

MUHAMMAD RAHEEM ETC VS FAZAL RAHEEM ETC
Case No. 12/13, Dated 05.03.2025.

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

CIVIL APPEAL NO. : 12/13 OF 2025
DATE OF INSTITUTION : 05.03.2025
DATE OF DECISION : 21.05.2025

1. MUHAMMAD RAHEEM S/O MUHAMMAD YASEEN
 2. ARIF S/O MUHAMMAD NAEED
 3. SAWAT KHAN S/O MUHAMMAD AFZAL
- ALL R/O QAUM UTMAL KHEL TANDA SHABI KHEL,
TAPA FATIH KHAN KHEL, DISTRICT ORAKZAI.

.....(Appellants)

-VERSUS-

1. FAZAL RAHEEM S/O FAZAL HUSSAIN
2. IBRAHIM S/O FAZAL HUSSAIN
3. NOOR RAHEEM S/O FAZAL HUSSAIN
4. FAZAL HUSSAIN ALIAS SHENAY
5. MST. GUL ZARMEENA D/O PAIND KHAN
6. LAL SARMEEN D/O PAIND KHAN
7. MST. SHERMEENA D/O PAIND KHAN
8. MST. NOOR GAR D/O PAIND KHAN
9. ZULFIQAR S/O NISAR
10. KHAIR AMEEN S/O NISAR
11. NISAR
12. MAH DAULAT D/O PAIND KHAN

ALL R/O QAUM UTMAL KHEL TANDA SHABI KHEL,
TAPA FATIH KHAN KHEL, DISTRICT ORAKZAI

..... (RESPONDENTS)

JUDGEMENT
21.05.2025

Through this judgement I shall decide an appeal filed by the appellants against the respondents challenging the judgment and order dated 15.02.2025 of the learned Civil Judge-II, Kalaya, Orakzai whereby the said court has accepted application u/o 23, Rule 1 of the Code of Civil Procedure Act, 1908 and the plaintiffs/respondents were granted permission to withdraw suit No. 15/01 and file fresh one.

Concise facts of the case are that respondents filed suit for declaration, perpetual, cum-mandatory injunctions and specific performance of agreement deed dated 24.12.2016 against the appellants to the effect that they are legal heirs of their predecessor Painsa Khan deceased. That their predecessor was owner of a house,

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hujra, masjid and agricultural property, the description of which is briefly given in the heading of the plaint, situated at Tapa Fateh Khan, Utman Khel and Malak Khel District, Orakzai. That respondents shifted to Peshawar due to enmity some 60/50 years back and the suit property was usurp by the appellants. That respondents executed an agreement deed dated 24.12.2016 vide which they agreed to return 10 fields out of the suit property, furthermore, they also admitted in their statement and written application before APA, the rights of the respondents, but now the appellants are denying the rights of the respondents. The respondents through instant suit also prayed for specific performance of deed dated 24.12.2016.

- (3). After summoning the appellants/defendants and obtaining written statement issues were framed by the learned trial court, whereafter the plaintiffs/respondents were asked for production of their evidence and after recording of statements of as many as 04 PWs, the plaintiffs/respondents submitted application for withdrawal of the suit with permission to file fresh one before the trial court. After obtaining reply to the application and hearing arguments the learned trial court accepted the application vide impugned order dated 15.02.2025. Being aggrieved from the impugned order the appellants/defendants preferred the instant civil appeal on the ground that the learned trial court has accepted the application u/o 23, Rule, 1 CPC through a non-speaking order. That previously the respondents have already availed remedy under order 23, Rule 1 CPC and as result of the same, the instant suit was filed at the permission of the court on 17.09.2020 and now after almost five years of the trial court and recording statements of the PWs, the respondents/plaintiffs have again submitted application u/o 23, Rule 1 CPC, which not only

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resulted into delay in the trial, but the appellants/defendants also suffer agonies and expenses, which were not taken into consideration by the learned trial court while passing the impugned order.

(4). Learned counsel for the appellants argued that no formal defect had been mentioned by the respondents in their application and the impugned order is non-speaking wherein a single reason for acceptance of application is not mentioned. He prayed for setting aside the impugned order.

(5). Counsel for the respondents argued that in the previous plaint prayer for possession of the suit property was made, but inadvertently in the instant plaint the same is missing, which needs to be included for the interest of justice. He also pointed out that during jirga the appellants disclosed about a deed dated 21.11.2022 which needs to be challenged in the instant suit. He prayed for acceptance of his application.

(6). After hearing arguments available record perused, which shows that a single ground for withdrawal of suit with permission to file fresh one is not mentioned in the application of the respondents filed by them u/s 23, Rule 1 CPC; however, during arguments he enumerated at least two grounds for which he intended to file fresh suit after withdrawal of the present suit. It is part of record that previously the present respondents had already availed the remedy under order 23, Rule 1 CPC and as a result the present suit was filed as fresh one on 17.09.2020. Copy of the previous plaint dated 18.06.2020 is available on the case file. The present appellants are in litigation, as defendants in the main suit, with the respondents for the last more than 05 years and statements of almost 04 PWs have been recorded in the instant case. The grant of permission for withdrawal

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of the suit to bring fresh suit in the instant case will maximize the agonies and expenses of not only the appellants, but also of the respondents. No grounds for withdrawal with permission to bring fresh suit are mentioned in the application of the present respondents, which alone was sufficient ground for dismissal of the application under order 23, Rule 1 CPC; however, as pointed out during arguments by the learned counsel for the respondent for inclusion of prayer for possession of the suit property etc in the instant plaint, if permission for withdrawal of the suit and filing fresh one is granted it will drag the suit and will result in further delay. The so-called defects pointed out by the counsel for the respondents during his arguments could have been rectified through amendment in plaint u/o 6, Rule 17 CPC, which reads as under;

“17. Amendment of pleadings. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties”

So, in view of the above if there was any deficiency in the suit of the respondents/plaintiffs the same could have been removed through amendment in plaint. The fresh suit will not only prolong the proceedings, but will also add to the agonies of the parties; therefore, keeping in view the application of the respondents wherein no formal defect is mentioned in the arguments can be rectified by means of amendment in plaint. The learned trial court has not properly exercised the jurisdiction

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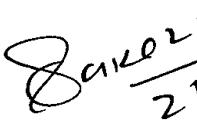
vested in him by allowing withdrawal with permission to bring a fresh suit. The impugned order and judgment being not sustainable in the eyes of law is hereby set aside. Resultantly the formal suit stands revived and is deemed to be pending. The respondents if so, advised may submit application for amendment in plaint and the learned trial court shall decide the same in accordance with law. Appeal accepted and disposed of accordingly. Copy of this order along with requisitioned record be returned back to the learned trial court for further proceedings while file of this court be consigned to record room.

Pronounced:
21.05.2025


(BAKHT ZADA)
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at Baber Mela

CERTIFICATE

Certified that this judgment consists of five (05) pages.
Each page has been read, corrected wherever necessary and signed by
me.


(BAKHT ZADA)
Addl: District Judge-I, Orakzai
at Baber Mela