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IN THE COURT OF ABDUL BASIT,

ADDITIONAL DISTRICT JUDGE-II, ORAKZAI

Civil Appeal No. 34/13 of 2023

Date of institution: 07.12.2023

Date of decision: 12.03.2024

Date of consignment:

Khameen Gul son of Miran Gul resident of Quom Mishti, Tari Banda, District Orakzai and two others (appellants/defendants)

Versus

Nasir Khan son of Muhammad Yaqoob resident of Quom Mishti, Tappa Darokhel Tari Banda, Village Shaho Khel, Kasha, Tehsil Central, District Orakzai and two others (respondents/plaintiffs)

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

## JUDGMENT

Through this judgment I will decide appeal preferred by appellants against respondents challenging the judgment, decree and order dated 16.11.2023 of the Court of learned Civil Judge-II, Kalaya, Orakzai whereby he has decreed the suit of respondents/plaintiffs.

Respondents contend that a field situated at village Tari Kalay near Toey Ghar measuring around 100 marla bounded by east filed of Nasir ud Din, west field of Mohsin ud Din, north river Khanki Algada & south water drainage Tari Kalay, the suit property, is their ancestral property and they are owners in possession of it; that they have leased out the suit property to appellants in presence of witnesses but appellants denied to put the lease agreement into black and white; that appellants not only intended to make possession over the suit property but also restrained them from cultivating the same, which act of appellants is illegal, against the law and invasion upon their rights; therefore, they have prayed for a decree to declare them

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owners in possession of suit property; that they have also prayed for decree for possession on demolishing the constructions, if any found/made during pendency of the suit coupled with decree for the permanent and mandatory injunctions to refrain them from making any sort of interference, making forcible possession, restraining them to cultivate the suit property etc.

Appellants were summoned. They appeared and filed joint written statement, wherein, raised various legal & factual objections *inter-alia* with facts that the suit property is their ownership in possession and respondents have no concern with it; that they are in lawful possession of the suit property; therefore, prayed for dismissal of suit.

The divergent pleadings of the parties were reduced into different issues by the learned trial court, which are reproduced 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 the plaintiffs is time barred?*
4. *Whether the plaintiffs are owners in possession of the inherited suit property measuring 100 marla?*
5. *Whether the suit property was given to the defendants on Ijara?*
6. *Whether the plaintiffs are entitled to the decree as prayed for?*
   *Relief?*

Parties produced evidence. The learned trial court heard the arguments & decreed the suit of respondents on 16.11.2023. Appellants being not contended with the decision, filed instant appeal with assertion that order of the learned trial court is illegal, against the law, unfounded, suffers from material illegality and irregularity, result of misreading and non-reading of evidence; therefore, prayed that on accepting the appeal, judgment, decree & order dated 16.11.2023 of the learned trial court may be set-aside and suit of respondents may be dismissed.

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Learned counsel for respondent refuted the arguments of learned counsel for appellants 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.

Before parting with my findings and assistance furnished by learned counsel for parties, I would like to mention that it is a settled principle of law that civil disputes are decided on strength of preponderance of evidence. There is admittedly no land settlement or revenue record of district Orakzai and the disputes between the parties are resolved on basis of oral evidence, possession over lands or agreement deeds, if any, brought before the *jirga* and now the courts; therefore, while deciding this appeal, the court has no other option but to base its findings on pleadings of parties, oral evidence and documentary proof, if any, brought on file. In the suit in hands, the ownership of suit property is also in dispute, which respondents alleged to be their ownership and appellants have denied and claimed their ownership. Since, respondents have claimed the ownership of suit property; therefore, they were burdened to prove their title. To prove this, they have recorded the statements of as many witnesses as they wished, who have although deposed in favor of respondents but boundaries mentioned by Meenawar Khan (PW-1) were not found exactly in accordance with the boundaries detailed in the plaint because as per plaint, there existed landed property of Sanab Gul towards the east of suit property, whereas, PW-1 claimed the same to be his land. Besides, respondents have claimed the suit property to be their ancestral property but PW-1 deposed that suit property was earlier the ownership of Malkhi, who was either father or uncle of the respondents. Perusal of parentages of respondents, however, does not suggest that Malkhi

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was father of either of the respondents; therefore, it will be presumed that Malkhi was the uncle of respondents and in absence of any proof on record, the suit property cannot be termed as ownership of respondents.

On the other side, Gul Zameer Khan (PW-2) is co-villager of the respondents, who though supported the claim of respondents; however, he is not direct witness of the facts that suit property was the ownership of respondents rather he had allegedly heard it from his father that the suit property was cultivated by respondent no. 1 and his father. Even, he did not remember that how long ago, his father has told him about this fact. It is also worth noting that contents of the plaint speak about the ownership of suit property of all the respondents, however, the statement of (PW-2) only speaks about the ownership of respondent no. 1 (Nasir Khan) and he did not utter a single word about the ownership of all respondents.

Likewise, Abdul Ghaffar (PW-3) also stated that suit property was the ownership of respondents, however, he rest his belief on fact that since there existed a general passage adjacent to suit property; therefore, he knew that suit property was the ownership of respondents, which is no ground to believe his statement. Ismail Shah (PW-4) fully supported the stance of respondents with assertion that he along with respondent no. 1 was going to the suit property, where they have called upon appellant no. 1, his son and his nephew, who have asked respondent no. 1 to lease out the suit property to him, whereat, the latter agreed subject to prior execution of agreement. When, (PW-4) was subjected to cross-examination, he deposed that they had gone after appellants to discuss lease matter a year ago because few days before that, appellant no. 1 had driven over the tractor for cultivation of suit property, which shows that appellant no. 1 was already in possession of the suit property and was cultivating the same.

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Finally, respondent no. 1 appeared as (PW-5), who reiterated the facts of the case with assertion that he was engaged doing work in the suit property, when, appellant no. 1 stopped him doing so, whereat, they four people visited the village of appellants before filing the suit, where appellant no. 1 has shown his desire either to lease out the suit property or deliver him the same on half produce *(neemkara)*, to which he has shown readiness subject to prior execution of the agreement. There existed a wide gap in the statements of PW-4 and PW-5 because the earlier deposed that they had visited the suit property, where, they had called upon the appellant no. 1 to discuss the lease matter, whereas, the latter deposed that they had visited the village of appellants to discuss the issue, where appellant no. 1 has expressed his desire to lease out the suit property. There is also conflict noted in the statements of these witnesses on point that the statement of PW-4 provides the possession of suit property with appellant no. 1, whereas, the statement of PW-5 is silent about the same. Importantly, respondent no. 1 (PW-5) contended that they four persons including Ismail Shah have visited the village of appellant no. 1, where appellant no. 1 has offered to take on lease the suit property, however, respondents failed to bring the remaining two witnesses before the court and withheld the best available evidence to support their stance. Even, he conceded that he has no other witness than Ismail Shah in front of whom the lease issue was discussed, which not only doubts the visit of four persons to the village of appellant no. 1 but also making of any offer of lease by the appellants to him. Likewise, PW-5 stated that they have not convened any *jirga* on refusal of appellants to execute the lease agreement but PW-4 negated him stating that he had gone to the house of Mustafa, brother of appellant no. 1, and offered him *jirga* option.

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Besides above, plain reading of plaint suggests that respondents have allegedly leased out the suit property to appellants, however, not a single witness has been brought on record who could have confirmed their stance stating that suit property was leased out to appellants in their presence. Though, there are couples of positive suggestions brought on record in favor of respondents but as per law respondents have to prove their own case and cannot take benefit from the weaknesses of appellants. In the backdrop of these facts, it is held that respondents have failed to bring any cogent, reliable & confidence inspiring evidence on record to establish their title to the suit property; therefore, I have reached to conclusion that respondents have got no cause of action and the decision of learned trial court is not based on correct appreciation of evidence, hence, the appeal in hands is **allowed**, the judgment, decree and order dated 16.11.2023 of the learned trial court is set-aside and suit of respondents is dismissed.

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.

**Announced**
12.03.2024

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Addl. District Judge-II, Orakzai

**CERTIFICATE**

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

**Announced**
12.03.2024

**Abdul Basit**
Addl. District Judge-I, Orakzai