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**IN THE COURT OF ABDUL BASIT,
ADDITIONAL DISTRICT JUDGE-II, ORAKZAI**

Civil Miscellaneous Appeal No. 21/14 of 2023

Date of institution: 21.11.2023

Date of decision: 24.01.2024

Date of consignment:

Lahore Khan son of Lal Badshah and Ajmaeen son of Aiteen Badshah resident of Sheikhan Tribe, Sub-Section Samozai, Village Kanganay, Tehsil Central Orakzai, District Orakzai (appellants/defendants no. 1 & 2)

Versus

Imran Khan son of Sameen Gul and Sameen Gul son of Syed Badshah resident of Sheikhan Tribe, Sub-Section Samozai, Village Betao Mela, Tehsil Central Orakzai, District Orakzai (respondents/plaintiffs)

ORDER

Through this order I shall decide the civil miscellaneous appeal preferred by appellants against the judgment and order dated: 19.10.2023 of the Court of learned Civil Judge-II, Kalaya Orakzai, whereby, he has allowed the application and granted the temporary injunctions in favour of respondents as against appellants in Civil Suit No. 21/1 of 2023.

Concise facts of the case are that respondents have filed a civil suit against appellants, wherein, contended that they and their families were owners in possession of shops situated in Mishti Mela Bazar Khatang Road and Dabori Chowk near Ara Machine, the suit property, for the last forty years; that appellants were strangers to suit property, however, last night, appellant no. 1 being government constructor and appellant no. 2 being in police department have forcibly and without any prior approval from competent authority has started constructing shops in their landed property, out of which one shop was constructed in their property situated on Khatang Road, whereas, they were bent upon to construct other nine shops

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on backside of their shops situated near Ara Machine, due to which not only public thoroughfare was blocked but also caused hindrance in access to their shops; that appellants have no landed property situated in the entire bazar of Mishti Mela, whereas, their forefathers had been settled in other districts due to enmity; that respondents have many jirga verdicts in their favour as against family members of appellants, wherein, they had admitted the possession of respondents over the suit property; that respondents have also secured court decrees in the erstwhile FCR as well as in the court of learned Senior Civil Judge, Orakzai in respect of suit property; that private negotiations were also held between them last year but appellants were applying delaying tactics and finally the efforts got failed; that appellants were asked time and again to refrain from making interference in peaceful enjoyment of their possessions over the suit property and stop raising the constructions but they have refused; that they have contacted defendant no. 3 for removal of illegal constructions by appellants but all went in vain; therefore, respondents have prayed for declaration of their title to the suit property by declaring the act of appellants null & void and as against law; that respondents have also prayed for decree for permanent and mandatory injunctions against appellants so as to refrain them from making the interference in peaceful possession of respondents over the suit property and raising constructions therein coupled with issuance of directions to defendant no. 3, being government functionary and custodian of public interest, to remove the encroachments from public thoroughfare; that they have also prayed for decree for damages against appellants for violating the terms and conditions of the ADR and wasting precious time and money through Shari jirga in last year along with any other consequential relief, the court may deem appropriate.

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With plaint, respondents have also filed an application for temporary injunction so as to refrain appellants from making interference in peaceful possession of respondents over suit property, raising constructions therein and making any sort of interference in the suit property it till disposal of case.

Appellants were summoned by the learned trial court, where they have filed a joint written statement and written reply, wherein, they have raised various legal and factual objections. The learned trial court heard the parties and on allowing the application, granted temporary injunctions and restrained the appellants from raising constructions over the suit property for statutory period or till disposal of the case, whichever, period accrued earlier. The appellants being dissatisfied with the decision of learned trial court has impugned herein the judgment and order dated: 19.10.2023 to the extent of grant of temporary injunctions.

They have also filed application for condonation of delay on ground that the decision was passed by the learned trial court on 19.11.2023; they had applied for attested copies of the order on 20.10.2023, received the attested copies on 23.10.2023 and filed the instant appeal on 21.11.2023. They have also alleged that they had not been heard by the learned trial court and were under impression that the date was fixed for arguments and disposal of application for appointment of the local commission; therefore, they have prayed that on acceptance of the instant appeal, the impugned judgment and order of the learned trial court may be set-aside or they may be allowed to raise the constructions in the suit property at their own risk and costs.

Arguments heard and record perused.

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Viewing valuable arguments advanced by learned counsel for parties and record before the court, it is held that while deciding the applications for temporary injunctions, the courts keep into their minds the co-existence of three important ingredients i.e. prima facie case, balance of convenience and irreparable loss and if any one of these are found missing, temporary injunction cannot be granted as a principle. This is also a settled principle of law that court rests its findings on the material available before it, however, it is admitted fact that there exists no revenue record in district Orakzai, which could help the courts to determine the proprietary or ownership rights of the parties at dispute, and the court has to look into the pleadings of the parties, possessions of parties over the properties and any jirga decision/ verdict in their favour. In the instant case, respondents claim the ownership and possession over the suit property i.e. shops, which have also been allegedly declared to be their ownership in possession through different jirga verdicts and order passed by the political agent in erstwhile FCR system. At present there is nothing contrary on record against respondents to negate their contention except the oral assertions raised by appellants in the written statement. On the other side, respondents have brought a written paper signed by the jirga members, which reflects that on 31.05.2021 respondent Imran had filed a suit against Lahore Khan in the office of The Assistant Commissioner, Kalaya, Orakzai, whereby, Mufti Shafiullah was nominated for negotiation, spot inspection and decision of the issue in light of Shariah, where parties were asked for production of proof of their claims, to which respondent was ready to furnish the proof but appellants were making lame excuses and used delaying tactics, whereat, Mufti Sahib on submitting few proofs has excused from proceedings.

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Similarly, judgment and order dated: 24.11.2016 of the Assistant Political Agent/ADM Lower Orakzai also provides that there existed old dispute between respondents and Shah Manoor for the settlement of which, parties have consented for the constitution of the jirga, who probed into the matter and resolved the dispute amicably, on the basis of which the APA. Lower Orakzai Agency has passed the verdict in favour of respondent Imran Khan, which shows that respondents have prima facie strong case against appellants. Besides, appellants could not produce a single deed in their favour to show that they had prima facie stronger case than the respondents. Likewise, if appellants had not been restrained from raising constructions in the suit property, there was likelihood of irreparable loss to respondents as compared to appellants, which further shows that balance of convenience also tilt in favour of respondents.

Besides above, the impugned order was passed on 19.10.2023, the appellants have applied for attested copies on 20.10.2023, which were admittedly prepared on 21.10.2023, whereas, they have filed the instant appeal on 21.11.2023, which is time barred with delay of one day. So far fact that the appellants had not been heard by the learned trial court, it is observed that the same is not pressed by learned counsel for appellants nor it is worth consideration because previous order sheet explicitly provides that case was fixed for arguments on application for temporary injunctions as well.

In the wake of above discussion, it is held that the learned trial court has properly appreciated the available record and has not erred in arriving to just conclusion, hence, impugned judgment and order of the learned trial court is upheld and appeal in hands dismissed.

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Needless to mention that my findings above are tentative in nature and will not prejudice the mind of learned trial court at the time of final disposal of case. Copy of this order placed on record of learned trial court and the requisitioned record, if any, be returned. Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

Court file consigned to record room after completion & compilation.



Announced
24.01.2024

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CERTIFICATE

Certified that this judgment consists of six (06) pages, those are signed by me after necessary corrections.



Announced
24.01.2024

Abdul Basit
Addl. District Judge-II, Orakzai