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22.12.2022

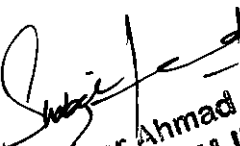
Parties present.

Through this single order I want to dispose of 02 applications, 1. for rejection of plaint under Order VII Rule 11 and section 11 CPC filed by the defendants and 2. for withdrawal of the suit with the permission to file fresh suit filed by plaintiffs.

Arguments already heard and record perused.

Brief facts of the case are that plaintiffs have filed the instant suit for declaration cum perpetual injunction to the effect that plaintiffs and defendants are co-owners and co-sharers in the suit property consisting of fields and mountains called *Mordagan* and *Babrane* situated at Central Orakzai, fully detailed in the headnote of the plaint. Plaintiffs have also sought rendition of accounts and possession through partition.

Defendants were summoned who appeared and contested the suit by filing written statement and reply to the application for grant of temporary injunction. Defendants also filed an application under Order VII Rule 11 & Section 11 CPC for rejection of plaint contending that the same matter, between the same parties has already been adjudicated and that the same has gain finality. While plaintiffs filed an application under Order XXIII Rule 1 CPC for withdrawal of the suit with the permission to file a fresh one.


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23/12/2022
Orakzai (Tribunal-II)

1. Application for rejection of plaint under Order VII Rule 11 and Section 11 CPC.


This application was filed by defendants, contending that the matter in issue has already been decided under FCR and has gain finality. That the suit of the plaintiffs is hit by rule of res-judicata. That the suit of the plaintiffs is liable to be rejected.

As per law, plaint can only be rejected when it does not disclose a cause of action or relief claimed is undervalued or plaintiff fails to correct the valuation in-spite directions of the court or that plaint is written upon insufficient stamp papers or suit is barred by law.

While Section 11 CPC describes rule of res-judicata which states that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under same titled in a court competent to try such subsequent suit or the suit in which such issue been subsequently raised, and has been heard and finally decided by such court.

As far as the instant is concerned, the matter was decided by the court of Assistant Political Agent, Lower Orakzai vide order dated 03.03.2015. The same was challenged before the court of Commissioner FCR, Kohat Division, Kohat, which remanded back the suit vide order dated 08.01.2016 to the court of then Assistant Political Agent Lower Orakzai with the following observations.

“from the perusal of the record it transpires that the second condition of the Jirga verdict i.e. taking of oath from 10


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Judge/JM-II
Orakzai (Kalya)

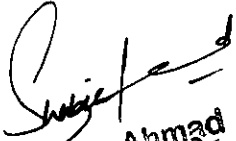
persons belonging to the plaintiffs/respondents has not been fulfilled; therefore, the case is remanded back to the trial court with the direction to implement the second condition of the verdict of the Jirga and administer the prescribed oath. The impugned order is upheld subject to taking of prescribed 10 person oath from plaintiffs/respondents. The appeal is dismissed”.

There is nothing on record which could show that the second condition of the verdict of the Jirga has been implemented or any final order has been passed by the court of Assistant Political Agent, Lower Orakzai. Therefore, it cannot be said that the matter in issue has been finally decided between the parties.

On what has been discussed above, it is held that the application of the defendants under Order VII Rule 11 and Section 11 CPC does not covers four corners of law, hence, stands **dismissed**. No order as to costs.

2. Application under Order XXIII Rule 1 CPC for withdrawal of the suit with the permission to file a fresh one file by plaintiffs.

This application has been filed by plaintiffs for withdrawal of suit with permission to file a fresh suit stating that there are incomplete averments in the plaint. That the matter has been decided under FCR by the then APA in the year 2015 and appeal against the said order has also been passed in the year 2016. That the plaintiffs inadvertently has not mentioned these facts in the present suit and both the decisions of APA and Commissioner FCR are not according to Jirga verdict. That since

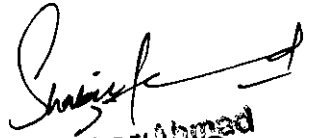

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there are formal defects in the present suit, therefore, plaintiffs want to withdraw the instant suit and to file a fresh one. That the plaintiffs also want to challenge those decisions as they were contradictory to the findings of Jirga verdict. That other necessary parties have also not been arrayed in the present suit. That since the suit property is undivided, therefore, plaintiffs want to submit proper renditions of accounts in the fresh suit.

On the other hand counsel for defendants strongly resisted the application by filing reply and forwarding arguments thereto. Counsel for defendants contends that plaintiffs want to withdraw the suit to file a fresh one, only to fill up the lacunas in the present suit. That the suit has already been decided under the FCR and has gain finality. That the suit comes within the ambit of past & closed transaction, therefore, cannot be withdrawn with the permission to file a fresh one.

Order XXIII, Rule 1 CPC empowers the plaintiffs to withdraw their suit at any time of the institution of the suit with permission to file a fresh one subject to formal defects and subject to satisfaction of the Court. Since there are incomplete averments in the present suit and incomplete averments amounts to formal defects. Suit of plaintiffs will ultimately fail by reasons of these formal defects.

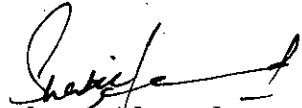
Keeping in view formal defects in suit, application for withdrawal of the suit with permission to file a fresh one is hereby **accepted** with a cost of Rs. 7000/-. Resultantly suit in


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hand is **dismissed** as withdrawn with permission to file fresh suit
subject to all legal limitations within 02 months.

File be consigned to District Record Room, Orakzai
after its proper completion and compilation.

Announced
22.12.2022


Shabeer Ahmad,
Civil Judge-II,
Tehsil Courts, Kalaya, Orakzai