

IN THE COURT OF SHAUKAT AHMAD KHAN
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 13/13 OF 2023
DATE OF INSTITUTION : 16.06.2023
DATE OF DECISION : 28.08.2023

1. ZIARAT GUL S/O GHANI KHAN
2. JAHANGIR KHAN S/O GHANI KHAN
BOTH RESIDENTS OF CASTE MANDRA KHEL LAGHONE,
TAPA MADAD KHEL, TEHSIL LOWER, DISTRICT ORAKZAI

.....(APPELLANTS)

-VERSUS-

1. MALAK BAHADAR KHAN S/O KAMAL KHAN
2. PALOOS KHAN S/O MUSHARAF KHAN
3. ZAMIN KHAN S/O MUSHARAF KHAN
4. MUHAMMAD YASIR S/O RUSTAM KHAN
5. TEHSIL KHAN S/O MALAK BAHADAR KHAN
ALL RESIDENTS OF CASTE MANDRA KHEL LAGHONE,
TAPA MADAD KHEL, TEHSIL LOWER, DISTRICT ORAKZAI

..... (RESPONDENTS)

Present : Mr. Zahir Bashir and Insaf Ali Advocates for appellants
: Dr. Amir Ajam, Tariq Iqbal Malak Shehzada and Talha
Muhammad Advocates Advocate for respondents no. 1 to 5

JUDGEMENT
28.08.2023

Impugned herein is the order/judgment dated 24.05.2023 of learned Senior Civil Judge, Orakzai vide which application of the appellants/defendants for setting aside ex-parte decree has been dismissed.

- (2). In a suit for declaration-cum-perpetual injunctions with possession through partition of the suit property, before the court of learned Senior Civil Judge, Orakzai, respondents being plaintiffs (hereinafter referred to as plaintiffs) claim that they are owners in possession of the suit property with a small portion jointly owned with them by appellants being defendants no. 1 and 2 and others impleaded as defendants no. 3 to 6 in the suit (hereinafter referred to as defendants no. 1 to

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6), that plaintiffs donated land to the Provincial Government for construction of a Primary School in 1982 with transfer of further property in 2016 for reconstruction of the school, that the defendants no. 1 to 6 without proper partition of the suit property are bent upon making encroachment over the share of plaintiffs on the pretext of upgradation of Government Primary School to Middle standard. The defendants no. 1 to 6 were summoned who appeared before the court and submitted written statement contesting the suit of plaintiffs on various legal and factual grounds.

(3). Pleadings of the parties were culminated into the following issues;

- I. Whether the plaintiffs have got a cause of action?
- II. Whether the plaintiffs are estopped to sue?
- III. Whether suit of the plaintiffs is time barred?
- IV. Whether the suit property is the joint ownership of the parties and still un-partitioned and earlier in the year 1982, a portion of the joint property was given by the parties free of cost to the defendant no. 7 for construction of a primary school?
- V. Whether the defendants 01 to 06 in connivance with defendant no. 07, are going to extent the school building of the said school by upgrading the same to middle level and by taking illegal possession of the property without acquisition and consent of the plaintiffs?
- VI. Whether the plaintiffs are entitled to the decree as prayed for?
- VII. Relief.

(4). Later on, the contesting defendants no. 1 to 6 failed to appear before the court and were proceeded ex-parte. Plaintiffs produced ex-parte evidence.

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(5). The learned trial court, after having heard ex-parte arguments, preliminary decreed the suit of plaintiffs. The appellants being defendants no. 1 and 2 submitted application for setting aside ex-parte decree which was turned down by the learned trial court vide order dated 24.05.2023. Being aggrieved of the impugned order/judgment, the defendants no. 1 and 2 filed the instant appeal.

(6). I heard argument and perused the record.

(7). Perusal of case file shows that as per contention of the defendants no. 1 and 2, the proceedings of the instant suit were stopped under section 10 of the Code of Civil Procedure vide order dated 16.09.2021 which was restored vide application of respondents/plaintiffs vide order dated 13.10.2021, that no notice of restoration was issued to the defendants no. 1 and 2 and they were proceeded ex-parte vide order dated 16.03.2022. However, perusal of record speaks otherwise and the contention of defendants no. 1 and 2 is against the material available on record. Though, the proceedings in the instant suit were stopped vide order dated 16.09.2021 which was restored on 13.10.2021 in pursuance of the application of plaintiffs but a proper notice of restoration of suit was issued to the defendants. In pursuance of the said notice, both the defendants no. 1 and 2 have appeared before the court and participated in the subsequent proceedings on seven hearings. It was on 02.03.2022 when the defendants no. 1 and 2 absented themselves from the proceedings at which summons were


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again issued to them which were personally served upon both the defendants no. 1 and 2. But this fact is neither mentioned by the defendants no. 1 and 2 in their application of setting aside ex-parte decree nor in memorandum of appeal. Similarly, the defendants no. 1 and 2 have also not objected to the report of Process Server effecting personal service of both the defendants no. 1 and 2. The second contention of the defendants no. 1 and 2 to the fact that after transfer of the instant case from the court of the learned Civil Judge-I to the court of learned Senior Civil Judge, Orakzai at Baber Mela, no summon has been issued to the defendants no. 1 and 2, is also against the record. As per order dated 23.06.2022 after receipt of case file by the learned Senior Civil Judge, Orakzai summons have been issued to both the parties and as per report of the Process Server of the court, personal service of both the defendants no. 1 and 2 has been effected. The factum of issuance of summons to the defendants no. 1 and 2 and the factum of their personal service has neither been mentioned by the defendants in their application for setting aside ex-parte decree or in the memorandum of appeal nor the report of Process Server in that respect has been objected to. Moreover, the decree has been passed on 10.11.2022 whereas the application for setting aside ex-parte decree has been moved on 21.01.2023 after a period of more than two months and the application is hopelessly time barred.


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Hence, in view of what is discussed above, it is held that the defendants no. 1 and 2 have remained absent from proceedings of the case despite their personal service twice effected through summons of the court, they failed to showcase any sufficient reason for their absence and the application for setting aside ex-parte decree is time barred. The impugned order dated 24.05.2023 of learned Senior Civil Judge, Orakzai at Baber Mela is based on proper appreciation of the material available on file and needs no interference of this court in appeal. Hence, the instant appeal being devoid of merits is dismissed. File of this court be consigned to record room. Copy of this order be sent to the court of learned Senior Civil Judge, Orakzai for information.

Pronounced
28.08.2023



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District Judge, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of five (05) pages.

Each page has been read, corrected wherever necessary and signed by me.

Dated: 28.08.2023


(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
at Baber Mela

