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In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI AT BABER MELA

Civil Appeal No. CA-11/13 of 2023

Date of institution: 16.03.2023

Date of decision: 26.07.2023

Mati Ullah son of Khana Din resident of Qaum Mishti, Tappa Masti Khel,
Jaam Garhi, Tehsil Upper, District Orakzai.

..... (**Appellant/defendant**)

...Versus...

Asif Shah (late) through 07 legal heirs residents of Qaum Baland Khel,
Tappa Masti Khel, Jaam Garhi, Tehsil Upper, District Orakzai.

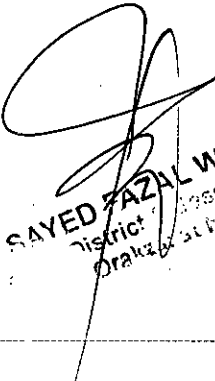
..... (**Respondents/Plaintiffs**)

**Appeal against Judgement, Decree and Order dated 27.02.2023,
passed in Petition No. 38/6 of 2022.**

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/defendant against the Judgment, Decree & Order dated 27.02.2023, passed by learned Senior Civil Judge, Orakzai in Petition bearing No.38/6 of 2022; whereby, Petition of the appellant/petitioner with the title of "Mati Ullah vs Asif Shah etc." for setting aside ex-parte decree was dismissed.

2. Plaintiffs presented suit for declaration and mandatory injunction regarding landed property measuring 9/10 Marlas located Jam Garhi of Biland Khel, Orakzai claiming ownership on the basis of sale deed of the year 1997. Notices have been issued to defendant. On absence, ex-parte evidence was procured and ex-parte decree was granted to plaintiffs. The defendant presented application for setting aside ex-parte decree which was dismissed vide Order No.12 dated 27-02-2023. Feeling aggrieved, the petitioner moved instant appeal which is under consideration.

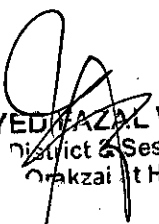

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3. Mr. Noor Karim Orakzai Advocate representing appellant/defendant argued that providing hearing opportunity is vested right that has been denied by the Trial Court. Neither phone call has been made nor notice has been served upon defendant and ex-parte decree has been granted in absolute violation of law. The petition for setting aside may be accepted and the case may be remanded for submission of written statement followed by opportunity of evidence.

4. Mr. Abid Ali Advocate representing respondents/decreed holders resisted the stance of opponent by stating that defendant was properly served with the process of the court and he put appearance. Plaintiffs have proved their case on the strength of cogent oral and documentary evidence as ex-parte. The decree has already been executed and petition is filed with ulterior motive to harass the decreed holders.

5. The defendant/appellant has not been provided hearing opportunity and petition for setting aside ex-parte decree has wrongly been dismissed are points for determination in instant civil appeal.

6. The record of original suit, the execution petition and that of Civil Misc Application available on file reflects that Process Server namely Mati Ullah has reported on Notice No. 831 dated 22-12-2020 that defendant is residing in District Rawalpindi and has been informed on his cellular phone No. 03331872100. Second notice bearing No. 109 dated 10-02-2021 is on file where second cellular phone No. 03018020036 was mentioned for calling the defendant. It was for the third time when the Process Server visited the defendant and served him notice in person. This notice has been issued on 24-02-2021; on the overleaf of which, signature


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of the defendant has been obtained by writing his CNIC as well which is

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bearing No. 21604-1647766-3. The signature of the defendant reflecting on the overleaf of such notice dated 03-04-2021 is very much identical and comparable with the signature of appellant on the power of attorney signed in favor of counsel for appellant in instant Civil Appeal. The date fixed for appearance in such duly served notice is 06-03-2021 and on this very date, the learned presiding officer has marked his attendance being present in person on Order No.8 dated 06-03-2021 of original suit. All such material available on record establish that defendant/appellant was served personally and he attended the Court in person. Therefore, the question of not providing hearing opportunity is out of question at all.

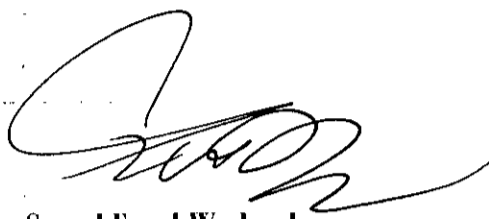
7. When it is established that defendant was duly served with the process of the Court and he put appearance in Court in person, the dismissal of the petition for setting aside ex-parte decree was natural outcome within the parameters of law.

8. Another aspect of the case is limitation for presentation of application for setting aside ex-parte decree in line with Order-9 Rule-13 of the Code of Civil Procedure, 1908. Article 164 of the Limitation Act 1908 provides 30 days' time for institution of such like application. It has been settled in Judgement reported as 2008 SCMR 287 that where appearance had been entered but the defendant was later proceeded against ex-parte, the limitation would run from date of decree. On this criteria 05-09-2021 was the last date for presentation of application for setting aside ex-parte decree which was presented on 10-11-2022; a hopelessly time barred petition which has rightly been taken of the file by the learned Civil Court.


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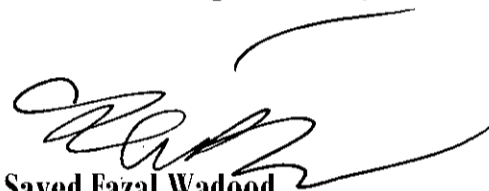
9. For what has been discussed above, the appeal in hand stands dismissed with cost of Rupees Ten Thousand (Rs. 10,000/-) as the litigation was protracted without any justifiable reason. Requisitioned record be returned with copy of this Judgment; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

10. Announced in the open Court
26.07.2023


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CERTIFICATE.

Certified that this Judgment is consisting upon Four (04) pages; each of which has been signed by the undersigned after making necessary corrections therein and red over to the parties.


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela