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

Civil Appeal No. 16/13 of 2023

Date of institution: 13.05.2023

Date of decision: 07.02.2024

Date of consignment:

Muhammad Haneef son of Manab Khan and Meharban Khan son of Sultan Akbar residents of Tribe Mishti Mir Ghara, Orakzai (appellants/plaintiffs)

Versus

Obaid Gul son of Khiyal Gul and Omar Gul son of Khiyal Gul Caste Hujam residents of Mishti Bazar, Orakzai (respondents/defendants)

**APPEAL UNDER SECTION 96 OF CPC AGAINST
THE JUDGEMENT AND DECREE OF THE LEARNED CIVIL
JUDGE-II, KALAYA ORAKZAI**

JUDGMENT

This civil appeal has been preferred against the judgment and order dated 29.04.2023 whereby the learned Civil Judge-II, Kalaya Orakzai has dismissed civil suit no. 45/1 of 2022 of the appellants/plaintiffs.

Concise facts of the case are that appellants were owners of five fields (khait) and a house situated in Alwoorah Mela Aqab Mishti Bazar, the suit property; that appellants have leased out suit property to respondents on payment of Rs. 10,000/- per annum through agreement dated 16.04.2020; that in compliance to the agreement, the suit property was handed over to respondents, however, on completion of period, when the appellants have demanded the money, respondents have not only refused the payment but made forcible possession over the suit property; therefore, appellants have prayed for specific performance of the contract, recovery of money as per agreement and possession of the suit property, hence, suit.

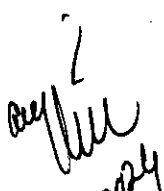
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07/02/2024

Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

The suit was contested by respondent no. 2 before the learned trial court. On 29.04.2023, learned trial court dismissed the suit. On 13.05.2023, appellants being dissatisfied with judgment, decree and order of the learned trial court have assailed the dismissal order through instant appeal, however, on 02.11.2023, appellants have filed an application under Order 23 rule 1 of The Civil Procedure Code, 1908 to withdraw the suit with permission to file fresh one on grounds that there were some formal defects in the main suit because neither the necessary parties had been impleaded nor the boundaries of suit property have been given in the suit. The learned counsel for respondents submitted the written reply and contested the application vehemently.

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 the suit of appellants was dismissed by the learned trial court and appellants have assailed the dismissal order before this court in appeal, however, on coming to know about the formal defect in the suit, appellants have moved the application for withdrawal of suit with permission to file fresh one, which appears to be quite genuine because contents of plaint are silent about the boundaries of suit; therefore, in case the appeal is allowed and suit is decreed in favour of appellants, then, it would be hardly possible for the executing court to execute the court decree without specification of the boundaries of the suit property. Likewise, appellants have alleged that there existed twenty families in the suit property and unless and until all of them or necessary parties out of them are not impleaded in the suit, then object of the suit would not be achieved, which both are sufficient reasons to allow the appellants to withdraw the suit.


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In view of the above, it is held that in case appellants are not allowed to withdraw the suit with permission to file fresh suit, then, no executable decree can be passed in favour of appellants. Since, appeal is continuation of the main suit; therefore, on allowing the appeal, the impugned judgment, decree and order dated 29.04.2023 of the learned trial court is set-aside and on allowing the application in question, the suit of appellants is dismissed as withdrawn with permission to file fresh suit with costs of Rs. 25,000/- to be paid by appellants to respondent no. 2.

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
07.02.2024

Abdul Basit
Addl. District Judge-II, Orakzai

CERTIFICATE

Certified that this judgment consists of three (03) pages, those are signed by me after necessary corrections.



Announced
07.02.2024

Abdul Basit
Addl. District Judge-II, Orakzai