(35)

IN THE COURT OF ABDUL BASIT,

ADDITIONAL DISTRICT JUDGE-II, ORAKZAI

Civil Appeal No. 22/13 of 2023

Date of institution: 16.06.2023

Date of decision: 09.02.2024

Date of consignment:

Khiyalmeen Ali son of Ali Baz Khan resident of Quom Mani Khel near Kalaya Bazar, Tehsil Lower, District Orakzai and three others (appellants/ defendants)

Versus

Murtaza Aalim son of Dr. Aalim Jan resident of Quom Mani Khel, Lower, District Orakzai presently Ibraheem Zai, Tehsil & District Hangu and eight others (respondents/plaintiffs)

APPEAL UNDER SECTION 96 OF CPC AGAINST THE JUDGEMENTAND DECREE OF THE COURT OF SENIOR CIVIL JUDGE, ORAKZAI

JUDGMENT

This civil appeal has been preferred against the judgment and order dated 31.05.2023, whereby, the learned Senior Civil Judge, Orakzai has decreed the civil suit no. 11/1 of 2023 of the respondents/plaintiffs.

Concise facts as per averments of the plaint are that respondents/ plaintiffs have alleged that they were recorded owners in possession of the landed property consisting of 17 fields and house measuring around 15 jarib situated in Fateh Khan Kunj Ahmad Khel Quom Mani Khel near Kalaya Bazar Orakzai, the suit property, since the time of their forefathers; that Fateh Khan was their grandfather; that suit property was forcibly occupied by Qasaban in 1929, which was redeemed by them in 1985 on payment of Rs. 34,000/- and two fields; that the money and two fields were handed over to Qasaban by Ali Baz Khan, father of appellants/defendants, however, in order to compensate him, they have paid him Rs. 34,000/- and a field,

09/02/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

(36)

which was larger in size than the two fields delivered by him to Qasaban followed by a jirga; that suit house was in possession of their tenant Itibar Khan, who cultivated the suit property; that appellants/defendants have not made any interference in the suit property until death of their father in 2004; however, after that they have made undue demands, which were refused by them and jirga was held between them on 21.11.2006, according to which they were forced to pay Rs. 65,000/- to appellants/defendants; that since their gun valuing Rs. 12,000/- was already in possession of appellants/ defendants; therefore, they had paid Rs. 53,000/- to appellants/defendants in light of jirga verdict, which was acknowledged by appellant/defendant no. 1; however, the appellants/defendants have once again started making interference in the suit property and made attempt to forcibly occupy the 12 fields, leading a passage over there and making cultivation in the suit property, whereat, they had filed an application to Deputy Commissioner, Orakzai but they were directed to approach the civil court; that appellants/ defendants have no concern whatsoever with the suit property; therefore, respondents/plaintiffs have prayed for declaration that they were owners in possession of suit property and appellants/defendants have no concern with it; that they have also prayed for the decree of permanent and mandatory injunctions so as to restrain them from making any sort of unwarranted interference and forcible possession in the suit property; hence, the suit.

Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu
09/09/2024

The respondents contested the suit by filing joint written statement, wherein, they have raised various legal & factual objections *inter-alia* with facts that respondents/plaintiffs were not the exclusive owners of the suit property; that they were also recorded co-sharers to the extent of half shares in the suit property, which was redeemed by ancestors of parties at dispute jointly from Qasaban else their ancestor would not have delivered two

fields; that they have jointly constructed a house in the suit property, which was jointly delivered to the tenant Itibar Ali; however, when, they have demanded their shares in the suit property, respondents/plaintiffs have filed the instant suit; that they conceded to have jirga conducted between them in 2006, however, refused to have received any money or landed property in exchange of two fields; that the respondents/plaintiffs have filed this suit malafidely because there existed a passage for more than 30 years, which leads to their house and used by them and other inhabitants of the locality, whereas, there was construction work under progress to metal the road but respondents/plaintiffs have filed the suit to interrupt the construction work; therefore, prayed for the dismissal of suit.

The learned trial court framed different issues from divergent the pleadings of the parties, which are reproduced as below;

Issues

1. *Whether 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 ancestral property of the plaintiffs and the defendants have got nothing to do with the same?*
5. *Whether the defendants are illegally interfering in the suit property?*
6. *Whether the plaintiffs are entitled for decree as prayed for?*

Relief?

09/02/2024
Abdul Basit,
Addl: District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

The learned trial court offered the opportunities to the parties to lead evidence. Consequently, they recorded the statements of as many witnesses as they had wished. After close of evidence, the learned trial court heard the arguments from both sides and decreed the suit of respondents/plaintiffs as was prayed for vide judgment, decree and order dated 31.05.2023.

(38)

Being dissatisfied, the appellants/defendants have impugned the judgment, decree and order dated 31.05.2023 of the learned trial court, wherein, made objections raised in the written statement and contended that judgment and order of the learned trial court is illegal, unfounded, against the law, based on misreading and non-reading of evidence; that the learned trial court has decreed the suit in haste without considering the fact that no description, boundaries and detail of the suit property has been given in the plaint; that material issues no. 4 & 5 have not been discussed on merits & decided in haste; that no issue with regard to payment of money and delivery of the landed property by respondents/plaintiffs to appellants/ defendants in exchange of two fields delivered to Qasaban is framed; that not only the respondents/plaintiffs misinterpreted but the learned trial court has also been misled on point that the suit passage leads through the lands of respondents/plaintiffs rather the suit passage is situated adjacent to and leads along with the lands of respondents/plaintiffs; that when they have intended to metal the suit passage, respondents/plaintiffs stopped them from doing so, where upon, they had returned the money to them; therefore, they have prayed that on accepting the instant appeal, the impugned judgment, decree and order of the learned trial court may be set-aside and suit of respondents/plaintiffs may be dismissed.

09/02/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

Learned counsel for respondents refuted the arguments of learned counsel for appellants and argued that the learned trial court has properly appreciated the evidence and record on file and committed no illegality or irregularity in passing the impugned order; that appellants/defendants have not only admitted jirga decision dated 21.11.2006 but have also conceded their ownership in the suit property; thus, prayed for dismissal of appeal with heavy costs.

(39)

Arguments heard and record perused.

Viewing the arguments advanced by learned counsel for parties and record before the court, it is held that the suit property was admittedly in possession of Qasaban that was redeemed by ancestors of parties at dispute, according to which Ali Baz Khan, ancestor of appellants/defendants, has admittedly delivered two fields and Rs. 34,000/- to retrieve the same. It is also an admitted fact that after redeeming the suit property, a dispute arose between the parties at dispute, according to which appellants/defendants claimed that respondents/plaintiffs have not delivered them anything in return to two fields delivered to Yaqeen Ali, whereas, respondents/plaintiffs contended that they had already discharged the liabilities. On this issue, a jirga was held between the parties, who on taking powers from parties at dispute vide decision dated 21.11.2006, Exh.PW 8/4, resolved the issue, whereby, fixed an amount of Rs. 65,000/- to be paid by Dr. Jan Aalim (respondents/plaintiffs) to Khiyalmeen Ali (appellants/defendants). It was further held that a rifle worth Rs. 12,000/- belonging to respondent/plaintiff (Dr. Jan Aalim) was already in possession of appellants/defendants; thus, the said amount was deducted from Rs. 65,000/- and respondents/plaintiffs were bound to pay balance amount of Rs. 53,000/- to appellants/defendants on 25.03.2007. It was also decided by jirga members that a passage leading along with/adjacent to the lands of respondents/defendants shall allow to be used by all brethren of Ghariwal for transportation of pickups and tractors etc. as per need with a condition that said passage shall not be considered/ deemed/called as government road.

09/02/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Saber Mela,
Hangu

After jirga verdict, an amount of Rs. 53,000/- was admittedly paid by respondents/plaintiffs to appellants/defendants through Hayat Ali and in this respect receipt dated 2503.2007, Exh.PW 7/1, was brought on file, which was though initially objected by the appellants/defendants, however,

later on they not only relied on the same receipt in evidence but also endorsed the fact of receipt of money in paragraph no. 7 of memorandum of appeal with assertion that they had returned the said amount to respondents/ plaintiffs through Hayat Ali and in this respect referred the note over the said receipt. The note mentioned over the payment receipt, Exh.PW 7/1, only provides that "in case of return of said money by Khiyalmeen Ali, the same shall be received by Hayat Ali" and there is no documentary proof on record that Hayat Ali had received back the said amount from Khiyalmeen Ali and he had returned it to Amjad Ali or the respondents/plaintiffs. Even, the statement of Hayat Ali (DW-1) also perused, who though supported the stance of appellants/defendants and stated that he has returned the money to Amjad Ali, however, there is admittedly no acknowledgement receipt or any documentary proof on record about the return of said money by him to respondents/plaintiffs or Amjad Ali.

Above discussed facts explicitly provides that appellants/defendants have admittedly received the consideration in lieu of two fields they had given in exchange to Qasaban for redeeming the suit property in light of jirga decision on 25.03.2007, which is also evident from contents of the memorandum of appeal, however, their contention that they had allegedly returned the money to respondents/plaintiffs when the latter have refrained them from metalling the suit passage is not sustainable for the reasons here-in-below;

- first, that their stance cannot be relied being not based on true accounts of facts because they had clearly denied the receipt of any money and any landed property in exchange of delivery of two fields to Qasaban in their written statement;

09/02/2024
Abdul Basit
Addl: District & Sessions Judge-II
Orakzai at Baber Mela
Hangu

(M)

- second, the plea of receiving money and returning back to the respondents/plaintiffs is an improvement of fact at later stage of proceedings and this plea was not raised in the written statement;
- third, it appears from pleadings of the parties that appellants/ defendants have started metalling the suit passage after approval of the tender, if any, few days before filing of the suit in hands in August 2020, whereat, respondents/plaintiffs have refrained them from doing so, where after, they filed the instant suit; therefore, appellants/defendants were estopped by their own conduct to return the consideration of those two field, which they had received in 2007 i.e. after about more than 12 years, which at one hand is breach of jirga decision and on the other hand would lead to revival/opening of the buried hatches;
- fourth, there is no date, time and place on record to show that when, where and to whom the said money was returned;
- fifth, once appellants/defendants had conceded the receipt of money in lieu of two fields that had given in exchange to Qasaban, then, the transaction was closed then and there and they cannot be allowed to return the money at their own whims and wishes;
- sixth, the issue of disputed passage was already resolved in the jirga decision, wherein, it is clearly mentioned that the brethren of Ghariwal shall use the disputed path for transportation of pickups and tractors etc. when needed and it shall not be considered/deemed or called as public passage/government road.
- seventh, rifle valuing Rs. 12,000/ is admittedly still in possession of appellants/defendants, which leads to inference that had appellants/ defendants returned the money to respondents/plaintiffs, then, they must have also returned the rifle to them too but they did not.

09/12/2024
Abdul Basit
Addl: District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

So far objection of appellants/defendants that respondents/plaintiffs have not given any description/detail of suit property in the plaint, it is held that there is no settlement record in district Orakzai and admittedly landed properties in district Orakzai are identified through names attributed to every field, whereas, in the suit in hands, around 15 jarib area consisting of 17 fields known as Fateh Khan Dag Kunj is the suit property, which is also admitted by appellants/defendants in their written statement & evidence stating that a jirga was convened between them in 2006 with respect to suit property, which means that suit property is known to parties at dispute.

The oral evidence produced by respondents/plaintiffs fully supported their stance and appellants/defendants have failed to bring on record any contrary material to shatter their plea. Even, they admitted at the bar that they are only contesting the matter of disputed passage, which is also evident from memorandum of appeal that as soon the respondents/plaintiffs have refrained them from metalling the suit passage, they have returned them money, which speaks volume about admission of title of respondents/ plaintiffs by appellants/defendants, otherwise, they would not have alleged the return of money to them being a co-sharer in the suit property. Similarly, Imraz Ali, appellant/defendant no. 2 appeared as special attorney on behalf of other appellants/defendants as DW-4, however, he did not utter a single word in his whole examination-in-chief that suit property was their joint ownership. Likewise, respondents/plaintiffs are not refraining appellants/ defendants from use of the suit passage but from making interference in it.

Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

In view of my detailed findings above, it is held that the learned trial court has committed no illegality or irregularity or misreading or non-reading of evidence, hence, the impugned judgment, decree and order dated 31.05.2023 of the learned trial court is upheld and appeal dismissed being bereft of merits.

43

Parties have to bear costs of their proceedings because none of them proved the expenses incurred on litigation or costs of the proceedings.

Copy of this order be placed on record of learned lower court, where after, the requisitioned record be returned and file of this court consigned to record room after necessary completion and compilation.

Announced
09.02.2024

Abdul Basit
Addl. District Judge-II, Orakzai

CERTIFICATE

Certified that this judgment consists of nine (09) pages, those are signed by me after necessary corrections.

Announced
09.02.2024

Abdul Basit
Addl. District Judge-II, Orakzai