In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

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BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI AT BABER MELA

Civil Appeal No. CA-14/13 of 2022

Date of institution: 20.10.2022
Date of decision: 14.11.2022

&

Civil Revision No. 3/12 of 2022

Date of institution: 20.10.2022
Date of decision: 14.11.2022

Khan Bahadur son of Gul Bahadur, resident of Qaum Mishti Khel Tappa Haider Khel, Tehsil Central and District Orakzai.

..... **(Petitioner/plaintiff)**

...Versus...

Sayed Ameen son of Abdul Mateen resident of Qaum Mishti Khel Tappa Haider Khel, Tehsil Central and District Orakzai.

..... **(Respondent/defendant)**

Appeal and Revision against Order dated 07-09-2022, passed in Civil Suit No. 63/1 of 2022.

JUDGMENT

The captioned Civil Appeal and Civil Revision have jointly been taken for consideration through this single Judgement for the reason that both of them had arisen out of one Order dated 07-09-2022; passed in Civil Suit No. 63/1 of 2022 by learned Civil Judge-II, Tehsil Courts Kalaya, Orakzai.

2. Briefly stated facts of the case are that the plaintiff Khan Bahadur (petitioner herein) has filed civil suit against the defendant Sayed Ameen (respondent herein) for declaration, injunction and possession. It is detailed in averments of the plaint that he is owner in possession of the suit property known as Kashy Seeray Ghar and Jranda situated at Qaum Mishti village

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Haider Khel Orakzai on the strength of Deed executed between the parties in the year 1990. The interference of defendant in the suit property in against the Law and facts that necessitated presentation of suit.

3. On appearance, the defendant had submitted written statement, stating therein that the plaintiff has got no nexus with the ownership and possession of the suit property. The elders of Haider Khel which is the sub caste of Darvi Khel has jointly and severally contracted lease agreement with one Muhammad Asghar of Mishti Mela for coal mining in the area. The document and claim of plaintiff regarding property is fake and concocted with ulterior motive of illegal gain.

4. The defendant has presented an application for rejecting the plaint under Order-7 Rule-11 of Code of Civil Procedure, 1908; whereas, the plaintiff submitted an application for withdrawal of the suit with permission to file fresh one under Order-23 Rule-1 of Code of Civil Procedure, 1908. Both the applications have been clubbed and disposed of through single impugned Order; wherein, petition for rejection of plaint was allowed and application for withdrawal with permission to file fresh one was turned down on the basis of being infructuous. The Order of rejection was assailed in Civil Appeal bearing No. 14/13 of 2022; whereas, Order of dismissing the permission of withdrawal was clutched in Civil Revision No. 3/12 of 2022. Both the Civil Appeal and Civil Revision are under consideration and being disposed of through this single Judgement.

5. Mr. Abdul Qayum Khan Advocate representing plaintiff/petitioner argued that he himself admitted failure of the suit due to some formal defects and that is why he has presented application for withdrawal of suit with

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permission to file fresh one before learned Trial Court. This defective suit was liable to be withdrawn and was wrongly based for determination of its rejection.

6. Mr. Abid Ali Advocate for respondent/defendant contended that the plaint has rightly been rejected by learned Trial Court as the same was not maintainable even if withdrawal with permission to file fresh one was conceded.

7. An Order rejecting a plaint is a decree and is appealable as such. Similarly, revision is lying against disallowing withdrawal and thus there is no issue in formation of the appeal and revision.

8. For rejecting a plaint, the Court can only examine the plaint and its accompaniments and nothing else. The substance of the plaint should be looked into while deciding application for rejecting plaint. When the presenter of the plaint himself is terming it defective and having formal defects as a whole, the Court was supposed to first determine petition for withdrawal of the suit with permission to file fresh one and subsequently to check it in the touch stone of Order-7 Rule-11 of Code of Civil Procedure, 1908. It has been settled in cases reported as P-2004 SCAJK-1 and 1989 ALD-100 that where an application for withdrawal has been filed, the Court cannot decide the case on merits. The logic behind this order of preference is to prevent technicalities from defeating justice.

9. In the light of above discussed facts and circumstances of the case, this Court holds the view that impugned Judgement was passed without taking the peculiar circumstances of the case and proper application of Law into consideration. Resultantly, Revision Petition stands allowed. The case

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is remanded back to learned Trial Court with the direction to decide the petition for withdrawal of suit with permission to file fresh one on its merits. As for as appeal is concerned, the application for withdrawal of suit with permission to file fresh one is being remanded for its determination on merit; therefore, commenting or determination of question of rejecting plaint is premature. However, the respondent is at liberty to re-agitate the question of maintainability before the learned Trial Court if was needed or desired in the subsequent course of action. Costs shall follow the events.

10. Requisitioned record be returned back with the copy of this Judgement while file of this Court be consigned to the District Record Room after completion and compilation within the span allowed for.

11. Announced in the open Court
14.11.2022

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CERTIFICATE.

Certified that this Judgment is consisting upon four (04) 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