

**IN THE COURT OF SHAUKAT AHMAD KHAN**  
**DISTRICT JUDGE, ORAKZAI (AT BABER MELA)**

CIVIL APPEAL NO. : 12/13 OF 2023  
DATE OF INSTITUTION : 16.06.2023  
DATE OF DECISION : 26.08.2023

1. MEHBOOB ALI S/O RAEES KHAN
2. REHMAT KHAN S/O AZAL JAN  
BOTH R/O CASTE RABIA KHEL, TAPA PIAYO KHEL, DISTRICT  
ORAKZAI

.....(APPELLANTS)

-VERSUS-

ZARMAN SHAH S/O AKBAR SHAH, R/O CASTE SHEIKHAN,  
TAPA UMARZAI, DISTRICT ORAKZAI

..... (RESPONDENT)

**Present:** Khursheed Alam Advocate, the counsel for appellants.  
: Habib Khan Advocate, the counsel for respondent.

**JUDGEMENT**  
**26.08.2023**

Impugned herein is the judgement/decree dated 17.05.2023 of learned Civil Judge-I, Orakzai vide which suit of the respondent/plaintiff has been decreed as prayed for.


- (2). The respondent being plaintiff (hereinafter referred to as plaintiff) through a suit before the learned trial court sought declaration-cum-perpetual and mandatory injunctions to the fact that he had a business partnership of coal mine situated at *Gozdara Sheikhan Wap Panra District Orakzai* with Raees Khan (now dead), at the ratio of 75 % and 25 % respectively. That after the death of Raees Khan, the appellants being defendants no. 1 and 2 in the main suit (hereinafter referred to as defendants no. 1 and 2), the son and the brother of said Raees Khan respectively, continued with the business at the same ratio, however, in 2008 due to worst law and order situation in the locality and the factum

  
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of fire in the mine, the mining operation was stopped till 2016. After normalization of law-and-order situation, plaintiff contacted the defendants through elders of locality, to resume the business but they refused and allowed the plaintiff to resume the mining operation with his own expenses. Accordingly, plaintiff resumed the mining operation by spending about 05/06 crore rupees whereafter defendants started claiming their shares in the coal mine without having got no concern with the same. Hence, the suit. The defendants were summoned who appeared before the court and submitted written statement wherein they besides raising various legal and factual objections, contented that they have neither been approached by the plaintiff nor they have withdrawn from the business and that they are still partners in the business at the ratio of 25 % shares.

Pleading of the parties were culminated by the trial court into the following issues;

1. Whether the plaintiff has got a cause of action?
2. Whether the plaintiff is estopped to sue?
3. Whether the suit of the plaintiff is time barred?
4. Whether the present suit is bad for mis-joinder and non-joinder?
5. Whether the partnership of running business over the disputed coal mine exists between the plaintiff and defendant no. 01 and 02?
6. Whether the plaintiff has spent 5/6 crore rupees over the disputed coal mine?
7. Whether mining is illegally stopped by the defendants in the disputed coal mine?

  
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8. Whether the plaintiff is entitled to the decree as prayed for?
9. Relief.

Parties were given opportunity to produce evidence. Accordingly, Yaqoob Shah, Muhammad Daud, Bakht Ameer, Akhtar Gul and Jehanzab Khan appeared in the witness box as PW-1 to PW-5 respectively while one, Sarteef Khan as attorney for plaintiff appeared in the witness box as PW-6 in support of their contention. On the other hand, defendant no. 1 appeared in the witness box as DW-1 while Muhammad Farooq and Talib Badshah were examined as DW-2 and DW-3.

After conclusion of evidence of both the parties, the learned trial court heard the arguments and decreed the suit of the plaintiff. The defendants, being aggrieved of the impugned judgement/decreed, filed the instant appeal.


- (3). I heard arguments and perused the record.
- (4). On record the original partnership deed dated 13.01.2003 Ex. PW 1/1 vide which the plaintiff and Raees Khan were partners in coal mine business at the ratio of 75 % and 25 % respectively, is admitted between the parties. The ratio of profit and loss in business i.e., 75 % and 25 % is also not disputed between the parties. It is also admitted by the plaintiff even in the headnote of the plaint that after the death of Haji Raees Khan he continued the business with defendants no. 1 and 2 at the same ratio of profit and loss. It is also admitted by the defendants that from 2008 to 2016 the mining operation on the coal mine was

  
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stopped either due to Talibanization or a fire in the coal mine. The core issues for deciding the between the parties is, that the plaintiff claim that in 2017 he contacted the defendants for resumption of mining activities on the mine through a jirga of four members and that he also personally contacted the Mehboob Ali, defendant no. 1 but they refused and allowed the plaintiff to continue with his business and thereafter the plaintiff restarted the business with a cost of Rs. 5/6 crore. On the other hand, defendants claim that they have neither been approached by the plaintiff nor they have withdrawn from the business, that they are still partners in the business at the ratio of 25 % and that the plaintiff has not incurred the amount of Rs. 5/6 crore on resumption of the mining activities. In this respect the learned trial court has framed issues no. 5 and 6 which are taken together for discussion. The plaintiff in support of his claim has relied upon a verdict of jirga dated 14.09.2018 Ex. PW 4/1 vide which the matter has been resolved by the jirga members in favour of the plaintiff on the ground, that the jirga members after having heard the contention of both the parties required the plaintiff to produce those persons before the jirga as witnesses whom were sent by the plaintiff to the defendants in connection of the resumption of mining activities on the coal mine who would give statement on oath to which both the parties agreed; however, when on the date fixed the plaintiff produced two of those persons, the defendants resiled and thereafter the matter was

  
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resolved in favour of plaintiff. Plaintiff in order to prove his contention has produced Akhtar Gul and Jahanzeb as PW-2 and PW-5, the two of the jirga members. They have supported the contention of the plaintiff. Both the witnesses have been cross examined but not a single question has been put to any of the witness either regarding constitution of the jirga or its proceedings or the verdict of jirga. On the other hand, the defendants have contended that this document does not bear their signatures; hence, not binding upon them. No doubt it is proved on record that the jirga was constituted which has resolved the matter in favour of plaintiff but the question of law involved in the matter is, that whether the verdict of jirga is binding upon the defendants. During the course of arguments learned counsel for the plaintiff submitted that as the jirga was constituted under the customarily law prevalent in the then FATA; therefore, it has binding effect on both the parties. But he failed to lay hand on any document giving binding effect to the decision of a privately constituted jirga. At that time a legal mechanism resolving the civil dispute in the form of FATA Interim Governance Regulation, 2018 was applicable where as per section 10 of the Regulation a civil dispute was used to be referred by the Deputy Commissioner to the council of elders and after receipt of findings of the council, the Deputy Commissioner after deciding legal issues used to pass a decree. The relevant provision of law on the point is as under;

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“10. **Civil reference to the Council of Elders.** - (1) Where the Deputy Commissioner is satisfied from any information that a civil dispute exist between the parties which is likely to cause breach of peace, he may, for the settlement thereof make an order in writing stating the grounds for his being so satisfied, refer the dispute within the fifteen days to the Council of Elders, for findings of fact in accordance with Rewaj, which shall give its findings on facts within ninety days on the issues in dispute after making necessary inquiry and hearing the parties and their witnesses.

(2) Where a reference to the Council of Elders is made under sub-section (1), the Deputy Commissioner shall nominate the Council of Elders. The names of the members so nominated be communicated to the parties, and any objections taken thereto by any of the parties, shall be recorded. The Deputy Commissioner shall dispose of the objection after hearing the parties and recording the reasons thereof, appoint the members of the Council accordingly.

(3) The order of reference made under sub-section (1) shall state the issues in dispute on which the findings of Council of Elders is required.

(4) On receipt of the findings of Council of Elders, the Deputy Commissioner shall decide the legal issues, if any, and after recording his reasons pass a decree in accordance with the

  
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findings of the majority of the Council of Elders and applicable law.”

Besides, the aforementioned law on the point learned counsel for the plaintiff could not point out any other provision of law giving effect to the verdict of jirga privately constituted between the parties the sanctity of binding effects. In these circumstances, the constitution of privately constituted jirga and its verdict can be held no more than a contract between the parties. In the instant case as the defendants have not consented to the verdict of jirga; therefore, it has no binding effect upon them. In the given circumstances, the core issue involved in the lis is, that whether the plaintiff had sent jirga to the defendants and that the defendants had abandoned the partnership allowing the plaintiff to the continue with the business on his own? In this respect the plaintiff, as per contents of plaint, has alleged that he had sent four elders of the locality to the defendants but they had refused to resume the work on mining activities discontinued the partnership and allowed the plaintiff to continue the business on his own but he has not disclosed the names of those four elders in the plaint. In his court statement as PW-6, the attorney of plaintiff, has stated that he had sent a jirga consisting of Shah Jee, Bakhat Amir, Muhammad Daud and Shah Hussain to the defendants and that he had also personally contacted the defendants. Out of those four persons, Muhammad Daud and Bakhat Amir have been examined as PW-2 and PW-3

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respectively. Both the witnesses in their examination-in-chief have referred to their joint affidavit dated 10.01.2020 Ex. PW 2/1 admitting the same as true and correct, correctly bearing their signature and thumb impression respectively. But in the contents of affidavit not a single word is mentioned regarding the fact that they had approached the defendants on behalf of plaintiff for resumption of business.

Hence, in view of what is discussed above, it is held that though the verdict of jirga dated 14.09.2018 Ex. PW 4/1 is proved on record but that being contract between the parties was not assented to by defendants and has no binding effect upon them while the factum of defendants being approached by plaintiff through elders and the factum of refusal of the defendants to discontinue the partnership, is not proved. Hence, issue no. 5 is decided in negative against the plaintiff.

**Issue no. 6:** This issue is restricted to the oral assertion of the plaintiff in his plaint but no oral or documentary evidence has been brought on record except the bald statement of attorney for the plaintiff as PW-6. Hence, this issue is decided in negative against the plaintiff.

**Issue no. 7:** As per contents of plaintiff, defendant no. 3 Deputy Commissioner has stopped the mining activities at the instance of defendants no. 1 and 2 but no order of Deputy Commissioner in this respect has been brought on record. Similarly, no oral evidence has been adduced in this respect,

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even attorney for the plaintiff in this statement as PW-6 has not spoken a single word in this respect. Issue decided in negative against the plaintiff.

**Issue no. 2, 3 and 4:** Issue no. 2, 3 and 4 are formal in nature and restricted to the oral assertions of written statement. These issues have been decided against the defendants but not a single objection has been raised in the memorandum of appeal.

**Issue no. 1 and 2:** As the plaintiff has failed to prove issues no. 5 and 6; therefore, both these issues are decided in negative against the plaintiff.

In view of what is discussed above, it is held that the learned trial court has failed to appreciate the authenticity of jirga verdict Ex. PW 4/1. Similarly, the findings of learned trial court to the fact that PW-2 and PW-3 in their joint affidavit Ex. PW 2/1, as their examination in chief, have stated that they were jirga members sent to the defendants with an offer of renewal of the partnership agreement, is also based on assumption and presumption. The said PWs have never stated in the affidavit Ex. PW 2/1 that they were sent as jirga members rather it contains a general statement to the fact that a message was sent to the defendants as scribed in para no. 2 of the affidavit as;

"یہ کہ زرمان شاہ (plaintiff) نے کام شروع کرنے سے پہلے محبوب وغیرہ (Defendants no. 1 and 2) کو


پیغام بابت شراکت داری بھیجوا یا تھا مگر وہ انکاری ہوئے۔"

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Hence, the impugned judgment/decreed dated 17.05.2023 of the learned trial court is set aside, suit of the plaintiff is dismissed with cost. File of this court be consigned to record room. Copy of this judgment be sent to the learned trial court for information.

**Pronounced**  
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**CERTIFICATE**

Certified that this judgment consists of ten (10) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 26.08.2023

  
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