

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
GILGIT**

BEFORE:

*Mr. Justice Syed Arshad Hussain Shah, Chief Judge
Mr. Justice Wazir Shakeel Ahmed, Judge*

Cr. Misc. No. 22/2019 in Cr. PLA No. 20/2019

Syed Alam s/o Didar Shah, r/o Taboray Darel District Diamer.	Petitioner
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Versus

The State	Respondents
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PRESENT

For the petitioner: Mr. Amjad Hussain, Sr. Advocate SAC
 Mr. Muhammad Saleem Khan Advocate

For the State : The Advocate General, Gilgit-Baltistan

On Court's Notice : 1. The Sr. Superintendent of Police Diamer
 2. The Assistant Commissioner Darel
 3. The Tehsildar of concerned Sub-Division
 4. Mr. Haider Khan, Member Jirga
 5. Mr. Muhammad Bashir, Member Jirga

Date of Hearing: **07.09.2020**

JUDGMENT

Syed Arshad Hussain Shah, Chief Judge:- The above Cr. Misc. Application No 22/2019 in Cr.PLA No. 20/2019 has also been filed for acquittal/ release of the Accused/Petitioner on the basis of a compromise deed purported to have been effected between the parties. This application was heard on 22.10.2019 and necessary orders were issued to the parties as well as to the Additional District & Sessions Judge, Diamer, Chilas, wherein certain formalities were ordered to be completed and submitted before this Court on the next date besides presence of the parties and concerned govt. officers. In compliance of the directives, SSP Diamer, Assistant Commissioner Darel, Tehildar and M/s. Haider Khan and Bashir, Members of the Jirga were present in the Court today. Since, we were already conscious of some facts appearing on the face of Compromise Deed, therefore,

before proceeding to hear the case, the learned counsel for the petitioner was asked to read-over the contents of the Compromise Deed to the Court at bar and satisfy the Court as to whether it was a Compromise Deed or a Decision of the Jirga. The learned counsel for the petitioner, after reading the Compromise Deed, conceded that it was not a Compromise Deed rather was a Decision of the Jirga. It was painfully observed that in the Compromise Deed, (hereinafter referred as Compromise Decision) parties were bound to agree/ accept the decision of the Jirga on oath. The first question raised by the Court to the counsel for the petitioner and Members of Jirga was in a case where conviction awarded by the learned Trial Court was upheld by the learned Chief Court an appeal against thereof being pending before this Court, did any law allow the so-called Jirga to establish a parallel Court to sit over the decisions of the Courts and deliver its own verdict? The learned counsel for the petitioner candidly conceded that no Jirga could be allowed under the law to establish parallel Courts to sit over the decisions of the constitutionally recognized Courts of the country. When this question was put to the Members of the Jirga too, one of them, who happened to be the Ex. Minister of Gilgit-Baltistan legislative Assembly, submitted that he had not looked at the heading of the Compromise Decision whether the heading was written as Compromise Deed or Decision of the Jirga. The Member concerned also admitted that Jirga Members could not be allowed to sit over the decisions of the Courts and alter/ modify the same. The other Member was an illiterate person. When faced with this situation, the members of the Jirga made abortive attempts to justify their decision by submitting that they, with good faith to establish harmonious atmosphere in the area and to eradicate the evil of animosity, did so. They might be right in their statements, but, *prima facie*, contents of the Compromise Decision, in no way, reflect to be a compromise deed, instead, with a high degree of certainty, a Decision of the Jirga.

2. The above were the facts revolving around the Jirga Decision. In addition to this, the compromise decision as well as the exercise undertaken by the Jirga conceal some material facts, which were essentially attached with the compromise. That out of 8 legal heirs of the deceased, 04 legal heirs entered into compromise with the accused party empowering two persons for Salsi/ Decision. Both the parties have been given Talaq as binding force to accept the decision of

the Jirga which on the face of it is against the principles of Sharia and law. Hence, the compromise cannot be termed/ considered as a voluntarily compromise between the parties. The Jirga was not given power of compromise and decision on the basis of evidence, which is also illegal because no Jirga can decide a criminal case on the basis of evidence. According to Jirga decision Rs. 2500,000/- (rupees twenty five lacs) was fixed as Diyat amount. Only a sum of Rs. 541,875/- was deposited in the account of one minor Waqas Nabi. Nothing is received by other major heirs, who all are female (widow and sisters). All have forgiven their shares of Badl-e-Sulh. According to report of Assistant Commissioner of the concerned sub-division, there are 8 legal heirs plus one Mankoothah widow of deceased. Out of these legal heirs, one is Mankoothah wife of deceased whose Nikah is proved but not consummated. She is given Rs. 20,000/- (rupees twenty thousand) as half of dower only. Though dower is a debit towards other legal heirs having no concern with badl-e-sulh. The question is how without consummation, a widow could be excluded from inheritance.

3. Without prejudice to the position in respect of the case in hand, the Superior Courts of Pakistan are very much clear about illegal Jirga system in Pakistan and have been passing directives in this regard from time to time while deciding such like matters brought to them. These Jirgas on account of having no legal validity, are absolutely unguided in their powers and decision making, often making arbitrary and unjust decisions under the guise of compromises, which more often than not, due to ignorance of law and Islamic injunctions, resort to violation of constitutionally guaranteed rights with regard to life, liberty, body, reputation or property of the people by enforcing a binding solemn affirmation on oath and Talaqs. This court is to see whether the agreement constituting a jirga for decision was lawful. Waiver of qisas or acceptance of badl-e sulh or compromise in any form attracts voluntariness as a necessary element. In such types of arrangement all prerequisites of a contract must be present. An agreement without free consent is void. Similarly, any agreement tainted with undue influence and coercion is also void (Chapter II of the Contract Act,1872). Voluntariness, therefore in all consents is implied. The agreement constituting Jirga suffered with many illegalities. First, it was not between all the legal heirs. Secondly it was not meant for compromise but decision. Thirdly unislamic provision of binding the contracting

parties on Oath by *talaq* was inserted. Discussing the legal status of Oath as binding force on Talaq the Lahore High Court in a case entitled *Abd-ur-Raheem v Shergul* (1987 CLC 1602) held that taking Oath by talaq is unislamic though this verdict was in civil case but *ratio* is equally applicable in criminal cases as well. Otherwise too binding any party even by legal oath to abide by any decision is not voluntary. This agreement was therefore illegal. Now coming to the status of Jirga the Supreme Court of Pakistan in a case entitled “National Commission on Status of Women VS Government of Pakistan through Secretary Law and Justice” (PLD 2019 SC 218) in paragraph 2(iii,iv) observed as below “*Jirgas/panchayats etc. reinforce unfair social norms by implementing the decisions of notable elderly men of the village or tribe on its socially and financially weaker members (women and the impoverished); such bodies convene in village gatherings to resolve disputes between parties where as a matter of culture and tradition, women are a rare sight and if involved in a dispute are usually being represented by their male kin which again is a violation of the right to due process and equality under Articles 10-A and 25 of the Constitution; (iv) In the light of the above mentioned widely prevalent circumstances in the rural and tribal areas, the internationally recognized principles of due process of law and ‘right of access to justice to all’ enshrined in different international treaties to which Pakistan is a signatory have been completely violated*”. Another dicta on the status of local tribunals is from Lahore High Court in Husnain Akhar Vs. Justice of Peach (205 YLR 2294) wherein it has been held that “*the law of the land does not countenance/ approve of deciding criminal cases through the intercession of the Panchayats/ Arbitration Council. Even otherwise, it is tantamount to bypass and short-cutting the procedure provided for under the law.*” In another case of the said learned Court reported as Muhammad Younis Vs. Nazar Ahmed (2013 YLR 139), it has been held that the “*so-called Panchayat has no legal sanctity to declare anyone guilty or innocent*”. No person whether as a part of a body or Jirga can act as a community appointed Judge and to establish his own Court. Sometimes, it goes without checking whether the person involved in Jirga system is/ was a literate enough to understand the law of the land and the Islamic injunctions. Similar situation prevails with the case in hand as one of the members of the Jirga is an illiterate person. Yes, the case would be somewhat different

though not binding, if the Members of Jirga are well reputed and God fearing. Religious Scholars, who could reach to a conclusion strictly in accordance with Islamic law and the law of the land, however, with no element of coercion or duress to convince the parties to compromise with their free will.

4. However, the Jirgas can play a role of mediation, negotiation or reconciliation between the parties, who willingly, without pressure or duress, consent to do the same. Intervention of Jirgas, whether at initial stage of case, during pendency or after its decision is not allowed. Intervention of Jirga and holding Jirga meeting hearings, especially in criminal matters, is violation of the Constitution and the law as it would be termed as establishing a parallel judicial system. It must be kept in mind by all Judicial functionaries and public functionaries as well that in order to decide all issues arising out of a criminal offence, civil issues and others, the Constitution of Pakistan has clearly established Courts right from the Civil Courts, Administrative Courts/ Tribunal upto the Supreme Court of Pakistan. It is general perception that the purpose of effecting compromises between the parties by Jirgas is to develop and maintain peace and harmony amongst the people of the area, however, it would not be out of context to mention here that if such so-called Jirgas are really sincere to develop and maintain peace and harmony amongst the people, they should make efforts before taking place of such untoward incidents and not afterwards.

5. The above observations of ours shall have no effect on any other measures taken by the government in the form of establishment of Alternate Dispute Resolutions Systems, or any other body duly approved by the government of Pakistan or recognized by law and are working across the country with the lawful objectives.

6. As far as the case in hand is concerned, it is made clear here that case has been decided against the judgments of the learned two Courts, and Cr.PLA No.20/2019 is subjudice before this Court. As discussed above, the Compromise Decision, on the basis of which the petitioner party prays for acquittal / release of the accused / petitioner, does not appear to be a Compromise Deed to have been made with the consent/free will of the complainant/ legal heirs, rather it is a

“Decision of the Jirga”, apparently against the judgments of the two Courts below. Thus, the decision of Jirga has vitiated the whole process of compromise and the Compromise Decision itself. **Consequently, Cr. Misc. Application No. 22/2019 in Cr.PL.A No. 20/2019 is rejected/ dismissed. Acquittal of the accused/ petitioner on the basis of the said compromise is refused.**

7. Before parting with this judgment, we deem it expedient to issue the following directives for implementation thereof on the part of the concerned authorities in future:

- (i) The Law Enforcement Agencies all over Gilgit-Baltistan Region is duty bound to be vigilant and if they find any Member or Members of a Jirga/ Panchayat (informal fora) involved in forcibly convincing any party to a criminal matter to enter into a compromise, intimate the concerned heads of Divisions and District Administrations;
- (ii) The Commissioners of respective Divisions, Deputy Commissioners of the respective Districts are directed to activate informers to share information in respect of the para (i) above to the Law Enforcement Agencies;
- (iii) The GB police must ensure immediate action against the person(s) involved in the activities mentioned in para (i) above. The Inspector General GB is directed to formulate SOPs and circulate to all District Police Offices for implementation and submit compliance report to the Registrar of this Court within a period of 20 days of receipt of this judgment.
- (iv) No compromise in criminal cases shall be entertained by the learned Chief Court as well as District Judiciary of GB where they find involvement of Jirga(s); unless the parties themselves approach the Court for effecting compromise(s) with their free will and without an element of coercion/ duress.
- (v) It is further to be noted here that a compromise between the parties with free will and consent and the one which is effected under the decisions of the so-called Jirgas are two different things. In each case of

compromise, legal aspects must thoroughly be looked into to see whether the compromise effected between the parties is a compromise with their free will/consent or it is a result of intervention by Jirgas and in the latter case, the compromise case shall be rejected straightaway. Pain and suffering are caused to the heirs of a murdered person and the Holy Qur'an has only empowered the legal heirs to forgive the murderer not the Jirga to force the legal heirs to forgive the murderer. In future, if any case is referred to the Trial Court for recording statements etc., the concerned District Judge/ Trial Court must ensure adherence to all legal aspects besides strict compliance of the Court directives as a whole.

8. The office of this Court is directed to send a copy of this judgment to all the authorities mentioned herein above for strict compliance in future.

Chief Judge

Judge