

26 1

**IN THE COURT OF ADDITIONAL DISTRICT JUDGE-II,
ORAKZAI AT BABER MELA**

Miscellaneous Civil Appeal No.1/14 of 2020

Date of institution: 09.07.2020

Date of decision: 11.08.2020

Gulfam Hussain & others r/o Zerha Tehsil Lower District Orakzai.
(Appellants)

Versus

Syed Hamid Hussain & 16 others r/o Zerha Tehsil Lower District
Orakzai
(Respondents)

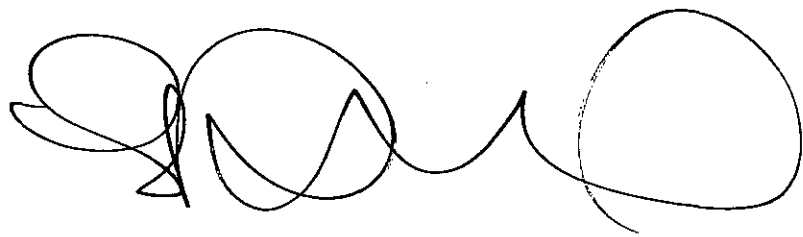
Represented by:

Mr. Abdul Qayoum Khattak Advocate, counsel for appellants
Mr. Javed Muhammad Advocate, counsel for respondents

JUDGMENT

This judgment is intended to dispose of the instant civil miscellaneous appeal filed against the order of Learned Civil Judge, Orakzai dated 07.07.2020, vide which the application for temporary injunction, filed by the appellants, was dismissed.

Brief facts of the case are that the appellants instituted suit for declaration along with prayer for permanent injunction to the effect that the appellants vide decision of Jirga Dated 28-01-1983 have equal share with respondents in gain and loss acquired out of the suit property fully detailed in the heading of the plaint and the respondents are not entitled to take possession and lease of the suit property by digging lime stone without the permission of the appellants which adversely affect the rights of the appellants. The appellants are also seeking

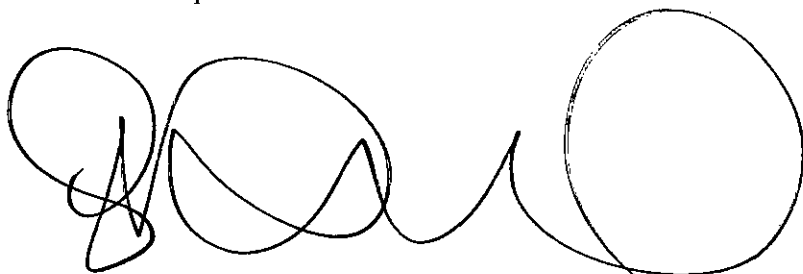


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Baber Mela

perpetual injunction against the respondents to the effect to restrain them from production, digging lime stone, any sort of interference in the suit property and to restrain the respondents from denying the rights of appellants in the suit property. The appellants in *Juzz Bay* also prayed for the recovery of RS. 22 Lac; 1/3 share, out of Rs. 66 lac; in the income of suit property received by the respondents.

The appellants along with their suit also submitted an application before the Learned Lower Court for temporary injunction to restrain the respondents from interference in the suit property. The learned lower Court, after receiving the written statement and reply of application for temporary injunction, heard arguments on the said application and after hearing the arguments, the application for temporary injunction was dismissed vide order dated 07.07.2020. Feeling aggrieved from the impugned order, the instant appeal was preferred.

Learned counsel for the appellants argued that the disputed property are joint and the appellant have their due share in the income of the property, that the respondents received Rs.66 lac out of which 1/3 share is the right of appellants as per decision of the Jirga Dated 28-01-1983, that the respondents have admitted the decision of Jirga dated 28-01-1983 in their written statement, that the documents considered by the Lower court are not relied by the respondents in their written statement therefore could not be considered, that the alleged lease has been expired and no fresh lease/license has been



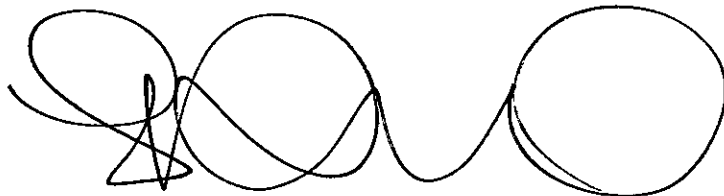
SHAUKAT ALI
Addl: District & Sessions Judge (C)
Orakzai at Hangu

issued to the respondents. Learned counsel for the appellants argued that the order of the learned lower court is illegal and against the facts and circumstances of the case therefore liable to set aside.

Conversely learned counsel for the respondents strongly opposed the arguments of learned counsel for the appellants and argued that the disputed property had been leased out to the respondents and the respondents are in possession of the property where they are working for last three years in the mines and at about 700/800 ton stone is still laying on the spot, that the respondents have deposited the requisite fee for the renewal of lease and the lease still subsist, that the signatures of respondents are not available on the decision of Jirga produced by the appellants which is subject to proof and is not reliable, that the appellants have no rights of ownership in the suit property and they have never put any objection with the competent authority on the lease granted to respondents, that the appellants have not denied the lease and possession of the respondents, Learned counsel for the respondents argued that prima facie case does not exist in favor of appellants.

Arguments of learned counsel for the parties heard and record perused.

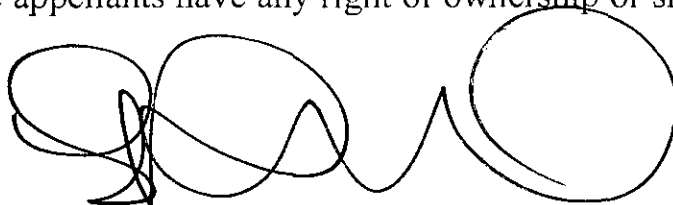
The essential factors that are to be considered whilst determining the question of granting temporary injunction are that the applicant seeking injunction has to show firstly a prima facie existence of his right and its violation by the respondents, secondly that



SHAUKAT ALI
Addl: District & Sessions Judge-II
Orakzai at Hangu

the applicants will suffer more inconvenience than the respondents if injunction is refused and lastly that in case of refusal of injunction irreparable loss or injury may accrue to the applicant. All the three aforementioned essential ingredients must co-exist in favor of the applicant seeking injunctive relief against the respondents.

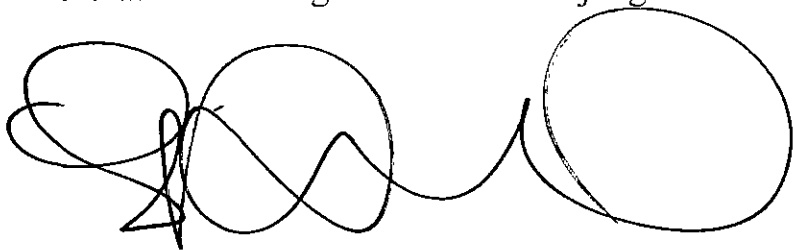
The appellants in their suit and application for the grant of temporary injunction has sought the direction of Court to restrain the respondents from any sort of interference in the suit property; digging the mountain for lime stone and from taking any sort benefits with the averments that the appellants have equal share in the suit property vide decision of the mediators dated: 28.01.1983. The case of the appellants is mainly hinges on decision of Jirga dated 28-01-1983 on which the appellants primarily rely for their claim against the respondents in the suit property. The respondents in their written statement have denied the decision of mediators dated 28-01-1983 and produced a decision of Jirga of the same date i.e. 28-01-1983 the contents of which are different from the decision relied by the appellants. The record reflects that that the respondents are lease holder and also have the possession of the suit property which is not denied by the appellants. The decision of mediators on which the suit of the appellants is based is yet to be proved by the appellants after recording pro and contra evidence. The appellants at present could not surface on record any authentic document that could prima facie suggest that the appellants have any right of ownership or share in the



SHAUKAT ALI
Addl: District & Sessions Judge (J)
Orakzai at Hangu

suit property. The record does not prima facie show the infringement of the right of the appellants in the suit property; therefore, prima facie case does not exist in their favor.

Furthermore, the record would evince that the dispute property presently in the possession of the respondents and license has been issued to them by the competent authority for mining and there is nothing on record that the license has been cancelled, therefore, those would be the respondents that may suffer inconvenience if they are restraint from mining, hence the balance of inconvenience is not in favor of the appellants. So far as irreparable loss is concerned the damage or injury that can be adequately compensated in the shape of money or the damage that can be physically repaired is not irreparable loss or injury but such material injury that cannot be adequately compensated, is termed as irreparable loss, however the appellants could not pointed out on record such loss that cannot be adequately compensated in terms of money. The appellants in their suit have also prayed for the recovery of money as their share with respondents, hence the appellants could be compensated in the shape of money if they could prove their claim against the respondents. The essential ingredients; the existence of which was necessary for the grant of temporary injunction do not tilt in favor of the appellants; therefore, their case is not arguable for the grant of temporary injunction. It is worth to mention here that the findings in the instant judgment are



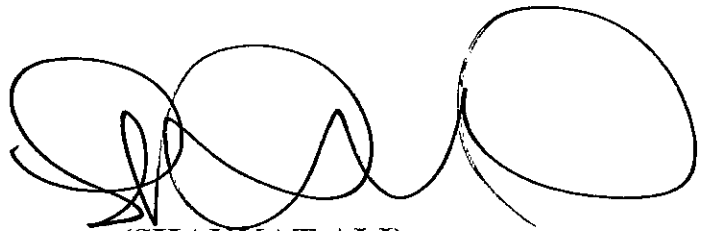
SHAUKAT ALI
Addl: District & Sessions Judge-II
Orakzai at Hangu

tentative and would have no effect on the merits of the case while deciding the suit of the appellants.

As sequel to the above discussion, the impugn order dated 07-07-2020 passed by Civil Judge Orakzai is upheld and the instant appeal being devoid of merits stands dismissed, with no order as to costs.

File be consigned to record room after necessary completion and compilation.

Announced
11-08-2020



(SHAUKAT ALI)

Additional District Judge-II,
Orakzai at Baber Mela Hangu

CERTIFICATE

Certified that this judgment consists of 06 pages. Each page has been checked, corrected where ever necessary and signed by me.



(SHAUKAT ALI)

Additional District Judge-II,
Orakzai at Baber Mela Hangu