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

Civil Appeal No. 03/13 of 2024

Date of institution: 15.01.2024

Date of decision: 01.04.2024

Date of consignment:

Muhammad Usman son of Afsar Khan resident of Yaqoobi Kala Tehsil  
Takht Nusrati, District Karak (appellant/plaintiff)

Versus

Muhammad Haroon son of Hasan Badshah resident of Zareen Kala Tehsil  
Takht Nusrati, District Karak and one other (respondents/defendants)

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

**Ex-Parte Judgment**

Through this ex-parte judgment I will decide civil appeal preferred by appellant against respondents challenging the ex-parte judgment, decree and order dated 19.12.2023 of the Court of learned Civil Judge-I, Orakzai, whereby, he has dismissed the suit of appellant/plaintiff.

Concise facts of the case are that appellant was resident of district Karak and worked as private contractor; that respondent no. 1 was Junior Clerk in Public & Health Department and respondent no. 2 was government contractor; that respondent no. 1 has acquired contract of Swaru Kot High School from respondent no. 2 through a ring, which he onward entrusted to him for construction of school building at the rate of Rs. 450/- per sqft and construction of boundary walls at the rate of Rs. 70/- per sqft through an agreement dated 24.07.2021; that he has supplied the necessary material and labor for the construction of school as per agreement and erected 75% of the school building consisting of boundary walls, ground floor and first

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floor in April 2023; that respondent no. 1 has stopped further construction work on pretext of no release of cheque but in August he started the balance construction work through other private contractor; therefore, when he has demanded the money of the work done by him, respondent no. 1 bluntly refused; hence, appellant has prayed for specific performance of contract coupled with recovery of Rs. 7,833,597/- from respondent no. 1 and return of the construction material as per list annexed with the plaint or its market value; that appellant has also prayed for decree for permanent & mandatory injunctions so that respondents may be restrained from further construction work, hence, suit.

Respondents were summoned by the learned trial court but none of them appeared and placed ex-parte. The learned trial court after recording the ex-parte evidence and hearing arguments dismissed the suit. Appellant being not satisfied with the decision preferred the instant appeal, wherein, stated the facts of the case and alleged that order of the learned trial court is illegal, against the law and facts, unfounded, suffers from material illegality & irregularity, result of misreading & non-reading.

On 08.03.2024, the appellant has also filed an application under Order XLI Rule 27 CPC for permission to adduce the additional evidence of Muhammad Faheemullah; therefore, prayed that on acceptance of instant appeal, the ex-parte judgment, decree and order of the learned trial court dated 19.12.2023 may be set-aside and while allowing his application, the case in hands may be remanded to the learned trial court with direction to lead the additional evidence of Faheemullah and then decide the case afresh in accordance with law.

Ex-parte arguments heard and record perused.

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In view of ex-parte arguments and record placed on file, it is held that appellant in his plaint expressly mentioned that respondent no. 1 was Junior Clerk in the Public Health Department, who has acquired a contract through ring and onward entrusted to him for implementation through agreement dated 24.07.2021, Exh.PW 1/1. This is an admitted position that there is no evidence in rebuttal for the reason that respondents had been placed ex-parte, whereas, the evidence produced by appellant should have been considered, however, appellant was still under heavy duty to prove the legality of agreement arrived between him & respondent no. 1 by producing confidence inspiring and un-shattered evidence on file. Since, respondent no. 1 was Junior Clerk in a government department and any government servant or official cannot take part in any bid/auction etc. or acquire the contract in private capacity as per service rules unless he has no objection certificate from the concerned department; therefore, it is rightly observed by learned trial court that appellant has failed to prove that under what capacity the respondent no. 1 has entered into agreement with appellant and whether he was competent to do so or not.

Besides, there is also no piece of document, paper or evidence on record to show that respondent no. 2 had actually been awarded the contract for construction of the school; therefore, question of acquiring the contract by respondent no. 1 from respondent no. 2 through ring is also not tenable in the eyes of law. If the contention of appellant is admitted at all, even then, the agreement, Exh.PW 1/1, is admittedly written on a plain paper, which does not specify the area to be constructed by the appellant except the amount of rate, which is incomplete and uncertain agreement. No doubt, the appellant has recorded the statements of laborers, however, none of them have mentioned the wages they had received, if any, nor did disclose the fact that how much area they had constructed.

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So far appellant's application for permission to adduce the additional evidence within the meaning of Order XLI Rule 27 is related, it is held that admittedly Sub-Rule 2 of Rule 1 of Order XVI and Rule 27 of Order XLI of The Civil Procedure Code, 1908 empowers the court to call any witness or document even at appellate stage when the court requires any witness or document to be produced to be examined is necessary to enable it to pronounce the judgment or for any other substantial cause, however, the appellant intends to record the statement of Faheemullah, second marginal witness to the agreement deed dated 24.07.2021, Exh.PW 1/1, which will be only helpful to the court to deduce that agreement was arrived between the parties at dispute, whereas, the record will be still silent about the actual work done and cost incurred by appellant in the construction of school or competence of respondent no. 1 to enter into agreement because complete evidence is silent about all these facts. Besides, earlier, during pendency of the suit before learned trial court, appellant did not submit any application to produce the additional evidence despite he had the chance to file it before filing the appeal in hands and he could have produced the same before the trial court but he failed; therefore, appellant in such circumstances is not entitled to be allowed to produce additional evidence of marginal witness at this stage, which would otherwise meant to fill up the lacunae in his case, the wisdom is drawn from case law reported in 2012 C L C 495.

Since, it was the bounden duty of appellant to prove his case by producing cogent, reliable and confidence inspiring evidence on record but he badly failed to produce it; therefore, it is concluded that appellant has got no cause of action to file the instant suit nor entitled to the decree as prayed for. If the appellant feels aggrieved, he can at the most, challenge the authority & competence of respondent no. 1 to acquire the contract through ring from respondent no. 2 before the proper forum, if so advised.

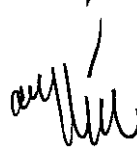
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In view of my findings above, it is concluded that the learned trial court has committed no error in misreading and non-reading of evidence nor did commit any illegality or irregularity in passing the impugned order; hence, ex-parte judgment, decree and order dated 19.12.2023 of the learned trial court is upheld and appeal dismissed ex-parte being bereft of merits.

Appellant has to bear costs of his proceedings because he has not specifically proved the cost incurred on the case.

The requisitioned record along with copy of this order sent to the learned trial court and file of this court consigned to record room after necessary completion and compilation.



**Announced**  
01.04.2024

**Abdul Basit**  
Addl. District Judge-II, Orakzai

**CERTIFICATE**

Certified that this judgment consists of five (05) pages, those are signed by me after necessary corrections, if any found.



**Announced**  
01.04.2024

**Abdul Basit**  
Addl. District Judge-II, Orakzai