

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

Civil Miscellaneous Appeal No. 03/14 of 2024

Date of institution: 04.04.2024

Date of decision: 27.09.2024

Date of consignment:

Sajjad Khan son of Habib Khan resident of Quom Mir Feroz Khel, Tehsil Lower, District Orakzai and fifteen others (appellants/plaintiffs)

Versus

Ghaffar Khan son of Khaista Gul r/o Quom Feroz Khel Tappa Qeemat Khel, Tehsil & District, Orakzai & 204 others (respondents/defendants)

JUDGMENT

The present civil miscellaneous appeal has been preferred against the order dated 07.03.2014 whereby the learned Civil Judge-I, Kalaya, Orakzai has refused to grant temporary injunction to appellants.

Succinct facts of the case as per contents of the plaint, the copy is available on record, are that the mountains/properties situated at Quom Feroz Khel was the joint ownership in equal shares of four sub-sects (tappa) namely Qasim Khel, Qeemat Khel, Ghairat Khel and Jaisal Khel; that mountains consisting of 1. Cheeta Mountain bounded from east Stori Khel, west Bezot Mountain, north Behram Zai & south Syed Khaleel 2. Rusmali & Karrapa bounded from east Stori Khel, west Karghan, north Syed Khaleel & south Karrapa 3. Bandajat Ferozkhel Mountain bounded from east Utman Khel, west Khawaja Khizar area, north Utman Khel with Sapoy & south Spakai and 4. Lerri Mountain bounded from east Orakzai Scouts Camp, west Quom Sheikhan Lands, north Quom Sheikhan and Tanby, to be referred as suit property, was joint ownership of parties at dispute, which is still undivided; that parties at dispute are

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equal sharers in the suit property; however, respondents by use of force and illegal means intend to make possession over the suit property so as to raise constructions, make interference, sale and changes therein, which is against the law; that appellants have filed different applications for the partition of suit property and for this purpose a committee was also constituted but the partition could not have been carried out due to use of influence by respondents; therefore, appellants have prayed for decree to declare that the suit property is the joint ownership of parties at dispute coupled with decree for possession of the suit property on its regular partition or in alternate they may be granted decree for possession of the suit property on demolition of constructions etc. provided respondents make forcible possession during pendency of the suit. Appellants have also prayed for decree for permanent and mandatory injunctions so as to restrain respondents from constructions, making interference, changes or sale of the suit property till its regular partition.

Respondents were summoned by the learned trial court, however, only respondents/defendants no. 3, 22, 34, 36, 82, 101, 129, 141, 165 and 198 turned up and contested the suit by filing written statements etc., whereas, few of the respondents/defendants had filed cognovits and the rest were placed ex-parte. The record further reflects that the contesting respondents/defendants in their written statement have averred that there was a dispute of demarcation between the parties at dispute and other groups, not party to the suit, whereas, there are some persons not party to the suit thus until and unless the demarcation is carried out, no partition is possible. It was further alleged that there were coal mines in the suit property; therefore, no regular partition can be carried out.

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With the plaint, appellants had also filed an application for grant of temporary injunction, to which the contesting respondents/defendants had filed written reply. The learned trial court on hearing the parties at dispute dismissed the application of temporary injunction on 07.03.2024. Appellants feeling aggrieved impugned herein the order through this appeal. On receipt of appeal, respondents/defendants were summoned, however, none of them appeared before the court except respondents no. 22 and 116; therefore, the remaining respondents were placed ex-parte.

Arguments heard and record perused.

There is no second view that all the ingredients i.e. prima facie case, balance of convenience and irreparable loss must co-exists for grant of temporary injunction and if any one of these is missing temporary injunction cannot be granted as a principle. The main contention of the appellants is that the suit property is the joint ownership of parties at dispute, which is undivided and not partitioned till date; however, the respondents are bent upon to make interference, changes, constructions and sale of the same without legal backing; therefore, they have prayed for declaration of their title to the suit property and its possession through regular partition by metes and bounds. Though the contents of written statement does not provide any denial of ownership rights of appellants by respondents and specifically speaks about the joint ownership of suit property of the parties at dispute and others, who have not arrayed as parties to the suit, which on one hand is acknowledgement of ownership rights of the appellants, whereas, on the other hand suggests that the suit property is admittedly the joint ownership of parties at dispute and thus provides that there exists a prima facie case in favour of appellants.

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So far contention of respondents that there are many other persons, who are necessary parties to the suit and have not been arrayed parties, whereas, they have also boundary disputes with other groups, who belong to different districts and regular partition cannot be carried out until those disputes are settled or they are arrayed as parties to the suit, it is held that suit cannot be failed due to non-impleading the necessary parties because they can be arrayed as plaintiffs or defendants in the main suit at any time either on the application of appellants or respondents or by the learned trial court by exercising its inherent powers if it is found that they are necessary parties to the suit. Likewise, if they have boundary disputes with other groups belonging to different districts, the law also provides that the properties falling in different districts or having dispute over boundaries of districts or even over properties falling in different districts can be heard separately, where possible, or by one court of any district, where feasible. As far fact that suit property has been leased out and it cannot be partitioned, same cannot be held as hindrance in partition of the property because partition of the suit property will only clarify the shares of parties at dispute and would have no effect on lease agreements, which shall follow its course as per law.

In the given circumstances, it is held that if temporary injunction is refused to the appellants, there will always be apprehension of raising constructions etc., sale, changes and alienation of the suit property by any co-sharer, which apprehends irreparable loss to appellants because it is well settled law that every co-owner is owner in possession of each and every inch of the joint holding until it is regularly partitioned between the parties by metes and bounds, thus, raising of constructions

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in joint holding at place of his choice impliedly amounts to invasion upon the rights of other co-owners; therefore, it is held that appellants/ plaintiffs have prima facie arguable case against respondents and in case temporary injunction is refused to appellants then this will be appellants party, who will suffer irreparable loss and balance of convenience and not the respondents/defendants, hence, the appeal in hands is allowed, the impugned order of the learned lower court is set-aside and temporary injunction is granted only to the extent that respondents/ defendants shall refrain from sale, raising constructions, making forcible possession and cutting the trees in the suit property till disposal of case or for statutory period, whichever accrues earlier, and subject to order of the superior courts, if any.

My order is tentative in nature having no bearing on the merits of the case. Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

Copy of this order is directed to be placed on the running/main file of the learned trial court, where after, the requisitioned record, if any, is returned and file of this court consigned to the record room after necessary completion and compilation.

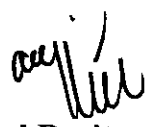


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CERTIFICATE

Certified that this judgment consists of five (05) pages, those are signed by me after necessary corrections.



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