

(X)

**IN THE COURT OF JAMAL SHAH MAHSOOD,
ADDITIONAL DISTRICT JUDGE-I, ORAKZAI (MCAC)**

1. Civil Appeal No.1/19 Of 2019

Date of original institution before Commissioner Kohat	23-04-2018
Date of transfer to the D&SJ Orakzai	01-04-2019
Date of transfer to this court (as MCAC)	16-07-2019
Date of Decision	27-07-2019

Sherin Gul s/o Mehrab Gul; r/o section Rabia Khel, sub section Behram Khel, Orakzai Agency

(Appellant)

Vs

- (1) **Muhammad Hussain** s/o Saleem Shah; r/o section Rabia Khel, sub section Behram Khel
- (2) **Zar Muhammad** s/o Noor Muhammad; r/o section Rabia Khel, sub section Ayaz Khel, Orakzai
- (3) **APA/ADM**, Upper Orakzai Agency

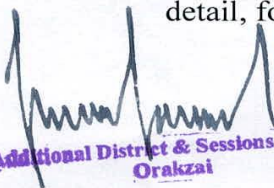
(Respondents)

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- Mr. Abdul Qayyum Khan Advocate for Appellant
 - Messrs. Muhammad Riaz Hussain, Noor Badshah Bangash and Noor Karim Advocates for Respondent No.1.
 - Messrs. Mian Fazal Malik Kakakhel and Abid Ali Advocates for Respondent No.2.
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APPEAL against order and decree of learned Assistant Political Agent/ADM, Upper Orakzai, dated 21-03-2018, passed in civil case No. 06/2016 (**Impugned Judgment**)

Judgment in Appeal:

1. Through the impugned judgment, the respondent No.3 (APA/ADM), after discussing majority award with the Council of Elders (CoE) in detail, found the same according to Rewaj and accepted the same.


Additional District & Sessions Judge-I
Orakzai

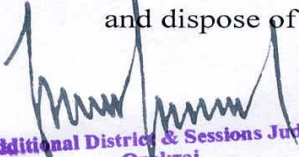
2. The record of the case is full of irrelevant documents; however, the history of the case, as can be ascertained from the available relevant record, is as follows;

- a) Zar Muhammad (respondent No.2) filed an application, dated 14-04-2016, before the APA Upper Orakzai for legal redressal. The crux of this application (page 5) is that the Forest Department had approved plantation of trees in village Zanda, Tapa Ayaz Khel: that plantation was in progress when the law and order situation of the area worsened and his family left. That during his absence Sherin Gul (present appellant) ploughed this land (and thereby damaged and uprooted more than 3000 trees), halted the plantation of forest and laid claim to this land. That for 45 days Jirgas took place; that a Jirga of year 1967 had already declared Sherin Gul (appellant) as usurper and on the wrong. He prayed that Sherin Gul may be proceeded against for causing damage to government plantation and punished.
- b) The political administration (APA and Naib Tehsildar) carried some proceedings for constitution of a Jirga/Council of Elders. On 13-07-2016, an application (page 16) was filed in the office of APA by Muhammad Hussain (respondent No.1). Muhammad Hussain claimed that he was the actual owner of the property in question and in possession of the same for 50 years; and that the other parties had no concern with this property.
- c) For the purpose of Jirga, two elders each were nominated by the present appellant and respondent No.2, while three official

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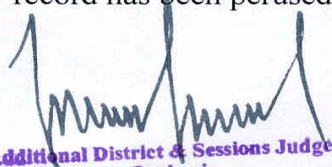
members were nominated as Council of Elders (CoE) for resolution of the matter (page 8). No formal order of reference was made; however, out of these 07 members, 05 members of CoE gave their finding through a document (stamp paper) dated 11-08-2016 (page No. 27). These 05 members of CoE stated that the members nominated by Sherin Gul (present appellant), nor Sherin Gul himself, attended the Jirga, despite official notice. That, however, they considered the case and came to the conclusion that the previous decision (page 7) of one Bilyameen Akhunzada (1967 Jirga) was found authentic and correct; and held that the disputed property belonged to Zar Muhammad (respondent No.2). Based on this verdict, the APA/ADM decreed the case in favour of Zar Muhammad, vide judgment dated 07-11-2016 (page 44 to 46).

- d) Since the stance of respondent No.1 (Muhammad Hussain) was not considered by this Jirga/CoE, nor he was given any notice; therefore, he filed an appeal before the Court of Commissioner FCR Kohat Division. Vide order dated 08-06-2017 (page 66), the Commissioner accepted this appeal. It was held that the trial court APA/ADM had not fulfilled the codal formalities regarding issuance of proper order of reference/ToRs, and that the stance of Muhammad Hussain was also not considered by the CoE. The order of APA/ADM was set aside and case was remanded back to the trial court with directions to hear the stance of all the parties and dispose of the case as per section 08 FCR.

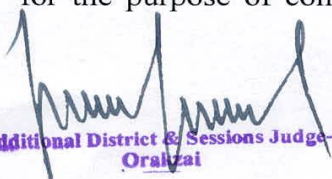

Additional District & Sessions Judge-1
Orakzai



- e) After remand, the APA/ADM framed order of reference with 06 issues and 06 elders were nominated as CoE (page 89). The representatives named by Muhammad Hussain (respondent No.1) were again not made members of CoE (reasons for which are given in an undated order, at page 4). Some members of CoE (the official members and the members representing respondent no.2) submitted written ex-parte findings (page 112). Based on these findings, the learned lower forum (APA/ADM) once again, through the impugned judgment, decreed the case in favour of Zar Muhammad (respondent No.2).
3. Being aggrieved of the impugned judgment, the present appellant filed the instant appeal before the Court of Commissioner FCR Kohat Division. The main grounds taken in appeal are that the impugned judgement was passed without compliance of necessary provisions of section 08 of FCR and that the same was made on the basis of award given by a self-made Jirga, through ex-parte proceedings. The appeal remained pending before the Court of Commissioner Kohat for some time, however, it was then transferred to the court of District & Session Judge Orakzai, after merger of FATA into KP Province. It was ultimately transferred to this court, for disposal as Model Civil Appellate Court (MCAC).
4. Notices were issued to the parties. The 03 contesting parties appeared in person and through their counsels. Arguments were heard and the record has been perused.


Additional District & Sessions Judge-I
Orakzai

- (11)
5. For the effective application of right of appeal, it is necessary that the record of the case be complete in all respects. The record, in the present case, is not complete. However, for the purpose of determination of the points raised in memo of appeal, the available record has been considered.
 6. The proceedings before the lower forum (APA/ADM) were conducted under the provisions of the Frontier Crimes Regulation, 1901. The instant appeal has come up for hearing after repeal/annulment of FCR. This court is required to follow the procedure as laid down in CPC. In these peculiar circumstances, it would be convenient to appraise the impugned judgment on the touchstone of FCR first. According to section 52 of FCR, any material irregularity or defect in proceedings which caused occasion for miscarriage of justice, made the order/judgment/decision liable to be corrected in appeal. Similar principles are applicable in appeals under CPC as well.
 7. The gross irregularities committed by the lower forum are highlighted here. Vide order/judgment of Commissioner Kohat dated 08-06-2017 (page 66) the case was remanded back to the APA/ADM with directions to formulate proper order of reference and to hear all the parties involved in the dispute, including Muhammad Hussain (respondent No.1). However, subsequent to remand no summons/notice was served on appellant Sherin Gul, or on Muhammad Hussain (respondent no.1) in respect of the proceedings of jirga/CoE. Under section 20 of FCR, the powers conferred by CPC for the purpose of compelling the attendance, before himself or the


Additional District & Sessions Judge-1
Orakzai

CoE, of the parties and witness, were available to the APA/ADM; however, all the proceedings have been conducted in a unilateral and suspicious manner. Thus, a clear defect in proceedings is evident from record, which probably has caused miscarriage of justice.

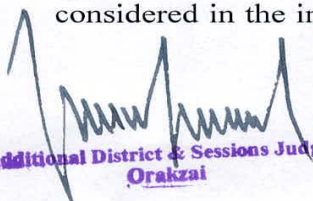
8. The order of reference was given to 06 members of CoE. No representative of respondent No. 2 was appointed. There is nothing to record to show that any notice/summon was issued by CoE to parties or their representatives. The verdict of CoE has interestingly been given by 04 members only. The respondent No.2, Zar Muhammad, has also signed this verdict of CoE. In the impugned judgment it has been stated that the verdict was given by a divided CoE (four to two); however, that is a clear mis-statement. The verdict of CoE has been given 04 members only, which is ex-parte and there is nothing on record to show that the remaining members of CoE or parties were served with any notice of proceedings before CoE. In fact, the jirga decision (page No. 112) does not even mention the present appellant as party to the dispute. There is nothing on record to prove that any inquiry was conducted by the CoE or any witness examined. It is probable that the opinion of CoE was formulated on the direction of Zar Muhammad (respondent No. 2), who has also put his signature on this verdict.

9. The proceedings before the lower forum have been conducted in such a rash manner that even the property in dispute has not been clearly identified, nor its limits ascertained. There is nothing on record to suggest that any witness was examined by the CoE. The CoE was



required to give its verdict on the basis of local Rewaj, but no reference to any Rewaj has been made. The matter has been simply determined on the basis of a photocopy of a previous jirga decision, allegedly given by one Akhunzada Bilyameen.

10. No record of any proceedings of the CoE is available on file. The claims of the parties, as submitted by them before the lower forum, were in crude form. These claims remain vague to this moment. No procedure was adopted by the APA/ADM to clarify the claims of each party and evolve proper issues from these diverging claims. The disputed property has been referred to as shamilat (mountains and forest) in various places; some interest of Forest Department in the disputed property is also mentioned. Thus, other necessary parties seem to have been ignored while deciding the case ex-parte, in favour of respondent no.2.
11. In these circumstances it evident that no real and meaningful resolution on dispute has been made by the lower forum. The decision of the lower forum is the outcome of irregular proceedings, with no application of judicial mind and the same has occasioned miscarriage of justice. The impugned judgment is also contrary to good conscience and public policy. Resultantly, the instant appeal is accepted and the impugned judgment and decree are hereby set aside.
12. Having found the impugned judgment as such, it would be unjust to leave the parties without any forum for proper and judicious determination of the dispute existing between them. Therefore, it is considered in the interest of justice that the parties should be allowed


Additional District & Sessions Judge-1
Orakzai

to be at liberty to file a fresh suit. Therefore, by using the powers conferred under Order 41 Rule 33 of CPC, it is held that the circumstances of the case require that any of party to dispute is at liberty to file fresh suit under CPC before a civil court, for proper adjudication of the dispute.

13. No order as to costs. Let a copy of this judgment in appeal be placed on the file of lower forum and the record be returned to quarter concerned. Let this file be consigned to record room after its necessary completion and compilation.

Announced
27-07-2019


Jamal Shah Mansoor
Additional District Judge-I,
Orakzai

CERTIFICATE

Certified this judgment consists of 08 pages. Each page has been signed by me, and corrected wherever necessary.


ADJ-I, Orakzai.