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

Civil Appeal No. 07/13 of 2024

Date of institution: 08.04.2024

Date of decision: 11.09.2024

Date of consignment:

Shahbaz Khan son of Omar Khan and two others resident of Quom Mishti, Tappa Darvi Khel, Village Zawan, Tehsil Central, District Orakzai (appellants/defendants)

Versus

Ali Akbar son of Abdul Akbar resident of Quom Mishti, Tappa Darvi Khel, Village Zawan, Tehsil Central, District Orakzai (respondent/plaintiff)

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

JUDGMENT

Through this judgment I will decide appeal preferred by appellants against the respondent challenging the judgment, decree and order dated 13.03.2024 of the Court of learned Civil Judge-II, Kalaya, Orakzai whereby he has decreed the suit of respondent.

Concise facts giving rise to the instant appeal are that on 13.09.2021, respondent/ plaintiff has filed a civil suit no. 22/1 of 2021, wherein, alleged that landed property situated in Quom Mishti Tappa Darvi Khel, Zawan bounded from the east lands of respondent, west water khuwar along with fields of Miras Khan, north fields of Shahbaz Khan etc. & south public passage, the suit property, was the ownership of Gulman Shah; that he has exchanged his landed property situated in village Karghan with the suit property in 1995 and become exclusive owner in possession of the suit property; that appellants have no concern with the suit property, however, they have started making interference in it and were taking away clay from it without his permission, which act of appellants was illegal, against the

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law and inoperative upon his rights; thus, he has prayed for decree to declare him owner in possession of the suit property coupled with decree for possession provided the same is taken away from him during pendency of the suit or same is not proved with him; that he has also prayed for decree for permanent and mandatory injunctions so as to restrain appellants from making any sort of interference etc. in the suit property.

Appellants were summoned by the learned trial court. They appeared and filed a joint written statement, wherein, raised various legal and factual objections *inter-alia* with facts that respondent was not owner in possession of the suit property; that they had actually purchased the suit property from Miras Khan and were recorded owners in possession of the same; that respondent has filed this suit only for the reason that he had purchased a piece of land between landed property of appellants so prayed for dismissal of suit. Divergent pleadings of the parties were reduced into different issues by the learned trial court as below;

1. *Whether plaintiff has got a cause of action? OPP*
2. *Whether the suit of plaintiff is within time? OPP*
3. *Whether this court has got jurisdiction to entertain the suit of plaintiff? OPP*
4. *Whether suit of plaintiff is hit by res-judicata? OPD*
5. *Whether suit of plaintiff is bad due to non-joinder and misjoinder of the parties? OPD*
6. *Whether plaintiff is estopped to sue? OPD*
7. *Whether plaintiff is owner in possession of the suit property on the strength of exchange of land with one Ghulam Shah effected in the year 1995? OPP*
8. *Whether defendant purchased the suit property from one Mirwais Khan? OPD*
9. *Whether plaintiff is entitled to the decree as prayed for? Relief?*

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Parties produced evidence. The learned trial court heard the arguments & decreed the suit of respondent on 13.03.2024. 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 having been ignored the cardinal principles of natural justice, having not considered the record available on file, based on presumptions, speculations and capricious, therefore, prayed that on acceptance of instant appeal, judgment, decree and order of the learned trial court dated 13.03.2024 may be set-aside and suit of respondent may be dismissed.

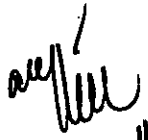
Learned counsel for respondent refuted the arguments of learned counsel for appellants and argued that learned trial court has properly appreciated the evidence and record on file and committed no illegality or irregularity in passing the impugned order; therefore, prayed for dismissal of appeal with heavy costs.

Arguments heard and record perused.

Before passing my findings, I would like to mention that it is a settled principle of law that civil disputes re decided on the strength/basis of preponderance of evidence. Since, district Orakzai is newly merged district and there is admittedly no land settlement or revenue record of district Orakzai and the disputes between the parties are resolved on 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 parties, oral evidence and documentary proof, if any, brought on file.

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Perusal of record & arguments advanced by learned counsel for parties lead me to the inference that controversy between the parties relates to ownership of suit property, which respondent alleged to be his exclusive ownership being received through exchange of his landed property situated in Karghan village with suit property belonging to Gulman Shah, whereas, appellants denied his right claiming the suit property to be their purchased ownership; therefore, this court has to see that who is the owner of suit property. To sort out answer to above query, the evidence led by respondent studied carefully. Respondent (PW-1) though admitted that he was not having any written proof about exchange of the suit property but not only conceded the presence of witnesses to the exchange proceedings but have also produced them before the court. Amongst them, statement of Gulman Shah (PW-2) is of immense importance; he was the owner in possession of suit property and has stated that he had exchanged the suit property with the property of respondent situated in Karghan in 1995. Likewise, Muhammad Durkhan (PW-3) and Hussain Muhammad (PW-4) appeared in the witness box and deposed that suit property was exchanged by respondent with Gulman Shah around 28 years ago and supported the stance of respondent. None of the witnesses produced by respondent were cross-examined by the appellants on material aspects nor there is any material contradiction noted in their statements. Although, Gulman Shah (PW-2) admitted that he had written proof about the exchange proceedings in his house, which was not produced before the court and supposedly the best available evidence was withheld, however, on one hand, the admission of Gulman Shah about the exchange of his lands (suit property) with respondent is proved, whereas, on the other hand the appellants and their witnesses have also admitted that Khiyalmat Shah, father of Gulman Shah, had exchanged the properties with


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respondent having availed the fact that suit property had actually been exchanged by Gulman Shah with respondent in 1995 and respondent is presently recorded owner in possession of the same. Even, Miras Khan (DW-1) admitted that Khiyalmat Shah was also given property situated at Karghan in exchange and respondent was given the property in Mishti. Juma Khan (DW-2) made the case more transparent stating that he was aware about exchange of properties between Gulman Shah and respondent, which further supports the claim of respondent; therefore, in given situation the non-production of written proof becomes immaterial especially when the fact of exchange is admitted by appellants and their witnesses.

So far fact that Gulman Shah was minor at the time of exchange, it is held that admittedly he was minor but the statement of Miras Khan (DW-1) suggests that the exchange was carried out through his father Khiyalmat Shah. Even, otherwise, the transaction was in favour of both those parties, whereas, none of them have challenged it before any forum; therefore, it is not damaging to the respondent's case. Similarly, the appellants were also burdened to prove the purchase of suit property from Miras Khan; however, they have not produced a single witness to this. Admittedly, Miras Khan (DW-1) was produced as witness before the court, who stated to have sold out the property to appellants in sum of Rs. 13,000/-, however, he did not state the sale of suit property. Even, the appellants and his witnesses have admitted that they have no proof of sale and purchase of suit property. Even, Juma Khan (DW-2) is not the witness to sale transaction allegedly effected between appellants and Miras Khan and had just heard about it. He has come to know about the sale amount from appellants on very day of his recording the statement in the court; therefore, appellants have failed to produce any cogent evidence about purchase of suit property.

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In the backdrop of my above findings, it is held that the learned trial court has committed no illegality, irregularity, misreading or non-reading of evidence and has rightly reached to just conclusion of the case; therefore, it is held that appellants have failed to shatter the contention of respondent. In view of above I see no force in instant appeal, hence, impugned judgment, decree and order dated 13.03.2024 of the learned trial court is upheld and appeal in hands **dismissed** being bereft of merits. 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 six (06) pages, those are signed by me after necessary corrections, if any found.



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