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

1. Civil Appeal No.5/19 Of 2019

Date of institution 16-09-2019
Date of Decision 12-10-2019

(1) Mawaali Khan s/o Nobat Khan and **(2) Moqem Khan** s/o Bahadar Khan; both residents of Qoam Feroz Khel, Tapa Jesal Khel, District Orakzai

(Appellants)

Vs

- (1) Mansoor Orakzai** s/o Aman Ullah Khan;
(2) Major Saad Khan s/o Khalid Khan Orakzai
(3) Amir Ihsan s/o Ihsan Ullah Khan; all legal heirs of Nasar Ullah Khan; residents of Abdul Aziz Khel, Sultanzai, Orakzai.
(4) Jan Muhammad and
(5) Sultan Muhammad, both sons of Speen Gul; residents of Qoam Afridi, Abdul Aziz Khel, Sultanzai, Orakzai.

(Respondents)

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- Mr. Akhunzada Syed Parwaiz Advocate for Appellants
 - Syed Mufeed Shah Advocate for Respondents
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APPEAL against order/judgment/decree of learned CJ/JM-II, dated 05-09-2019, in case No 38/1. **(Impugned Order/Judgment)**

Judgment in Appeal:

1. Through the impugned judgment, the learned lower court declared the case in hand as a past and closed transaction; the suit of the appellants was disposed of accordingly and case file was consigned to record room.

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2. The facts of the case, as can be ascertained from the available record, are that the present appellants filed a petition, dated 11-09-2012, before the court of Political Tehsildar of erstwhile Lower Orakzai Agency. The appellants claimed that they had purchased some land in *toi* (stream) of Tapa Jesal Khel, about 28 years before filing of the petition; that one Hashmat Khan Sultanzai laid claim to the said land by stating that he was entitled to the same on the ground of brotherhood with Tapa Jesal Khel; that the property in question was at that time with Sultan and Jan Muhammad Afridi. The appellants had prayed for resolution of the matter.
3. The order sheets available on record show that the matter remained pending before the court of Assistant Political Agent (APA), Lower Orakzai, purportedly under the Frontier Crimes Regulation, 1901. Jirga members (Council of Elders) was nominated. On 10-11-2012, the verdict of Jirga was submitted and the same was accepted by APA. However, the order in this respect was issued after about 02 years and 05 months, on 09-04-2015. It seems that an appeal was filed before the Commissioner FCR Kohat Division, by Mansoor Orakzai and others (present respondents No 1 to 3). Mansoor Orakzai claimed that the property was their ownership and that the other two parties had nothing to do with the same. This appeal was accepted, by the Commissioner, vide order dated 09-02-2017. The case was remanded back to the trial court with the direction to constitute a fresh Jirga after framing of proper issues as required under section 8 FCR.

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4. On 10-03-2017, the then trial court (APA Lower Orakzai) recommended the trial. Several order sheets, including some undated and some anachronistic, of the then trial court reveal that the matter remained pending in proceedings relating to the capacity of witnesses to depose in the matter. Finally, on 13-03-2019, which was not even a date fixed according to the previous order sheet dated 13-02-2019, the present case was disposed of. It was mentioned by the then trial court of Assistant Commissioner (AC) Lower Orakzai that proper civil courts had started working in the erstwhile FATA region and that the case could not continue in his court. It was directed by the AC that the parties may consult the civil court for disposal of the case. However, the AC, in this order sheet also declared Mawaali Khan etc (present appellants) as *par* (defeated) on the basis of some unrecorded oaths of local persons/Jirga members.
5. The case was then transferred to the court of Senior Civil Judge Orakzai and ultimately to the court of CJ-II Orakzai. The learned CJ-II, through the impugned order, after pointing out the concluding remarks of AC Lower Orakzai, mentioned in order sheets dated 13-03-2019, declared the case to be a past and closed transaction and thereafter consigned the case to record room.
6. Being aggrieved of the impugned judgment, the present appellants have filed the instant appeal. The main grounds taken in appeal are that the judgement of AC was passed without compliance of directions issued by the Commissioner for proceeding afresh with the case after framing of proper issues; that the court of AC Lower Mawaali Khan and another vs Mansoor Orakzai and others

4. On 10-03-2017, the then trial court (APA Lower Orakzai) recommenced the trail. Several order sheets, including some undated and some anachronistic, of the then trial court reveal that the matter remained pending in proceedings relating to the capacity of witnesses to depose in the matter. Finally, on 13-03-2019, which was not even a date fixed according to the previous order sheet dated 13-02-2019, the present case was dispose of. It was mentioned by the then trial court of Assistant Commissioner (AC) Lower Orakzai that proper civil courts had started working in the erstwhile FATA region and that the case could not continue in his court. It was directed by the AC that the parties may consult the civil court for disposal of the case. However, the AC, in this order sheet also declared Mawaali Khan etc (present appellants) as *par* (defeated) on the basis of some unrecorded oaths of local persons/Jirga members.

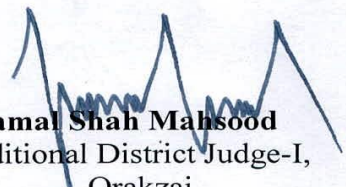
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6. Being aggrieved of the impugned judgment, the present appellants have filed the instant appeal. The main grounds taken in appeal are that the judgement of AC was passed without compliance of directions issued by the Commissioner for proceeding afresh with the case after framing of proper issues; that the court of AC Lower Mawaali Khan and another vs Mansoor Orakzai and others

after conducting proper proceedings and trial under the Code of Civil Procedure, 2008. Resultantly, the instant appeal is **accepted** and the impugned judgment is hereby set aside. The case is remanded back to the learned trial court with directions to proceed further with case in accordance with applicable law.

11. No order as to costs. Let a copy of this judgment in appeal be placed on the file of lower forum and the same be returned to trial court for further proceedings. The parties are directed to appear before the court of learned CJ-II Orakzai on 22-10-2019. Let this file be consigned to record room after its necessary completion and compilation.

Announced
12-10-2019



Jamal Shah Mahsood
Additional District Judge-I,
Orakzai

CERTIFICATE

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



ADJ-I, Orakzai.