

Order-11
18/11/2021

Petitioner present through counsel.

Respondents except respondent No.4 present in person.

Arguments already heard.

Brief facts of case are that petitioner filed instant petition u/s 145 Cr.PC to seal the springs in question by contending that he belongs to caste Khadizai and is the resident of village: Khadizai, Tehsil Upper Orakzai while disputed springs known as *Nika Cheshma and Nika Door Khan* is the ownership and possession of caste Khadizai since time of their ancestors. That water of disputed springs is being used by the caste Khadizai for various purpose and has also sold some of the water to other tribes. That respondents belonging to caste Ali Khel, Esa Khel and Ghotak have got no concern with disputed springs but they along with other people forcibly occupied the disputed springs on 18.07.2002 and stopped supply of water to caste Khadizai and also extended threats to them. It is also averred in the petition that civil suit titled Syed Hakeem vs Sher Muhammad etc in respect of disputed springs and other landed property is pending before the court of Civil Judge-I Orakzai but inspite of that respondents have illegal and forcibly occupied the springs as a result of which there is likelihood of breach of peace between the parties, hence it is requested that disputed springs be sealed.

Respondents contested the petition by submitting their written reply, wherein, they ^{raised} various objections and contended that civil suit is pending before the court of Civil Judge-I Orakzai and in which injunctive order was granted by the trial court but the same order was set aside by District Judge Orakzai. It was further

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Sd/- Civil Judge
Orakzai at Baber
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contended that disputed springs have been used by the respondents and other members of their caste, hence if the same is sealed, then it will cause irreparable loss to them.

Learned counsel for both the parties heard and record gone through.

From the perusal of the record, it is an admitted position that prior to instant petition a civil suit was filed by the petitioner against the respondents regarding disputed springs and other landed property, which is pending before the court of Civil Judge-I Orakzai. The copies of record of civil suit are available on file and the perusal of which reveals that petitioner and other filed a suit for declaration and permanent injunction against respondents to the effect that disputed property comprising springs known as Nika Cheshma and Nika Door Khan and forest are situated in Moza Khadizai, which is owned and possessed by the caste Khadizai and plaintiffs also belong to caste Khadizai while defendants belong to caste Ghotak, Esa Khel and Ali Khel and have got no right to use the water of disputed springs and cut the forest. Plaintiff/petitioner also filed an application for temporary injunction along with the plaint. Respondents/defendants contested the suit as well as application by submitting their written statement and reply and contended that disputed springs and forest are owner in possession of caste Esa Khel, Ghotak and Ali Khel and the same has been used by them since long time.

Records depicts that application for temporary injunction filed by the petitioner/plaintiff was accepted by the trial court, however, feeling aggrieved, respondents/defendants filed appeal before the court of

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District Judge Orakzai. The appeal was accepted by Learned District Judge Orakzai vide judgement dated: 20.03.2021 and directed the trial court to decide the application for temporary injunction of plaintiff/petitioner as well as of defendants/respondents. The same suit as well as applications are still pending adjudication before the civil court. Meaning thereby that Civil Court, being court of ultimate jurisdiction has already taken the cognizes, hence all the matters in controversy including possession, interference and injunction are to be regulated by the said court. Being such position, the Magistrate is divested of his power in presence of civil proceedings. The Magistrate u/s 145 Cr.PC is under obligation to respect any decision concerning possession etc given by the civil court. In case proceedings u/s 145 Cr.PC are conducted regarding the same subject matter by the Magistrate, then there is likelihood of conflicting decision between the two courts and such practice is not only derogatory to the norms of administration of justice but it may also culminate in disastrous results. Reliance in this regard is placed on 1993 PCr.LJ 959 (Supreme Court AJ&K), 2005 PCr.LJ, 2006 MLD 702, 1995 PCr.LJ 1912, 2005 PCr.LJ 1410. As the civil court, which is the court of ultimate jurisdiction has already taken cognizance regarding the disputed springs, hence petition u/s 145 Cr.PC is not maintainable.

In view of above discussion petition in hand is dismissed.

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

Announced
18.11.2021

FARMAN ULLAH
Senior Civil Judge
Farman Ullah
Senior Civil Judge,
Orakzai at Baber Mela.