

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

Civil Appeal No. 06 of 2019

Date of institution 02-10-2019
Date of Decision 05-11-2019

Khalil Khan s/o Akram Khan, of Stori Khel tribe, Tapa Mulla Khel,
Malang Kalay, Orakzai

(Appellant)

Vs

Jehanzeb s/o Malik Faqir Khan, of Stori Khel tribe; r/o Sheeraz Garhi,
Orakzai

(Respondent)

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- Shoaib Nasrat Khel Advocate for Appellant
 - Abid Ali and Fazal Malik Kaka Khel Advocates for Respondent
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APPEAL against order/judgment and decree of learned CJ/JM-II, dated
19-09-2019, in case No 15/1 of 2019. (**Impugned Judgment**)

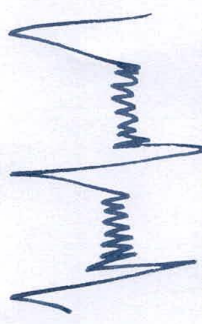
Judgment in Appeal:

1. Through the impugned judgment, the learned lower court of CJ-II declared the present case as a past and closed transaction; the suit was disposed of accordingly and case file was consigned to record room.
2. The present dispute arose before merger of FATA region into the province of KPK, when Frontier Crime Regulation, 1901, was in force. No order sheet is available on the record of the case; however, the facts of the case, as can be ascertained from the available record, are; that present appellant, Khalil Khan, filed an application (titled application for deliverance of justice and

favorable consideration), dated 19-04-2018, before the Political Tehsildar of Lower Orakzai. The appellant pleaded that he was a permanent resident of Malang Kalay, Stori Khel; that he was in possession of agricultural land, as tenant, for 60 years, from which land he had been forcefully stopped by Jehanzeb (respondent) since many years; that many Jirgas took place between them but to no avail. He prayed that Jehanzeb and his brothers be summoned to court.

3. The endorsement on this application suggests that the Political Tehsildar Lower Orakzai (PT-L) marked this application to Political Muharrir Lower Orakzai (PM-L). Thereafter, it seems that mediators were nominated by the parties for conciliation, vide document dated 16-05-2018. On 15-08-2018, an opinion was given by Jirga members for resolution of dispute. On 30-08-2018, the present appellant filed another application before Tehsildar with prayer that the Jirga verdict be set aside and the Jirga members be directed to give fresh verdict. On this application, the PT-L directed PM-L to call the parties along with Jirga members. On 12-10-2018, the Jirga gave its second verdict, in which Khalil Khan (appellant) was declared *Parh* (defeated). A third Jirga verdict/opinion, dated 12-12-2018, is also available on file which has been attested by Tehsildar Lower Orakzai. All these decisions/opinions of Jirgas differ from each other. On 14-12-2018, the present respondent (Jehanzeb) filed an appeal before Assistant Commissioner Lower Orakzai, with prayer that the Jirga verdict dated 12-10-2018, may be attested. It seems that

Additional District & Sessions Judge-I
Orakzai



acting on this application, the Assistant Commissioner Lower Orakzai put his signature on the Jirga verdict dated 12-10-2018 with an endorsement “attested as recommended by Jirga members”.

4. After merger of FATA region into the Province of KP, the case was 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 declared the case as a past and closed transaction and thereafter consigned the case file to record room.

5. Being aggrieved of the impugned judgment, the present appellant has filed the instant appeal. The main grounds taken in the memorandum of appeal are; that the APA had not passed any judgment; that the impugned judgement of CJ-II is against the law and facts of the case; that no opportunity was given the parties for adducing evidence and that the matter was disposed of through a non-speaking order where the appellant was condemned unheard.

6. Notice was issued to the respondent, who appeared along with counsels. Arguments were heard and the record has been perused.

7. As mentioned above, the impugned judgment has been passed on the basis of order; rather, attestation made by Assistant Commissioner on Jirga verdict dated 12-10-2018. The disputes of a civil nature under FCR, 1901 were dealt with by section 8 of the Regulation. The mode and manner adopted by the Political Tehsildar, Political Muharrir and the Assistant Commissioner of



Additional District & Sessions Judge-I
Orakzai

Lower Orakzai in the instant matter is novel one. There is no order and writing in respect of constitution of Council of Elders; no order of reference to Council of Elders, with statement of issues in dispute; there is no order sheet of any proceedings before the court of Assistant Commissioner and there is no judgment nor any decree passed in the matter. In fact, the case was never conducted by the Assistant Commissioner. All the proceedings were conducted by some Political Muharrir and Political Tehsildar and the Assistant Commissioner only put his signature on one of 03 verdicts of Jirgas. Thus, all proceedings have been conducted without due process and the same cannot be considered as a past and closed transaction.

Additional District & Sessions Judge-
Orakzai


8. The learned counsel for the respondent stressed during arguments that the instant case relates to dispute regarding tenancy and that civil court has no jurisdiction in the matter. However, in such a case the proper procedure would be to return the plaint for being presented before proper forum, rather rejection of the same. No proper plaint was filed in the court of CJ-II; and the application made to Political Tehsildar by present appellant was vague. The real dispute could only have been ascertained after filing of proper pleadings by the parties, according to the Code of Civil Procedure.

9. The date of attestation made by Assistant Commissioner cannot be ascertained; however, it has certainly been signed after 14-12-2018. As held by the august Peshawar High Court, in case of “Ali Azim Afridi Vs Federation of Pakistan and others” (WP No.

3098-P/2018), any decision of civil or criminal nature passed by the courts working under FCR, 1901 or FIGR, 2018 (FATA Interim Governance Regulation) after 30-11-2018, would be void ab-initio.

10. In these circumstances, it is held that the present case cannot be considered as a past and closed transaction. 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 12-11-2019. Let this file be consigned to record room after its necessary completion and compilation.

Announced
05-11-2019


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