

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

BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI

Civil Appeal No. 09/13 of 2022

Date of institution: 05.04.2022
Date of decision: 05.10.2022

Mastan Ali son of Mehdi Ali and three others r/o Aand Khel Bala Tehsil
Lower District Orakzai

.....(**Petitioners/Plaintiffs**)

...**VERSUS**...

Hikmat Ali son of Safdar Ali and three others residents of Aand Khel
Bala Tehsil Lower Orakzai.

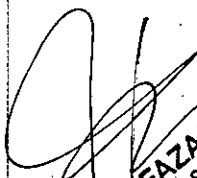
.....(**Respondents/defendants**)

**Civil Appeal against Order dated 26-02-2022 in Civil Case No. 86/1 of
2020.**

JUDGMENT

Through instant Civil Revision Petition, the petitioners/plaintiffs have challenged the validity of Order dated 26.02.2022, passed in Civil Suit No. 86/1 of 2020; whereby, learned the Civil Judge-I, Camp Court Kalaya, Orakzai has stayed the above-mentioned suit by attracting Section-10 of the Civil Procedure Code, 1908.

2. Appeal has been preferred by the plaintiffs while the proper remedy against stay of suit is Civil Revision. It has been settled in a case reported as 1988 CLC 466 that appeal against Order of stay of suit is not competent. In second case reported as PLD 1971 Dacca 286, it has been ordained that revision is competent in appropriate cases. In circumstances, instant Civil Revision has been treated as Civil Appeal in line with the Judgement reported as 1995 MLD 1578 which prescribes that Appeal can be converted



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into Revision and Revision into Appeal, provided same is within period of limitation and other necessary formalities are fulfilled.

3. Brief facts of the case leading to instant Civil Revision. (treated as Civil Appeal) are that plaintiffs Mastan Ali etc (petitioners herein) have instituted/filed a representative suit for declaration, injunction, recovery of money and possession against the defendants to the effect that plaintiffs are real and actual owners of the dwelling house and its adjacent landed property in Stori Khel, Orakzai. They have provided this dwelling house and its adjacent landed property to the defendants for temporary residence and utility against the consideration of working for plaintiffs for free as professional joint workers in different fields which was prevailing custom in the area. This concession has been exploited by the defendants and claimed ownership and retained possession that necessitated presentation of suit.

4. In compliance with summons issued to the defendants, they appeared before the learned Trial Court and contested the suit by submitting an application under Order-7 Rule-10 of the Code of Civil Procedure 1908, with the stance that parties to the suit and subject matter of the suit are similar in a suit titled "Hikmat Ali etc. vs Mastan Ali ect." which is earlier instituted and pending adjudication in the same Court. On receiving reply of such application followed by arguments, learned Trial Court accepted the application and stayed the suit vide impugned Order which is subjected in the instant Civil Appeal.

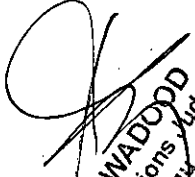
5. Sayyed Hamza Gelani Advocate representing appellants argued that some of the parties are different in both the suits. Similarly, the shares


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claimed are also different. The prayer part of both the suits and the stance and grounds of both the suits are different and thus provision applied by the learned Trial Judge for stay of suit is not applicable.

6. Mr. Javid Muhammad Panji Advocate representing respondents is of the view that the five conditions required for application of Section-10 of the Civil Procedure Code, 1908 are available and stay of suit was only available option mandated by Law.

7. Perusal of record reflects that parties are under litigation in two suits. Plaintiffs of one suit are defendants of other suit and vice versa. Some addition and deletion in parties have been made but that is also curable as the second suit is of representative in nature and those who have not been impleaded are impliedly arrayed as party. However, the contents and plea raised in both the suits are different; that too, with different prayers on different grounds. Very relevant Judgement reported as 2008 CLC 398 is reproduced herein below for testing the applicability of Section-10 of the Code of Civil Procedure, 1908. *"Two suits pending, one field for specific performance of agreement and permanent injunction while other for declaration, possession and recovery of mesne profit. One test of applicability of S. 10, C.P.C, is to see whether on final decision being reached in previous suit, such decision would operate as resjudicata in subsequent suit. Subject matter of both the suits same with some exception. Cause of action were different as well as reliefs claim in both suits also different. If suit filed by applicant was decreed there would be no need to proceed with subsequent suit, if suit of applicant dismissed the suit filed by*

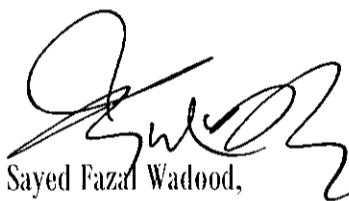

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respondent would have to be processed on merits. Instead of staying the suit filed by respondents and to avoid conflict of opinion, High Court consolidated both the suits to proceed together." On the gadget of the referred Judgement, the Section-10 of Code of Civil Procedure, 1908 has wrongly been applied. The mistaken view of law always attracts provision of Section-115 of Code of Civil Procedure, 1908 and thus impugned Order is without lawful authority and is liable to be corrected in revision.

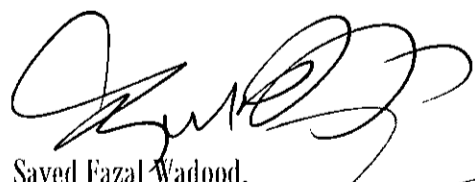
8. For what has been discussed above, the impugned Order of the learned Trial Court is hereby set aside; however, the questions pertaining to consolidation, clubbing, fixing on same date with separate proceedings of both the suits are being kept open for the learned Trial Court to decide. Requisitioned record be returned with copy of this Judgement and file of this Court be consigned to District Record Room, Orakzai after its completion and compilation within the span allowed for.

9. Announced in open court
05.10.2022


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CERTIFICATE

Certified that this Judgment consists of four (04) pages. Each page has been checked and signed by me after necessary corrections and read over to the parties in open Court.


Sayed Fazal Wadood,
AD&SJ, Orakzai at Baber Mela