

34

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

Civil Revision No. 07/12 of 2024

Date of institution: 04.07.2024

Date of decision: 01.10.2024

Date of consignment:

Taj Wali Khan son of Eman Shah Quom Feroz Khel resident of Goein, Lower Orakzai (petitioner/defendant no. 5)

Versus

Khalid Hakeem son of Hakeem Khan resident of Quom Feroz Khel, Tehsil Lower Orakzai and six others (respondents no. 1-7)

JUDGMENT

Through this judgment I shall decide the civil revision filed by petitioner against respondent no. 1/plaintiff u/section 115 of The Civil Procedure Code, 1908 challenging therein the judgment and order dated 04.04.2024 of the Court of learned Civil Judge-II, Kalaya, Orakzai passed in a civil suit, whereby, he has dismissed the application of petitioner filed under Order VII Rule 11 CPC meant for rejection of the plaint.

Concise facts of the case are that respondent no. 1/plaintiff has filed a civil suit for possession through partition, permanent and mandatory injunctions against petitioner and respondents no. 2-7, defendants in the main suit; he contended that parties at dispute, except petitioner/defendant no. 5, were the real cousins and a plot measuring around 30 marla situated at Goein, Kalaya Orakzai bounded from east house of Rosham Khan, west & north lands of respondent no. 1/plaintiff and north path to the property of respondent no. 1, the suit property, was their ancestral ownership, which has not been partitioned privately or regularly; that respondents no. 2-5/defendants no. 1-4, after renumbering, had secretly sold out their share to

2024/10/01
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

the extent of 7½ marla in the suit property to petitioner, who had started constructing the boundary wall up to 5 feet height without regular partition in order to make forcible possession over the suit property; that petitioner and respondents no. 2-7 were asked time and again to opt for a regular partition of the suit property and in this respect *jirga* were also convened but of no avail; that earlier respondent no. 6 had filed a pre-emption suit against petitioner, however, said suit was dismissed for want of deposit of 1/3rd pre-emption amount, where after, respondent no. 7 had exercised his right of pre-emption by filing a suit, which is still pending adjudication before the court of learned Civil Judge-I, Kalaya Orakzai; that petitioner and respondents no. 2-7 were not ready for partition of the suit property due to their own interests; therefore, respondent no. 1/plaintiff has prayed for decree of possession through partition to the extent of his share in suit property coupled with decree for permanent and mandatory injunctions.

Petitioner and respondents no. 2-7 were summoned by the learned trial court. Respondent no. 6 was placed ex-parte, whereas, respondents no. 2-7 and petitioner had filed respective written statements, wherein, raised various legal and factual objections. Petitioner and respondents no. 2-5 had also filed an application for rejection of the plaint under Order VII Rule 11 CPC due to non-disclosure of cause of action mainly on ground that respondent no. 1/plaintiff had claimed the suit property to be his ancestral ownership, however, his father was alive at the time of filing the suit. Respondent no. 1/plaintiff filed written reply to the application and contended that he was an exclusive owner to the extent of his share in suit property that has been gifted to him by his father during his lifetime in presence of other legal heirs; therefore, their contention is wrong.

01/10/2024
 Abdul Basit
 Addl. District & Sessions Judge
 Orakzai at Baber Mela,
 Hangu

The learned trial court heard the parties and finally dismissed the application. Petitioners feeling aggrieved impugned herein the judgment and order dated 04.04.2024 of the learned trial court by alleging it wrong, against the law, facts and untenable in the eyes of law. He alleged that learned trial court has committed grave illegality and material irregularity in exercise of jurisdiction vested in it, which resulted in miscarriage of justice. He alleged that impugned order is the result of misreading, non-reading of material available on file and based on improper appreciation of the record. He further contended that court has passed the decision in haste since son cannot file suit during the lifetime of his father; therefore, prayed that on acceptance of instant revision, the impugned judgment and order of the learned trial court may be set-aside and on allowing his application, the plaint of respondent no. 1/plaintiff may be rejected.

Arguments heard and record perused.

In the wake of arguments advanced by learned counsel for parties and record available on file, I have come to the conclusion that contents of the plaint explicitly provides that respondent no. 1/plaintiff has claimed the partition of suit property being his ancestral property and there is no mentioning of the fact that he was exclusive owner in possession of his share in it or he had become owner in possession of the suit property on strength of gift deed/affidavit. He has introduced the fact of gift of his share in the suit property by his father for the first time when the petitioner has filed application for rejection of plaint. Contents of plaint categorically provide the word "moroosi" & there was no claim of exclusive ownership of respondent no. 1 found at single place. Respondent no. 1 had raised plea of exclusive ownership for the first time in his reply to the application in question, which otherwise amounts to change in nature of suit.

01/10/2024


Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela.
Hangu

Since, the respondent no. 1/plaintiff has not earlier taken the stance of exclusive ownership of his share in the suit property, whereas, he has also not denied that his father had died after filings of the suit in hands, which leads to inference that when he had filed the suit in hands, his father was alive; therefore, respondent no. 1/plaintiff had no *locus standi* or cause of action to file the suit in hands.

In the light of my above discussion, I have come to conclusion that the learned trial court has erred exercising the jurisdiction vested in it and failed to appreciate the material fact on record; therefore, the instant civil revision petition is **allowed**, the impugned judgment and order dated 04.04.2024 of the learned Civil Judge-II, Kalaya Orakzai is set-aside and on allowing the application of petitioner filed u/Order VII Rule 11 CPC, the plaint of respondent no. 1/plaintiff is rejected for want of disclosure of cause of action. As none of the parties have proved the costs incurred on the proceedings; therefore, they have to bear costs of their proceedings.

Copy of this order is placed on record of learned lower court. The requisitioned record, if any, be returned and file of this court consigned to record room after necessary completion and compilation.

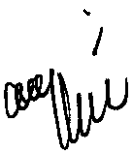
Announced
01.10.2024


Abdul Basit
Addl. District Judge-II, Orakzai

CERTIFICATE

Certified that this judgment consists of four (04) pages, those are signed by me after necessary corrections.

Announced
01.10.2024


Abdul Basit
Addl. District Judge-II, Orakzai