

24

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

Civil Appeal No. 08/13 of 2024

Date of institution: 18.04.2024

Date of decision: 01.07.2024

Date of consignment:

Noor Afzal son of Muhammad Afzal and three others resident of Quom Bar Muhammad Khel, village Kurez, Dakkhana Kurez, Tehsil Lower Orakzai (appellants/defendants)

Versus

Mst. Kamila Jan daughter of Muhammad Afzal (wife of Shabab Khan resident of Kurez, Tehsil Lower Orakzai (respondent/plaintiff))

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

JUDGMENT

Through this judgment I will decide appeal preferred by appellants against the respondent challenging the ex-parte judgment and order dated 20.03.2024 of the Court of learned Civil Judge-II, Kalaya Orakzai whereby he has dismissed the application of appellants intended for setting aside the ex-parte decree passed in Civil Suit No. 54/1 of 2023.

Concise facts of the case are that respondent/plaintiff has filed a civil suit against appellants/defendants with assertion that parties at dispute are brothers and sisters *inter-se*; that Afzal Khan, father of parties at dispute, was owner in possession of landed property, fully detailed in the headnote of the suit and to be referred as suit property; that their father died leaving behind parties at dispute as the only legal heirs, who were entitled in his legacy; that after demise of their father, respondent/plaintiff has contacted appellants/defendants for partition of her share in the suit property but they have applied dilly dally tactics and finally refused her on 25.03.2022;

ayy
M
Abdul Basit
District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu
01/07/2024

25

therefore, she has prayed for decree of declaration that parties at dispute are the legal heirs of deceased Afzal Khan and she is entitled for her partition legal share in the suit property; that she has also prayed for the decree of possession of her share in the suit property through partition coupled with decree for permanent & mandatory injunctions as per relief, hence, the suit.

Appellants/defendants were summoned by the learned trial court. On 04.08.2023, appellants/defendants no. 1 & 2 turned up before the learned trial court & brought into the notice of court that they were also representing appellants/defendants no. 3 & 4 and shall submit special power of attorney on their behalf on next date. On next date, no one turned up on behalf of appellants/defendants; therefore, they all were placed ex-parte by learned trial court on 21.08.2023, whereupon, the ex-parte evidence was recorded and ex-parte preliminary decree was passed on 05.10.2023.

On 30.10.2023, the appellants/defendants have filed an application no. 29.6 of 2023 before the learned trial court for setting aside the ex-parte decree dated 05.10.2023, wherein, respondent/plaintiff was summoned and heard the parties but learned trial court did not agree with plea of appellants/defendants and dismissed their application vide order dated 20.03.2024.

Appellants being not satisfied with the decision, preferred the instant appeal. Learned counsel for appellants while arguing narrated above facts of the case with assertion that order of the learned trial court is illegal, against the law and facts, unfounded, suffers from material illegality and irregularity because appellants/defendants no. 3 & 4 have not been given proper opportunity to defend their rights; thus, prayed that on acceptance of this appeal, judgment and order dated 20.03.2024 of the learned trial court may be set-aside, their application for setting aside decree dated 05.10.2023 passed ex-parte may be allowed and suit no. 54/01 may be restored.

Handwritten signature and date: 08/07/2024

Abdul Basit
Addl. District & Sessions Judge
Orakzai at Baber Mela,
Hangu

Learned counsel for respondent/plaintiff refuted the arguments of learned counsel for appellants/defendants and argued that learned trial court has properly appreciated the record on file and did not commit illegality in passing the order; thus, prayed for dismissal of appeal with heavy costs.

In the light of valuable assistance furnished by learned counsel for parties and record on file, this is concluded that admittedly appellants/defendants no. 1 and 2 made appearance before the learned trial court on 04.08.2023, where, they have apprised the court about their representation about appellants/defendants no. 3 & 4 and submission of special power of attorney on their behalf on following date, however, on next date, no one turned up on behalf of appellants/defendants and were placed ex-parte by the learned trial court. I have perused the entire file no. 54/1 of 2023 of the learned trial court but could not find a single summon or piece of paper on record disclosing the service of summons either personally or through any male members of the their family, which provides that the appellants/defendants no. 3 & 4 had not been served properly. If it is presumed that appellants/defendants no. 1 & 2 had informed appellants/defendants no. 3 & 4 about institution of the suit in hands, even then, under given situation the learned trial court was supposed to resummons appellants/defendants no. 3 & 4 after placing appellants/defendants no. 1 & 2 ex-parte since the learned trial court had no proof in black and white on record about the service of summons on them. Mere saying of appellants/defendants no. 1 & 2 to submit the special power of attorney on behalf of appellants/defendants no. 3 & 4 on next date cannot be treated as service of summons on them i.e. appellants no. 3 & 4 unless there had been an acknowledgement about fact from appellants/defendants no. 1 & 2 that they had informed the appellants/defendants no. 3 & 4 or in knowledge of institution of the suit.

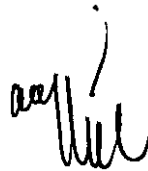
Handwritten signature and date: 21/07/2024

Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

27

Besides above, law also demands adjudication of cases on merits rather than to knock out the cases on technicalities. In similar manner, a preliminary ex-parte decree was passed in favour of respondent/plaintiff on 05.10.2023, whereas, the appellants/defendants have filed the application for setting aside the said decree on 30.10.2023, which is well within time; therefore, on **accepting** the appeal in hands, judgment and order dated 20.03.2024 of the learned trial court is set-aside with costs of Rs. 30,000/- (thirty thousand) to be paid by appellants/defendants to respondent/plaintiff, the application for setting aside preliminary decree dated 05.10.2023 passed ex-parte is allowed and suit no. 54/01 is remanded to the learned trial court to decide the same afresh in accordance with law. Parties are directed to appear before the learned trial court on 10.07.2024.

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
01.07.2024

Abdul Basit
Addl. District Judge-II, Orakzai

CERTIFICATE

Certified that this judgment consists of four (04) pages, those are signed by me after necessary corrections, if any found.



Announced
01.07.2024

Abdul Basit
Addl. District Judge-II, Orakzai