

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

Civil Appeal (against order) No. 18 of 2020

Date of Institution: 02-03-2020

Date of Decision: 19-11-2020

(1) **Zahir Hassan** s/o Kamal Hussain, (2) **Nasar Mir** s/o Naseer Ali, (3) **Sameen Khan** s/o Muhammad Amin and (4) **Menhaj Ali** s/o Wazir Ali; r/o Sra Khoona, Lower Orakzai – as representatives of all persons belonging to Said Khel *tapa* (sub caste) of Bar Muhammad Khel caste.

(Appellants/Plaintiffs)

Vs

(1) **Sharif Khan** s/o Gul Khan, (2) **Riqab Ali** s/o Samand Khan, (3) **Noor Habib** s/o Ajab Khan, (4) **Nazak Ali** s/o Gul Karam, (5) **Malak Saifoor** s/o Mohabbat Khan and other un-specified persons; all belonging to *tapa* Alat Khel (of Bar Muhammad Khel caste) and residing in Khando, Lower Orakzai.

(Respondents/Defendants)

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- Syed Muzahir Hussain Advocate for appellants
 - Javid Muhammad and Jabir Hussain Advocates for respondents
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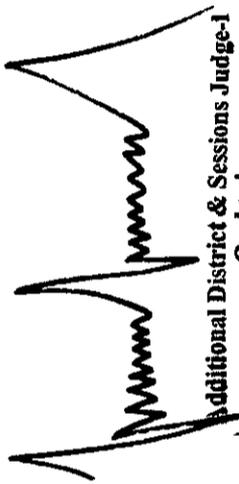
APPEAL against the Order and Judgment, dated **20-02-2020**, of learned CJ-I, Orakzai, passed in Civil Suit No. 04/1 of 2019.

(Impugned Judgment)

Judgment:

1. Through the impugned judgment an application for grant of temporary injunction, filed by the present appellants (plaintiffs), was dismissed by the learned trial court.
2. Facts of the case, according to the record, are that the appellants/plaintiffs claim to be representatives of all persons belonging to *tapa* Said Khel (the provisions of Order 1 Rule 8 of CPC, however, have not been complied with so far, and permission for suing in representative capacity has not been expressly given to them by the trial court). They claim that the suit property (described in plaint as the eastern watershed/side of a mountain called Raag, situated in Sra Khoona) is in ownership and in possession of the

plaintiffs (people of tapa Said Khel) since the time of their forefather; that the respondents (people of tapa Alat Khel) are encroaching 2000 feet into the property of plaintiffs, from the eastern side and trying to take possession of this property for a coal mine. The plaintiffs allege that the respondents have no right in the property belonging to tapa Said Khel or the right to starting a mine in the said area. Alongwith this plaint they filed an application under Order 1 Rule 8 CPC and an application for temporary injunction. Proceedings in application under Order 1 Rule 8 CPC have not been carried on by the trial court, while application for the temporary injunction was dismissed through the impugned judgment.


Additional District & Sessions Judge-1
Orakzai

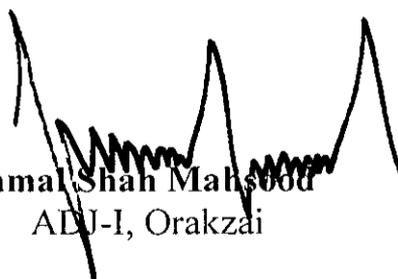
3. The defendants/respondents were summoned by the trial court; they appeared and submitted written statement and reply to application for temporary injunction. The respondents denied the suit of the plaintiffs and alleged that the plaintiffs/appellants had no right over the suit property; and that the respondents/defendants (people of tapa Alat Khel) were in possession of the same as owners since more than 200 years.
4. The appellants/plaintiffs, being aggrieved of the rejection of their application for temporary injunction, have filed the instant appeal.
5. Notice was given to respondents/defendants; they appeared to contest the instant appeal. Arguments of the counsels for the parties were heard and available record perused. My tentative findings, for the purpose of deciding instant appeal, in light of available record and arguments of the parties are as follows.
6. For the purpose of grant of temporary injunction, generally, three essential ingredients are required to be proved by a petitioner in its favour, viz.: a prima facie case, balance of inconvenience and irreparable loss. These three essentials must be established by a party to co-exist in its favour. Each essential is discussed below, keeping in view the circumstances of present case.
7. Both the parties (as representatives of their respective sub-castes) claim ownership over the suit property through inheritance. The assertions of parties raised in their respective pleadings, which are without any proper verifications on oath, are subject to pro and

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contra evidence. In such a situation no prima facie case can be said to exist in favour of appellants/plaintiffs, at present.

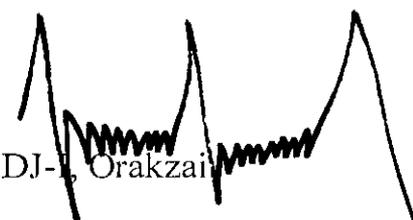
8. As far as the point of balance of inconvenience is concerned, both the parties claim to be in possession of suit land; which factual controversy is to be resolved by trial court - after recording of evidence. However, the appellants/plaintiffs admit that 2000 feet of mine belonging to respondents/defendants is present in the disputed property; as such, this would show that the respondents are in possession of the suit property since a sufficiently long time. In such a situation the point of balance of inconvenience lies in favor of respondents/defendants – due to their admitted possession over the disputed area.
9. As far irreparable loss is concerned, the activity of mining by respondents/defendants - as admitted by appellants/plaintiffs, is not something that cannot be converted into monetary value. The appellants/plaintiffs, if they succeed in their suit, will be able to claim mesne profits. Thus, it is not a case of irreparable loss to the appellants/plaintiffs.
10. In light of the above discussion, the instant appeal is found to be without merit. No infirmity could be pointed in impugned judgement. Resultantly, the instant appeal is **dismissed**. Parties to bear their own costs. Let a copy of this order be placed on record and the same be returned to learned trial court. Let this file be consigned to record room after its necessary completion and compilation.

Announced
19-11-2020


Jamal Shah Mahsood
ADJ-I, Orakzai

CERTIFICATE

Certified that this judgment consists of 03 pages. Each page has been signed by me.


ADJ-I, Orakzai