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IN THE COURT OF SHAUKAT AHMAD KHAN
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

MISC. CIVIL APPEAL NO. : 13/14 OF 2021
DATE OF INSTITUTION : 19.04.2021
DATE OF DECISION : 02.07.2021

NOROZ ALI S/O NOOR ALI, TAPA ZAKARIYA KHEL, R/O TEHSIL
LOWER DISTRICT ORAKZAI AND THREE OTHERS

.....(APPELLANTS)

-VERSUS-

SAJJAD ALI S/O MASHHAD ALI, R/O TAPA KHWEDAD KHEL,
TEHSIL LOWER DISTRICT ORAKZAI AND FOUR OTHERS

..... (RESPONDENTS)

Present: Javid Muhammad and Jabir Hussain Advocates for appellants
: Haseeb Ullah Khan Advocate for respondents

JUDGEMENT

02.07.2021

Impugned herein is the order dated 08.02.2021 of learned CJ-I, Orakzai vide which on acceptance of the application of respondents/plaintiffs for grant of temporary injunctions, the appellant/defendants have been restrained from making interference in the suit property while application of the appellants/defendants for rejection of plaint under order 7 rule 11 of the CPC has been turned down.

In a suit before the learned CJ-I, Orakzai respondents, being plaintiffs in the suit have sought declaration-cum-perpetual injunctions against appellants being defendants in the suit to the fact that the plaintiffs' tribe of Bar Muhammad Khel are residing on the eastern side of a mountain named as

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(2)

Landoka ghar while the defendants' tribe of Mani Khel are residing on the western side of the said mountain, both enjoying the possession of their respective side of mountain as owners since long with a boundary being drawn by the natural course of water i.e., Panidal. That the defendants in violation of the proprietary rights of the plaintiffs are bent upon making interference in the suit property.

(2). Defendants submitted written statement wherein they besides contesting the suit on various legal and factual grounds contended that they are owners in possession of the suit property since their forefathers and that the matter has already been decided between the parties in 1992.

(3). The suit was accompanied by application for grant of temporary injunctions vide which the plaintiffs wanted the defendants to be restrained for making interference in the suit property. The defendants submitted reply, contested the application. The learned trial court heard the arguments and passed the impugned order. The defendants being aggrieved of the order filed the instant appeal.

(4). I heard arguments and perused the record.

(5). Learned counsel for the appellants/defendants submitted that the defendants are owner in possession of the suit property since their forefathers, that the matter has already been decided between the parties vide verdict of jirga dated 28.11.1992, that in 1999 the defendants sold firewood

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of the suit property to the plaintiffs, that in 2017 the defendants vide agreement deed dated 06.02.2017 have leased out some of the area to the plaintiffs for coal mining, that all these documents show the ownership of defendants over the suit mountain, that the claim of the plaintiffs is based upon oral assertions and not a single document is annexed by them with the plaint, that the plaintiffs have sued in capacity of representatives of their tribe and the defendants have also been sued in capacity of the representatives of caste Mani Khel but the provisions of order 1 rule 8 have not been complied with, that the suit property is not specified in the plaint, that the learned trial court has based his findings upon the factum of Panidal ignoring the documentary evidence available on file in support of contentions of the defendants, that during pendency of the suit the defendants have also submitted application for maintaining the status quo on the spot aimed at restraining the plaintiffs to stop the coal mining in the garb of temporary injunctions but while deciding the application of plaintiff for grant of temporary injunction the application of defendants has not been taken into consideration and the same has not been decided, that the plaintiffs have got no prima facia case and the other two ingredients for grant of temporary injunctions also do not favour the contention of plaintiffs.


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(6). On the other hand, learned counsel for the respondents/plaintiffs supported the impugned order. He submitted that the appeal is time barred, that plaintiffs being residing on eastern side of Landoka ghar while the defendants being residing on western side of the said mountain, are owners of the respective side of the mountain, that the boundary between the two tribes is drawn by nature in the form of Panidal which is a universal factor for deciding the line of demarcation, that a public road has passed through the suit mountain, the compensation of which has been to the plaintiffs, that plaintiffs have got a prima facie case and that the facts of balance of convenience and irreparable loss also tilt in favour of the plaintiffs.


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(7). After having heard arguments of both the counsels for parties and after having gone through the record, it is observed that the impugned order is passed on 08.02.2021 while the appellants/defendants have filed application for attested copies on 10.02.2021, the copies have been delivered to the appellants/defendants on 19.03.2021 while the instant appeal is filed on 19.04.2021. In these circumstances the appeal is barred only by 01-day of 09.02.2021 but in view of the extraordinary circumstances due to pandemic of Covid-19, the appellants/defendants cannot be knocked down on mere delay of only 01-day in filing of appeal, therefore the delay is condoned and the appeal is held within time.

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(8). The respondents/plaintiffs, suing in representatives capacity and having sued the appellants/defendants too in representative capacity, were required to obtain the permission of court under the provisions of order 1 rule 8 at CPC but as a separate application for permission of the court to sue in representative capacity and the list of ascertainable persons to be noticed by the court are available on file, therefore the permission of court can be obtained even after the institution of the suit. Hence, the respondents/plaintiffs cannot be non-suited on a mere ground of having not obtained the permission of court prior to suing in representative capacity.

(9). With respect to merits of the case the claim of respondents/plaintiffs is based on the fact that they are residing on eastern side of mountain named as Landoka ghar while the appellants/defendants are residing on the western side of the said mountain which has not been disputed by the appellants/defendants. It is evident from the record that the eastern side of Landoka ghar has throughout remained disputed between the parties. Various jirgas have also been held for resolving the issue between the parties, out of which the verdict of jirga dated 28.11.1992 favours the contentions of appellants/defendants. Similarly, the agreement deed dated 06.02.2017 vide which the appellants/defendants have leased out some of the area of Landoka ghar to the

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respondents/plaintiffs for coal mining also supports the contention of appellants/defendants. Moreover, one of the documents dated 30.09.1999 was produced by the appellants/defendants during the course of arguments vide which firewood of the disputed mountain have been sold by the appellants/defendants to the respondents/plaintiffs. On the other hand, the respondents/plaintiffs too have also annexed an un-dated copy of agreement vide which the demarcation line between the parties has been decided as Panidal. However, prima facia the preponderance of evidence on the basis of available record tilt in favour of the appellants/defendants. Similarly, learned counsel for respondents/plaintiffs also failed to point out any irreparable loss or inconvenience to the respondents/plaintiffs except to restrain from coal mining in the garb of temporary injunctions granted against the appellants/defendants, which cannot be termed as irreparable loss. So far the contention of the appellants/defendants regarding maintaining status quo on the spot by both the parties is concerned, the same seems reasonable in circumstances of the case, for, allowing the respondents/plaintiffs to continue with coal mining in the suit mountain in the garb of temporary injunctions granted against the appellants/defendants would amount to decree the suit in favour of respondents/plaintiffs prior to final disposal of the case.


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(10). Hence, in the light of what is discussed above coupled with the application of appellants/defendants for maintaining status quo on the spot, the appeal in hand is partially allowed to the extent that status quo be maintained by both the parties on the spot for a period of 06 months or till final disposal of the suit whichever is earlier. No order as to cost. Copy of this order be sent to Civil Judge-I, Orakzai. Consign.


Pronounced
02.07.2021


(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of seven (07) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 02.07.2021


(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
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