

IN THE COURT OF BAKHT ZADA,
ADDL: DISTRICT JUDGE-I, ORAKZAI (AT BABER MELA)

CIVIL APPEAL NO. : 06/13 OF 2024
DATE OF INSTITUTION : 26.10.2024
DATE OF DECISION : 13.12.2024

1. RASHEED ALI S/O NAZEER ALI
 2. YASAR ALI S/O SARDAR ALI
- BOTH RESIDENCE OF CASTE MANI KHEL, TAPA MAST ALI
KHEL, TEHSIL LOWER DISTRICT ORAKZAI.
R/O

.....(Appellants)

-VERSUS-

1. FAYAZ ALI S/O MAJAN ALI
R/O CASTE MANI KHEL, TAPA SABZI KHEL STARSAM
DISTRICT ORAKZAI.

.....(RESPONDENTS)

JUDGEMENT
13.12.2024


Impugned herein is the judgement and decree dated 23.09.2024 of learned Civil Judge-I, Tehsil Kalaya, District Orakzai in case no. 182/1, vide which the learned trial court has struck off the right of evidence of the petitioners/defendants and decreed the suit of the respondents/plaintiffs.

- (2). The petitioners/defendants alleged that without providing proper opportunity of evidence, their evidence was struck off and closed. That the learned trial court has not even recorded their statements despite of their presence in the court on the last date of hearing. That the impugned order is not in accordance with law and that there was no likelihood of decree of the suit in favour of the respondents, if the statements of their witnesses were recorded. The petitioners/defendants prayed for setting aside order and judgement dated 23.09.2024 and deciding

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the case on merits after providing proper opportunity of producing evidence to the appellants/defendants.

- (3). After hearing arguments of the learned counsel for the partes available record perused which shows that after completion of plaintiffs evidence, on 02.07.2024 the defendants were directed to produce evidence, but on three consecutive dates the defendants failed to produce evidence and on the subsequent date, notice under order XVII, rule 3 CPC was given to petitioners/defendants for production of their evidence, but again the petitioners/defendants failed to produce the same and the learned trial court struck off their rights of producing evidence and decreed the suit of the plaintiffs forthwith on the basis of available record, but in the present case the last order sheet dated 23.09.2024 clearly shows that defendants were present in the court at the time of closing of evidence. In every case where the action against a delinquent party was imperative and his evidence had to be closed on the grounds because his case squarely and eminently fell within the mischief of order XVII, rule 3 CPC. The court while closing the evidence was not in any manner obliged to adjourn the case and require or ask the litigant to appear and examine himself as a witness on subsequent date. Where the party was present in the court and desired to appear as a witness, the court should not decline his request, rather it shall be appropriate that where the party was present, the court while applying order XVII, rule 3 CPC and


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closing the evidence on given date should itself aske the party to avail the chance of appearing as his own witness and the court should also record such fact in its order sheet that a chance was given to the litigant which had not been availed. However, if such fact was not so recorded by the court, though the party was present and sought its examination, such party should initially move an application to the court of examination, if the case had not yet been decided, but where the case is finally decided a ground should be specifically set in the memo of appeal/ revision as the case may be about the presence of the party and asking for the examination, which should be supported by an affidavit of the counsel of the said party. Although, in the present case the attendance of the defendants/petitioners has been marked as present and the case has been finally decided by the court on the same date by striking of the evidence of the defendants, but it has not been recorded in the order sheet that the party was asked to avail the chance of appearing as his own witness which is against the dictum recorded by the superior courts recorded in its various judgments i.e., **2015 SCMR 1401 and 2014 SCMR 637.**

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- (4). In view of the above, the learned trial court despite of presence in the court has not given any opportunity to the petitioners/defendants to avail the chance of appearing as his own witness and no such fact was recorded by the learned trial court in his order sheet, therefore, the instant order and judgment dated 23.09.2024 of learned Civil Judge-I Kalaya being not tenable in

the eyes of law, is hereby set aside, however they are burdened with cost of Rs. 10,000/- for non-production of evidence as directed by the learned trial court. The case is remanded back to the learned trial court with the direction to provide a fair opportunity to the petitioners/defendants for recording their evidence and thereafter decide the case in accordance with law.

- (5). Original record of this case along with copy of the order be sent to the learned trial court for onward proceedings, while record of this court be consigned to record room within the stipulated time.

Pronounced:
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CERTIFICATE

Certified that this judgment consists of four (04) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 13.12.2024

Bakht Zada
13-12-24
(BAKHT ZADA)
Addl: District Judge-I, Orakzai
at Baber Mela