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

Civil Appeal No. 29/13 of 2023 - *Alaim*

Date of institution: 23.10.2023

Date of decision: 05.03.2024

Date of consignment:

Ejad Ali son of Ajab Ali resident of Quom Mani Khel, Tappa Zakariya Khel, Tehsil Lower District Orakzai & four others (appellants/defendants)

Versus

Ghulam Nabi son of Abdul Nabi and Shahid Ali son of Mohib Ali resident of Quom Mani Khel, Tappa Zakariya, Tehsil Lower, District Orakzai (respondents/plaintiffs)

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

JUDGMENT

Through this judgment I shall decide appeal preferred by appellants against the respondents challenging the judgment, decree and order dated: 19.10.2023 of the Court of learned Civil Judge-II, Orakzai whereby he has decreed the civil suit no. 131/1 of 2022.

Brief facts of the case are that respondents are permanent resident of Quom Mani Khel, Tappa Zakariya, District Orakzai; that they are recorded exclusive owners in possession of property known as "Tandair Pahari" situated in Mani Khel, the suit property, since the time of their forefathers; that the suit property is residential area, where their houses are also situated but appellants have forcibly installed the crush machines in the suit property and forcibly excavating the stones and other material from it, which act of appellants is against the law and inoperative upon their rights; that appellants have no concern whatsoever with the suit

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property; therefore, prayed for decree to declare them exclusive owners in possession of the suit property coupled with decree for permanent and mandatory injunctions so as to refrain them from making any interference, excavating the stones, other material, sale, purchase and making any sort of changes in the suit property till disposal of the suit.

The learned trial court summoned the appellants, who appeared before him. Appellants no. 1, 3-5 submitted their joint written statement, wherein, raised various legal and factual objections, which were reduced into different issues by the learned trial court, which are as below;

1. *Whether the plaintiffs have got a cause of action? OPP*
2. *Whether the plaintiffs are estopped to sue? OPD*
3. *Whether the suit of the plaintiffs is time barred? OPD*
4. *Whether the suit of the plaintiffs is bad due to non-joinder and misjoinder of the parties? OPD*
5. *Whether plaintiffs are owners in possession of mountain called Tandair Mountain situated at Mani Khel since their predecessor and defendants are illegally interfering in the said mountain? OPP*
6. *Whether defendants have installed a crush machine on the property of plaintiffs and are excavating stones and other materials from the Tandair Mountain? OPP*
7. *Whether grandfather of defendants no. 1, 3, 4 & 5 namely Ajab Ali has purchased the suit property (mountain) vide agreement deed dated 31.01.1957 and since then defendants are owners in possession of the same? OPD*
8. *Whether the plaintiffs are entitled to the decree as prayed for? Relief?*

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After recording of pro and contra evidence, the learned trial court heard the arguments and decreed the suit of respondents as per prayer. The appellants being dissatisfied with the order, impugned herein judgment, decree and order dated 19.10.2023 with assertions that the impugned judgment and order of the learned trial court is illegal, against the law, unfounded, non-speaking, result of misreading & non-reading of evidence. They further asserted that the learned trial court has decided the suit in hurry without arraying all the necessary parties to the suit, whereas, the impugned order is also self-contradictory. They further alleged that the learned trial court has not discussed the legal issues including the issue of limitation in accordance with law and dismissed the suit in haste; thus, prayed that on accepting the appeal in hands, the impugned judgment, decree and order of the learned trial court may either be dismissed or case be remanded for decision afresh.

Arguments heard and record perused.

Viewing the valuable arguments advanced by learned counsel for parties and record before the court, it is held that main theme of law is to address the issues of parties at dispute in accordance with law leaving no stone unturned by affording equal and reasonable opportunity to all the parties before the court. In the instant case, I have observed few anomalies that could not be over sighted and goes deep into the roots of the case; therefore, instead of discussing the other merits of the case, I would confine myself to the extent of the shortcomings observed in the case and verdict of the learned trial court.

The bone of contention between the parties is the suit property, which respondents alleged to be their ownership and appellants alleged to

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be their ownership on strength of agreement deed dated 31.10.1957, Exh.DW 1/2. This is worth mentioning that the deed relied by appellants was drafted in "Persian" language and parties at dispute have submitted respective translations of the deed, which were found contradictory; thus, the learned trial court directed the In-Charge of Kalaya Madrasa for the submission of translation and while making reliance on said translation, the learned trial court decided the case. It is for the guidance of the learned trial court that when it refers any document to any person for translation, other than secret document, then, it is bound to refer it to known expert having command over language. There is nothing on record that who was the In-Charge of Kalaya Madrasa and whether he was good in translating the documents or had he the command over "Persian" language or not. If the translation made by him is admitted true, even then, the translator must have been summoned as Court Witness and parties at dispute should have been offered an opportunity to cross-examine him..

Besides above, the appellants have specifically raised the issues of limitation, misjoinder and non-joinder of necessary parties etc. and in this respect the learned trial court has also framed issues no. 2, 3 & 4, however, the learned trial court decided all these issues in negative on main ground that appellants have failed to produce any evidence in this respect. This is to clarify here that all these issues are factual as well as legal in nature; therefore, if the parties have failed to produce any evidence to prove any facts related with these issues, even then, the learned trial court was bound to discuss these issues independently/separately keeping in mind its legal aspect by making reliance on the pleadings of the parties as well as the law available on the point.

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This is true that suits cannot be defeated due to misjoinder and non-joinder of necessary parties; however, at the same time non-impleading the necessary parties to the suit also defeat their precious rights. In the instant case, the respondents have alleged the suit property to be their exclusive ownership since the time of their forefathers, however, this is strange to note that respondents claim suit property to be their exclusive ownership alone since the time of their forefathers, which do not include the female heirs, which is unbelievable because on the death of ancestors of the respondents, all the surviving legal heirs of deceased would have become co-owners in the legacy left by deceased; therefore, respondents were bound to implead them as plaintiffs or defendants in the suit property being necessary parties to the suit but they have failed; therefore, in such an eventuality, it becomes the duty of learned trial court to ascertain about the all legal heirs of deceased including the female folks and in case there are females survived by deceased, array them as plaintiffs or defendants in the suit, as the case may be, and decide the case.

Beside above, the findings of the learned trial court are also found to be contradictory. The learned trial court while deciding issue no. 6 held that respondents have failed to establish that appellants have installed the crush machine on the property of respondents and were excavating the stones and other materials from the "Tandair Pahari"; therefore, decided this issue in negative as in favor of appellants, however, while passing the impugned order, decreed the suit as a whole as per prayer, which envisages that appellants were making the interference in the suit property; therefore, the learned trial court was supposed to pass vivid, unambiguous, clear and speaking order but it failed.

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More so, the learned trial court while deciding issues no. 5 & 7 based its findings on presumptions rather than evidence or factual grounds that were also not warranted because the court has to be clear in mind while deciding the case one or the other way and has to satisfy itself completely while decreeing or dismissing the suit.

Last but not the least, attendance of appellant no. 2/defendant no.2 was marked, however, the learned trial court failed to bring on record the written statement from his side despite fact there is nothing on record that he has been placed ex-parte; therefore, in view of my above findings, this court is left with no option but to allow the appeal, set-aside the impugned judgment, decree and order dated 19.10.2023 and remand the case to the learned trial court with direction to ask respondents/plaintiffs to implead all the necessary parties to the suit including female folks; receive written statement from appellant/defendant no. 2; to summon the In-Charge Kalaya Madrasa as court witness and allow parties to cross-examine him, if they so wish, otherwise, summon lecturer/professor of any government college, who is master in "Persian", as a court witness to translate the deed dated 31.01.1957 and allow parties to cross-examine him, if they so wish; to record the additional evidence if any learned trial court deems necessary and decide the case afresh by discussing all legal and factual issues independently.

Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on case. Parties present before the court are directed to appear before the Court of learned Civil Judge-II, Kalaya, Orakzai on 09.03.2024.

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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.

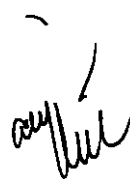


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CERTIFICATE

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



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