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IN THE COURT OF ABDUL BASIT,

ADDITIONAL DISTRICT JUDGE-II, ORAKZAI

Civil Appeal No. 12/13 of 2023

Date of institution: 22.03.2023

Date of decision: 12.03.2024

Date of consignment:

Saif-ur-Rehman son of Noroz Gul resident of Quom Ali Khel Tappa Panjam, Ghotak, Tehsil Upper, District Orakzai (appellant/defendant)

Versus

Zarmast Khan son of Azmat Khan resident of Trekho Pakha, Upper Tehsil, District Orakzai and seven 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 appellant against respondents challenging the judgment, decree and order dated 24.02.2023 of the Court of learned Civil Judge-I, Orakzai whereby he has decreed the suit of respondents/plaintiffs.

Respondents contended that a house measuring 40 marla situated in Trekho Pakha is their ownership in possession for the last 150 years; that beside above they have also leveled off agricultural lands Channay Xavar, Siray Rawaz, Ghughay Kas, Serray Rawaz and were enjoying the same as owners for the last more than 150 years; that they were also owners in possession of jungle situated near Balyani towards north of Ranjko Baba Ghar, the suit property, with which appellant has no concern because the latter had migrated from the said area to other place for the last more than 150 years; that ancestor of appellant has claimed the ownership of suit property in 1923, however, at that time this area was ruled by Mehmood

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Akhunzada and according to decision, ten members of their family were offered take special oath on the holy Quran, which was taken by ancestor of respondents; that a road pass by their house leading from Dewari to Shah Zaman Garhi was their property, which they have spared for the road; that the survey of their house has also been conducted, which was not objected by anyone and they had also received the price from government; that due to militancy factor, many of the families have migrated from the area but appellant taking advantage of this had made interference in the suit property and have started claiming the same to be their ownership; that this act of appellant is against the law; therefore, they have prayed for a decree to declare them owners in possession of suit property; that they have also prayed for decree for the permanent and mandatory injunctions to refrain the appellant from making any sort of interference in the suit property.

Appellant appeared and filed amended written statement, wherein, raised various legal & factual objections *inter-alia* with admission of fact that he has no concern with house but claimed the remaining suit property to be his ownership in possession with which respondents have no concern; that he is in lawful possession of the same thus 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?

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Parties produced evidence. The learned trial court heard the arguments & decreed the suit of respondents on 24.02.2023. Appellant being dissatisfied 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 24.02.2023 of the learned trial court may be set-aside and suit of respondents may be dismissed.

Learned counsel for respondent refuted the arguments of learned counsel for appellant 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 the findings of the case, I would like to mention that on 10.01.2023, appellant has submitted an amended written statement, wherein, explicitly conceded the plea of respondents to the extent of house, which is no more an issue between parties at dispute; therefore, my findings shall revolve around the rest of the suit property.

It was claim of respondents that they were owners in possession of suit property for the last 150 years; the appellant has migrated from the area long before but returned there during the rule of Mehmood Akhunzada to claim the ownership of the suit property due to which their ancestor was burdened to take oath, which offer was accepted and their ancestor took the oath and they were enjoying the peaceful status of the suit property since the time of their forefathers. Be that as it may, there is neither any material on record to establish that respondents were real owners in possession of the suit property nor anything on record to show that they or their ancestor

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had purchased it from anyone. Zarmast appeared in the witness box as PW-1, who though reiterated facts of the plaint but in examination-in-chief, he has not only made huge improvements by stating that nephews of Pir Gul, great grandfather of appellant, were accused to dishonor a woman due to which they have migrated from their native village around 150 years ago and also that, thereafter, the great grandfather of the appellant had sold out the suit property. Although, statement beyond pleadins is not admissible, however, this part of statement reflects that suit property was originally the ownership of ancestor/great grandfdather of appellant. Now, the onus to prove the fact that who has purhased the suit propert from the ancestor of appellant and how the respondents have become owners in possession of the same, lies on respondents. The statement of PW-1 clearly provides that he did not know that to whom the ancestor of appellant has sold the suit property rather he candidly and unequivocally stated that he still did not know that to whom the suit property was sold, which at least clarifies that the suit property was not basically purchased by respondents. The witness on recollection of fact added that the some of the suit property was sold out to Muhammad, who had died 70 years ago, whereas, the lands of Kandwala and Daagray are still lying barren, which further transpires that it has not fallen into the ownership of respondents and at the most, the title of the legal heirs of Muhammad was at stake.

Besides, the narration of all the respondents' witnesses falls within the definition of hearsay evidence because none of the witness has directly witnessed the accusation leveled against the nephews of Pir Muhammad nor they have witnessed them migrating from their native land but they rest their beliefs that they had heard so from their ancestors, which narration or evidence cannot be trusted to disentitle someone from title of suit property

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specially when there is no proof on record that who has purchased it from the great grandfather of the appellant. Even none of them is witness of fact that Pir Gul had asked Mehmood Akhunzada to arrange jirga for resolution of matter of suit property. Even, PW-1 has not disclosed the names of those lands/fields, which he alleged to have sold out by Pir Gul. Importantly, it is admitted by Zarmast that Pir Gul, the great grand-father of appellant, was not present/available in the jirga, who returned to Hangu after creation of the Pakistan, which further negates their contention that Pir Gul had asked for convening a jirga. Even, he admitted that suit property consists of 32 fields and each field has its own boundaries, however, he has not mentioned the detail/boundaries of each field in the suit. Even, he admitted that there was no dispute over disputed property between his grandfather and Pir Gul, which speaks volume about fact that suit property was not the ownership in possession of respondents.

Apart from above, the testimony of respondents' witnesses cannot be believed on ground that PW-1 admitted that Pir Gul was not present in the jirga, whereas, other witnesses deposed that he was present there, which means that they wanted to establish the presence of Pir Gul in the jirga to strengthen the respondents' version. This is strange to note that Gul Dad Shah (PW-2) and Sher Rehman did not witness the suit property but still they have deposed that the suit property was the ownership of respondents, which does not appeal to prudent mind. The statement of Qalandar Shah (PW-3) provides that over accusation of honor issue i.e. *karokari*, the accused party was also burdned with fines, which fact is not disclosed by other witnesses and infers that respondents intend to grab the suit property by any means. Sher Rehman (PW-4) deposed that Pir Gul and others were accused for honor issue, whereas, Himmat Khan (PW-5) fully changed the

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direction towards great grandfatehr of appellant stating that he has come to know from his father and uncle that Pir Gul had been accused for honor issue. Even, Himmat Khan (PW-5) has also not seen the suit property nor he was in knowledge of fact that who is in possession of the same but it is totally unimagineable that he has stood up in the witness box deposing in favor of respondents; thereofre, all discussed statements above are not only contradictory but also leads to conclusion that they have hatched a false story/case to esbalish the ownership of the respondents in respect of suit property.

If the narration of PW-1 is considered that Pir Gul had sold out the suit property to Muhammad or an unknonw person, even then, the question arises that what for and why the ancestor of respondents have taken oaht on the holy Quran in 1920s despite fact that the ancestor of appellant has sold out the suit property.

So far sruvey of the suit property and fact of receiving the money is related, it is held that there is no written proof or receipt available on file in this respect, whereas, the cross-cheque through which the alleged money was received has also not been produced on record, which otherwise is not a strong proof to establish the title of suit property in favour of respondents.

In the backdrop of above facts, it is held that respondents have got no cause of action nor they have succeeded to establish their ownership in respect of suit property by producing any cogent, reliable and confidence inspiring evidence on record; therefore, it is concluded that the learned trial court has misconceived the evidence on file, hence, the appeal in hands is **allowed,** the impugned judgment, decree and order dated 24.02.2023 of the learned trial court is set-aside and the suit of respondents is dismissed being bereft of merits.

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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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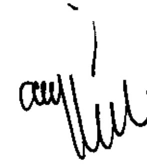
CERTIFICATE

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



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