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

Civil Misc. Appeal No. 18/14 of 2023

Date of institution: 04.11.2023

Date of decision: 23.12.2023

Date of consignment:

Khiyal Shah son of Muzaffar Shah caste Shinai Tapa Haid Khel Kandi  
Ali Khan resident of Alwara Mela Central Orakzai present at Moza  
Farsha Banda, District Hangu & seventeen others (appellants/plaintiffs)

Versus

Safar Gul son of Ali Hasan caste Mashiti Tapa Darvi Khel Kandi  
Parachgan resident of Alwara Mela Tehsil Lower Central District  
Orakzai & six others (respondents/defendants)

**JUDGMENT**

This civil miscellaneous appeal has been preferred against the  
judgment and order dated 26.10.2023 whereby the learned Civil Judge-  
II, Kalaya Orakzai has dismissed their application for withdrawal of  
suit with permission to file fresh suit and fixed the case for evidence.

Concise facts of the case are that appellants have filed a Civil  
Suit No. 12/1 of 2022 before the court of learned Civil Judge-II, Kalaya  
Orakzai on 20.11.2020, wherein, alleged that they were owners of suit  
properties, fully detailed in the headnote of plaint, since the time of their  
forefathers; that they were residing in district Hangu and suit properties  
were given in possession of respondents no. 1-6 on tenancy on payment  
of half produce as rent; that respondents no. 1-6 had stopped paying the  
produce from the last year and started claiming the ownership of suit  
properties despite fact that they had no concern with it; that respondent  
no. 2 had also illegally exchanged the suit property detailed in para  
"dal" with respondent # 7 on pretext of interim arrangement; therefore,  
they have prayed for decree of declaration that they are owners of suit

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properties and respondents have no concern with it; that they have also prayed for decree for possession through eviction of respondents from the suit properties, hence, the suit.

The suit was contested by respondents before the learned trial court. On 20.12.2022, the learned trial court dismissed the suit. On 17.01.2023, the appellants have assailed the dismissal order before the court of learned Addl. District Judge-II, Orakzai in Civil Appeal No. 04/13 of 2023, which was allowed, the impugned judgment, decree and order of the learned trial court was set-aside on 10.04.2023 and case was remanded to learned trial court with direction to frame additional issues, lead the evidence accordingly and decide the case afresh. The learned trial court received the case and invited the parties to submit the proposed issues. The additional issues were framed accordingly. On 05.06.2023, however, learned counsel for appellants filed application for amendment in the issues but the learned trial court dismissed the said application on 06.09.2023. To achieve the object, on 23.09.2023, appellants have filed application for withdrawal of suit with permission to file fresh suit, which was also dismissed by the learned trial court on 26.10.2023 with observations that the appellants have failed to point out any legal defect at the time of dismissal of suit in first round of litigation and even did not raise such plea before the learned appellate court in appeal against the said dismissal order or at the time of remand of case and remarked that those formal defects could have been removed by filing an amended plaint.

Appellants being aggrieved of the verdict have filed this appeal with assertion that impugned judgment and order of the learned trial court is wrong, baseless, unfounded, result of misreading and non-reading of record on file and subject to set-aside. He added that learned

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trial court has not properly perused the record and decided the petition in haste because, the points they have raised in their application cannot be cured by filing amended plaint; therefore, prayed that on acceptance of instant appeal, the impugned judgment and order of the learned trial court may be set-aside and they may be permitted to withdraw the suit with permission to file fresh one.

Learned counsel for the respondents refuted the arguments of learned counsel for appellants and argued that appellants have filed the instant application just to linger on the proceedings; therefore, their appeal may be dismissed and judgment and order of the learned trial court may be upheld.

Arguments heard and record perused.

Viewing the arguments advanced by learned counsel for parties and record before the court, it is held that there is no denial of fact that earlier the suit of appellants was dismissed, which was challenged by them in an appeal, which was allowed and case was remanded to the learned trial court for framing of issues in light of observation made by court and decide the case afresh after leading the evidence. On receipt of case on remand, learned trial court asked parties to submit proposed issues. The appellants have filed the proposed issues while respondents did not opt so; therefore, additional issues were framed, however, the learned trial court did not consider all the proposed issues advanced by appellants, for which they have filed an application for amendment in issues, nevertheless, their application was dismissed on 06.09.2023 with observations that since the proposed issues were beyond pleadings and they cannot deviate from pleadings or make improvements at later stage, which order was not assailed in an appeal, and thus closed the door for amendment in the pleadings. I have studied the application of

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appellants and reached to conclusion that appellants intend to withdraw the instant suit with permission to file fresh one on ground that their actual claim is against respondents no. 1-4, whereas, they only intend to restrain the remaining respondents from interference etc. in the suit properties. They also intend to submit a fresh suit to include the prayers for rendition of accounts, recovery of produce amount, possession through demolishing of new constructions and to raise a plea that respondent no. 1 in collusion with other owners have sold out their some property to health department and in return acquired jobs, which pleas were inadvertently left to be raised in the main suit, which all appears to be solid ground for withdrawal of suit with permission to file fresh suit.

In agree with findings of learned trial court that these pleas can be submitted by filing an amended plaint, however, on one side the learned trial court in its order dated: 06.09.2023 has closed their way by holding that that cannot deviate from their pleadings or make any changes/improvements in pleadings, whereas, on the other side refused them to withdraw the suit with permission to file fresh one, which is against the natural justice. By allowing so, appellants would be in a position to add or delete parties and submit comprehensive pleadings by looking into all aspect of the case, which would not only achieve the ends of justice on hand but shall also avoid multiplicity of litigation between the parties in the future. Besides, Order 23 Rule 1 (2) of The Civil Procedure Code, 1908 also provides that Where Court is satisfied that a suit must fail by reason of some formal defect, or that there are other sufficient grounds for allowing the plaintiff to institute fresh suit for the subject-matter of a suit or part of claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or

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abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of claim. Contents of application provide that appellants have come to know about the legal defect in their suit during evidence and if that legal defect is not removed, there is likelihood of defeating the ends of justice, which is not the spirit of law.

In view of the above, it is held that the learned trial court has not properly looked into the available pleadings and record on file, hence, appeal in hands is allowed, judgment and order dated: 20.10.2023 of the learned trial court is set-aside and appellants/plaintiffs are permitted to withdraw the suit in hands with permission to file fresh one purely in accordance with law and subject to payment of costs of Rs. 10,000/- to be paid by appellants/plaintiffs to respondents/defendants no. 2 & 3. The learned trial court may be informed accordingly.

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


**Announced**  
23.12.2023

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

**CERTIFICATE**

Certified that this judgment consists of five (05) pages, those are signed by me after necessary corrections.

**Announced**  
23.12.2023

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