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**IN THE COURT OF ABDUL BASIT,  
ADDITIONAL DISTRICT JUDGE-II, ORAKZAI**

Civil Misc. Appeal No. 17/14 of 2023

Date of institution: 03.11.2023

Date of decision: 20.12.2023

Date of consignment:

Ahmad Siraj son of Qabil Khan resident of Quam Mishti Tapa Darwi  
Khel, Village Zawan Tehsil Central Orakzai and two others  
(appellants/defendants)

Versus

Shaurung son of Naurang Khan caste Mishti, Tapa Darwi Khel, Village  
Zawan Post Office Mishti Mela, Tehsil Central Orakzai  
(respondent/plaintiff)

**JUDGMENT**

This civil miscellaneous appeal has been preferred against the judgment and order dated 09.10.2023 whereby the learned Civil Judge-II, Kalaya Orakzai has allowed the application of respondent for the appointment of local commission to record the statement of Agha Jan.

Concise facts of the case are that respondent/plaintiff has filed a civil suit seeking declaration to the effect that he was owner in possession of landed property/field measuring 5 jarib bounded by east fields of Mama Khel, fields of Sameer and passage, west fields of Mama Khel, north fields of Daarye and south passage and fields of Badar, the suit property, with which appellants/defendants have no concern; that respondent/plaintiff has also prayed for recovery of lease amount of Rs. 275,000/- for the period between 2000 and 2008 and on rendition of account, the half profit from the period 2014 to 2022 and till disposal of the case; that respondent/plaintiff has also prayed for possession of the suit property on demolishing of the constructions, if any made during the pendency of suit and decree for permanent and mandatory injunctions so as to restrain appellants from making any sort of sale, interference and constructions in the suit property.

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The appellants/defendants appeared before the learned trial court and submitted joint written statement, wherein, raised various legal and factual issues. As per order sheet of learned trial court, he has framed the issues and case was fixed for evidence. On 02.09.2023, respondent/plaintiff has filed an application to appoint a local commission to record the statement of Agha Jan, a witness, for the reason that he is an important witness of the case and he cannot attend the court to record the statement due to illness. The appellants/defendants filed a written reply and contested the application. The learned trial court allowed the application vide order dated 09.10.2023 and appointed Mr. Insaf Ali, advocate, as local commissioner, to record the statement of Agha Jan in his house in presence of parties and their counsel. The appellants/defendants being aggrieved of the verdict have impugned the judgment and order through this appeal.

Arguments heard and record perused.

Before parting with my findings and the assistance furnished by learned counsel for parties, I would like to mention that Order XXVI of The Civil Procedure Code, 1908 deals with the subject of commissions, examination of witnesses by local commissioner, a local investigation through commission and the rests. Rule 1 of the Order *ibid* clearly provides those cases in which court may issue commission to examine the witnesses and empowers that any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is sick or infirm and unable to attend the court. Likewise, Rule 2 of the Order *ibid* further empowers the court to issue a commission for examination of a witness either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

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In the instant case, respondent/plaintiff has filed an application mentioning the fact that Agha Jan is an important witness of the case, however, he is ill and unable to attend the court to record his statement; therefore, sought permission to record his statement through the local commissioner, which was considered by the learned trial court and the local commission was appointed to record his statement, which in the wake of above discussed provisions of law was aptly in accordance with law and I have found no legal infirmity or defect in the impugned order. So far contention of learned counsel for respondent/plaintiff that the statement of not a single witness has been recorded till date or that respondent/plaintiff has failed to produce any documentary evidence about the illness of witness, whose statement is sought to be recorded through commission, it is held that admittedly the statement of not a single person has been recorded till date; however, keeping in mind the fact of illness of the witness, priority may be given to said witness so that a piece of evidence may be brought on record to decide the *lis* on merits instead the witness may not be able to record his statement due his illness. So far question of illness of the witness is concerned; the learned counsel for respondent/plaintiff produced the copies of medical documents of witness, which shows that the witness is ill.


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In the wake of above discussion, it is held that learned counsel for appellants/defendants has failed to point out any legal defect or infirmity in the impugned judgment and order, hence, the impugned judgment & order dated 09.10.2023 of the learned trial court is upheld and appeal in hands is **dismissed** being bereft of merits. The learned trial court, however, is directed to go through the file thoroughly and frame the issues, if not framed earlier as the issues were not found on file, as per pleadings of parties so that parties to the suit may know the line on which they have to lead the evidence.

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Parties have to bear costs of their proceedings because none of the parties has specifically produced any evidence not proved the cost incurred on the appeal.

Copy of this order be placed on record of learned trial court, where after, the requisitioned record be returned and file of this court consigned to record room after necessary completion and compilation.



**Announced**  
20.12.2023

**Abdul Basit**  
Addl. District Judge-II, Orakzai

**CERTIFICATE**

Certified that this judgment consists of four (04) pages, those are signed by me after necessary corrections.



**Announced**  
20.12.2023

**Abdul Basit**  
Addl. District Judge-II, Orakzai