

IN THE COURT OF ASGHAR SHAH
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

MISC. CIVIL APPEAL NO. : 5/14 OF 2021
DATE OF INSTITUTION : 29.10.2020
DATE OF TRANSFER IN : 16.01.2021
DATE OF DECISION : 20.01.2021

AYUB KHAN S/O MIANDAD KHAN, R/O BEZOT, TAPA
QAMBAR KHEL, JAWAR KHEL, DISTRICT ORAKZAI

.....(APPELLANT)

-VERSUS-

MALANG JAAN S/O SHAH WALI, KARGHAN, TAPA MIR KOLI
KHEL, BECHO HOSPITAL, KALAYA DISTRICT LOWER
ORAKZAI AND SIX OTHERS

.....(RESPONDENTS)

Present: Syed Mukhtiar Hussain Bukhari Advocate for appellants.
: Irfan Khan Advocate for respondent no. 7
: Jabir Hussain Advocate for respondents no. 1, 3 to 6

MISC. CIVIL APPEAL NO. : 4/14 OF 2021
DATE OF INSTITUTION : 29.10.2020
DATE OF TRANSFER IN : 16.01.2021
DATE OF DECISION : 20.01.2021

TALHA MUHAMMAD S/O HUSSAIN GUL, BEZOTE, TAPA
KAMBAR KHEL, PO FERAZ KHEL, KALAYA DISTRICT LOWER
ORAKZAI AND EIGHT OTHERS


.....(APPELLANTS)

-VERSUS-

AYUB KHAN S/O MIANDAD KHAN, R/O BEZOT, TAPA
QAMBAR KHEL, JAWAR KHEL, DISTRICT ORAKZAI

.....(RESPONDENT)

Present: Irfan Khan Advocate for appellants
: Syed Mukhtiar Hussain Bukhari Advocate for respondent no.1
: Jabir Hussain Advocate for respondent no. 2, 4 to 7


(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela

CONSOLIDATED JUDGEMENT
20.01.2021

Both the above-mentioned appeals have been filed against the single order dated 05.10.2020 of the learned Senior Civil Judge, Orakzai vide which the application for temporary injunction of the appellant/plaintiff Ayub Khan (herein after called appellant) was dismissed and respondents/defendants Malng Jan etc (herein after called respondents) were allowed to raise construction over the suit property on their own risk and cost. Therefore, both the appeals in hand are decided vide single consolidated judgement in hand.

(2). Through suit before the trial court, appellant/plaintiff claimed declaration, possession alongwith perpetual and temporary injunction to the effect that the suit property is jointly owned and possessed by the parties and he is owner in possession to the extent of 1/4 share out of total 40 kanals land. That on account of private partition carried out through private Jirga, the suit property was divided between the parties wherein plaintiff got 10 Kanals, respondent/defendant no. 2 Mir Akbar also got 10 Kanals whereas remaining 20 Kanals were given to respondents/defendants no.3 to 6 Akram Khan etc. That, it was agreed between the parties that in case anyone want to sell out his share, the first right will be that of the co-owners but later on the respondents/defendants



(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela

no. 3 to 6 sold out their share secretly in favour of respondent/defendant no.1 Malang Jan and they also handed over the possession of the suit property of 20 Kanals to respondent/defendant no.1. That, since only share of the owners were partitioned and no actual partition has taken place. That, despite this the respondent/defendant no.1 started construction of shops as well as started cultivation on the valuable portion of the land and also started interference in the property owned and possessed by the plaintiff. That despite various requests, the respondents/defendants refused to stop the construction/cultivation hence, the suit before the trial court.

- (3). Alongwith suit and application for temporary injunction for the subject purpose was also filed, which application after due process was dismissed by the trial court vide impugned order dated 05.10.2020 and the respondents/defendants were allowed to raise construction in the suit property on their own risk and cost. Both the parties preferred their respective appeals. The appellant/plaintiff is aggrieved of the dismissal of their application submitted for temporary injunction whereas respondent/defendant Talha Muhammad is aggrieved from the impugned order to the extent of allowing construction at his own risk and cost.

- (4). Arguments heard and record perused.



(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela

(5). From the arguments and record available on file, it reveals that in order to grant a temporary injunction, the three basic ingredients of the same i.e., prima facie case, balance of inconvenience and irreparable loss⁴ must co-exist side by side and even if a single ingredient is missing no temporary injunction can be granted. In the instant case, the admitted position is that the respondent/defendant no. 1 is purchased owner as well as having possession of the purchased suit property. The partition is admitted in the plaint but during the arguments it was submitted by the appellant that only shares of the parties were determined and no physical partition has taken place. When the sale in favour of respondent/defendant no. 1, partition of the suit property is admitted, then the proper course was to opt for partition of the suit property. When there is no suit pending for partition, how can temporary injunction be granted for an indefinite period. The admitted ownership of respondent/defendant no. 1 followed by claim of partition and his possession on the area purchased by him has created a very good prima facie case in his favour and he will face inconvenience and irreparable lose, in case he is stopped from benefiting himself from his owned property. On the other hand, no such ingredient of the temporary injunction tilt towards the appellant/plaintiff. As such, the learned trial court was justified in dismissing the application of temporary injunction of the appellant/plaintiff.

Asghar Shah
 (ASGHAR SHAH)
 District Judge, Orakzai
 at Baber Mela

(6). As far as the permission granted to the respondents/defendants for raising construction on the suit property on their own risk and cost is concerned. In this regard the counsel for the respondent no. 7, Talha Muhammad submitted that on the day of passing impugned order he was marked absent and neither he was proceeded ex-parte nor was provided opportunity of hearing and submission of written statement besides he was not granted the relief of raising construction upon own risk and cost as granted to other defendants. It was further submitted that neither any surety bonds have been asked from the co-defendants nor they have submitted any affidavit claiming construction on their own risk and cost. When, admittedly, respondent Talha Muhammad was absent, how can the court either hear him or grant him opportunity of written statement or other relief. Moreover, the respondent/defendant no. 1 to whom the permission for raising construction has been granted upon his own risk and cost never came in appeal to challenge the said order, hence how can the respondent no. 7, Talha Muhammad could challenge the same besides in the trial court due to their absence, the respondent/defendant no. 7 never claimed to raise construction over the suit property upon their own risk and cost nor the said point is raised in the memorandum of appeal, hence how can either the trial court or the present court could grant the said relief to the

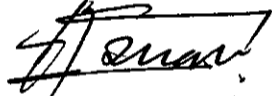


(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela

respondent no. 7. The court has got the vast powers to grant conditional relief subject to own risk and cost even without submission of any affidavit by the claimant or even without any surety bonds as did by the trial court. Thus, there is nothing illegal in the impugned order to call for interference of the present court therein.

(7). In the light of above, no legal infirmity in the impugned order of the learned Senior Civil Judge was pointed out, hence the same is upheld and both the appeals resultantly stand dismissed being meritless. No order as to cost. File of the trial court be returned while file of this court be consigned to Session Record Room after its completion and compilation.


Announced
20.01.2021


(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of six (06) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 20.01.2021


(ASGHAR SHAH)
District Judge, Orakzai
at Baber Mela