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**IN THE COURT OF JAMAL SHAH MAHSOOD, ADDITIONAL
DISTRICT JUDGE-I, ORAKZAI**

Civil Appeal (against order) No. 25 of 2020

Date of Institution: 02-09-2020

Date of Decision: 10-09-2020

1. Khayalmin Ali s/o Ali Baz Khan, and his sons **2. Imraz Ali, 3. Waiz Ali** and **4. Razmeen Ali**; all residents of Mani Khel, Ahmad Khel Lower Orakzai.

(Appellants/Defendants)

Vs

1. Dr. Jan Alam, 2. Jamal Hussain and **3. Shah Alam Khan**; all sons of Muhammad Khan and residents of caste Mani Khel, Orakzai; presently r/o Ibrahimzai, District Hangu.

(Respondents/Plaintiffs)

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- Syed Hamza Gillani and Ibrahim Khan Advocates for appellants
 - Jabir Hussain and Insaf Ali Advocates for respondents
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APPEAL against the Order and Judgment, dated **28-08-2020**, of learned Senior Civil Judge, Orakzai, passed in Civil Suit No. 92/1 of 2020. **(Impugned Judgment)**

Judgment:

1. Through the impugned judgment the application for grant of temporary injunction, filed by the present respondents (plaintiffs), was accepted by the learned lower court, for the period of 06 months or till disposal of case; the defendants were restrained from any sort of interference in the disputed suit property and from construction of a pathway on this property.
2. Facts of the case are that the respondents (plaintiffs) filed their suit seeking declaration, along with perpetual directory injunction, in respect of suit property (which is described in plaint as consisting of 17 *khet*/fields with 01 house, spreading over 15 jerib area, situated in Fateh Khan Kunj, Ahmad Khel, Mani Khel near Kalaya Bazar Orakzai – a sketch of which is annexed with plaint). The respondents/plaintiffs claim to be owner-in-possession of the suit

property since their forefathers; and also claim that the same is being cultivated at present by their *zamindar*, Etebar Ali. They allege that the appellants (defendants) are trying to illegally dispossess them from 12 *khet*, construct a pathway through the suit property and cultivate it. They further averred that the defendants/appellants had no concern with the suit property, being neither owners nor in possession of the same. They prayed for restraining the defendants/appellants from interfering in and from forceful dispossession of the plaintiffs/respondents from the suit property. Along with the plaint a separate application for temporary injunction was filed; which was accepted through the impugned judgment.

3. On summons, the defendants/appellants appeared before lower court and submitted the written statement and replication. They denied the suit of the plaintiff and raised many legal and factual objections. They claimed to be owners-in-possession, to the extent of half share, in the suit property. They further claimed that the suit property was presently being cultivated jointly by both the parties, through the same *zamindar*, Etebar Ali, which is mentioned in plaint.
4. The suit of the parties is pending before the trial court for Case Management and Scheduling Conference. Issues are not framed and evidence is yet to be recorded. However, the application for temporary injunction was hotly contested by the parties and the same was decided during the summer vacations by on-duty judge, after application for early hearing by a party. The learned lower court, after hearing the arguments, accepted the application and granted temporary injunction through impugned judgment.
5. The appellants/defendants, being aggrieved of acceptance of the application for temporary injunction, have filed the instant appeal.
6. Notice of appeal was given to respondents/plaintiffs; they appeared to contest the instant appeal. Arguments of the counsels for the parties were heard and available record perused. My tentative findings, for the purpose of deciding instant appeal, in light of available record and arguments of the parties are as follows.
7. The disputed property is allegedly located in Orakzai District, where no revenue record is available to render help for ascertainment of certain controversies. Both the parties are related to each other, as

admitted in their respective pleadings; and both claim ownership in suit property through inheritance. The parties also admit some previous dispute in respect of suit property, which they both jointly had with someone described as *qasabaan* in the pleadings. The plaint has been vaguely verified by a counsel of plaintiffs while the written statement does not bear any verification at all.

8. For the purpose of grant of temporary injunction, generally, three essential ingredients are required to be proved by the petitioners in their favour, viz.: a prima facie case, balance of inconvenience and irreparable loss. These three essentials must be established by a party to co-exist in its favour. Each essential is discussed below in peculiar circumstances of present case.


Both the parties claim ownership in suit property through inheritance and both parties admit being relatives inter se. The assertions of parties raised in their respective pleadings, without any proper verifications on oath, are subject to pro and contra evidence. In such a situation no prima facie case can be said to be present in favour of plaintiffs/respondents.

10. As far as the point of balance of inconvenience is concerned, both the parties claim to be in possession of suit land for the purpose of cultivation. Both parties have named a certain *zamindar*, Etebar Ali, as the person who is cultivating the suit property on their behalf. As far as the alleged pathway in suit property is concerned; the existence of same is denied by the plaintiffs, while the defendants claim that it exists for more than 30 years. This factual controversy too can be resolved through recording of evidence only. However, for the purpose of tentative assessment of record for the present purpose the image of suit property obtained from Google Earth app can be considered, as the same has been brought on record and is admitted by both the parties. The Google Earth image does prima facie show existence of a pathway in the suit property. Copies of previous jirga decisions between the parties, which have been annexed with pleadings, also admit the existence of pathway for use of parties. In such a situation the balance of inconvenience cannot be said to lie in favour of the plaintiffs/respondents.

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11. As far irreparable loss is concerned, the suit property is admittedly being cultivated by the same person, who is claimed as their *zamindar* by both the parties. It is also an admitted fact that a concrete pavement is being constructed on the suit property, with public/government funds. As far as the produce of cultivation is concerned, each party can claim mesne profits and damages etc., if so desired, and thus no question of irreparable loss will arise. In respect of the concrete pavement of passageway, with government funds, the respondents could not convince this court as to how the same would result in irreparable loss to them. Thus, it is not a case of irreparable loss to the appellants/plaintiffs by any stretch of imagination.
12. In light of the above discussion, the instant appeal is **accepted**. The impugned order/judgment is held to have been passed without proper appraisal of record and without considering the legal principles enunciated on the point. The impugned judgment is thus hereby set aside. Parties to bear their own costs. Order in appeal announced in open court. Let a copy of this order be placed on record and the same be returned to the learned trial court. Let this file be consigned to record room after its necessary completion and compilation.

Announced
10-09-2020


Jamal Shah Mansood
ADJ-I, Orakzai

CERTIFICATE

Certified that this judgment consists of 04 pages. Each page has been signed by me, and corrected, wherever necessary.


ADJ-I, Orakzai.