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

Civil Misc. Appeal No. 05/14 of 2024

Date of institution: 14.06.2024

Date of decision: 09.09.2024

Date of consignment:

Saddam son of Taza Khan and one other residents of Quom Mishti Tappa Darvi Khel, Tehsil Central Lower, Orakzai (appellants/defendants)

Versus

Khana Mir Gul son of Khaista Gul and three others residents of Quom Mishti, Tappa Darvi Khel, Village Budgor, Central Orakzai (respondents/plaintiffs)

**APPEAL UNDER SECTION 104 OF CPC AGAINST  
THE JUDGEMENT AND ORDER OF THE LEARNED CIVIL  
JUDGE-II, KALAYA, ORAKZAI**

**JUDGMENT**

Through this judgment I will decide civil miscellaneous appeal filed by appellants against respondents challenging the judgment and order dated 14.05.2024 of the Court of learned Civil Judge-II, Kalaya, Orakzai in Civil Suit No. 85/1-Neim of 2023, whereby, he has struck off the right of defence of appellants while invoking the provision of Order XVII Rule 3 of CPC.

Concise facts of the case are that respondents/plaintiffs were owners in possession of three fields measuring around two jarib situated at Budgor bounded from west house of respondents/plaintiffs, east filed of Eid Akbar, north field of Paey Muhammad, south filed of Eid Yar Gul (referred as marked "A" in the sketch) and two fields measuring around three jarib and 20 marla situated on bank of the road bounded from east road, west field of Taj Gul, north field of Safiullah, south filed of Paey Muhammad (referred as marked "B" and "C" in the sketch), the suit property, since the time of their forefathers; that appellants/defendants have no concern with the suit

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property, however, they have forcibly restrained them from cultivating and utilizing the suit property in April 2020, which was their sole source of income and livelihood; that they have also issued threats to them as well as committed assault to Ghuncha Gul; that in order to know the reality, they have sent jirga to appellants/defendants but the later have wrongly confined the jirga members for around 3-4 hours, who were set-free by the police, however, no demand as such was made; therefore, respondents/plaintiffs have prayed for declaration of their title to the suit property coupled with decree for permanent and mandatory injunctions, hence, the suit.

Appellants/defendants were summoned by the learned trial court. They appeared and filed joint written statement, wherein, raised various legal and factual objections *inter-alia* with facts that they were the real owners in possession of the suit property since the time of their ancestors and respondents/plaintiffs have no concern with it; that divergent pleadings of the parties were reduced into different issues as below;

1. *Whether the plaintiffs have got a cause of action?*
  2. *Whether the plaintiffs are estopped to sue?*
  3. *Whether the suit of the plaintiffs is time barred?*
  4. *Whether the suit property consisting of 3 fields detailed in the headnote of the plaint are the ownership in possession of the plaintiffs since their predecessor and the defendants have nothing to do with the suit property?*
  5. *Whether the suit property is the ownership in possession of plaintiffs and the defendants have forcefully stopped cultivation in the suit property?*
  6. *Whether the suit property is the ownership in possession of the defendants and the plaintiffs have nothing to do with the suit property?*
  7. *Whether the plaintiffs are entitled to the decree as prayed for?*
- Relief?*

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Parties were directed to produce the evidence. Respondents recorded and closed its evidence, however, when appellants/defendants were directed to adduce the evidence, they used delaying tactics; therefore, learned trial court issued them notice under Order XVII Rule 3 of The Civil Procedure Code, 1908 and finally struck off their right of defence on 14.05.2024 due to non-production of evidence and fixed the case for final arguments.

The appellants being aggrieved from the dismissal order filed instant appeal. Learned counsel for appellants while arguing narrated above facts of the case with assertion that order of learned trial court is illegal, against the law and facts, suffers from material illegality and irregularity, therefore, prayed that on acceptance of instant appeal, the judgment and order dated 14.05.2024 of the learned trial court may be set-aside and they may be granted yet another opportunity to produce the evidence so that the suit may be decided on its merits.

Learned counsel for respondents refuted the arguments of learned counsel for appellants and argued that learned trial court has given ample opportunities to the appellants and properly invoked the provision and did not commit illegality in passing the impugned order; therefore, prayed for dismissal of appeal.

Viewing the arguments of learned counsel for parties and record on file, this is held that admittedly the right of defence of appellants has been struck off by the learned trial court due to non-production of evidence in spite of offering them sufficient opportunities, however, perusal of record transpires that the suit of respondents/plaintiffs had also been dismissed by the learned trial court on 15.05.2023 for the very reason and this court had set-aside the said order through its judgment and order dated 09.10.2023 in Civil Appeal No. 18/13 of 2023 and remanded the case to the learned trial

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court for offering yet another opportunity to the respondents/plaintiffs. On same footings, appellants/defendants are also entitled to the same treatment as all are equal before the law, whereas, the law also provides that no one should be condemned unheard.

Besides above, Order XVII Rule 3 of The Civil Procedure Code, 1908 though empowers the court to decide cases promptly if party directed by the Court fails to adduce the evidence or material on record; however, this provision of law on one hand is enabling in its character whereas on another hand discretionary; therefore, it demands liberal interpretation favoring the aggrieved party so that the disposal of cases may be made on merits rather than to knock down the rights of parties on technicalities. On the given scenario, the reasons mentioned for non-production of evidence despite notice are considered sufficient. The foremost point to be addressed is prolongation of the case for not a justifiable reason but there is always remedy available in the form of imposition of cost or payment of proper compensation to the opposite party in the appropriate cases.

In the wake of above discussion, the appeal in hands is allowed and impugned judgment and order dated 14.05.2024 of the learned trial court is set-aside with costs of Rs. 12,000/- to be paid by appellants/defendants to respondents/plaintiffs on their appearance before the learned trial court and appellants/defendants are offered quite last opportunity to produce its entire evidence before the learned trial court on the date to be fixed by the learned trial court, otherwise, the learned trial court may proceed with the case in accordance with law. Parties are directed to appear before the learned trial court on 16.09.2024.

Parties have to bear costs of their proceedings because none of the parties has specifically proved the cost incurred on the case.

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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.

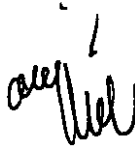


**Announced**  
09.09.2024

**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