

**IN THE COURT OF ASGHAR SHAH**  
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

MISC. CIVIL APPEAL NO. : 1/14 OF 2020  
DATE OF INSTITUTION : 12.11.2020  
DATE OF DECISION : 24.11.2020

- 1. ZAMAN KHAN S/O JANAT KHAN
  - 2. AMAN ULLAH S/O FAZAL REHMAN
  - 3. DILAWAR KHAN S/O FAZAL REHMAN
- ALL BELONG TO TRIBE ALI KHEL, SUB-TRIBE SHER KHEL,  
TALET, DISTRICT UPPER ORAKZAI

.....(APPELLANTS)

-VERSUS-

SAMEER KHAN S/O KHYAL MUHAMMAD TRIBE ALI KHEL,  
SUB-TRIBE SHER KHEL, TALET, DISTRICT UPPER ORAKZAI

..... (RESPONDENT)

**Present:** Abid Ali and Fazal Malik Advocates for appellants.  
: Farid Ullah Shah Advocate for respondent

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JUDGEMENT  
24.11.2020

Allegedly, the appellants/defendants twice refused to receive the summon issued by the trial court for their attendance, hence they were proceeded ex-parte and after recording ex-parte evidence, the trial court passed ex-parte judgment and decree in favour of respondent/plaintiff for recovery of Rs. 1,200,000 vide judgement and decree dated 16.11.2019.

- 2. It was on 03.03.2020 when appellants/defendants approached the trial court through an application for setting aside ex-parte judgment and decree dated 16.11.2019, then

  
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the said application after due process is turned down by the court vide impugned order dated 13.10.2020 on account of application of the appellants/defendants being time-barred which has given birth to the appeal in hand.


- 3. Arguments heard and record perused.
- 4. From the arguments and record available on file, it reveals that when the order sheets of the learned trial court gone though, it provides that only summon was issued to the defendants twice in order to procure their attendance without sending them copy of the plaint. The order V Rule 2 of the CPC provides that summon shall be accompanied by a copy of the plaint. Moreover, Order V Rule 17 of the CPC provides that when the defendants refused to sign, the summon, the service shall be carried out by way of affixation either on the outer door of the defendants' house or any conspicuous part of their house but in the instant case no affixation of the summon as required by law was carried out. The ibid rule is reproduced below for ready reference;

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**Order V Rule 17 of CPC**

*“Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his*

*behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any), by whom the house was identified and in whose presence the copy was affixed.”*

  
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5. Furthermore, the Order V Rule 19 of the CPC provides that upon the return of summon, the process server shall verify his report on affidavit and the court to examine the process server on oath regarding the service being duly made. However, when the two summon issued to the defendants examined overleaf, it reveals that neither the process server verified his report on affidavit nor the court has examined the concerned process server on oath. The ibid rule is reproduced below for ready reference;

**Order V Rule 19 of CPC**

*“Where a summons is returned under rule 17, the Court shall, if the return under that rule has*

*not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."*

6. Also, it was noted with concern that neither any identifier has been cited as witness overleaf the summon nor the process server attempted to obtain even the CNICs numbers of the defendants on the same. Thus, the very mandatory provisions of law have been violated resulting into the subsequent proceedings against the defendants being placing them ex-parte and passing ex-parte order are suffering from severe legal infirmities. When an order is passed not being within the four corners of law, no period of limitation could run against such order. Also, in number of judgments of superior courts, decision on merits by avoiding technicalities have been reflected. In the instant case, the recovery of huge amount of Rs. 1200000/- is involved, therefore, let the parties to prove their version on merits by adducing evidence in support of their contentions.

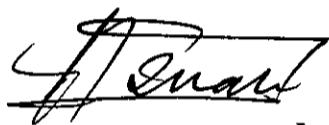


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7. Therefore, in the light of what stated above, the appeal in hand is accepted, impugned order of the trial court dated

13.10.2020 dismissing the application of the appellants/defendants submitted for setting aside the ex-parte decree stand set aside alongwith ex-parte decree dated 16.11.2019. The case is remanded back to the trial court where the parties should appear on 28.11.2020 and the trial court is directed to obtain written statement from the defendants and thereafter to decide the case on merits in accordance with law. No order as to cost. File of the trial court be returned while file of this court be consigned to Session Record Room after its completion and compilation.

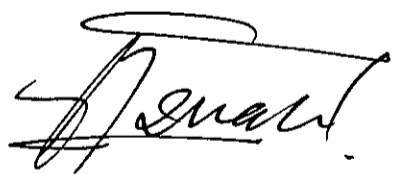
**Announced**  
24.11.2020

  
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**CERTIFICATE**

Certified that this judgment consists of five (05) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 24.11.2020

  
**(ASGHAR SHAH)**  
District Judge, Orakzai  
at Baber Mela