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

Civil Appeal No. 13/13 of 2024

Date of institution: 15.05.2024

Date of decision: 11.09.2024

Date of consignment:

Muhammad Rauf son of Muhammad Rafeeq resident of Quom Mamozai, Tappa Ado Khel, Tehsil Upper, District Orakzai & two others (appellants/defendants no. 1-3)

Versus

Muhammad Sajid son of Gul Syed resident of Quom Mamozai, Tappa Ado Khel, Tehsil Upper, District Orakzai and three others (respondents)

**APPEAL UNDER SECTION 96 OF CPC AGAINST
THE JUDGEMEN, DECREE AND ORDER OF THE LEARNED
SENIOR CIVIL JUDGE, ORAKZAI**

JUDGMENT

Through this judgment I will decide appeal preferred by appellants against respondent no. 1 challenging the judgment, decree and order dated: 23.04.2024 of the Court of learned Senior Civil Judge, Orakzai whereby he has decreed the suit of respondent no. 1/plaintiff.

Succinct facts of the case as per amended plaint filed by respondent no. 1/plaintiff against appellants and respondents no. 2-4/defendants no. 4-6, the proforma defendants, on 22.12.2022 are that a house situated at Mamozai, Orakzai bounded from east four fields of respondent no. 1, west three fields of respondents, north vacant plot of respondent no. 1 & south house of Muhammad Younas Khan, the suit property, devolved on him & his siblings through inheritance; that during militancy period, the district Orakzai was abandoned by the inhabitants due to military operation and he along with his family members/respondents no. 2-4 had shifted to district Hangu; that he has received Rs. 400,000/- from the government of Pakistan

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as damages on 01.09.2019 during survey vide form no. 146512; that appellants had no concern with the suit property, however, while taking advantage of their absence, they had forcibly made possession over the suit property and started constructions over there; that the appellants have no concern with the suit property; therefore, he has prayed for a decree to declare him and his siblings/respondents no. 2-4 owners of the suit property coupled with decree for possession on demolishing the area constructed by appellants; that he has also prayed for decree for permanent and mandatory injunctions in order to restrain appellants from making forcible possession, raising the constructions, making any sort of interference etc. in the suit property, hence, the suit.

The learned trial court summoned the appellants and respondents no. 2-4; however, respondents no. 2-4 did not turn up and placed ex-parte, whereas, appellants appeared and submitted respective written statements; that appellants have raised various legal and factual objections in respective written statement *inter-alia* with facts that suit property was their ancestral property and recorded as joint ownership in possession of appellants no. 1-2; that respondents had no concern with the suit property; that respondents were *hujam* by profession; therefore, their ancestors had delivered the possession of suit property to ancestor of respondents namely Yar Zada for temporary residence on account of service he had rendered to them and in this respect an agreement dated 05.08.1999 was also executed between their ancestor and appellant no. 3; that possession of the suit property was taken back from respondents before start of military operation in 2007; therefore, compensation amount was also received by respondents illegally; thus, they have prayed for dismissal of suit.

Divergent pleadings of the parties were reduced into issues as below;

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Issues:

1. *Whether the plaintiff has got a cause of action?*
2. *Whether the suit of plaintiff is based on malafide?*
3. *Whether the suit of the plaintiff is within time?*
4. *Whether the suit house is the ownership and possession of the plaintiff and is their inherited property?*
5. *Whether the suit house was given to the predecessors of the plaintiff namely Yar Zada for temporary residence by the predecessors of the defendants in lieu of his services being "Nayan Family" (Barber) and the plaintiff has got no right of ownership in the area?*
6. *Whether the suit house was declared to be the ownership of the defendants, according to the decision of jirga dated 05.08.1999 between Yar Zada and defendant no. 3 and the same is inherited property of the defendants?*
7. *Whether the defendants shifted to Peshawar during the operation of Pak Army and the plaintiff in collusion with concerned authorities/ committee has received an amount of Rs. 400,000/- fraudulently as compensation against the disputed house?*
8. *Whether plaintiff is entitled to the decree as prayed for?*
Relief?

Needless to mention that earlier the suit of respondent/plaintiff was decreed against appellants no. 1 & 2 by learned trial court on 31.05.2022; however, appellants no. 1 & 2 being dissatisfied with the judgment, decree and order of the learned trial court had filed a civil appeal no. 06/13 of 2022 before the court of learned District Judge, Orakzai on 22.06.2022, wherein, appellant no. 3 had filed an application to array him party being necessary party to the suit, whereupon, the appeal was allowed, judgment, decree and order of the learned trial court was set-aside; application of appellant no. 3 was accepted and case was remanded to the learned trial court with direction to receive amended pleadings of the parties and afford them an opportunity of additional evidence.

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The learned trial court received the amended pleadings and recorded the additional evidence of parties as per will of the parties. The learned trial court heard the arguments and again decreed the suit of respondent/plaintiff on 23.04.2024. Appellants being not contended with the decision, preferred instant appeal. Learned counsel for appellants while arguing narrated above facts of the case with assertion that order of the learned trial court is illegal, against the law and facts, unfounded, suffers from material illegality and irregularity, result of misreading and non-reading of evidence; therefore, prayed that on acceptance of instant appeal, judgment, decree and order of the learned trial court dated 23.04.2024 may be set-aside and suit of the respondents may be dismissed.

Learned counsel for respondent/plaintiff 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 passing my findings, I would like to mention that it is a settled principle of law that civil disputes are decided on the strength of preponderance of evidence. Admittedly, there is no land settlement or revenue record of district Orakzai and the disputes between the parties are resolved on the 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 the parties, oral evidence and documentary proof, if any, brought on file. The instant case is bit different than other civil disputes. In this case, respondents were undoubtedly in possession of suit property until 2007, when they had allegedly abandoned the suit property and started

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living in district Hangu due to military operation in the area. This is also established from the evidence that respondents had received an amount of Rs. 400,000/- compensation from government on account of loss caused to the suit property during militancy era through Citizen Losses Compensation Program (CLCP). It is, however, proved from evidence that compensation amounts were paid to only those people, who were in possessions of the properties when the damage was caused to the houses. In this respect, the statement of Khaista Akbar (APW-01), the then member of CLCP, Orakzai, is of worth importance, who confirmed the conducting of survey of the suit property along with survey team and on the basis of said survey, respondent being in possession of the suit property had received the compensation money as evident from Sheet No. 5 of the Exh.PW 1/1.

The witness Khaista Akbar, however, stated that they had not verified the ownership of the people of area rather the payments of compensation were made to only those persons, who were in possessions of the properties and had suffered losses on the spot due to damage caused to their properties as it had nothing to do with the ownership rights. All this simply means that compensation was paid to only those persons, who being in possession of properties had suffered the losses irrespective of their ownership rights/title to the properties. The witness being well versant with customs of the area had also admitted that respondent/plaintiff belonged to a professional caste/tribe and people belonging to professional caste/tribe used to live under the protection/control of their masters/*naikan*/owners, which these discussed facts go against the contention of respondents.

If the above discussed facts are overlooked, even then, the onus to prove the ownership of suit property rests on respondent/plaintiff and they cannot be allowed to take the benefit of weaknesses of appellants. In order

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to prove their case, respondent/plaintiff had recorded the statements of as many as four persons including him. Ajmal Khan (PW-1) was the member of the survey team, who brought the record about payment of compensation money to occupiers of the properties. Khan Said (PW-2) and Fazal Badshah (PW-5) were paternal uncles and Muqadar Shah (PW-3) was the brother of respondent/plaintiff, who all though fully supported the plea of respondent/plaintiff; however, they being descendants of Yar Zada had direct interest in the suit property and had also prayed for their rights in it; therefore, their statements cannot be taken into account having they vested interest in the suit property. Respondent/plaintiff did not produce a single independent witness from the area to depose in his favour despite fact that Muqaddar Shah (PW-3) in his statement deposed that Walayat Khan, Younas, Raziq and Memon Gul also reside near the suit property, who could have been produced as witnesses to support their stance.

Importantly, if the statements of respondent/plaintiff's witnesses are considered despite their vested interest in the suit property, even then, Khan Said (PW-2) admitted that they belonged to *hujam* tribe by profession and fathers of appellants no. 1 & 2 were his protectors/*naikan*, which envisages that they were not owners of suit property rather it was delivered to them by appellants for residential purpose. Since, appellants had alleged ownership of suit property in counter to the claim of respondent/plaintiff and in this respect had referred a *jirga* decision dated 05.08.1999, whereby, Yar Zada, ancestor of respondent/plaintiff, had allegedly acknowledged that ancestor of appellants were owners of the suit property, whereas, Yar Zada had no right therein and he was only allowed to live there; to which appellants had though failed to produce a single witness to *jirga* decision and respondent/plaintiff had denied the *jirga* proceedings, nevertheless, Khan Said (PW-2)

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in his cross-examination admitted that he was also present in a *jirga* held between Yar Zada and fathers of appellants no. 1 & 2 in 1999 but he did not remember the names of elders representing them, which is an admission about the *jirga* verdict dated 05.08.1999, Exh.PW 5/2. This is strange to note that Khan Said (PW-2) was present in *jirga* held between Yar Zada and fathers of appellants but he did not remember the *jirga* verdict, which leads to adverse inference that Yar Zada was not owner of the suit property; therefore, no better title could have been transferred to respondent/plaintiff or successors of the late Yar Zada than their ancestor had.

In the backdrop of above findings, it is held that respondent/plaintiff has failed to prove their case by producing cogent, independent and reliable evidence on file; therefore, they have got no cause of action and the learned trial court has failed to appreciate the available evidence on file, hence, the appeal in hands is allowed; the impugned judgment, decree and order dated 23.04.2024 of the learned trial court is set-aside and suit of respondent/plaintiff 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.



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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.



Announced
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