

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

CIVIL APPEAL NO. : 26/13 OF 2021
DATE OF INSTITUTION : 02.07.2021
DATE OF DECISION : 29.09.2021

AZIM ULLAH S/O MUHAMMAD NAZIR, R/O SHAKAR TANGI,
SHEIKHAN, DISTRICT LOWER ORAKZAI AND FOUR OTHERS
.....(APPELLANTS)

-VERSUS-

MUHAMMAD RAHIM S/O RAHIM KHAN, R/O TOTA MELA
DISTRICT ORAKZAI AND FIVE OTHERS
..... (RESPONDENTS)

Present: Noor Badshah Bangash Advocate for appellants
: Ihsan Bangash Advocate for respondents

JUDGEMENT
29.09.2021

Impugned herein is the judgement and decree dated 04.06.2021 of learned CJ-I, Orakzai vide which suit of the respondents Muhammad Rahim and others being plaintiffs has been decreed against the appellants Azim Ullah and others being defendants.

(2). The respondents/plaintiffs through a suit for declaration cum perpetual injunction before the court learned Civil Judge, Orakzai alleged that they are owners in possession of a land with mountain named as Patla Dara situated at Tapa Mamazai Mishti, Orakzai, boundaries of which are detailed in the headnote of the plaint while the appellants/defendants having got no concern with the suit land and mountain are bent upon cutting trees over there. The respondents/plaintiffs sought a decree of declaration cum perpetual injunction to the fact that appellants/defendants

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may be restrained from cutting trees, making interference and construction of a playground over the suit property. It is alleged in the plaint that the respondents/plaintiffs belong to caste of Mishti and they are in possession of the suit property since their forefathers. Being owners, two persons of the caste of respondents/plaintiffs, were employed by the forest department for raising forest over the suit property, and that as per local customs, the contract and commission for construction of metalled road in the suit property was also awarded to the respondents/plaintiffs. The suit area was also declared by the jirga as ownership of respondents/plaintiffs. That the appellants/defendants belong to caste Sheikhan having abode at "Shakar Tangi" area and have got no concern with the suit property. That prior to the instant suit, the parties were litigating before the then APA Orakzai; however, after merger of the then FATA with Khyber Pakhtunkhwa and extension of the regular laws, the said litigation was transferred to civil court where the

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same was withdrawn with permission to file fresh suit. Hence, the present suit. The appellants/defendants were summoned who submitted written statement wherein besides raising various legal and factual objections they claimed that they are owners in possession of the suit property since their forefathers.

Pleading of the parties were culminated by the trial court into the following issues;

1. Whether the plaintiffs have got a cause of action?

2. Whether the plaintiffs are estopped to sue?
3. Whether the suit of the plaintiffs is time barred?
4. Whether the suit property is the ownership of the plaintiffs and the defendants have nothing to do with the suit property?
5. Whether the plaintiffs are entitled to the decree as prayed for?
6. Relief.

Parties were given opportunity to produce evidence. Accordingly, the respondents/plaintiffs examined Record Keeper/Copyist of the District Courts, Orakzai who produced record in respect of previous litigation between the parties, senior clerk of the forest department as PW-2 who produce record regarding agreement deed 28.02.1993 while respondent/plaintiff Muhammad Rahim being attorney for remaining plaintiffs appeared in the witness box as PW-3. On the other hand, appellants/defendants examined Touseef Rehman as DW-1 and Abdul Wahab as DW-2. Both of them alleged that the suit area was the ownership of their forefathers whom have sold the same to the appellants/defendants. Appellant/defendant Azim Ullah himself appeared in the witness as DW-3.

After conclusion of evidence of both the parties, learned Civil Judge heard the arguments and decreed the suit in favour of

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respondents/plaintiffs. Appellants/defendants being aggrieved of the impugned decree and judgement file the instant appeal.

(3). When the case was fixed for final arguments before this court, the appellants/defendants submitted application for issuance of local commission for making investigation on the spot regarding possession of the parties over the suit area. The respondents/plaintiffs submitted reply of the application and contested the same.

(4). I heard arguments on main appeal as well as the application for issuance of local commission and perused the record.

Learned counsel for the appellants/defendants contented that the appellants/defendants have been condemned unheard by the learned trial court. That the counsel for the appellants/defendants has neither been provided opportunity to argue the case in depth nor the written arguments submitted by the counsel for appellants/defendants were received and placed on file by the learned trial court. That the agreement deed dated 28.02.1993 allegedly executed between the respondents/plaintiffs and the Forest department is neither proved nor it pertains to the suit property. That the suit of the respondents/plaintiffs rests upon the sole statement of attorney for respondents/plaintiffs who has failed to discharge the burden of proof.

On the other hand, learned counsel for the respondents/plaintiffs submitted that as per order sheet no. 29 of 13.04.2021 of the learned Civil Judge, Orakzai, arguments of

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both the counsels for parties have been heard and the appellants/defendants have not been condemned unheard. Learned counsel for the respondents/plaintiffs supported the decree/judgement of the learned trial court. He further submitted that sufficient evidence is available on file to prove the question of possession over the suit property and there is no need for issuance of local commission for making investigation on the spot.

After having heard arguments of the learned counsels for the parties and after having gone through the record, it is observed with respect to application for issuance of local commission that no doubt the question of possession for deciding the lis, particularly in circumstances where no revenue record or other documentary evidence is available on file, is very much relevant; however, primarily the parties are required to discharge their burden and the court, if deems it proper, may issue a local commission. In the instant case sufficient evidence is available on file for the court to determine the question of possession; therefore, there is no need to issue a local commission for making spot inspection. Hence, the application being without merits, dismissed.

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With respect to main appeal, the claim of the respondents/plaintiffs is; that they are owners in possession of the suit property and the appellants/defendants have got no concern to cut trees over there. On the other hand,


appellants/defendants claim that they are owner in possession of the suit property since their forefathers. Admittedly, there is no revenue record regarding the suit property. Similarly, none of the parties has any documentary evidence to prove their ownership and the contentions of both the parties rest upon the oral evidence adduced by them. The respondents/plaintiffs in support of their contention have relied upon the agreement deed Ex. PW 2/1 allegedly executed between the Forest department and respondents/plaintiffs vide which the respondents/plaintiffs have let the forest department to raise forest over the land named as "Fati Ullah Dara" of the respondents/plaintiffs. The respondents/plaintiffs further claimed that the contract as per local traditions of the then FATA for construction of metled road was awarded to them which further proves the stance of ownership of respondents/plaintiffs over the suit property. The respondents/plaintiff Muhammad Rahim as attorney for the remaining plaintiffs has also supported the contentions of respondents/plaintiffs in his statement as PW-3.

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On the other hand, the appellants/defendants have relied upon the statements of Tauseef Rehman and Abdul Wahab as DW-1 and DW-2 respectively and the sole statement of appellant/defendant Azim Ullah as DW-3. Both the DW-1 and DW-2 have alleged that their forefathers were original owners of the suit property whom had sold the same to the forefathers of the appellants/defendants. The appellant/defendant Azim Ullah

in his statement as DW-3 has also supported the contentions of appellants/defendants.

Keeping in view the aforementioned contentions of both the parties supported by their respective evidence brought on file, it is evident from the record that as per contents of plaint the respondents/plaintiffs belonging to caste Mishti are owner in possession of the suit property named as "Patla Dara" while the appellants/defendants belonging to caste Sheikhan are owners of "Shakar Tangi" area. The appellants/defendants in para 2 of their written statements have admitted the contention of the respondents/plaintiffs to the extent that appellants/defendants belonging to caste Sheikhan are owners of "Shakar Tangi" area; however, contented that the "Patla Dara" alongwith land and mountain is the ownership of the appellants/defendants as well since their forefathers. The contention of the respondents/plaintiffs is supported agreement deed Ex. PW 2/1 wherein the respondents/plaintiffs are shown as owner of the land named as "Fati Ullah Dara" which has been further shown as bounded by "Shakar Tangi" on its western side. As the document in question is part of a public record produced by the concerned custodian of record, therefore admissible in evidence. The statement of respondent/plaintiff Muhammad Rahim is also relevant and supportive of the case of respondents/plaintiffs. He has been lengthy cross examined but nothing contradictory could be extracted from his mouth rather the contention of


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respondents/plaintiffs has been affirmed from him in his cross examination. A suggestion has been put to him in affirmative as;

”یہ درست ہے کہ اراضی متدعو یہ شکر تنگی کا حصہ نہیں ہے بلکہ اس کے ملحق ہے“

The aforementioned suggestion clearly depicts that the appellants/defendants admit the claim of respondents/plaintiffs to the extent that “Patla Dara” and “Shakar Tangi” are two different areas.

On the other hand, the contentions of the appellants/defendants regarding purchase of the suit property from *Hangu Khanan family*, on one hand is beyond the pleadings while on the other hand both the witnesses have led no direct evidence rather their statements are based on heresy evidence; therefore, cannot be taken into consideration. So far, the statement of appellant/defendant Azim Ullah as DW-3 is concerned, in his examination in chief he has deviated from his pleadings wherein he has alleged that “Patla Dara” area is part of “Shakar Tangi” area as against the contentions of the appellants/defendants in their written statements wherein both the areas have been shown separately located, and second, that they have purchased the suit property from *Hangu Khanan*. However, in his cross examination he has admitted that both are different areas.

”یہ درست ہے کہ ہمارا اپنا علاقہ ہے اور مدعیان کا اپنا علاقہ متدعو یہ ہے۔ اراضی متدعو یہ پتلادہ کے نام سے

مشہور ہے۔ اور پتلادہ میں مدعیان نے پہاڑ اور اراضی پر دعویٰ دائر کیا ہے۔ ہمارا علاقہ اور گھر شکر تنگی میں ہیں۔

He has further admitted that;

"اراضی متدعوئیہ اور لاکہ وغیر جہاں پر ہماری آبادی اور ہم آباد ہیں کے مابین کافی فاصلہ ہے۔"

He has also admitted the contention of the respondents/plaintiffs regarding raising forest by the forest department over the suit property of respondents/plaintiffs.

"یہ درست ہے کہ محکمہ جنگلات نے مدعیان کی اراضی متدعوئیہ میں درخت اگائے تھے۔"

"مجھے Ex. PW 2/1 کے بارے میں محکمہ جنگلات کے دستاویز پیش کردہ کا علم نہ ہے۔"

He has also not denied the execution of agreement deed Ex. PW 2/1 between the respondents/plaintiffs and forest department. Similarly, he has also not denied the awarding of contract of metalled road passed through the suit property.

"مجھے علم نہ ہے کہ اراضی متدعوئیہ میں روڈ گزرنے کا ٹھیکہ مدعیان نے بطور مالکان لیا۔"

The said witness has also admitted the boundaries of the suit property detailed in the headnote of the plaint as correct.

"یہ درست ہے کہ مدعیان نے اراضی جائیداد متدعوئیہ کا حدود اور بوجہ صحیح اور درست طور پر عرض دعویٰ میں تحریر کیا

ہے۔ اور مدعیان نے دعویٰ میں صحیح طور پر حدودات متعین کیے ہیں۔ جبکہ ہماری ملکیتی اراضی جانب مشرق خنزیر درہ،


مغرب کی جانب سینٹل درہ کا گاؤں ہے اور جانب شمال الگڈہ (توئی)، جانب جنوب پہاڑی سلسلہ واقع ہے۔ اور مدعیان کے

اراضی متدعوئیہ کی جانب جنوب بھی پہاڑی سلسلے ہیں۔"

- (5). In view of what is discussed above, it is held that "Patla Dara" and "Shakar Tangi" are two different areas. The

respondents/plaintiffs are owners in possession of "Patla Dara", the suit property. The respondents/plaintiffs have proved their contention. The learned trial court has rightly decreed the suit of the respondents/plaintiffs. The impugned judgement/decreed is based upon proper appreciation of evidence available on file and needs no interference of this court. The appeal in hand resultantly stands dismissed being devoid of force with cost. File of this court be consigned to Record Room while record be returned. Copy of this judgement be sent to learned trial court.


Pronounced
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CERTIFICATE

Certified that this judgment consists of ten (10) pages. Each page has been read, corrected wherever necessary and signed by me.

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