed upon by the defendants and in evidence all the Defendants' witnesses recorded in their statements that the suit property is the ownership of the defendants. Secondly, the written statement is silent over the details of the said mortgage. Needless to mention that the statements of the defendants' witnesses are over all silent over the fact rather has deviated from the said stance taken by the defendants.

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23. Keeping in view the above discussion, it is held that defendants have failed to produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.05 is decided in negative and against the defendants.

ISSUE NO. 1 and 6:

Whether plaintiffs have got cause of action?

Whether plaintiffs are entitled to the decree as prayed for?

24. Both these issues are interlinked, therefore, are taken together for discussion.

25. Keeping in view my issue wise discussion, it is held that plaintiffs have got cause of action and are entitled to the decree as prayed for. Both these issues are decided in favor of plaintiffs and against the defendants.

RELIEF:

26. As a result of issue wise findings, suit of the plaintiffs succeeds. It is therefore, decreed as prayed for.

27. Cost to follow the events.

28. File be consigned to record room after its necessary completion and compilation.

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Announced
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CERTIFICATE: -

Certified that this judgment consists of Eleven (11) pages. Each and every page has been read over, corrected and signed by me where ever necessary.

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