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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-07/14 of 2023

Date of institution: 09.06.2023

Date of decision: 27.07.2023

Malak Mughal Deen son of Khana Deen Resident of Qaum Shekhan, PO Mishti Mela, Tehsil Central, District Orakzai.

..... (**Appellant/Plaintiff**)

...**Versus**...

Fazal Deen son of Khana Deen Resident of Qaum Shekhan, PO Mishti Mela, Tehsil Central, District Orakzai.

..... (**Respondent/Defendant**)

Appeal against Judgement, Decree and Order dated 09.05.2023 in Civil Suit titled "Mughal Deen vs Fazal Deen" of the year 2022

JUDGMENT

Instant Civil Appeal has been preferred by the appellant against the Judgment and Decree dated 09.05.2023, passed by learned Civil Judge-II, Kalaya, Orakzai in Civil Suit titled "Mughal Deen vs Fazal Deen"; whereby, plaintiff/appellant was refused withdrawal of suit with permission to file fresh one.

2. Briefly stated facts of the case are such that suit for declaration injunction and partition is pending adjudication in Civil Court. The plaintiff presented application for withdrawal of suit with permission to file fresh suit which was dismissed vide Order dated 09-05-2023. The plaintiff feeling aggrieved, preferred instant Civil Appeal which is under consideration.

3. Sami Ullah having CNIC No. 21601-14267591-7 being grandson of the defendant is before the Court as special attorney for defendant who stated at the bar that he is neither engaging the counsel nor can afford it. He requested that the Civil Appeal may be disposed of today as he is unable to come again

SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangu

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to the Court for different reason including financial. Mr. Abid Ali Advocate representing this gentle man in Trial Court as before the Court in some other case had extended his professional assistance to the litigant who put NOC subject to imposition of cost.

4. One important aspect of the present civil appeal is its form that needs to be determined. Plaintiff has challenged the Order dated 09-05-2023 in civil appeal. An order rejecting withdrawal of suit is not appealable; however, such order disallowing withdrawal can be challenged under Section 105 of Code of Civil Procedure, 1908 (A1925 C711). Similarly, a revision may lie against permission to withdraw with liberty to file a fresh suit being settled in Judgement reported as 1999 CLC 1437. In this background, instant Civil Appeal is converted into Civil Misc. Appeal.

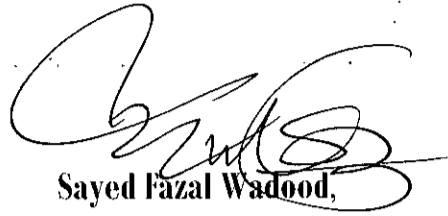
5. Civil Misc. Appeal in hand speaks about the existence of the formal defects in shape of insufficient description of property involved in suit which has been termed formal defect in a case reported as 2005 SCMR 1405. Similarly, where prayer for necessary relief has been omitted, the expression of formal defect will attract as was discussed in 2008 CLC 466. Moreso, the provision contained in Order-23 Rule-1 of Code of Civil Procedure, 1908 is enabling provision and required under the law to be construed liberally. By giving liberal meaning to the grounds taken in memorandum of appeal, there is formal defect attracted to the suit which cannot be remedied through amendment.

6. For what has been discussed above, Appeal converted into Civil Misc. Appeal in hand is allowed. Consequently, the impugned Order dated 09-05-2023 is set aside. The appellant/plaintiff has granted permission to withdraw the suit with permission to file fresh one subject to payment of cost Rs. 5000/- as litigation has been protracted without justifiable reason. The copy of this

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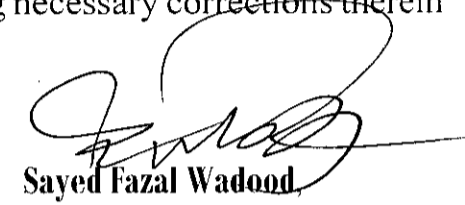
Judgement shall be sent to learned Trial Court; whereas, file of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

7. Announced in the open Court
27-07-2023


Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment consists of three (03) 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