

(23)

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

1. Civil Appeal No.7/19 Of 2019

Date of institution 04-10-2019
Date of Decision 13-11-2019

- (1) **Hawaldar Khan** s/o Akbar Shah,
(2) **Haji Aqal Mir** s/o Noor Rehman,
(3) **Lahore Khan** s/o Lal Mast,
(all belonging to **Sheikhan** branch of Utmankhel tribe, Tapa
Bazramkhel – residents of Jalaka Mela, Lower Orakzai)
(Appellants)

Vs

- (1) **Jumat Khan** s/o Jalal Din,
(2) **Saleem Khan** s/o Aabat Khan,
(3) **Talib Khan** s/o Gul Wali Shah,
(4) **Sawab Khan** s/o Mastan Shah,
(5) **Zaribat Khan** s/o Zameen Shah,
(6) **Khial Wali Khan** s/o Niamat Khan,
(7) **Taj Badshah** s/o Zewar Shah,
(respondents 1-3, belonging to **Shengarian** branch and
respondents 4-7, to **Khulkikkel** branch of Utmankhel tribe,
Tapa Bazramkhel – residents of Jalaka Mela, Lower
Orakzai)
(Respondents)

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- Mr. Mian Afrasiab Gul Kakakhel Advocate, for Appellants
 - Mr. Ihsan Ullah Khan Advocate, for Respondents No. 1 to 3
 - Respondents No. 4 to 7 ex parte
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APPEAL against order/judgment/decree of learned CJ/JM-II, dated
04-09-2019, in case No 24/1 of 2019. (**Impugned Order/Judgment**)

Judgment in Appeal:

1. Through the impugned judgment, the learned lower court held the present case to be a past and closed transaction; the case of the respondents No. 1 to 3 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 present respondents No. 1 to 3 filed a petition, dated 19-01-2018, before the Political Tehsildar of Lower Orakzai. At that time Frontier Crime Regulation, 1901, was in force in the erstwhile FATA region, including Orakzai. The respondents No. 1 to 3 (belonging to Shengarian caste) claimed that the property of Spaydara Bandajat was shared between Shengarian and Khulkikhel castes of Utmankhel tribe; that Sheikhan caste was not entitled to a separate share in Spaydara Bandajat, but had its joint share with Khulkikhels. No order sheet is available on the record of the case; however, the endorsement, dated 06-02-2018, on this application suggests that the Political Tehsildar Lower Orakzai (PT-L) marked this application to Political Muharrir Lower Orakzai (PM-L), with directions to summon the parties for a suitable date. On 19-02-2018, a conciliation Jirga was constituted by Political Tehsildar. 02 verdicts, dated 14-05-2018 and 30-07-2018, were given by Jirga members. Both these verdicts were attested by Tehsildar Lower Orakzai, on 28-09-2018 and reported to Assistant Commissioner on 18-11-2018. These verdicts have also been attested by Assistant Commissioner Lower Orakzai, through undated endorsements on these verdicts. The record also shows that on 13-11-2018, one of the present appellants filed an appeal against the Jirga verdict before the Assistant Commissioner Lower Orakzai (AC), which was marked by AC to his Reader for summoning the parties and for proceedings as

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per Law and Rewaj. However, the appeal was ultimately not entertained by AC.

3. 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.
4. Being aggrieved of the impugned judgment, the present appellants have filed the instant appeal. The main grounds taken in the memorandum of appeal are; that the proceedings before merger were not in accordance with law; that the impugned judgment was erroneous in law and fact, which was passed without considering the record of the case and that the same resulted in violation of fundamental rights of the appellants.
5. Notice was issued to the respondents. Respondents No. 1 to 3 appeared through counsel, while respondent No. 6 appeared and stated that Khulkikhels (respondents No. 4 to 7) did not want to contest the instant petition as the same had nothing to do with them. Arguments of contesting parties were heard and the record has been perused.
6. As mentioned above, the impugned judgment has been passed on the basis of order; rather, attestation made by Assistant Commissioner on Jirga verdicts dated 14-05-2018 and 30-07-2018. 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

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Assistant Commissioner of Lower Orakzai in the instant matter is novel one. There is no order in writing in respect of constitution of Council of Elders; no order of reference, with statement of issues in dispute, to Council of Elders; 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 the 02 verdicts of Jirgas. Thus, all proceedings have been conducted without due process by a forum (Naib Tehsildar) which had no jurisdiction to proceed with and decide under section of 8 of FCR.

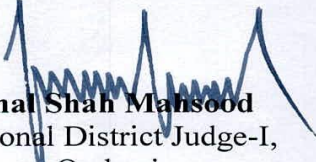

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7. Moreover, the final attestation in the instant case was made after 28-09-2018, when even the Assistant Commissioner had lost jurisdiction to deal with such cases – after the 25th Constitutional Amendment.
8. No proper plaint was filed in the court 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. 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.


10. 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 20-11-2019. Let this file be consigned to record room after its necessary completion and compilation.

Announced
13-11-2019


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.