

**IN THE COURT OF ZAHIR KHAN CIVIL JUDGE-I KALAYA, ORAKZAI**

Petition No. ....01/12 (2) of 2021.

Date of Institution.....10.02.2021.

Date of Decision.....08.08.2024.

Lal Khan S/O Sarozai and 14 others all R/O Qaum Stori Khel, Tappa Mala Khel, Khwa Darah, Kharasha, Tehsil Lower, District Orakzai.....Petitioners.

Versus

Muhammad Hassan Khan S/O Javid Hassan Khan and 04 others all R/O Mahala Bhana Mari, Peshawar.....Respondents.

**PETITION UNDER SECTION 12 (2) CPC AGAINST THE JUDGMENT & DECREE DATED 28.10.2018, PASSED BY THE COURT OF ASSISTANT POLITICAL AGENT, LOWER ORAKZAI**

**JUDGMENT: -**

08.08.2024

Lal Khan and 14 others (hereinafter referred to as petitioners) have challenged validity of the judgment and decree dated 28.10.2018 passed by the Assistant Political Agent, Lower Orakzai in case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018 in favor of Muhammad Hassan Khan and others (hereinafter referred to as respondents) in terms of section 12 (2) CPC on the ground of fraud, misrepresentation and want of jurisdiction.

Relevant facts of the case are that, there was a dispute between Khanan and Qaum Stori Khel over a property known as "Kharasha". To resolve the matter in controversy between the parties; a jirga was constituted by the Tehsildar, Lower Orakzai in the year 2006. The said jirga decided the matter in favor of Qaum Stori Khel, however, decision of jirga dated: 30.06.2006 was set aside by the Assistant Political Agent on 05.09.2016 and constituted a fresh jirga to decide the matter in controversy.

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between the parties a fresh. Hassan Khan, respondent No. 1 approached the court of AC, Lower Orakzai through a written application for possession of the subject property and redressal of his grievances. On the application of respondent No. 1, proceedings were conducted by the AC, Lower Orakzai and a fresh jirga was constituted to resolve the matter in controversy between the parties. The jirga members decided the matter in favor of respondents by deciding that the disputed property is the ownership of respondents and they are entitled to the possession of the same. The verdict of the jirga was attested by the AC, Lower Orakzai accordingly and decree dated 28.10.2018 was passed in favour of respondents against Qaum Stori Khel in the above cited case.

On 10.02.2021, the present petitioners filed the petition in hand whereby they have challenged the impugned judgment and decree in terms of section 12(2) CPC on the following grounds of fraud, misrepresentation and want of jurisdiction.

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1. That there was a land dispute between Khanan (respondents) and Qaum Stori Khel (petitioners). The landed property was known as "Kharasha". In order to resolve the controversy between the parties to the dispute, a ten members jirga was constituted by the Tehsildar, Lower Orakzai in the year 2006 and the jirga decided the matter in favor of petitioners and the respondents were declared as "Parr" (unsuccessful).
2. That from 17.06.2006 to October, 2018, the respondents remained silent and then secretly filed an application before APA, Lower Orakzai. Some so called Malaks/Elders from Khyber agency were chosen as fresh

Jirga members to resolve the dispute between the parties. The petitioners were not noticed and on 23.10.2018, the jirga members delivered their verdict/award which was accepted by the court of APA, Lower Orakzai, resultantly, on 28.10.2018, the impugned decree was passed by the court of APA, Lower Orakzai in favor of respondents which is result of fraud and misrepresentation and liable to be set aside.

3. That the petition under section 12(2) CPC is within time as the petitioners got knowledge of the decree when the objection petition of Qaum Stori Khel was rejected by the court concerned and warrant of possession was issued by the court.

4. That on 5<sup>th</sup> June, 2018, through an Act of 2018, twenty-fifth amendment in the Constitution was promulgated which omitted Article 247 of the Constitution, and amended Article 246. Tribal areas of FATA regions were merged into the settled areas. With this constitutional amendment, the judicial system of the country was extended to FATA.

Since omission of Article 247 ibid the normal laws stood applicable/extended to the newly merged FATA and criminal as well as civil courts were established in the said areas. The worthy Peshawar High Court, Peshawar on adjudication of writ petition No. 3098-P of 2018 dated 30.10.2018, declared FIGR as ultra vires of the constitution, as such, adjudication of civil and criminal cases by the Executive Hierarchy (AC/DC/Commissioner/FATA Tribunal) on the strength of the Council of Local Elders, was declared as against the spirit of law and as illegal. Similarly, in the writ petition No. 1-P/2019 and writ petition No. 129 of

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2019 the court declared the FCR and FIGR as unlawful and null and void. The worthy Peshawar High Court, Peshawar vide judgment dated 30.10.2018 has declared adjudication by the defunct hierarchy under the FIGR after 31.05.2018 and after the day and date Article 247 of the constitution was omitted by the Act of 2018, as against the law, ultra vires and void ab-initio.

5. That constitution of the jirga in the month of October 2018 by the court of APA, Lower Orakzai under section 8 of FCR is against the law and liable to be canceled.

6. That when the jirga was constituted on 23.10.2018 under section 8 of FCR, neither consent of the petitioners was obtained nor they were summoned. The impugned decree was obtained through fraud and misrepresentation.

7. That the proceedings conducted by the then jirga members in the year 2006, which decided the matter in favor of petitioners, was kept secret. The matter was decided on oath on the Holy Quran in the year 2006; therefore, the matter comes within the definition of past and closed transaction after the decision on the Holy Quran.

8. That the previous jirga was constituted in the year 2006 with the consent of Sadeeq Khan (cousin of the present respondents), therefore, constitution of fresh jirga in the year 2018 was against the law and its award cannot culminate into the decree dated 28.10.2018.

9. That respondents remained mum from 2006 to 2016 and 2018. The ex-parte proceedings and ex-parte decree, without hearing the petitioners is

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against the law and liable to be set aside. That the petitioners were condemned unheard, therefore, the impugned decree is liable to be set aside.

10. That the impugned decree is also against the injunctions of Islam, custom and traditions of the tribal areas, therefore liable to be set aside.

The respondents contested the 12(2) CPC petition through written reply on the ground that petitioners have no cause of action/locus standi to file the present petition. The petition is based on mis-statement, malafide and material facts have been concealed from the court. That the petition is based on false, frivolous and vexatious grounds just to harass the respondents. That, the jirga decision dated 30.06.2006 was set aside by the then court on 05.09.2016 and a fresh jirga was constituted on the application of respondent No. 1 submitted before the APA, Lower Orakzai.

Proceedings were carried out under the then prevailing law. The jirga verdict/award was attested and accepted by the AC, Lower Orakzai on 23.10.2018 which resulted into decree dated 28.10.2018. It is lastly prayed, that the 12(2) CPC petition may kindly be dismissed with costs.

Pleadings of the parties were reduced into the following issues.

### ISSUES

1. Whether the petitioners have got cause of action?
2. Whether the petitioners are members of Qaum Stori Khel?
3. Whether the impugned judgment and decree dated 28.10.2018 passed in suit No. 8/1 of 2019 by the court of Assistant

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Commissioner, Lower Orakzai is result of fraud and misrepresentation and passed without jurisdiction?

4. Relief.

Parties were provided with an opportunity to produce their respective evidence.

To support the claim, petitioners produced Haji Qismat Ali, record keeper AC, Lower Orakzai as PW-1, copy of the written application dated 25.04.2018 for constitution of fresh jirga was exhibited as Ex.PW-1/1, copy of issues as Ex.PW-1/2, verdict/award of jirga members as Ex.PW-1/3, copies of the order sheets of AC, Lower Orakzai as Ex.PW-1/4 & Ex.PW-1/5, copies of 02 applications after the orders/decrees as Ex.PW-1/6 & Ex.PW-1/7. Wali Jan and Sayal Akbar appeared as PW-02 and PW-03. Copies of their CNICs are Ex.PW-2/1 and Ex.PW-3/1 respectively. They also supported the stance of petitioners. Rehmat Kareem, special attorney for petitioners was examined as PW-04. Special power of attorney is Ex. PW-4/1. Copy of his CNIC is Ex.PW-4/2 and he lastly, requested for acceptance of the petition in hand. Thereafter, evidence of the petitioners was closed.

On the other hand, respondents produced Saddiq Hassan Khan as RW-01. Copy of his CNIC is Ex.RW-1/1. Muhammad Hassan Khan/special attorney for respondents deposed as RW-02 and denied the version of the petitioners. Copy of his CNIC is Ex.RW-2/1 and special power of attorney is Ex.RW-2/2 and he lastly, requested for dismissal of the petition. Thereafter, evidence of the respondents was closed.

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With the valuable assistance of learned counsels for the parties, I have gone through the record.

My issue wise findings are as under:-

**ISSUE NO .2**

**Whether the petitioners are members of Qaum Stori Khel?**

As per averments of the petition u/s 12(2) CPC, petitioners are the members of Qaum Stori Khel, Lower Orakzai and the property in question known as "kharasha" is their ownership and the decree dated 28.10.2018 was passed by the court of APA, Lower Orakzai in favor of respondents without summoning them during the proceedings. Respondents have not denied the stance of petitioners to the extent that they are not members of Qaum Stori Khel, Lower Orakzai, however, per their contention, the entire

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Qaum Stori Khel was represented by their elders during the trial proceedings before the court of APA, Lower Orakzai, hence, they were aware of the proceedings and of the decree in the favor of respondents.

Furthermore, as per Ex.PW-2/1 (copy of CNIC of PW-02), Ex.PW-3/1 (copy of CNIC of PW-03) and Ex.PW-4/1 (copy of CNIC of PW-04), petitioners hail from Qaum Stori Khel, Tappa Mala Khel, Lower Orakzai, resultantly, it is held that petitioners are the members of Qaum Stori Khel, hence, issued No. 2 is decided in positive.

**ISSUE NO .3**

**Whether the impugned judgment and decree dated 28.10.2018 passed in case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018 by**

**the court of Assistant Commissioner, Lower Orakzai is result of fraud and misrepresentation and passed without jurisdiction?**

Before going into discussion, it is to clarify that issues were framed by this court on 18.10.2022 and in issue No. 3, suit No. 8/1 of 2019 is inadvertently mentioned instead of case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018. Per record, the case file is one and the same. Case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018 was entered by the court of APA while after receiving the case file by the court of learned CJ-II, Orakzai, case file was entered as civil suit No. 8/1 of 2019. Correction be made in issue No. 3 with red ink accordingly. Muharrir is directed to do the needful.

#### **JURISDICTION:**

Claim and contention of petitioners is that, the worthy Peshawar High Court, Peshawar on adjudication of writ petition No. 3098-P of 2018 dated 30.10.2018, declared FIGR as ultra vires of the constitution, as such, adjudication of civil and criminal cases by the Executive Hierarchy (AC/DC/Commissioner/FATA Tribunal) on the strength of the Council of Local Elders, was declared as against the spirit of law and as illegal. The worthy Peshawar High Court, Peshawar vide judgment dated 30.10.2018 has declared adjudication by the defunct hierarchy under the FIGR after 31.05.2018 and after the day and date Article 247 of the constitution was omitted by the Act of 2018, as against the law, ultra vires and void ab-initio. Record shows that the issue of jurisdiction was raised by the judgment debtors during pendency of the execution of decree dated

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28.10.2018. The executing court rejected the stance of JDs on the ground that although, FIGR was declared ultra vires of the constitution yet it was held in the judgment dated 30.10.2018 passed by the worthy Peshawar High Court, Peshawar in writ petition No. 3098-P/2018 "*Ali Azeem Afridi vs Federation of Pakistan and others*" that all decisions in the Civil or Criminal cases would be void ab-initio, which are passed after one month from the date of judgment of the worthy Peshawar High Court, Peshawar. This order dated 07.12.2020 of the executing court, whereby, objection petition was dismissed, was impugned before the court of worthy District & Sessions Judge, Orakzai in appeal No. 3/14 of 2020. The court of worthy District & Sessions Judge, Orakzai, vide judgment dated 10.02.2021 upheld the order dated 07.12.2020 of executing court. The judgment dated 10.02.2021 was also challenged before the worthy Peshawar High Court, Peshawar in revision petition which was also dismissed. The relevant portion of judgment dated 30.10.2018 is

reproduced for reference:-

*( In view of the above, we while allowing the writ petition as prayed for, declared the notification dated: 29.05.2018 whereby FATA interim Government Regulation, 2018, was promulgated, as ultra vires of the Constitution, to the extent of allowing the Commissioners to the Act as Judges; Counsel of elders deciding Civil and Criminal matters, Constitution of Qaumi jirga; Modified applications of Chapters VIII and XLII of the code for security; Third Scheduling; administered area, and*

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*after one month from the dated of judgment, any decision of Civil or Criminal nature would be void ab-initio).*

As per record, the impugned decree was passed by the court of AC, Lower Orakzai on 28.10.2018 while the judgment referred above was delivered on 30.10.2018. The order/decree dated 28.10.2018 was passed prior to the judgment of worthy Peshawar High Court, Peshawar with one month protection to the decisions made under FIGR. Hence, it is held that decree dated 28.10.2018 was passed by a court of competent jurisdiction.

**FRAUD AND MISREPRESENTATION:**

As per averments of the 12(2) CPC petition, the decree dated 28.10.2018 has been obtained by fraud and misrepresentation. The petitioners were condemned unheard. Before going into discussion, the court would like to discuss the mechanism of dispute resolution both; civil and criminal under the then prevailing law i.e FCR. Section 8 of the FCR dealt with the resolution of civil disputes between the various persons which may likely cause a breach of peace in the area, the Political Agent or the District Coordination Officer, on the receipt of any such complaint, would refer the matter to the Council of Elders, the members whereof to be nominated with the consent of the parties, who shall inquire the matter and record their findings by Riway of the locality. On receipt of finding of the Council of Elders, the Political Agent or the District Coordination Officer would pass a decree in accordance with the findings of the majority of the Council of Elders or would remand the case to the Council of the Elders for further inquiry and findings, if so required.

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The record on file reveals that on 05.09.2016, APA, Lower Orakzai set aside the order of Tehsildar, Lower Orakzai and constituted a fresh jirga for resolution of the matter between the parties. The fresh jirga members delivered their award in favor of respondents and it was accepted by AC, Lower Orakzai on 23.10.2018 which resulted into decree dated 28.10.2018 in case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018. After transfer of cases to the regular courts, suit titled "Sadeeq Khan vs Qaum Stori Khel" No. 42/1 of 2019 was dismissed as withdrawn with permission to file a fresh one on 12.10.2019 while suit No. 8/1 of 2019 was consigned to record room vide order dated 19.09.2019 on the ground that decree dated 28.10.2018 has already been passed and the matter comes within the ambit of past and closed transaction.

As mentioned above, the APA, Lower Orakzai had the power to accept or reject the jirga award. Remand the matter to a fresh jirga. Per record, the fresh jirga decided the matter in favor of respondents after observing legal formalities under the FCR. The contention of petitioners that, they were not aware of the proceedings before the court of APA, Lower Orakzai is not supported by record on file. PWs have admitted in their cross examination that they were aware of the proceedings before the APA, Lower Orakzai. Qaum Stori Khel including petitioners was duly represented by their elders/Malaks as per custom and tradition of the Erst-while FATA.

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PW-02 admitted in his cross examination that;

میں جاوید خان اور سعود خان کو نہیں جانتا۔ جائیداد متدعوئیہ پر تقریباً عرصہ 20/10 سال سے مابین فریقین تنازعہ ہے۔ تنازعہ قوم ستوری خیل تپہ ملاخیل کا صدیق کے ساتھ چلا آ رہا ہے۔ میں صدیق خان کو جانتا ہوں۔ جو کہ عبدالعزیز خیل سے ہے اور خان ہے۔ مسمیان حاجی میناگل، اصغر شاہ، گل میر اور ملک جان کو میں جانتا ہوں اور یہ ہمارے تپہ کے مشران ہیں۔ مجھے علم ہے کہ صدیق خان اور ہماری قوم کے درمیان پہلے (قوم ستوری خیل) فیصلہ ہوا تھا۔ جس میں تپہ ملاخیل کے کسان نے صدیق خان کے لئے قرآن پر خلف لیا تھا۔ صدیق خان کے ساتھ جرگہ کاروائی میں مسمیان میناگل، ملک جان، گل میر اور اصغر شاہ آئے تھے۔ یہ بطور مشران شریک ہوتے تھے۔ مجھے یہ علم نہ ہے کہ فیصلے کے مطابق جائیداد متدعوئیہ کی ملکیت کس کے حصے میں آئی۔ میں مسول الیہ میر حسن خان کو جانتا ہوں جو کہ صدیق خان کا تھیجا ہے۔

Similarly, PW-03 admitted in his cross examination that;

مابین فریقین زمین پر تنازعہ عرصہ تقریباً 25 سال سے ہے۔ میں مسمیان حاجی میناگل، اصغر شاہ اور ملک جان کو جانتا ہوں۔ جو کہ قوم ستوری خیل تپہ ملاخیل کے باشندے ہیں۔ یہ درست ہے کہ ہمارے قوم ستوری خیل تپہ ملاخیل کے مشران ہیں۔ یہ درست ہے کہ مزکورہ بالا کسان اور صدیق خان کے مابین کئی جرگے ہو چکے ہیں۔ یہ درست ہے کہ مابین فریقین مختلف عدالتوں میں جسمیں APA اور کمشنر کی عدالتیں شامل ہیں۔ 2006 میں جو جرگہ ہوا تھا اس سے باخبر ہوں۔ جس میں قرآن ہوا تھا۔ مجھے 2018 کے فیصلوں کا علم نہ ہے۔

PW-04 admitted in his cross examination that;

یہ درست ہے کہ 2006 والا فیصلہ APA لوئر اور کزئی کی عدالت میں تھا۔ 2006 میں ہمارے مشران اصغر حاجی، حیواگل وغیرہ جاتے تھے۔ یہ درست ہے کہ merger سے پہلے تمام فیصلہ جات APA کے عدالت میں ہو کرتے تھے۔ مجھے یاد ہے کہ 2006 میں جرگہ ہمارا قوم مابین صدیق خان ہوا تھا۔

PW-01 and PW-02 did not utter a single word about fraud, misrepresentation and want of jurisdiction in their statements. The assessment of record on file leads this court to the conclusion that the decree dated 28.10.2018 was passed by the court of competent jurisdiction of APA, Lower Orakzai. The petitioners were in knowledge of the proceedings before the court of APA, Lower Orakzai. The proceedings were carried out by the court of APA, Lower Orakzai under the relevant provisions of FCR. The jirga verdict/award was accepted by the court

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concerned and decree dated 28.10.2018 was passed in favor of respondents accordingly. Although, the 2006 jirga decided the matter in favor of petitioners, however, the said jirga decision was not accepted by the court and later on, a fresh jirga was constituted which decided the matter in favor of respondents and the proceedings ended up in decree dated 28.10.2018. The Qaum Stori Khel including the petitioners was represented before the court concerned by their elders/Malaks. Petitioners failed to establish that the impugned decree is against the relevant provisions of the then prevailing law i.e FCR, customs and traditions of the Erst-while FATA. Pertinent to mention that the order dated: 12.10.2019 passed by the court of learned CJ-II, Orakzai whereby, suit No. 42/1 was dismissed as withdrawn and order dated: 19.09.2019 in suit No. 8/1 passed by the same court whereby, case file was consigned to record room on the ground that decree dated 28.10.2018 has already been passed, were not challenged before any forum. Similarly, decree dated 28.10.2018 has not been challenged before any forum by anyone.

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Crux of my issue wise discussion is that, petitioners failed to substantiate the allegation of fraud and misrepresentation. Mere allegations of fraud and misrepresentation are not supported by any material available on record. Discrepancy or irregularity, if any in the proceedings held by the court of APA, Lower Orakzai would not amount to fraud and misrepresentation, hence, issue No. 3 is decided in negative against the petitioners and in favor of respondents.

ISSUE NO. 1

**Whether the petitioners have got cause of action?**

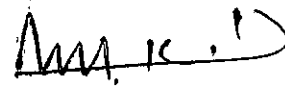
After my findings on issues, petitioners failed to prove the factum of fraud and misrepresentation during the proceedings of case No. 2322/AC/L dated Kalaya, the October 28<sup>th</sup>, 2018. Meaning thereby that, petitioners have got no cause of action. This issue is therefore, decided in negative.

**RELIEF**

As a result of my issue-wise findings, petition fails for want of proof. Same is therefore dismissed. Parties are left to bear their own costs of their proceedings because none of the parties have specifically proved the costs incurred on the case.

File be consigned to record room along with the requisitioned record after its necessary completion and compilation.

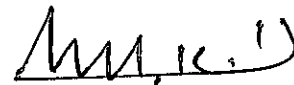
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**CERTIFICATE:**

It is certified that this judgment consisting of 14 pages; each page has been read over, corrected, where necessary and signed by me.



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