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

CIVIL APPEAL NO. : 28/13 OF 2021
DATE OF INSTITUTION : 06.11.2021
DATE OF DECISION : 10.01.2022

ABDUL RAZIQ S/O ABAD KHAN, R/O SHAMA KHEL KHUJRI,
TEHSIL KAKI DISTRICT BANNU

.....(APPELLANT)

-VERSUS-

1. CHAIRMAN PROGRAM MANAGER, FATA SECRETARIATE
SPECIAL PROGRAM, OFFICE PLOT NO. 3B-1 G-5, DIPLOMATIC
AVENUE, MAITREYAN PLAZA, ISLAMABAD
2. ADO FATA SECRETARIATE SPECIAL PROGRAM
3. DEPUTY COMMISSIONER ORAKZAI
4. DIRECTOR GENERAL FATA PROJECTS WARSAK ROAD
PESHAWAR
5. ASSISTANT COMMISSIONER ORAKZAI
6. TEHSILDAR LOWER ORAKZAI
7. MANAGER CRA DISTRICT ORAKZAI

..... (RESPONDENTS)

Present: Salih Shah Advocate for appellant.

JUDGEMENT

10.01.2022

Impugned herein is the decree/judgement dated
11.09.2021 of learned Senior Civil Judge, Orakzai vide which
the suit of the appellant/plaintiff has been dismissed.

2. In a suit before the court of learned Senior Civil Judge,
Orakzai, appellant/plaintiff sought recovery of Rs. 2,105,017/-
against the respondents/defendants no. 1 to 4 on the grounds, that
the appellant/plaintiff worked as contractor for construction of
various works under the respondents/defendants no. 1 to 4 and
after completion of all the projects with all variations and
escalation, the respondents/defendants no. 1 to 4 did not make
him the due payment.

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As per contents of plaint, the appellant/plaintiff being contractor was awarded the following contracts vide agreement deed dated 17.07.2017;

- FXOI-037- civil veterinary dispensary
- FXOI-035- civil veterinary dispensary
- FXOI-034- civil veterinary dispensary

During the period of construction, the scope of works were changed at which the appellant/plaintiff refused to execute the works but the respondents/defendants promised to pay the extra charges, if incurred. However, after execution of all the works, respondents/defendants failed to pay the amount as per BOQ prepared by the appellant/plaintiff according to the site. Hence, the suit.

The respondents/defendants were summoned but they failed to appear before the court, hence they were proceeded ex-parte. The appellant/plaintiff led the ex-parte evidence and after conclusion of the evidence, the learned trial court heard the arguments and dismissed the suit vide impugned judgement/decree. Hence, the present appeal.

3. On presentation of the appeal, the memorandum of appeal was gone through which revealed that in the suit the respondents no. 1 to 4 were arrayed as defendants but in memorandum of appeal the Assistant Commissioner Orakzai, Tehsildar Lower Orakzai and Manager CRA have also been impleaded as

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respondents. Similarly, as per plaint the suit was valued in the sum of Rs. 2,105,017/- for the purpose of court fee and jurisdiction but the memorandum of appeal has been valued in the sum of Rs. 200/- for the purpose of court fee and jurisdiction. However, being regular first appeal, pre-admission notice was issued to the respondents/defendants and the appellant/plaintiff was directed to pay the court fee. None of the respondents/defendants turned up before the court; therefore, they were proceeded ex-parte.

During pendency of appeal, the appellant/plaintiff instead of paying court fee came up with application for waiver of the court fee. The application was fixed for arguments alongwith the arguments on main appeal.

Accordingly, arguments heard on the application as well as on the appeal.

5. So far, application of the appellant/plaintiff for waiver of court fee is concerned, the court has got no power to waive off the court fee except where appeal is instituted in *forama pauperise*. In the instant case the present appeal has neither been originally instituted in *forama pauperise* under rule 1 order 44 of the CPC nor the present application has been moved to continue the appeal in *forama pauperise*. Hence, the application of the appellant/plaintiff for waiver of court fee is turned down.

6. With respect to merits of the case, the claim of the appellant/plaintiff is, that the contracts were awarded to him for

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execution of various construction works vide agreement deed dated 17.07.2017; however, after issuance of work orders, the scope of works were changed involving extra cost at which the appellant/plaintiff refused to execute the works but the respondents/defendants promised to pay the extra amount, therefore he continued with the execution of works. In view of the pleadings coupled with the evidence brought on record and the material available on file points for determination of the dispute between the parties are; whether the scope of works was changed and the escalation occurred, if yes whether these were notified to the respondents/defendants and whether the respondents/defendants had promised to pay the extra amount.

In order to prove his stance, appellant/plaintiff appeared in the witness box as PW-13 wherein he has reiterated the contents of plaint. He has also produced Naimat Ullah as PW-1, Taseer Ullah as PW-2, Ahmad Ullah Khan as PW-3, Zakir Ullah Khan as PW-5, Hamza Ali as PW-5, Ikram Ullah as PW-6, Waheed Ullah as PW-7, Muhammad Iqbal as PW-8, Haji Khan as PW-9, Muhammad Zamran Khan as PW-10, Rooh Niaz Khan as PW-11 and Shah Jahan as PW-12. All the witnesses have alleged in their statements that they have worked with the appellant/plaintiff in completion of the projects; however, not an iota of oral or documentary evidence is brought on record by the appellant/plaintiff as to show that the scope of the work/works

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were changed. With respect to work variation article 7 of the agreement deed dated 17.07.2017 executed between the parties, prescribes the procedure for alteration, modification, additive or deductive work but the appellant/plaintiff being contractor has neither given a notice of any such variation to the respondents/defendants nor the procedure for work variation as laid down under the ibid provision of agreement has been adopted. Similarly, not a single oral or documentary evidence has been brought on record as to show that the respondents/defendants have verbally promised to pay the appellant/plaintiff for work variation or escalation.

Furthermore, as discussed earlier, the form of appeal is also defective.

7. Hence, in view of what is discussed above, the instant appeal being without merits, is dismissed with cost. Appellant/plaintiff is directed to pay the required court fee within a month of the order. Copy of this order be sent to learned trial court for information. The requisitioned record be returned to record room while file of this court be consigned to Record Room after its completion and compilation.


Pronounced
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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: 10.01.2022


(SHAUKAT AHMAD KHAN)
District Judge, Orakzai
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