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IN THE COURT OF SHAUKAT AHMAD KHAN,
DISTRICT JUDGE, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 12/13 OF 2022
DATE OF INSTITUTION : 19.10.2022
DATE OF DECISION : 24.11.2022

1. GUL AKBAR S/O MUHAMMAD AKBAR
2. SADIQ S/O FAZAL AKBAR
BOTH RESIDENTS OF TORA WARI, TEHSIL TALL, DISTRICT
HANGU

.....(APPELLANTS)

-VERSUS-

1. DIN SHAH
2. WAZIR BADSHAH
3. PIR BADSHAH
SONS OF MUHAMMAD SHAH, ALL RESIDENTS OF MAMOZAI,
TAPA ABDUL UR RAHIM KHEL, VILLAGE KARYA, TEHSIL
UPPER, DISTRICT ORAKZAI

..... (RESPONDENTS)

Present: Syed Hamza Gilani Advocate for appellants.
: Malak Hamid Khan Afridi and Tajamal Hussain Advocates for respondents.

JUDGEMENT
24.11.2022

Impugned herein is the judgement dated 27.09.2022 of learned Civil Judge-I, Orakzai vide which suit of the appellants/plaintiffs has been dismissed.

(2). In a suit before the learned trial court, the appellants/plaintiffs sought possession through partition of the suit property along with permanent injunctions to the fact that the parties, being close relatives, jointly owned the suit property detailed in the headnote of plaint, with possession of the same with respondents/defendants paying share to appellants/plaintiffs residing at Torawarhi District Hangu. That after emergence of Taliban in the locality, the respondents/defendants migrated from area and the suit property was occupied by Taliban. Moreover, after restoration of law-and-order situation, the respondents/defendants refused to pay share of

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appellants/plaintiffs in the compensation awarded for damage to the house and land. The respondents/defendants contested the suit through their written statement on various legal and factual grounds. The parties were provided with opportunities to produce evidence in their respective contention.

The appellants/plaintiffs produced Gul Ashgar s/o Abdullah Shah as PW-1, Rehman Shah s/o Abdullah Shah as PW-2, Jamal Khan s/o Meer Mat Khan as PW-3, Saeed Ullah Khan s/o Ghafar Khan as PW-4 and Sadiq Akbar s/o Fazal Akbar as PW5. While respondents/defendants produced Jamal Deen s/o Rakham Deen as DW-1, Habib Rehman s/o Niaz Badeen as DW-2, Asghar Khan s/o Edat Khan as DW-3 and Deen Shah s/o Muhammad Shah as DW-4 in support of their contention.

The pleadings of the parties were reduced into following issues;

- I. Whether the plaintiffs have got cause of action?
- II. Whether the suit of the plaintiffs is wrong and baseless?
- III. Whether the plaintiffs are estopped to sue?
- IV. Whether suit of the plaintiffs is time barred?
- V. Whether the plaintiffs are the owners of half of the suit property?
- VI. Whether the plaintiffs are entitled to the possession of half of the suit property after partition?
- VII. Whether the defendants have taken illegal possession of the share of the plaintiffs in the suit property?
- VIII. Whether the plaintiffs are entitled to the decree as prayed for?
- IX. Relief.

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After having heard arguments, the learned trial court dismissed the suit of appellants/plaintiffs. The appellants/plaintiffs, being aggrieved of the impugned judgement, filed the instant appeal.

(3). During pendency of appeal, the appellants/plaintiffs submitted application for withdrawal of the suit with permission to file a fresh suit on the ground of formal defects in the suit which was contested by the respondents/defendants through submission of detailed reply. The case was fixed for final arguments as well as arguments on the application. On date fixed, the respondents/defendants submitted fresh Wakalatnama in favour of Tajamal Hussain Advocate and sought time for production of their counsel, which was allowed. After providing the respondents/defendants with another opportunity to produce their counsel, arguments of the learned counsel for the

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appellants/plaintiffs heard at some length. He referred to the panel of parties and the headnote of the plaint and submitted that as all the necessary parties have not been impleaded in the suit and the rest of the joint property of the parties have also not been included in the suit which have led to the failure of the suit of the appellants/plaintiffs; therefore, appellants/plaintiffs may be allowed to withdraw their suit with permission to file a fresh suit.

In view of the aforementioned submissions of learned counsel for the appellants/plaintiffs, it is held that it is a well settled principle of law that though, non-inclusion of all the necessary and proper parties in the suit and non-inclusion of all

the joint property in a suit for possession through partition, are not fatal to the lis but being formal defects no effective decree can be passed in such like circumstances; therefore, the application of appellants/plaintiffs seems genuine. So far, the agonies of the respondents/defendants caused due to protracted litigation, are concerned, the same, to some extent can be compensated through imposition of cost upon the appellants/plaintiffs. When respondent no. 2 as attorney for rest of the respondents was confronted with the aforementioned situation, he also conceded the contention of appellants/plaintiffs subject to imposition of heavy cost upon the appellants/plaintiffs.

(4). Hence, in view of what is discussed above, on acceptance of the application of appellants/plaintiffs, suit of appellants/plaintiffs is dismissed as withdrawn with permission to file a fresh suit subject to cost of Rs. 10,000/- to be deposited in the trial court at the time of submission of plaint to be paid to the present respondents/defendants. File of this court be consigned to record room. Copy of this order be sent to learned trial court for information and compliance.


Pronounced:
24.11.2022


(SHAUKAT AHMAD KHAN
District Judge, Orakzai
at Baber Mela

CERTIFICATE

Certified that this judgment consists of four (04) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 24.11.2022


(SHAUKAT AHMAD KHAN
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