(45)

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

Civil Suit No.	66/1 (neem) of 2026
Date of Institution:	12.06.2021
Date of Transfer In:	21.05.2024
Date of remanded back:	30.07.2026
Date of Decision:	23.10.2026

1. Nasir Orakzai
2. Israf Ali Shah
3. Riaz Ali Shah ***sons of Noor Zali Shah***
4. Taslim Bibi
5. Shamima Bibi
6. Tajmin Bibi
7. Shehnaz Bibi
8. Shabnam Bibi
9. Manza Bibi
10. Azmat Ali Shah, legal heirs of Noor Zali Shah.

Plaintiff No.01 to 3 and 10 are the Legal heirs of Mirzali Shah (defendant No.2)

All R/O Qoum Ali Khel, Tappa Sher Khel, Village Abdul Khel, Zakhtaan, Tehsil Upper, District Orakzai

..... ***(Plaintiffs)***

VERSUS

1. Janab Ali s/o Muzamil Shah
   Mst. Socho Bibi is proforma defendant No. 3.
   R/O Qoum Ali Khel, Tappa Sher Khel, Village Abdul Khel, Zakhtaan, Tehsil Upper, District Orakzai

..... ***(Defendants)***

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

JUDGEMENT:
23.10.2026

This order shall decide two suits namely Mr. Nasir Aurakzai and others Vs Mr. Janab Ali registered as 66/01, and a second one, Mr. Mir Zali Vs Mr. Janab Ali and others

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registered as 18/01. These suits were consolidated upon order of the appellate court in an appeal against dismissal of suit title Mr. Nasir Aurakzai and others Vs Mr. Janab Ali. 66/01 being older in age was allowed to contain consolidated proceedings.

During this Judgment, for convenience, Plaintiffs in suit no 66/01 shall be referred to as Plaintiffs A; plaintiff of 18/1 shall be referred to as Plaintiff B, and Mr. Janab Ali, defendant no 01 in both suits, shall be denoted as Defendant.

Pleadings:

In suit no 66/01, Plaintiffs A have claimed that suit land is their entitlement that was mortgaged by their ancestors with the defendant for a redemption amount of Rs. 75,000/-. It is alleged that when redemption was attempted for recovery of suit land defendant refused to honour the mortgage agreement, and began to assert title over the land. Plaintiff A claim that they attempted extra judicial resolution of the matter through a jirga of local elders conducted on 13/08/20, but the defendant refused to honour its verdict passed against him.

Plaintiffs A now submit their willingness to pay the amount due against them, and request for recovery of suit land through redemption, and for demolition of any structures raised on it. They also pray for restraining orders against the

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defendant to prevent him from prejudicial use or disposal of suit property.

Mr. Mir Zali, plaintiff B of suit no 18/1 pleads that the suit property is joint ownership of him and Plaintiffs A of 66/01. He contends that the latter were not entitled to mortgage it in excess of their share with the Mr. Janab Ali. He denies the claims of defendant no 01 in respect of suit land, and has prayed partition of suit land, and for corresponding restraining orders against use or disposal of suit property prejudicial to his rights.

Mr. Janab Ali, defendant no 1 in both suits, begins with the regular objections to the legal validity of the suit, standing of the plaintiffs and competence of the forum for its trial. On facts, the defendant plainly denies the claim and version of the plaintiffs. On the contrary, he claims suit land to be his patrimony and entitlement. In respect of the Jirga, the defendant denies any participation or relation in the one alleged by the plaintiff i.e. 13/08/20. However, the defendant asserts that a tribal jirga was held on 30/09/2020, wherein 05 persons swore on the Holy Book in affirmation of the veracity of his position. In short, he claims to have owned the suit land since ages, and denies the claim of the plaintiffs as self-serving lies and fabrications.

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During the course of trial, Mr. Mirzali Shah, defendant no 02 passed away, leaving plaintiffs as his surviving legal heirs.

Divergence and differences between the positions of the three sides were from both suits were reduced into the following consolidated-issues.

Consolidated Issues:

i. *Whether plaintiffs have got cause of action?*
ii. *Whether disputed property is the inherited ownership of plaintiffs and the same was mortgaged with defendant in lieu of Rs. 75,000/- (seventy-five thousand)?*
iii. *Whether disputed property is owner in possession of the defendant since time of his ancestors?*
iv. *Whether the defendant No.2, Mirzali Shah, is the owner in possession of 55 Marlas out of the suit property?*
v. *If the suit property found to be jointly owned by the parties, what is the extent and measurement of the share/entitlement of each co-owner?*
vi. *Relief.*

Thereafter all sides were afforded an opportunity to produce evidence in respect of their claim or defense, as the case may be. All sides opted to rely on their evidence already recorded in suit no 66/01.

Witnesses/Exhibits:

Tajbar Khan s/o Nabi Shah appeared PW-01, Israf Ali Shah, plaintiff No. 02 as PW-02, Nasir Orakzai, plaintiff

No. 01 as PW-03, Janab Ali, defendant No. 01 as DW-01, Zareef Khan s/o Mustajab Ali as DW-02, Muhammad Nahid s/o Muhammad Aman as DW-03. They have exhibited the following documents;

i. Special Power of Attorneys of Israf Ali Shah Ex.PW-are 2/1 to Ex.PW-2/3.

ii. Special Power of Attorney of Muhammad Naheed is Ex. DW-3/1.

Reasoning/Rulings:

The dispute between sides could be reduced to three disparate and mutually exclusive claims. Plaintiffs A claim suit land to be their entitlement that was mortgaged with the defendant. Plaintiff B claims it is jointly owned by him and plaintiffs A. While defendant denies both claims, and regard suit land as his entitlement through generations.

Issue no 2 relates to the claim of plaintiffs A; issue no 3 relates to the claim of the defendant, whereas issue no 04 and 05 deal with the position of plaintiff B.

Below the court shall address each issue in light of the evidence.

Issue No 02:

The instant issue examines the claim of the plaintiffs about their entitlement to suit property. They have

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alleged that suit land was their ancestral property which devolved on them as patrimony. It was mortgaged with defendant no 01 for a credit of Rs. 75,000/-. They claim its redemption by payment of the mortgaged amount.

The issue under consideration has two limbs: plaintiffs A are the owners of suit land; and, that it was mortgaged with defendant no 01 for an amount of Rs. 75,000/-.

The burden to prove the issue naturally fell on the plaintiffs. Plaintiffs have produced three witnesses including him. Below is a brief assessment of the merits or otherwise of the evidence for the plaintiffs.

Mr. Tajbar Khan barely qualifies as a witness, far from being one on the point of ownership of the plaintiffs. His direct statement, in paraphrase, reads that he had heard the grandfather of defendant no 01 say that whenever you manage money proceed with the redemption of the mortgage. He further adds that defendant no 02 retains title to the extent of his share, and he has not sold it. (author's emphasis)

Two things float on the surface of the testimony of PW-01: first, his knowledge of some mortgage is hearsay; second, he is silent about entitlement of the plaintiffs as owners of the suit land.

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Mr. Israf Ali Shah, witness no 02 and attorney holder for plaintiffs no 01, 03-10 states that his father mortgaged suit land for a credit of Rs. 75,000/- to defendant no 01. He adds on the point of mortgage that out of the witnesses of the deed, Mr. Speen Gul and Tajbat Khan, the latter is still alive.

He explains that after the demise of their father, the plaintiffs approached defendant no 01 for redemption of suit land, but the latter refused. That they engaged local elders in a jirga that decided in our favour. He further alleges that when the defendant refused to honor the ruling of the jirga, plaintiffs knocked at the court's door.

Strictly stated, he sheds no light on the accrual of title on the plaintiffs. His statement is mainly concerned with the alleged mortgage of the suit land. A discrepancy with pleadings occurred in respect of the mortgagor of the suit land. Pleadings hold that plaintiffs mortgaged it, while PW-02 maintains that their father entered into the agreement.

Mr. Nasir Orakzai is witness no. 03 for the plaintiffs. He restates the position as held by witness no 2 that suit land was mortgaged by their father with defendant no 01. He further confirms the presence of witnesses, and the death of one of them.

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He explains that when they managed the redemption amount, they approached the defendant, but he refused to honor their agreement. Next, two jirgas were held for resolution of the dispute. When defendant no 01 was required by the Jirga to produce witnesses on his title, or bring persons to swear upon his rights, he withdrew from the proceedings, allegedly.

An aggregate estimation of the merits of the evidence in proof of claim seems a convenient way forward.

In addition to being a hearsay witness, PW-01's statement is vague and ambiguous. As highlighted above, it is unclear as to whom the statement 'when you manage' money was addressed. Still, the witness confirms that this statement was made before him, and not that he stood witness to the actual agreement of mortgage, which makes his knowledge of the alleged mortgage based on hearsay.

He confirms that the father of plaintiffs never filed any suit for redemption and recovery of suit land. The pleadings and evidence attempt to justify this omission by stating that the delay occurred due to financial constraints. However, the record is silent as to what precisely was the nature of the constraints, for how long they remained in force, and when and how they were shaken off.

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At another point in the cross examination, the witness states that the defendant held the possession of suit land on 'Ijara/tenancy'. He informs that suit land has been in possession of defendant no 01 since the times of his grandfather.

Attorney for plaintiffs, who took the stand as PW-02, made some interesting remarks. About the basis of his claim, he reiterated his plaint, and other witnesses. In the details he conceded that their deceased father purchased a house in Kohat. This statement runs counter to the position held earlier that due to weak financial conditions their father could not redeem suit land in his lifetime. He also admits that the incidence of the Jirga of 30/09/20.

In his cross-examination by defendant no 02, he admits that another suit filed by the former is true and valid. Defendant no 01 has alleged that defendant no 02, and the plaintiffs are colluding the matter only to unlawfully acquire suit land from him.

Mr. Nasir Orakzai, witness no 03, is 30 years old per his statement. Clearly, even if the incidence of the mortgage is conceded, he could not possibly be a witness to the mortgage, as he was 03 years old at the time. He concedes that his deceased father never engaged in any Jirga in respect of suit property with the defendant. He also concedes that a jirga did

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take place in which the defendant was required to bring forth 05 persons to swear upon his rights vis-a-vis suit land.

He claims innocence of any knowledge about whether such persons for plaintiff did meet the requirement of the Jirga or not. He does not deny it either.

To sum up, about the mortgage, the particulars of its when, where and how are missing from the pleadings as well as the evidence. The only designated witness on its incidence, PW-01 reported that he heard grandfather of the defendant no 01 admit to it, which makes him a hearsay witness on the actual fact.

The delay in making the claim, and the omission of the father of the plaintiffs to do it, is also not plausibly explained. The pleadings and the evidence mutually contradict on the point whether it was the plaintiffs or their father who mortgaged the land. Plaintiff's witness admits that suit land has been in the possession of the defendant since the time of his grandfather. All these observations, cumulatively taken, fatally damage the claim of the plaintiff

The issue is decided in the negative, against the plaintiff.

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Issue No 04:

Plaintiff B has claimed that he is owner to the extent of approx. 55 Marlas land in the suit property, being co-owner with Plaintiffs A. He alleges that both plaintiffs A and defendant were urged to desist from illegal interference and appropriation of suit land, but to no avail.

It is pertinent to underscore that plaintiff B has alleged that plaintiffs A and defendant are colluding to deprive him of his rightful entitlement. Whereas, defendant has alleged that plaintiffs A and plaintiff B, nephew and uncle inter-se, are colluding against him.

It is further relevant to consider that during the second round of litigation post-remand, Mr. Mirzali, plaintiff in suit 18/01 passed away childless, leaving plaintiffs A of suit no 66/01 as his legal heirs.

This issue examines the claim of the Plaintiff B of suit no 18/01 of his being owner of half of the suit land. The burden to prove fell on him. Below the court shall examine his evidence for proof of the issue.

- A few procedural facts seem pertinent to be highlighted for better appreciation of the issue under discussion. Plaintiffs A, nephews and now heirs of deceased Mir Zali Khan, originally claimed title over entire suit land, and

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had alleged that it was mortgaged by their predecessor with defendant.

- Mr. Mirzali admits that he filed suit no 18/01 only after an application for grant of interim injunction filed by plaintiff A was declined by both trial and appellate fora.
- Witness No 02 and 03 for defendants took the witness stand in support of plaintiff B, Mr. Mirzali. In respect of the claim to ownership of half of the suit land, witness no 02 relates an alleged Jirga in which suit land was divided between Plaintiffs A and Plaintiff B.
- The alleged Jirga related by Mr. Zarif Khan, witness no 02 for Mr. Mirzali, does not find any mention in the latter's pleadings. Purportedly, the jirga conveniently divided the land between the co-sharers, in accordance with the claim of Plaintiff B.
- This alleged jirga that took place in 2017 is testified about by both witnesses for Mr. Mirzali. In the jirga, it was settled that he is owner to the extent of 55 Marlas. Surprisingly, this revelation of a dispute and settlement finds no mention in pleadings of the plaintiff B.
- About knowledge of the witness no 02, it is pertinent to mention that he admits ignorance to the claim of the plaintiff A, of Plaintiff B, of the duration for which the suit land has been in possession of defendant. He seems to

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have knowledge only about a jirga that is nowhere mentioned in the pleadings.

- Attorney for plaintiff B, witness no 03 reiterates the position held in plaint, and stated by witness no 02. He claims that suit land was divided between the sides back in the past beyond his memory. That a dispute was recently settled in 2017. Both these facts do not find any mention in the pleadings of the party.

Allegations of Collusion:

Plaintiff B, and defendant have alleged collusion of the other with the plaintiff. The court could not miss to observe certain indicators in the corpus of evidence on the point. The court shall record its observations below:

- Plaintiffs A and Plaintiff B are nephews-uncle inter-se. Now, after the demise of Plaintiff B, Plaintiffs are his surviving heirs.
- Plaintiff B filed the suit 18/1 claiming title over half of the suit land only after application for grant of interim injunction was turned down by both appellate and trial court.
- Plaintiffs A originally claimed title over entire suit land to the exclusion of Plaintiffs B, but after the latter laid a claim to half, the former did not opt for re-joinder to the

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- During evidence, witnesses for Plaintiffs A plainly admitted the stance of Plaintiff B. Similarly, witnesses for Plaintiff B were specifically asked questions that confirmed his position as held in the pleadings. A cursory glance at the cross-examination of Mr. Zareef khan would establish the point, that his entire cross-examination by Plaintiff B is an attempt to establish the latter's position.
- In these circumstances, if the court were to determine the point of collusion, indicators from evidence point to one between Plaintiff B and Plaintiffs A.

  In view of the foregone, the issue is decided against plaintiff B.

Issue No 03:

The issue in a suit for declaration by the plaintiffs is irregular in view of prevalent practice. An issue on ownership of defendant is generally not framed. However, for conclusive determination of the matter, the court shall record its observations:

This issue poses the question as to whether the defendant has been the owner in possession of suit land from the time of his ancestors. Of the three witnesses produced by the plaintiffs, the one chronologically best suited to inform on the point is Mr. Tajbat Khan. He was aged 74-74 years at the time of his statement.

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In his statement in chief he reports that he heard grandfather of defendant no 01 say that he would hand over suit land once the amount is paid. It is safe to infer that suit land was in his possession then.

Next, the same witness, in the cross examination, confirms that grandfather of defendant no 01 used to cultivate suit land. A little ahead in his statement he directly concedes that grandfather of defendant no 01 was in possession of suit land.

So, since a claim for recovery of possession is under consideration, and a witness for the claimants has conceded that defendant no 01 has been in possession since the time of his grandparents, the court is not inclined to expend more ink on the proof of the fact. Admission dispenses with the need for proof.

About ownership of defendant no 01, it is pertinent that in a suit for recovery of possession through redemption of mortgage, the thrust of defendant's evidence was on defeating the opponent's claim, rather than proving his own title. There declaration of title in the strict and technical sense cannot be made in his favour.

Secondly, the matter being one from a recently merged district, where land revenue settlement is yet to be

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done, there is nothing documentary of neutral origin recorded by a public authority on the question of ownership or possession.

In such circumstances, the court is constrained to side with the party in whose favor evidence preponderates. There are no means available to the court to ascertain whether any third person is or possibly could be interested in the suit property. In such circumstances, declaration, which generally is a remedy in rem, assumed the character of a remedy in personam, good only in the current matter and against present plaintiffs.

Clearly, possession is 9/10th of ownership. It is good against anyone except the person holding the title. In absence of title deeds, unencumbered possession is as good as a title. But it is a shield, rather than a sword. Needless to underscore, this does not invest the defendant with a vested title as would be declared under section 42 of the Specific Relief Act. With these remotely relevant but necessary observations the issue is disposed accordingly.

Issue No 01:

The burden to prove this issue rests upon the plaintiffs. Plaintiffs A have alleged that the suit property belongs to them through inheritance and was mortgaged with

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the Defendant against Rs. 75,000/-, but the Defendant refused to redeem the same despite their demand. Similarly, Plaintiff B claimed ownership of 55 Marlas out of the suit property and alleged infringement of his rights.

The above allegations were sufficient to give the plaintiffs a reason to approach the Court for redressal of their grievances. However, while deciding Issues No. 2 and 4, this Court has already held that the plaintiffs failed to prove their respective claims through reliable and convincing evidence.

Accordingly, Issue No. 1 is decided in the favour of the plaintiffs.

Issue No 05:

Under Issue No 04, Plaintiff B, Mr. Mirzali (heirs) could not establish his entitlement as co-owner, to the satisfaction of the court. Therefore, instant issue for partition according to entitlement is rendered moot. It is decided accordingly.

Issue No 06/Relief:

Plaintiff A (Nasir Aurakzai etc) and Plaintiff B Heirs of Mr. Mirzali, both have failed to establish their claims as laid in their respective pleadings. Therefore, no relief is merited for them from the court. Issue is disposed accordingly.

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Ruling:

Before parting with the judgment, it is pertinent to highlight that an application for appointment of commissioner was disposed vide order no 27 of 01-07-26 in the terms that the same shall be revived if need for it was felt. The court does not see any need or utility for a commission in the matter. The application is accordingly disposed.

In view of the findings recorded above, both suits, namely Civil Suit No. 66/01 titled Nasir Aurakzai and others v. Janab Ali and Civil Suit No. 18/01 titled Mir Zali v. Janab Ali and others, are hereby dismissed.

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

Announced
23.10.2026

Ijaz Mahsood)
Senior Civil Judge,
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CERTIFICATE

Certified that this judgment of mine consists of thirteen (18) pages, each has been checked, corrected where necessary and signed by me.

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