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

Civil Revision No. 02/12 of 2023

Date of institution: 12.07.2023

Date of decision: 02.04.2024

Date of consignment:

Muhammad Roshan son of Muhammad Ameen resident of Tappa Mali Khel Orakzai presently at Islamabad (petitioner)

Versus

1. Gul Piayo Khan son of Habibullah resident of Quom Buland Khel Tappa Lodhiani Spin Thall, Tehsil Upper, District Orakzai (respondent no. 1/decree holder)
2. Zera Din alias Zahoor Din son of Izzat Khan and 3. Niaz Din son of Izzat Khan residents of Quom Melkhel Tappa Mali Khel, Tehsil Shawa North Waziristan (respondents no. 2-3/judgment debtors)

JUDGMENT

Through this order I shall decide civil revision filed by petitioner against respondents under section 115 of The Civil Procedure Code, 1908 challenging therein the judgment and order dated 23.06.2023 of the court of learned Civil Judge-I, Orakzai passed in civil petition no. 1/12 (2) CPC of 2022 whereby he has dismissed the application of petitioner filed for setting aside the consent decree dated 12.06.2021, which was allegedly obtained through application of fraud, misrepresentation and want of the jurisdiction of the court in civil suit no. 59/1 of 2021 of the said court.

Concise facts tempting petitioner to file the petition in hands are that on 10.01.2021, petitioner has filed an application u/section 12 (2) CPC for setting aside a consent decree passed in civil suit no. 59/1 of 2022, to be referred as civil suit, on the basis that respondent/decree holder has filed a declaratory suit against the respondents/judgment debtors in 2021, wherein, parties have patched up the matter and obtained a consent decree illegally, which is subject of cancellation on following grounds; that the suit property was recorded ownership in possession of the petitioner since

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the time of his forefathers and he has not sold out the same to respondents, who have no concern with the suit property, detailed in the civil suit; that the evidence led by respondents explicitly provided that suit property was the ownership of petitioner but in spite of that respondents did not implead him party in the main civil suit and succeeded to obtain the decree by application of fraud and misrepresentation; that form of civil suit was bad because respondent/decree holder was supposed to file a suit for specific performance of the contract but he has managed to obtain a decree for declaration on the basis of oral agreement; that he came to know about the impugned decree on receipt of summons in a civil suit titled "Gul Piyao versus Roshan etc." filed by respondent/decree holder against him; that respondents have kept the real facts hidden from the court and obtained the impugned consent decree, which is based on fraud and misrepresentation; therefore, he has prayed that on acceptance of the 12 (2) CPC petition, the impugned decree passed in civil suit may be set-aside and on restoration of the main civil suit, the petitioner may be arrayed as defendant therein and given an opportunity of full hearing, hence, the petition.

Respondents were summoned. They have appeared and filed joint written reply and contested the petition vehemently.

The learned trial court framed the issues as below;

1. *Whether the application has got a cause of action?*
2. *Whether the applicant has sold the suit property to respondent no. 2 vide sale deed dated 14.11.2019?*
3. *Whether the suit property is in possession of the applicant?*
4. *Whether the consent decree dated 12.06.2021 in suit no. 59/1 of 2021 was obtained through fraud and misrepresentation and liable to be set-aside?*

Relief?

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Parties produced respective evidences. The learned trial court heard the arguments and finally dismissed the petition through impugned judgment and order dated 23.06.2023. Petitioner was not contended with the decision of learned trial court; therefore, impugned the judgment and order through the civil revision in hands with assertion that judgment and order of the learned trial court is illegal, against the law, unfounded, based on misreading and non-reading of evidence; that the learned trial court on one hand has hold the suit property to be the ownership of petitioner but on the other hand dismissed his petition, which is against the natural justice; therefore, prayed that the instant revision petition may be allowed, the impugned judgment and order dated 23.06.2023 of the learned trial court may be set-aside and decree passed in civil suit may also be set-aside and on restoration of the proceedings in the civil suit, the learned trial court may be directed to array him defendant and provide him opportunity of hearing in civil suit no. 59/1 of 2021.

Arguments heard and record perused.

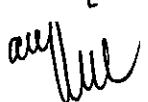
Viewing the arguments advanced by learned counsel for parties and record before the court, it is held that admittedly there is no land settlement/revenue record of district Orakzai and disputes between the parties are resolved on the basis of oral evidence, possession of parties over lands or agreement deeds, if any, brought before the *jirga* and now the courts; therefore, while deciding this petition, the court has to base its findings on pleadings of the parties and the documentary proof, if any, brought on file. Record provides that on 26.03.2021, respondent no. 1 has admittedly filed a civil suit no. 59/1 of 2021 against respondents no. 2 & 3, wherein, prayed for declaration, permanent and mandatory injunctions to the effect that respondents no. 2 & 3 through oral agreement to sell had

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promised to purchase landed property measuring around 40 kanal bounded from east Rung Ziarat & shamilat drainage/nala; west field of Muhammad Roshan; north fields of Qabal Ayaz and Muhammad Riaz and south fields of Muhammad Sharif, the suit property, from Muhammad Roshan and to sell him; that now respondents no. 2 & 3 had purchased the suit property from Muhammad Roshan, the petitioner, an year ago & started cultivation there; therefore, respondents no. 2 & 3 had no reason to breach the terms of oral agreement and they may be bound down to specifically perform the oral agreement, receive six million rupees from him and on selling him the suit property, deliver him the possession. The respondents no. 2 & 3 turned up before the learned trial court and patched up the matter with respondent no. 1, endorsed no objection if the civil suit was decreed in his favour, as a result whereof, the learned trial court passed a consent decree in favour of respondent no. 1 on 12.06.2021, which is under discussion now.

Although the learned trial court has framed as many as four issues in the petition, which are reproduced above, however, in my understanding the petitioner has simply alleged the obtaining of a consent decree by the respondents to be based on fraud and misrepresentation; therefore, learned trial court was expected to confine itself only to the extent of sorting out the element of fraud or misrepresentation in obtaining the consent decree by respondents and there was no need to frame any issue to determine the fact that whether petitioner has sold out the suit property to respondent no. 2 through sale deed dated 14.11.2019 or not or who was in possession of the suit property because deciding these issues at this stage in 12 (2) CPC petition amounts to depriving the petitioner from proper defense.


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Besides, contents of the civil suit clearly provides that suit property was originally the ancestral property of petitioner, who was then recorded owner in possession of it, whereas, respondent no. 1 has entered into agreement to sell with the respondents no. 2 & 3, who have allegedly promised to first purchase the suit property from petitioner and then to sell it to respondents no. 1, however, there is no oral or documentary proof on the civil suit that respondents no. 2 & 3 have actually purchased the suit property from petitioner; therefore, mere filing a civil suit by respondent no. 1 and endorsing the no objection by respondents no. 2 & 3 does not confer any title unless it was established through record that respondents no. 2 & 3 had actually purchased the suit property from petitioner, which smells the commission of fraud and misrepresentation. More so, when otherwise the previous ownership of the petitioner to the suit property was admitted by respondents then he was supposed to be arrayed as defendant in the civil suit being necessary party specially when there is admittedly no land revenue record/settlement record of the properties in the district Orakzai, where ownership is establishes through oral agreements and possessions etc.

This is also observed that respondent no. 1 has rest his claim on the basis of oral agreement to sell but he has filed a suit for declaration, permanent and mandatory injunction, which was bad in form because by that time there was no title already established/existed in his favour in respect of suit property, which had been denied and he should have prayed through a declaration rather that was an incomplete agreement and he was actually praying for the specific performance of the same and proper way was to file a suit for specific performance of the contract.

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Attested copies of the plaint of civil suit no. 72/1 of 2021 and order dated 13.12.2021 of the court of learned Senior Civil Judge, Orakzai read with para no. 4 of the written reply of the respondents also provide that respondent no. 1 has admittedly sold out the suit property to Muhammad Noor Khan through an agreement dated 29.05.2021 and in this respect yet another consent decree was passed in favour of Muhammad Noor Khan on 13.12.2021, however, contents of the plaint of civil suit no. 72/1 of 2021 provide that Muhammad Noor Khan rest his claim on agreement dated 29.05.2021, the day when Gul Piyao Khan, respondent no. 1, had no locus standi/better title to transfer/enter into agreement with Muhammad Noor Khan because he has allegedly become the owner of suit property on the basis of consent decree passed in his favor on 12.06.2021, which further does not rule out the possibility of the existence of element of fraud in the case.

The statement of respondent no. 2 (DW-1) further clarifies that the alleged stamp was purchased in October 2018, whereas, sale agreement was allegedly entered in November 2019, which only bears the thumb impression of petitioner despite an admission of fact that computerized national identity card of petitioner carries his signature. On the other side, Kausarullah (DW-2), marginal witness to agreement deed, deposed that the agreement was scribed on the very day the stamp paper was purchased, which is totally in conflict with the statement of DW-1 and has to be seen and determined by the learned trial court after recording of pro and contra evidence in the main suit.

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In view of the above facts, it has become quite clear that contention raised by petitioner is sustainable and respondent no. 1 was duty bound to implead all the necessary parties in the suit including petitioner; therefore, it is held that the consent decree obtained by respondent no. 1 in the civil suit is the result of fraud and misrepresentation, hence, the civil revision petition in hands is **allowed**, the impugned judgment and order dated 23.06.2023 of the learned trial court is set-aside and on accepting the 12 (2) CPC petition, the judgment, decree and order dated 12.06.2021 passed by learned trial court in civil suit no. 59/1 of 2021 is set-aside and the case is remanded to the learned trial court with direction to array the petitioner Muhammad Roshan as defendant being necessary party to the suit and afford him opportunity of hearing. Parties are directed to appear before the court of learned Civil Judge-I, Orakzai on 18.04.2023.

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, whereas, file of this court consigned to the 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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