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

Civil Appeal No. 14/13 of 2024

Date of institution: 24.05.2024

Date of decision: 09.09.2024

Date of consignment:

Torak Jan son of Mustajib caste Feroz Khel, Tappa Jaisal Khel Tori Khawry, District Lower Orakzai (appellant/plaintiff)

Versus

Sabireen son of Fazal-ur-Rehman caste Feroz Khel Tori Khawry, District Lower Orakzai (respondent/defendant)

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

Ex-Parte Judgment

Through this ex-parte judgment I will decide civil appeal preferred by appellant against respondent challenging the judgment, decree and order dated 30.04.2024 of the Court of learned Civil Judge-I, Kalaya, Orakzai whereby he has partially decreed suit of appellant/plaintiff and dismissed the rests of prayers.

Concise facts of the case as per plaint are that appellant/plaintiff was owner in possession of a residential house measuring 50 marla comprising of five rooms, a wash room, a latrine, a gutter, veranda, main gate, trees bounded from north hujra & house of respondent, south road etc., west lands and east house of appellant situated in Tor Khawry, District Orakzai, the suit house, since the time of his ancestors; that all the dirt & used water of the suit house drained out through the gutter; that respondent has no concern with the suit house therefore he has no reason to block the gutter, which pollutes the whole environment; that respondent has also no reason

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to encroach into the passage used by appellant/plaintiff in order to widen his passage; that there were also five standing mulberry (*toot*) and *sufaida* trees, which were his ownership in possession, however, respondent has cut those trees illegally; therefore, in relief "*alif*", appellant/plaintiff has prayed for decree for declaration that he is owner in possession of the suit house along with the trees, gutter & passage since the time of his forefathers and respondent has no concern with it; that he has also prayed for decree for the permanent and mandatory injunctions so as to restrain the respondent from claiming the suit house, gutter, trees and passage to be his ownership and making any sort of interference therein; that in relief "*bay*" he has prayed for decree for possession on demolishing the passage and to unblock/open the gutter; that in relief "*jeem*", he has prayed for decree for the recovery of Rs. 100,000/- on account of cutting the standing trees, hence, the suit.

On receipt of plaint, the learned trial court summoned respondent, who turned up and filed written statement, wherein, raised various legal and factual controversies. The learned trial court recorded the evidence of parties and after hearing the parties, partially decreed the suit to the extent of declaring the suit house as ownership in possession of appellant/plaintiff coupled with decree to unblock the gutter of the house owned & possessed by appellant/plaintiff and permanently restrain from blocking the same, whereas, he has dismissed the remaining claim.

Appellant/plaintiff feeling aggrieved impugned herein the judgment, decree and order dated 30.04.2024 of the learned trial court. On receipt of appeal in hands, the respondent was summoned; however, he did not turn up despite service of summons and placed ex-parte on 12.06.2024.

Ex-parte arguments heard and record perused.

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The learned counsel for appellant/plaintiff alleged that the impugned judgment and order of the learned trial court is non-speaking, suffers from patent illegalities, result of misreading and non-reading of evidence, passed in haste without looking and making any discussion on commission report, the decree was passed in parts as on one hand relief "alif" was decreed but no findings about ownership of gutter and passage in question had been made in the judgment; therefore, prayed to allow the appeal and set-aside the impugned judgment, decree and order of the learned trial court to the extent of dismissal order and decree the suit to the extent of balance reliefs.

Before furnishing my reasoning for the order, I would like to reproduce Rule 10 of Order XXVI of The Civil Procedure Code, 1908, which reads as below;

10. Procedure of Commissioner. (1) *The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.*

(2) **Report and depositions to be evidence in suit.** *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) **Commissioner may be examined in person.** *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

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Keeping in mind the above referred provision and without dilating upon the merits of case, suffice is to say that admittedly, the learned trial court has appointed a local commission, who visited the spot and submitted his report on 19.10.2022, where after, the learned trial court was expected to invite the objections from parties at dispute in light of Order XXVI of The Civil Procedure Code, 1908, however, the learned trial court has failed to comply with the necessary provision and fell in error. On providing the opportunity to the parties for filing the objections, if none of the parties had filed any objections, the court could have confirmed the commission report straightaway and in case if any party to the suit had filed an objection, then, the learned trial court was duty bound to record the statement of local commissioner first and then decide the fate of the case as per law. In this case, the learned trial court on receipt of commission report did not offer opportunity to the parties to submit the objections, if any, nor did it confirm or reject the report. Even, order sheet no. 20 dated 16.11.2022 reflects that learned trial court while deciding the stay application passed findings that the fate about confirmation or rejection of the commission report shall be seen at the time of passing final judgment, however, it appears that this fact has been slipped away from mind of learned trial court and the impugned judgment was passed without making any discussion on commission report.

Besides above, I have perused the whole file but failed to find the issues on record nor there any mentioning of this fact in the order sheet about framing of issues. Framing of issues before recording the evidence is essential as parties have to lead the evidence in light of issues framed by the court. The parties cannot be left in vacuum to lead the evidence unless they have clear direction to lead the evidence.

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Likewise, issues no. 6 & 8 specifically provide about the ownership of gutter and its blockage by respondent, however, learned trial court while deciding both these issues did not specify about the ownership of the gutter and as to fact that whether the gutter was made in the property owned by appellant/plaintiff or not. .

In view of above findings, it is held that the impugned judgment of the learned trial court is non-speaking and passed in haste without making any discussion on commission report; therefore, ex-parte appeal in hands is allowed, the impugned judgment, decree and order dated 30.04.2024 of the learned trial court is set-aside and case in hands is remanded to the learned trial court with direction to first invite the objections, if any, from the parties about the commission report, decide the fate of commission report accordingly, frame the issues in the suit, offer an opportunity to the parties about leading the fresh/additional evidence, if any they wish, and decide the case afresh in accordance with law. Appellant/plaintiff is directed to appear before the learned trial court on **14.09.2024**. No order as to costs.

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
09.09.2024


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
09.09.2024


Abdul Basit
Addl. District Judge-II, Orakzai