(41)

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

Civil Appeal No. 23/13 of 2023

Date of institution: 21.06.2023

Date of decision: 02.02.2024

Date of consignment:

Ayaz Khan son of Taj Ali Khan resident f Qaum Biland Khel, Tappa Palmat Khel, District Orakzai and six others (appellants/defendants)

Versus

Shah Sawar son of Sultan resident of Qaum Biland Khel, Tappa Palmat Khel, District Orakzai and three others (respondents/plaintiffs)

APPEAL UNDER SECTION 96 OF CPC AGAINST THE JUDGEMENTAND DECREE OF THE LEARNED CIVIL JUDGE-I, ORAKZAI

JUDGMENT

Through this judgment I will decide appeal preferred by appellants against respondents challenging the judgment, decree and order dated: 23.05.2023 of the Court of learned Civil Judge-I, Orakzai whereby he has decreed the suit of respondents/plaintiffs.

On 14.07.2021, respondents/plaintiffs have filed a civil suit no. 104/1 of 2021, wherein, asserted that they belonged to Tappa Piran (Syed) while appellants/defendants belonged to Tappa Himmat Khel Biland Khel; that landed property highlighted with points A, B, C and D in the sketch map measuring around 12 *jarib* located in Biland Khel (Waish Khawary) District Orakzai was joint ownership in possession of respondents/plaintiffs for the last 200 years and appellants/defendants have no concern with it; that landed property highlighted with points E, F, G and H, to be referred as property of appellants/defendants, in the sketch map situated towards north of the property of respondents/plaintiffs was allegedly the ownership of appellants/defendants; that a water flow marked *"alif"* & *"bay"* (the old

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water flow), was leading between the properties of parties at dispute, however, they and a third party by incurring money jointly have diverted the old water flow to mark *"tay"* & *"say"* (the new water flow) as shown in the sketch map; however, now appellants/defendants claim the ownership of around 3.5 to 4 *jarib* of the property belonging to respondents/plaintiffs from the old water flow marks to new water flow marks i.e. situated towards east side without any reason, to be referred as suit property; therefore, respondents/plaintiffs have prayed for decree of declaration that they were owners in possession of suit property for the last 200 years and appellants/ defendants have no concern with it; that respondents/plaintiffs have also prayed for decree for possession as a consequential relief in case appellants/ defendants made forcible possession over the suit property during pendency of suit, hence, the suit.

Respondents were summoned by learned trial court.

They appeared and filed a joint written statement, wherein, raised various legal & factual objections *inter-alia* with facts that suit property was their ownership in possession since the time of their forefathers, which was leased out by their ancestors to the ancestors of respondents/ plaintiffs but now the latter have made forcible possession over it; that the alleged water flow was shifted/diverted by them on their personal expenses to avoid any loss to their property; therefore, prayed for dismissal of suit. Pleadings of the parties were reduced into different issues as below;

1. *Whether the plaintiffs have got a cause of action?*
2. *Whether the plaintiffs are estopped to sue?*
3. *Whether the suit of plaintiffs is time barred?*
4. *Whether the suit property is the ownership of the plaintiffs and the plaintiffs re entitled to enjoy all the rights associated with suit property?*

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5. *Whether the ancestors of defendants had mortgaged the suit property to the ancestors of the plaintiffs?*
6. *Whether the plaintiffs are entitled to the decree as prayed for?*

Relief?

Parties produced evidence.

The learned trial court heard the arguments and decreed the suit of respondents/plaintiffs on 23.05.2023. Appellants/defendants being not contended with the decision have preferred instant appeal. Learned counsel for appellants while arguing narrated above facts of the case with assertion that order of the learned trial court is illegal, against the law and facts, unfounded, suffers from material illegality and irregularity, result of misreading and non-reading of evidence having been ignored the cardinal principles of natural justice, having not considered the record available on file and capricious, therefore, prayed that on acceptance of instant appeal, judgment, decree and order of the learned trial court dated: 23.05.2023 may be set-aside and suit of respondents/plaintiffs may be dismissed.

Learned counsel for respondents/plaintiffs refuted the arguments of learned counsel for appellants/defendants and argued that learned trial court has properly appreciated the evidence and record on file and committed no illegality or irregularity in passing the impugned order; therefore, prayed for dismissal of appeal with heavy costs.

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Arguments heard and record perused.

Perusal of record and arguments advanced by learned counsel for parties lead me to inference that main controversy between parties relates to the fact that whether suit property is the ownership of respondents/plaintiffs or whether the ancestors of appellants/defendants have leased out the same to ancestors of respondents/plaintiffs. Likewise, appellants/defendants have

also raised the objection of limitation; therefore, this court will deal with the subject accordingly. First of all, I would answer the limitation point. Admittedly, the district Orakzai was part of erstwhile FATA, which was regulated through FCR and recently been merged in the province of Khyber Pakhtunkhwa. It is also an admitted fact that after the 25th Constitutional Amendment Act 2018, all federal and provincial laws were extended to the newly merged districts i.e. erstwhile FATA in 2018; therefore, the question of limitation shall be considered in view of The Limitation Act, 1908 extended to this area.

The onus to prove this issue was on respondents/plaintiffs, however, they did not produce any evidence in this respect, however, issue is legal in nature; therefore, has to be decided on merits. Contents of plaint provide that respondents/plaintiffs have alleged the accrual of cause of action to them three months before filing the suit, when appellants/defendants have started claiming the suit property to be their ownership and finally denied their right two weeks before filing the suit, which is well within time within the meaning of Article 120 of The Limitation Act, 1908, which provides a period of six years for seeking the remedy of declaration from the date of accrual of cause of action. It is; therefore, held that the learned trial court has decided this issue correctly.

It was also argued by learned counsel for appellants/defendants that the learned trial court has misconceived the word *"Ganra"* by translating and mixing it with English word *"mortgage"*, which they actually meant was *"Ejara"* or the English word used for it was *"lease"*; therefore, they wanted to set-aside the judgment, decree and order of the learned trial court on this score as well. It is, however, observed that the word *"Ganra"* is generally used and meant as mortgage, whereas, the word *"Ejara"* is used

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and meant as lease in most part of the province. Contents of the written statement provides that the appellants/defendants have used both words *"Ejara"* and explained in brackets as *"Ganra"* and in arguments alleged to have meant it leasing out of the suit property to respondents/plaintiffs; therefore, I will treat this word as lease and dilate upon accordingly.

Notwithstanding the conceiving of word *"Ganra"* as mortgage and findings of learned trial court on issue no. 5, it is held that appellants/ defendants have alleged the suit property to be their ancestral ownership, which was allegedly delivered to respondents/plaintiffs on lease but not a single witness uttered a single word that ancestors of appellants/defendants had leased out the suit property to ancestors of respondents/plaintiffs. Even, Malik Mushk Aalim Bangash (DW-1) admitted that respondents/plaintiffs belonged to Piran tribe and Piran tribe has huge property/land in Biland Khel property. This is strange to note that he has appeared in the witness box without knowing the contentions of parties at dispute. Likewise, Wahib Noor (PW-2) also appeared in the witness box but he also did not utter a single word about the ownership of suit property and its leasing out by ancestors of appellants/defendants to the ancestors of respondents/plaintiffs. He was also blank about nature and subject of the suit property; therefore, the statements of both these witnesses cannot be relied. Muhammad Raeel Khan (DW-3) and Niaz Wali Khan (DW-4) were special attorneys for the appellants/defendants, however, they have also not deposed a single word that suit property was actually the ownership in possession of their ancestor and their ancestors had leased out to ancestors of respondents/plaintiffs; therefore, in absence of any oral and documentary evidence on file, this cannot be held that ancestors of appellants/defendants had leased out the suit property to the ancestors of respondents/plaintiffs.

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So far question of possession and title of respondents/plaintiffs over the suit property is concerned; it is held that appellants/defendants admit the possession of respondents/plaintiffs over the suit property. As far, question of ownership is related, oral evidence produced by respondents/plaintiffs has not been shattered by appellants/defendants; so, this shall be considered admission on their part. No doubt, they have admitted that in the erstwhile FATA, the laws and regulations were regulated by the political agents and other customs of the locality were regulated by Qazi (respectable elder/so called patwari), according to which if any sale/purchase was done, it was documented and stamped by the Qazi. It is, however, explained by them in arguments that only that sale/purchase was documented by the Qazi, which was made from real owners to third person. Even, otherwise, Muhammad Raeel Khan (DW-3) and Mushk Aalim Bangash (DW-1) admitted that Piran tribe live in Biland Khel and they have huge/vast landed property in Biland Khel. DW-1 also admitted that respondents/plaintiffs belonged to Piran tribe, which further clarifies that suit property is their ownership.

Importantly, appellants/defendants have put a suggestion to PW-1, which he negated saying that "it is wrong that suit property was shamilat" and self-stated that suit property was their ownership, which infers that had appellants/defendants the owners of suit property, then, they must not have put this suggestion to a witness rather would have suggested otherwise in terms of their ownership of the suit property. This is equally important to note that respondents/plaintiffs in their plaint explicitly provided that they (parties at dispute) and third party have diverted the old water flow mark to new water flow mark by incurring money jointly, which is also admitted by special attorneys for appellants/defendants and amounts to admission of title of ownership of respondents/plaintiffs.

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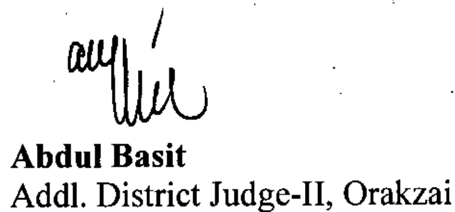
In the like manner, Muhammad Raeel Khan (DW-3) has shown ignorance and shown his inability to point out that whether respondents/ plaintiffs have 12 *jarib* landed property in Waish Khawray or more, which further avails that respondents/plaintiffs are owners of the suit property and appellants/defendants have no concern with it.

Crux of above discussion convinces me that respondents/plaintiffs are owners in possession of suit property and appellants/defendants have no concern with it but they have wrongly intruded in the peaceful enjoyment of the suit property by respondents/plaintiffs; therefore, it is held that the learned trial court has properly appreciated and discussed the evidence on file, did not commit any irregularity, illegality, misreading or non-reading of evidence and rightly passed the decree, hence, the judgment, decree and order passed by the learned trial court dated 23.05.2023 is maintained and appeal in hands dismissed being bereft of merits.

Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

The requisitioned record along with copy of this order sent to the learned trial court and file of this court consigned to record room after necessary completion and compilation.



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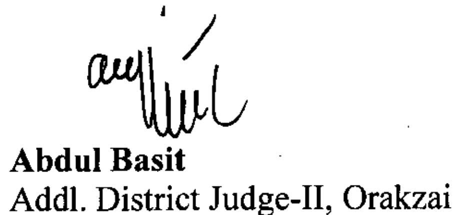
CERTIFICATE

Certified that this judgment consists of seven (07) pages, those are signed by me after necessary corrections, if any found.



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