

THE COURT OF MALIK ZEESHAN GUL CIVIL JUDGE-III, MARDAN
Case Title: Sherin Khan Vs Ahmad Shah etc.
Suit No.248/1 Neem of 2014.

Civil Suit No.248/1 Neem of 2014

Date of Institution: 03.06.2014

Date of Decision: 15.03.2025

1. Sherin Khan S/O Sher Bahadar Khan R/O Sherin Abad, Bunir
Road, Rustam Mardan.

.....*Plaintiff*

Versus

1. Ahmad Shah, 2. Dolat Shah, 3. Tajbar Khan sons of Janab Shah
R/o New Bagh Colony, Sherin Abad GPO Rustam Tehsil &
District Mardan.
4. Patwari Halqa Moza Bazar, 5. Tehsildar Mardan, 6. Sub-Registrar
Mardan.

.....*Defendants*

SUIT FOR DECLARATION & PERMANENT INJUNCTION
ETC.

JUDGMENT:
15.03.2025

Parties present.

Through this judgment the suit in hand is intended to be
disposed of.

Pending before this Court is a suit for declaration and
permanent injunction etc. As per plaint, plaintiff is the owner in
possession of the suit property measuring 2 Kanal & 10 Marla, which
falls in the revenue record in Khata No.292, Khasra No.2616 in Moza
Bazar as per Jamabandi for the year 2011-2012; that alongwith the

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said property, plaintiff also owned the other property in different other Khata & Khasra numbers, detail of which is mentioned in the plaint; that the plaintiff has sold out many shares to different people at different time 15/16 years ago and still the plaintiff owns much shares in the suit property; that the plaintiff had sold out 2 Kanal & 10 Marla property in the hands of defendants No.1 to 3, and in this regard the payment was received, registry was made and possession was delivered to them; that thereafter the defendants No.1 to 3 had constructed a house thereupon and are residing there since last 14/15 years; that due to the mistake of revenue officials the Khasra No.2616 was wrongly mentioned in the registered deed No.231/1, Bahi No.1, Jild No.472, page No.327/328 dated 07.04.2001, upon the basis of which mutation No.366 dated 21.06.2001 was entered; that the plaintiff did not sale out property to defendants No.1 to 3 in Khasra No.2616, but the sale was made in the Khasra No.2583; that the possession with the defendants No.1 to 3 is also in the Khasra No.2583; that the house of defendants No.1 to 3 is also constructed in the Khasra No.2583 and they have nothing to do with the Khasra No.2616; that the revenue record is liable to correction to the extent of Khasra No.2616; that the plaintiff also seeks for rectification of the registered deed No.231/1 dated 07.04.2001 to the extent that the Khasra No.2616 be deleted and instead Khasra No.2583 be entered

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therein; that the defendants were requested several times to do the needful, but in vain. Hence the instant suit is filed.

Defendants were summoned. Whereby defendants No.4 to 6 remained absent and were placed as *exparte* by my learned Predecessor. While defendants No.1 to 3 contested the suit by filing written statement. Wherein they raised several preliminary and factual objections. They alleged that the plaintiff has got no cause of action; that the plaintiff has sold upon them the suit property measuring 2 Kanal & 10 Marla through the registered deed No.231, Bahi No.1, Jild 472, Page 327/328 dated 07.04.2001 in the Khata No.262/776, Khasra No.2616 as per the Jamabandi for the year 1991-1992; that later on the mutation No.366 was attested on 21.06.2001 on the strength of the said registry; that the plaintiff has nothing to do with the Khasra No.2616 now; that the suit in hand is liable to be dismissed.

Divergent pleadings of the parties were reduced into the following issues by my learned predecessor.

ISSUES;

1. Whether plaintiff has got cause of action? OPP
2. Whether suit of plaintiff is maintainable in its present form?
OPD
3. Whether plaintiff is estopped to sue due to his own conduct? OPD
4. Whether suit of plaintiff is bad for mis-joinder and non-joinder of necessary parties? OPD

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5. Whether plaintiff has sold out his property measuring 2-K 10-M? OPD
6. Whether plaintiff is owner in possession of property measuring 2k 10m bearing khasra No.2616, khata No.292 as per jamabandi for the year, 2011-12? OPP
7. Whether registry No.231 dated 7/4/2001 and mutation No.366 dated 21/6/2001 are liable to be cancelled being forged and illegal? OPP
8. Whether plaintiff has alienated the property bearing khasra No.2583 (instead of 2616) but inadvertently in record it was written as 2616(liable to correction? OPP
9. Whether defendants are in possession of property bearing khasra No.2616? OPP
10. Whether plaintiff is entitled for the decree as prayed for?
Relief.

After framing of issues, both the parties were given an opportunity to produce their evidence. Accordingly the evidence was produced. Plaintiff produced as many as five number of witnesses. On the other hand, contesting defendants No.1 to 3 produced as many as 02 number of witnesses. Besides, the statement of local commission was recorded as CW-1.

PW-1 i.e. one Muhammad Ali (Clerk Sub-Registrar Officer Mardan) in his chief examination stated that he produce the original register in respect of deed No.231/1, volume No.472, Bahi No.1, attested on 07.04.2001, copy of which is Ex.PW1/1. **He was not cross-examined.**

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PW-2 i.e. the ADK Mardan stated in his chief examination that he produce the register of mutations in respect of original mutation No.366 attested on 21.06.2001, copy of which is Ex.PW2/1. **He was not cross examined.**

PW-3 i.e. Halqa Patwari Moza Bazar, Rustam Mardan stated in his chief examination that he produce the Fard Jamabandi for the year 2011-2012 in respect of Khata No.682 & Khata No.293, which is Ex.PW3/2; that he produce the pert patwar in respect of the Mutation No.366, copy of which is Ex.PW3/1; that he produce Jamabandi for the year 2007-2008 and for the year 2003-2004, copies of which are Ex.PW3/3 & Ex.PW3/4 respectively; that he produce the Jamabandi for the year 1998-1999 as Ex.PW3/5; that he produce the Aks Shajra Kishtwar in respect of the Khasra No.2616, Moza Bazar, copy of which is Ex.PW3/6, whereupon his signature is correctly present.

PW-4 i.e. one Sher Amin Khan stated in his chief examination that the plaintiff is his father; that he is attorney for the plaintiff and his power of attorney is Ex.PW4/1. He supported contents of the plaint. Further stated that **the Khasra No.2616 is wrongly mentioned in the registered deed No.231/1, Bahi No.1 dated 07.04.2001; that the defendants are not in possession of even an inch of property in Khasra No.2616; that the defendants, on the**

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strength of the said registered deed are in possession of a house in Khasra No.2583; that the plaintiff never sold out any property to defendants No.1 to 3 in Khasra No.2616. In his **cross examination**, he stated that it is correct that the plaintiff has sold out the property measuring 2 Kanal & 10 Marla situated at Bagh Colony to the defendants No.1 to 3 through the registered deed No.231 dated 07.04.2001 **in Khasra No.2616**; that the possession of the suit property was handed over to the defendants No.1 to 3 and is still with them; that the defendants No.1 to 3, after registry and delivery of possession had constructed a house thereupon, in which they are residing now; that it is correct that in favor of defendants No.1 to 3 the registered deed No.231 dated 07.04.2001 and later on the mutation No.366 dated 21.06.2001 was entered by the plaintiff; **that it is correct that the defendants No.1 to 3 are residing in their constructed house since last 21 years.**

PW-5 i.e. one Syed Rasool in his chief examination supported contents of the plaint. In his **cross examination**, he stated that he was born in the year 1955; that the plaintiff had purchased the property before his birth (birth of the present witness); that house of defendants No.1 to 3 is situated in Bagh Colony, which house the defendants had constructed.

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DW-1 i.e. one Maqsood Ali in his chief examination exhibited copy of his CNIC as Ex.DW1/1. He stated that he knows both the parties; that in front of him the sale transaction of 2 Kanal & 10 Marla property between the parties was made; that in his presence the registered deed No.231, Bahi No.1, Jild No.472, Page No.327,328 dated 07.04.2001 was scribed and in this respect the mutation No.366 dated 21.06.2001 was also entered and attested, whereupon his thumb impression is present; that the defendants No.1 to 3 had constructed a house thereupon after spending huge expenses. In his **cross examination**, he stated that **he cannot say as to in which Khasra number, house of defendants No.1 to 3 is situated.**

DW-2 i.e. one Ahmad Shah (Defendant No.1) stated in his chief examination that he is an attorney for defendants No.2 & 3; that his power of attorney is Ex.DW2/1; that the defendants No.1 to 3 had purchased 2 Kanal & 10 Marla property from the plaintiff through registered sale deed; that the plaintiff had also delivered possession of the same to them, whereupon they (Defendants No.1 to 3) had constructed houses after spending huge expenses; that the sale consideration was paid to the plaintiff and in this regard the registered deed No.231, Bahi No.1, Jild 472, Page No.327,328 dated 07.04.2001 was executed; that the said registry was acknowledged as correct and signed by the plaintiff and defendants alongwith the witnesses and the

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registrar. He supported contents of the written statement and stated that houses of the defendants are located in Bagh Colony, Sherin Abad. In his **cross examination**, he stated that it is wrong to suggest that his house falls in the Khasra No.2583 and that in Khasra No.2616, not an inch is in possession of defendants No.1 to 3.

CW-1 i.e. Patwari Halqa Moza Bazar Rustam Mardan (being commission official) stated that he along with Girdawar Circle was appointed as a local commission by the Court; that he along with Girdawar Circle, has visited the disputed property and Khasra numbers 2616 & 2583 in presence of both the parties; **that the defendants No.1 to 3 are in possession of a house in Khasra No.2583, which is the ownership of one Sherin Khan son of Sher Bahadar (plaintiff); that there is no possession at spot with the defendants No.1 to 3 in Khasra No.2616;** that the commission report is Ex.CW1/1, Aks Shajra Kishtwar as Ex.CW1/2, Naqsha Tasveeri of Khasra No.2583 as Ex.CW1/3, Naqsha Tasveeri of Khasra No.2616 as Ex.CW1/4 and Jamabandi for the year 2011-2012 in respect of Khasra No.2583 as Ex.CW1/5. Further stated that he obtained the signatures and thumb impressions of the parties upon the commission report, Shajra Kishtwar and Naqsha Tasveeri etc.

Both the parties had submitted their objection petitions against the said commission report.

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As per the objection petition of the plaintiff, the commission report is not a detailed one. Therefore, request was made for cross examination of the local commission.

As per the objection petition of defendants No.1 to 3, the commission report is against the facts.

Both the parties were provided with the opportunity to cross examine the local commission. In the **cross examination** from the plaintiff's side, it was stated that as per the revenue record, in Khasra No.2583 along with the other Khasra numbers, plaintiff is recorded as an owner; **that the defendants No.1 to 3 have no possession in Khasra No.2616.** While in the **cross examination** from the side of defendants No.1 to 3, it was stated that it is correct that in the disputed Khasra number, houses have been constructed now; that the Khasra No.2616 is no more agricultural in nature now and have been constructed; **that the defendants No.1 to 3 have constructed their house in the Khasra No.2583 and are in possession of the same;** that the Khasra No.2616 and 2583 are adjacent with each other.

In terms of documentary evidence, local commission report is Ex.CW1/1, Aks Shajra Kishtwar is Ex.CW1/2, Naqsha Tasveeri of Khasra No.2583 is Ex.CW1/3, Naqsha Tasveeri of Khasra No.2616 is Ex.CW1/4, Jamabandi for the year 2011-2012 in respect of Khata No.682/679, Khasra No.2583 is Ex.CW1/5, copy of the page

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No.327 & 328 of the register of Sub-Registrar Office Mardan is Ex.PW1/1, copy of mutation No.366 is Ex.PW2/1 and Ex.PW3/1, copies of the revenue record are Ex.PW3/2 to Ex.PW3/6.

Arguments heard and record perused.

Keeping in view, pleadings, evidence, valuable arguments from both the sides and available record, my issue wise findings are as under:

ISSUES NO. 5,6,7,8,9 & 10:

5. *Whether plaintiff has sold out his property measuring 2-K 10-M? OPD*
6. *Whether plaintiff is owner in possession of property measuring 2k 10m bearing khasra No.2616, khata No.292 as per jamabandi for the year, 2011-12? OPP*
7. *Whether registry No.231 dated 7/4/2001 and mutation No.366 dated 21/6/2001 are liable to be cancelled being forged and illegal? OPP*
8. *Whether plaintiff has alienated the property bearing khasra No.2583 (instead of 2616) but inadvertently in record it was written as 2616(liable to correction? OPP*
9. *Whether defendants are in possession of property bearing khasra No.2616? OPP*
10. *Whether plaintiff is entitled for the decree as prayed for?*

Since all these issues are inter-connected, hence taken up for discussion and adjudication together.

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Let this Court take a bird's eye view of the entire case and dispute between the parties.

Both the parties are in agreement on some points. While at dispute on some points. So far as sale of 02 Kanal & 10 Marla suit property is concerned. It is an admitted fact that the plaintiff had sold out the said property to the defendants No.1 to 3. Similarly the registered deed No.231/1, Bahi No.1, Jild No.472, Page No.327/328 dated 27.04.2001 is also an admitted document. Main dispute between the parties is that of Khasra No.2616 & 2583. While the plaintiff is of the view that he had actually sold out the said property in Khasra No.2583. He is of the stance that the Khasra No.2616 is wrongly mentioned in the said registered deed No.231/1. There on the other hand, defendants No.1 to 3 are of the stance that the suit property was sold upon them by the plaintiff in Khasra No.2616 and not in Khasra No.2583. As per them, the survey No.2616 is correctly mentioned in the said registered deed. Hence the core dispute may be summarized as under:

“Khasra No.2583 (as per plaintiff) VS Khasra No.2616 (as per defendants No.1 to 3)”

A perusal of Ex.PW1/1 i.e. record of Sub-Registrar Officer Mardan in respect of the registered deed No.231/1, as cited

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above, reveals that the suit property measuring 02 Kanal 10 Marla was sold by the plaintiff to defendants No.1 to 3 in Khasra No.2616.

Although the said deed is a registered one. And the same is an admitted document. In this regard, however this Court has following observations, keeping in view, the evidence led by the parties and the local commission report:

- *As per PW-4 i.e. attorney for the plaintiff the defendants are not in possession of even an inch of property in Khasra No.2616.*
- *As per PW-4 i.e. attorney for the plaintiff it is correct that the plaintiff has sold out the property to the defendants No.1 to 3 through the registered deed No.231 dated 07.04.2001 in Khasra No.2616.*
- *As per PW-4 i.e. attorney for the plaintiff defendants No.1 to 3 are residing in their constructed house since last 21 years.*
- *DW-2 i.e. the defendant No.1 denied that their house falls in the Khasra No.2583.*
- *As per the local commission report, the defendants No.1 to 3 are in possession of a house in Khasra No.2583, which is the ownership of the plaintiff;*

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that there is no possession at spot with the defendants No.1 to 3 in Khasra No.2616.

- *As per the cross examination of the local commission, in Khasra No.2583 along with the other Khasra numbers, plaintiff is recorded as an owner and the defendants No.1 to 3 have no possession in Khasra No.2616. And that the defendants No.1 to 3 have constructed their house in the Khasra No.2583 and are in possession of the same.*

To summarize, the situation is like this that in the said registered deed No.231/1, although Khasra number is mentioned as 2616 therein. But actually, the defendants No.1 to 3 are in possession of Khasra No.2583. Whereupon they have built their houses and residing therein from last more than 20 years.

But yet there is another aspect of the matter i.e. the Khasra No.2583 is still in the ownership of the plaintiff.

In this peculiar situation, to decree the suit in hand as prayed for or to dismiss it straight forwardly would not serve the purpose and dispute between the parties would still remain alive. Because, the admitted document i.e. the said registered deed No.231/1 reflects that the sale transaction was made in Khasra No.2616. But in

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reality, the defendants No.1 to 3 are in possession of Khasra No.2583, whereupon they built their houses and residing there since more than 20 years.

In order to ensure that no party get an unfair advantage from this situation, the guidance is hereby drawn from section 31, 32 & 33 of *The Specific Relief Act, 1877*.

For ready reference, it goes as under:

Section 31: When instrument may be rectified. *When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.*

Section 32: Presumption as to intent of parties. *For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.*

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Section 33: Principles of rectification. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Legally speaking, for the purpose of rectification of a document, it is mandatory to show that there has been either fraud or mutual mistake. Further in order to dig out the mutual mistake under the terms of section 31, as cited above, the Court should find it clearly proved. Purpose of rectification is to give effect to the real intention of the parties, which is not expressed through the plain reading or language of the instrument otherwise. Mutuality of mistake might arise from the fact that the mistake was made by a writer, who acted as mutual agent for both the parties, while reducing the contract into written instrument.

Keeping in view, the discussion made above, this Court is of the humble opinion that:

*If the possession of the suit property was not delivered to defendants No.1 to 3 at all in the light of the said registered deed No.231/1. **OR***

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If the defendants No.1 to 3 were already in possession of Khasra No.2616. Then the position of the matter in hand would be changed altogether.

But clearly as revealed by the commission report, defendants No.1 to 3 are in possession of Khasra No.2583 since the time of the said registered deed No.231/1 and then even the mutation No.366 was entered and attested. Importantly, they have built their house thereupon. Whereby, admittedly, they have incurred huge expenses upon construction of the same.

It is not the case that the defendants No.1 to 3 are going to be deprived of their purchased property measuring 2 Kanal & 10 Marla. Which is already in their actual possession and they have constructed house thereupon and residing therein since more than last 20 years. But it is the case, only to the extent of Khasra numbers. One mentioned in the said registered deed No.231/1 i.e. the Khasra No.2616 & one, which is actually in possession of defendants No.1 to 3, whereupon they have built their house and residing there since last more than 20 years.

In the given circumstances, if the said registered deed No.231/1 is left as it is. It would give an extra advantage to defendants No.1 to 3 upon the plaintiff. Because, as per the said registered deed, where on one hand, they are the owners of 2 Kanal & 10 Marla

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property in Khasra 2616. There on the other hand, they are actually in possession of 2 Kanal & 10 Marla property in Khasra No.2583 in shape of a constructed house. Hence in this scenario, the defendants No.1 to 3 would be considered the owners to the extent of 05 Kanal of property (2 Kanal & 10 Marla in Khasra No.2616 *plus* 2 Kanal & 10 Marla in Khasra No.2583) instead of their actual purchased property to the extent of 2 Kanal & 10 Marla. It would be clearly an extra and unfair advantage to defendants No.1 to 3 upon the plaintiff.

Similarly, as the Khasra No.2583, which is actually in the possession of defendants No.1 to 3 and whereupon they have built their house, as cited above, is in the ownership of plaintiff as per the revenue record and as revealed by the evidence. Here the plaintiff would be having an extra and unfair advantage upon defendants No.1 to 3 to that extent.

Hence for the detailed discussion made above, for the purpose of justice and keep the affairs balanced between the parties, the only appropriate remedy seems to be the rectification of the instrument. Hence this Court is of the following opinion that:

It is admitted as well as established that the plaintiff had sold out a property measuring 02 Kanal & 10 Marla in the hands of defendants No.1 to 3. Possession of said property was also delivered to defendants No.1 to 3. Whereupon, the defendants No.1 to 3 had

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built their house and residing therein since last more than 20 years.

The registered deed No.231/1 dated 07.04.2001 is liable to be rectified only to the extent of Khasra No.2583 instead of Khasra No.2616. Similarly, the mutation No.366 is liable to be set aside, because the same is based upon the said registered deed No.231/1.

But the plaintiff shall be bound to enter and attest a fresh mutation in favor of defendants No.1 to 3 in Khasra No.2583 to the extent of 02 Kanal & 10 Marla property, which is in possession of defendants No.1 to 3, but in the ownership of the plaintiff. Revenue hierarchies are directed to make necessary corrections in the revenue record to the extent of said 02 kanal & 10 Marla property in respect of Khasra No.2616 & Khasra No.2583 accordingly, as per law, subject to rights of third party (If any).

These issues are disposed of accordingly.

ISSUES NO.1,2,3 & 4:

- 1. Whether plaintiff has got cause of action? OPP***
- 2. Whether suit of plaintiff is maintainable in its present form?
OPD***
- 3. Whether plaintiff is estopped to sue due to his own conduct?
OPD***
- 4. Whether suit of plaintiff is bad for mis-joinder and non-joinder
of necessary parties? OPD***

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Although these issues are more legal than factual. However, the defendants could not convince this Court that the suit in hand is not maintainable in its present form. Similarly, it is also not established that the plaintiff is estopped to sue due to his conduct or that the suit is bad for mis-joinder & non-joinder of necessary parties. No evidence to that effect is led. Besides, for the detailed discussion made above, the plaintiff has got a cause of action.

Hence these issues are disposed of accordingly.

RELIEF:

As sequel to my detailed discussion, it is held that the registered deed No.231/1 dated 07.04.2001 is liable to be rectified only to the extent of Khasra No.2583 instead of Khasra No.2616 to the extent of 02 Kanal & 10 Marla property. Similarly, the mutation No.366 is liable to be set aside, because the same is based upon the said registered deed No.231/1. But the plaintiff shall be bound to enter and attest a fresh mutation in favor of defendants No.1 to 3 in Khasra No.2583 to the extent of 2 Kanal & 10 Marla property, which is already in actual possession of defendants No.1 to 3, but in the ownership of the plaintiff, in the revenue record. Revenue hierarchies are directed to make necessary corrections in the revenue record to the extent of said 2 kanal & 10 Marla property in respect of Khasra

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No.2616 & Khasra No.2583, accordingly as per law, subject to rights of third party (If any).

The suit is disposed of accordingly. No order as to cost.

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

Pronounced in the open court under my hand and seal of this court on this 15th day of March, 2025.

**MALIK ZEESHAN GUL
CIVIL JUDGE-III,
MARDAN.**

CERTIFICATE.

Certified, that this judgment consists of 20 pages. Each and every one has been read over corrected and signed wherever it was necessary.

**MALIK ZEESHAN GUL
CIVIL JUDGE-III,
MARDAN**