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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-25/13 of 2022

Date of institution: 13.12.2022

Date of decision: 22.07.2023

1. Sajid Khan son of Ali Sarwar
 2. Nazim Ali son of Ali Janan
- Residents of village Zerra, Tehsil Lower & District Orakzai.
..... (**Appellants/Defendants**)

...**Versus**...

1. Gulfam Hussain deceased through 07 legal heirs
 2. Luqman Ali son of Ali Muhammad
 3. Hamid Askar
- (**Respondents/plaintiffs**)

4. Syed Hussain Jan deceased through 06 legal heirs
5. Syed Saqalain son of Syed Muhammad Ali Shah
6. Hashim Raza son of Syed Wajid Ali
7. Tausif Ali Shah son of Hazrat Ali Shah
8. Malik Haider Shah son of Sultan Shah
9. Aziz Khan son of Ali Man Shah
10. Zar Wali son of Najaf
11. Wajid Ali
12. Wahab Ali son of Adam Khan
13. Muslim Raza son of Muhammad Raza
14. Director Mines and Minerals, Orakzai Kohat Division
15. Assistant Director Mines and Minerals Orakzai Kohat Division
16. Deputy Commissioner Orakzai
17. Assistant Commissioner Orakzai

..... (**Proforma Respondents**)

Appeal against Judgement, Decree and Order dated 03.11.2022 in Civil Suit No. 51/1 of 2020.

JUDGMENT

Instant Civil Appeal has been preferred by the appellants against the Judgment and Decree dated 03.11.2022, passed by learned Senior Civil Judge, Orakzai in Civil Suit bearing No.51/1 of 2020; whereby, plaintiffs/respondents were granted permission to file fresh suit subject to


SAYED FAZAL WADOOD
Additional District & Sessions Judge
Orakzai at Hangu

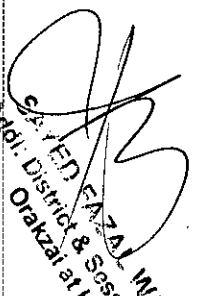
payment of cost after withdrawal of earlier suit without issuing notice to the defendants/appellants.

2. Briefly stated facts of the case are such that suit mentioned above was fixed for reply and arguments on maintainability as well as application for impleadment in the trial court on 02-11-2022 by fixing 03-11-2022 as next date of hearing. On such date, application for withdrawal of the suit with permission to file fresh one was presented by the plaintiffs and was conceded by the defendants. Resultantly, suit was dismissed as withdrawn with permission to file a fresh suit with the cost of one thousand (Rs.1000) vide Order No.6 dated 03-11-2022. Feeling aggrieved, the same was impugned in instant civil appeal which is under consideration.

3. Mr. Abrar ul Haq Advocate representing appellants argued that full hearing is the vested right which has been denied in the trial court. He has neither been heard nor provided hearing opportunity which alone is sufficient to set aside the impugned order. It was added that the formalities for getting permission to file representative suit have also not been complied with. The learned trial judge was required to determine maintainability of the suit before allowing such permission; learned the counsel for appellants concluded.

4. Mr. Abdul Qayum Advocate representing respondent was of the stance that the set of defendants who raised question of maintainability has not preferred any appeal and present appellants have no locus standi to object. It was added that permission to file fresh one was granted on the basis of no objection certificate against which appeal is not maintainable at all.

5. When plea of withdrawal and question of maintainability are pending adjudication at once, which one of such points shall be taken for consideration first? And, secondly right of hearing was refused to the appellant? and its effects; are two points for determination in instant civil appeal.


SAIF-UD-DIN FAZAL MABOOD
Addl. District & Sessions Judge
Orakzai at Hangu

6. It is on record that question of maintainability was fixed for arguments where question of withdrawal was raised in written followed by no objection certificate of large set of defendants. The scheme of the law on the subject is that when maintainability and withdrawal for removal of formal defect are simultaneously pending adjudication, withdrawal shall be taken first for consideration as it is very much possible that the ground of non-maintainability is the formal defect for which withdrawal has been sought. By this way, technical knockout is being avoided and disposal on merit is being ensured which is the philosophy preferred by law. Similarly, where an application for withdrawal has been filed, the Court is not supposed to decide the matter in issue on its merits.

7. The record further reveals that the defendants have conceded the petition for withdrawal by putting no objection on the margin of such application. The law does not allow to probate and reprobate being matter of estoppel by way of matter of record. Similarly, it has been settled in the Judgement reported as 2010 CLD 1198 that it the prerogative of the Court to allow or not to allow withdrawal of the proceedings unilaterally at the instance of one of the parties. Moreso, if the argument of the appellant by not giving him hearing opportunity is accepted as true and genuine; even then, appeal is continuation of suit and he has been heard at this stage which amounts to curing irregularity. The formal defect referred by the learned trial judges is going to the root of the case entailing its dismissal to which liberal meaning must be given in accordance with law and there is no ground available for the appellant to impugn it.

8. One important aspect of the present civil appeal is its form that needs to be determined. One set of defendants has challenged the Order dated 03-11-2022 in civil appeal. An order allowing withdrawal of suit is not



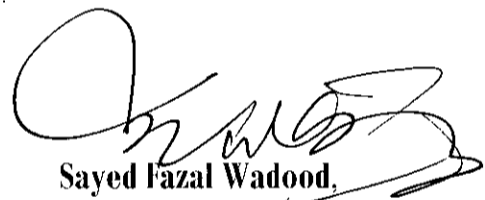
SAYED FAZAL WADOOD
Addl. District & Sessions Judge
Orakzai at Hangu

(20)

appealable; however, an order disallowing withdrawal can be challenged under Section 105 of Code of Civil Procedure, 1908. A revision may lie against permission to withdraw with liberty to file a fresh suit is what settled in Judgement reported as 1999 CLC 1437. In this background, instant Civil Appeal is converted into Revision and treated the same as revision on the score that condition requisites for entertaining revision for being fulfilled and the proceedings are within time.

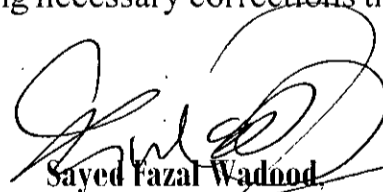
9. For what has been discussed above, it can safely be held that no illegality or material irregularity has been committed while exercising jurisdiction by the learned Trial Court. Appeal converted into Revision in hand is dismissed. Costs shall follow the events. Requisitioned record be returned back with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

10. Announced in the open Court
22-07-2023


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment consists of four (04) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela