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**IN THE COURT OF BAKHT ZADA,**  
SENIOR CIVIL JUDGE, ORAKZAI AT BABER MELA

Civil Suit No. 86/1 of 2022  
Date of Institution: 29.08.2022  
Date of Decision: 09.03.2024

1. Sobaidar Aziz Khan s/o Sobaidar Khan
  2. Umar Khan s/o Sobaidar Khan
- Both R/O Qoum Bezot, Tappa Batani, Tehsil Lower, District Orakzai.*
- .....(Plaintiffs)

**VERSUS**

1. Assistant Commissioner Lower Orakzai
  2. Irrigation Department KPK thought XEN Orakzai
  3. C&W through XEN C&W Orakzai
  4. Contractor Tabeeb Khan R/O Qoum Mishti, District Orakzai.
- .....(Defendants)

**SUIT FOR PERMANENT MANDATORY INJUNCTIONS AND RECOVERY OF DAMAGES THROUGH RENDITION OF ACCOUNTS**

**JUDGEMENT:**  
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Plaintiffs Sobaidar Aziz Khan and 01 other have brought the instant suit against defendants Assistant Commissioner Lower Orakzai and 03 others for permanent mandatory injunctions and recovery of damages through rendition of accounts.

Brief facts of the case as per plaint are that the plaintiffs are owners in possession of Aziz Khan Market since 1998, consisted of seven (07) shops total measuring about 10

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Marlas, situated at Feroz Khel Bazar. The description of the market is as under;

- i. Towards South:- Main Kalaya Head Quarter and spring namely "Chashma Jumat"
- ii. Towards East:- Shops Piayo Khel and Mir-ul-Haq
- iii. Towards West:- Vacant plot and drainage canal
- iv. Toward North:- Main Road Feroz Khel

That defendant No. 03, had dug and constructed a tube well for one Ghulam Habib. The water of said tube well and other drainage water were used to drain into a vacant plot, situated at the Western side of Aziz Market, for the last 20/30 years. The drainage water used to accumulate in front of the market which has not only damaged the market owned by the plaintiffs but has also made the life of people miserable. The plaintiffs prayed for mandatory injunctions to the effect that defendants No. 02 and 03 be directed to make proper drainage system for the same. That defendants No. 02 & 03 in garb of extension of road have also turned the flow of water towards the market owned by the plaintiffs. That due to recent rains, the market has been damaged and the business of the shopkeepers has badly affected. The plaintiffs prayed for permanent

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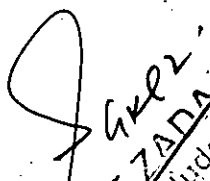
injunctions for restraining the defendants from further damage to the market owned by them. According to plaintiffs, previously a declaratory suit was instituted against defendants No. 02 to 04 which was withdrawn at the assurance of the defendants before the court, that they will give relief to the plaintiffs, but later on they refused and now they along with defendant No. 01 with malafide intention are not making proper drainage system and have turned the drainage water towards the market owned by the plaintiffs. That the defendants are bound to pay the damages to the plaintiffs after assessment of the damages and rendition of accounts. The defendants refused to accept the claim of the plaintiffs and hence the instant suit.

Defendants were summoned in whom defendants No. 01 to 03 appeared before the court through representative and submitted written statements, while defendant No. 04 was placed and proceeded ex-parte.

The divergent pleadings of the parties were reduced into the following issues by my learned predecessor in office.

**Issues:**

1. Whether the plaintiffs have got a cause of action?
2. Whether the suit of the plaintiffs is non-maintainable in its present form?

  
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3. Whether the plaintiffs are estopped to sue?
4. Whether the defendants have let the waste water of tube well towards the Aziz Market owned by the plaintiffs and have not properly arranged its drainage system which results in the damage to the said market?
5. Whether the plaintiffs have constructed the market illegally over an old bridge/culvert?
6. Whether there was already an installed drain system under the market from the last 25/30 years but the same is blocked by the plaintiffs which is causing an irreparable loss to the public road?
7. Whether the plaintiffs are entitled to the recovery of irreparable loss caused to the market by the defendants?
8. Whether the plaintiffs are entitled to the decree as prayed for?
9. Relief:

Parties were given opportunity to produce evidence in support of their respective claims. The plaintiffs produced and recorded the statements of following PWs;

**PW-01:** Plaintiff Aziz Khan s/o Sarwar Khan, aged about 61 years recorded his statement as PW-01. He reproduced the contents of his plaint during his examination-in-chief. He produced the copy of the order in previous suit titled "Sobaidar Aziz Khal Vs C&W etc" which is Ex.PW-1/1. He also placed on file the photos of alleged affected market

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which are Ex.PW-1/2. He was cross-examined by the district attorney.

**PW-02**, is the statement of Ismail Khan s/o Ali Badshah, aged about 47 years. He stated that the market of the plaintiffs has been constructed some 26/27 years back and now due to the drainage water of tube-well and bazar, the market of the plaintiffs has been damaged. He also stated that the tenants/shopkeepers of the market have also borne loss due to the said act of the defendants and they are entitled for damages.

**PW-03** is the statement of Wasil Khal s/o Ahmad Khel, aged about 45 years. He also repeated the same story as alleged by the PW-02.

On the other hand, the defendants produced and recorded the statements of following DWs.

**DW-01:** Sher Hayat, sub-engineer C&W department, Lower Orakzai recorded his statement as DW-01. He stated that they started work on construction of culvert in the road, which was completed but later on he was informed that flow of water through culvert is closed and a jirga has been taken place between Assistant Commissioner Lower Orakzai and the plaintiffs wherein the plaintiffs have agreed on providing alternate way for drainage of water subject to compensation. With the consent of the plaintiffs, underground water drainage system was completed and through Assistant Commissioner, compensation

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amount of Rs. 840,000/- was paid to the plaintiffs. He placed on file the copy of the compensation cheque. During cross-examination he stated that an amount of Rs. 840,000/- has been paid to the plaintiffs as damages accrued to them in shape of damage to their market.

After closing of evidence by the counsel for the defendants at the time of arguments on the main case, the learned district attorney submitted application for producing additional evidence in respect of the compensation cheque paid to the plaintiffs. The application was accepted by this court on 21.12.2023 whereafter, the defendants produced and recorded the statement of Muhammad Fayaz Khan, Tehsildar as ADW-01. During his statement, he submitted copies of the complaints submitted by the public in respect of the drainage water. The copies of which are Ex.ADW-1/1 and Ex.ADW-1/2. He also submitted the copy of decision took place with the consent of the plaintiffs with Assistant Commissioner Lower Orakzai and consequent upon the said jirga decision Ex.ADW-1/3, the plaintiffs have received 02 cheques amounting to Rs. 420,000/- each (total 840,000/-). The copies of the cheques are Ex.ADW-1/4. Copy of "Qabz-Ul-Wasool" in respect of the cheque as Ex.ADW-1/5. Cross-cheque of the total amount received by plaintiffs Ex.ADW-1/6.

During cross-examination, counsel for the defendants has not asked a single question about receiving of the alleged compensation.

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Furthermore, the outside of court compromise between AC L/Orakzai and the plaintiffs has also gone unrebutted during the cross-examination.

After closing of evidence of both the parties, my Issue wise findings are as under.

**Issue No. 02:**

The plaintiffs are seeking permanent and mandatory injunctions along with recovery of alleged damages occurred to Aziz Market owned by them due to drainage water. The defendants have alleged in their preliminary objection of their written statement that suit of the plaintiffs is not maintainable but neither they have produced any evidence in this respect nor this issue is pressed during the course of arguments, therefore, suit of the plaintiffs is maintainable in its present form, issue is decided in negative.

**Issues No. 03 to 07:**

All these issues are linked with each other, hence, taken together for discussion.

The instant suit has been instituted by the plaintiffs against the defendants on 29.08.2022; wherein they have prayed for permanent and mandatory injunctions and recovery of damages against the defendants in respect of restraining the

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defendants from further damaging the market owned by the plaintiffs and issuance of mandatory injunctions for construction of proper drainage system and recovery of recovery of damages caused to the market, owned by the plaintiffs, due to the drainage and rain water, through assessment of damages and rendition of accounts. During the pendency of the instant suit, the plaintiffs outside the court reached at an agreement with defendant No. 01 Assistant commissioner Lower Orakzai. The said agreement dated: 23.06.2023 is Ex.ADW-1/3 which has gone unrebutted during cross-examination and none of the PWs have uttered a single word about the same. The plaintiffs have permitted the defendants with their sweet well to construct an underground drainage system in the market subject to payment of compensation. The agreement is duly signed by the parties and consequent upon the said agreement both the plaintiffs have received 02 compensation cheques, each amounting to Rs. 420,000/- which are Ex.ADW-1/4 and the same are duly mentioned in "Qabz-UI-Wasool" Ex.ADW-1/5. The date mentioned on the said cheques is 12.09.2023 which denotes that subsequent to agreement dated: 13.06.2023, Ex.ADW-1/3, the plaintiffs have received the said compensation cheques. Now according to agreement, the plaintiffs have

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not only allowed the defendants to construct underground drainage system, but the same was constructed and the plaintiffs have also received the compensation, but astonishingly the instant suit was not withdrawn by the plaintiffs with malafide intention. Now, when the plaintiffs have allowed the defendants to construct the underground drainage system in the market, their prayer regarding permanent and mandatory injunctions has already become infructuous. Similarly, the plaintiffs have already received compensation amounting to Rs. 840,000/- without any protest with their sweet will. In such like circumstances, seeking further compensation is out of question. The plaintiffs were estopped to sue the defendants after agreement Ex.ADW-1/3 and receiving compensation cheques Ex.ADW-1/4. There is no need to discuss further issues No. 04, 05, 06 & 07 as the plaintiffs have already got relief in respect of the same outside the court. Issue No. 03 is decided in positive while issues no. 05 to 07 are disposed off accordingly.

**Issues No. 01 & 08:**

Both these issues are interlinked, hence, taken together for discussion.

As discussed over my detailed discussion over issues no. 03 to 07, it has been established that the plaintiffs have reached on an agreement with the defendants regarding construction of

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underground water drainage system. The said agreement has taken place during the pendency of this suit on 23.06.2023 which is Ex.ADW-1/3 and has gone unrebutted during cross-examination and in consequent upon the same, the plaintiffs have received the compensation cheques dated: 12.09.2023 in respect of which "Qabz-UI-Wasool" Ex.ADW-1/5 is available on the case file. The plaintiffs in pursuance to the said agreement have already allowed the defendants to construct underground drainage system in the market which has already been completed by the defendants and have received the compensation with their own sweet will without any protest, therefore, proceeding further with the instant suit after agreement Ex.ADW-1/3 by the plaintiffs seems to be based on malafide, therefore, issue no. 01 & 08 are decided in negative.

**RELIEF:**

As sequel to my above issue-wise findings, the plaintiffs have already got the relief, prayed for in the instant suit, outside the court on the basis of agreement Ex.ADW-1/3 which has taken place during the pendency of suit, therefore, suit of the plaintiffs is hereby dismissed with no order as to cost.

Case file be consigned to the record room after its necessary completion and compilation.

**Announced**

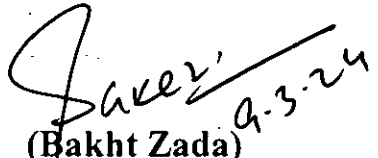
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**CERTIFICATE**

Certified that this judgment of mine consists of eleven (11) pages, each has been checked, corrected where necessary and signed by me.

  
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