

In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL DISTRICT JUDGE, ORAKZAI AT BABER MELA

Civil Appeal No. CA-14/13 of 2023

Date of institution: 01.04.2023

Date of decision: 31.05.2023

Inaz Ali son of Gul Khan Ali resident of Qaum Mani Khel, village Ahmed Khel, Tehsil Lower, District Orakzai.

..... (**Appellant/plaintiff**)

...Versus...

Ilham Ali son of Ikram Ali resident of Qaum Mani Khel, village Ahmed Khel, Tehsil Lower, District Orakzai.


..... (**Respondent/defendant**)

Appeal against Judgement, Decree and Order dated 16-03-2023, passed in Civil Suit No. 05/1 of 2023.

JUDGMENT

Instant Civil Appeal has been preferred by the appellant/plaintiff against the Judgment, Decree & Order dated 16.03.2023, passed by learned Senior Civil Judge, Orakzai in Civil Suit bearing No.05/1 of 2023; whereby, the suit with the title of Inaz Ali vs Ilham Ali was dismissed.

2. Plaintiff and his brother Hashmat Ali has constructed a joint dwelling house at village Ahmed Khel and using the pathway as approach to such house since 2006. The passage leading to the residence of the plaintiff is single available channel passing through the fields owned and possessed by defendant. A dispute was raised regarding use of the landed property as passage which was subjected in the proceedings of Jirga locally constituted in the year 2012. The Jirga has issued verdict in favour of the plaintiff through written document and issue was resolved once for all. In the year 2019, the defendant has interfered in the pathway that necessitated presentation of suit.


SAYED PIZAL WADOOD
Addl. District & Sessions Judge
Orakzai at Hangu

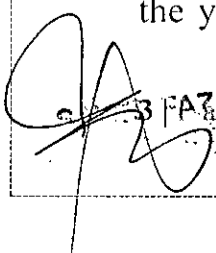
6. The suit was decreed vide Judgement dated 21-09-2022; against which, the defendant has preferred an appeal before the next forum. Hon'ble, the District & Sessions Judge, Orakzai vide Judgement dated 10-11-2022, remanded the case back to learned, the Trial Judge with the direction to appoint local commission with the mandate to investigate and acquire on the spot information about availability of alternate pathway for approaching the house of plaintiff. It was further directed that the case shall be decided on its merits by keeping in view the Commission Report.

7. The learned Trial Judge has appointed Mr. Insaf Ali Advocate as Local Commissioner recommended by counsel representing the parties vide Order No. 02 dated 03-12-2022. The points referred therein are being reproduced here in below:

1. یہ کہ آیا مدعی کی آمدورفت برائے مکان کے لئے دیگر راستہ ماسوائے راستہ متداغویہ مدعا علیہ موجود ہے۔ اگر ہے تو اسکی تفصیل بمعدہ پیش کرنا چوڑائی خاکہ تصویر کی مرتب کر کے پیش کریں۔
2. مدعا علیہ کی اراضی پر مدعی جس رقبہ سے گزر کر اپنے مکان تک جاتا ہے اسکی تفصیل بمعدہ لسانی و چوڑائی کی خاکہ تصویر میں ظاہر کر کے پیش کریں۔
3. موقع کی صورت حال کی بابت اپنی تفصیلی رپورٹ بھی پیش کریں جس میں ملحقہ اراضیات و مکانات اگر کوئی ہیں تو اسکی بھی تفصیل پیش کریں بمعدہ تصویر موقع کے کرفٹ رپورٹ کریں۔

8. Commission Report was exhibited in the statement recorded as CW-1 as exhibit CW-1/1; site plan is Ex.CW-1/2 and photographs have been produced as Ex.CW-1/3. Counsel representing plaintiff has cross examined the Local Commissioner in the lights of his objections. The suit was dismissed vide Judgement and Decree dated 16-03-2023. Feeling aggrieved, plaintiff as appellant is before the Court and appeal is pending adjudication.

9. Learned counsel representing appellant argued that plaintiff has constructed dwelling house over his ancestral property and is using the disputed path is single available approach since 2006. The defendant has later on acquired the ownership of the property on the basis of exchange and has illegally interfered in the peaceful utilization of the passage. This issue has already been settled through local Jirga in the year 2012 and believed by the Court while granting decree in his favor vide


 INSAF ALI
 Advocate
 Orakzai

Judgement and Decree dated 21-09-2022. Hon'ble the District & Sessions Judge, has remanded the case vide Judgement dated 10-11-2022 with the limited scope of inquiring the plea of single available approach or existence of alternate rout. The Commission Report Ex.CW-1/1 followed by other annexures categorically speak that the disputed pathway is single available approach and thus dismissal of suit was against the law. The local commissioner was appointed with the mutual consent of the parties and their counsel and therefore allowing the counsel for defendant to cross examine him was against the law. The suit of the plaintiff is proved on the strength of oral and documentary evidence and therefore withholding of decree by way of dismissal of suit is based on illegality. It was concluded with the prayer that appeal may be allowed and the suit may be decreed by reversing the Judgement of the Trial Court.

10. Learned counsel representing respondent/defendant contended that the plaintiff has failed to prove his case and was rightly dismissed. The Judgement of learned Trial Court is judicial determination based on deep appreciation of evidence and backed by law. The appeal is protraction of litigation on part of the plaintiff with ulterior motive of harassing the defendant; which, may be dismissed with cost. The commission report speaks about the availability of other rout which is feasible for approaching house of the plaintiff. The plaintiff attempted to detract the approach path from his own landed property and to grab the property of defendant. He added that defendant was neither part nor signatory of the Jirga verdict and he is stranger to the deed. Similarly, the learned Trial Judge has rightly determined all the issues afresh as order of remand has invalidated whole of the Judgement clutched therein. Sayed Hashim Jan has ceased to be the owner in the month of June when the exchange of property was completed; whereas, the alleged Jirga verdict is concluded in the month of August and that is why not applicable to the disputed approach path at all.

11. The case file has been examined in the light of professional assistance rendered by the learned counsel representing parties. The right of utilization of the disputed pathway has been recognized by the learned Trial Court in Judgement and Decree dated 21-09-2022. The defendant feeling aggrieved had preferred Appeal bearing No. 13/13 of 2022 which was decided with the mutual consent of the parties vide Judgement dated 10-11-2022 with the following operating part. "*Hence, in view of mutual understanding of counsel for the parties, without touching the merits of the case, the application of the respondent/plaintiff for issuance of local commission is accepted. Accordingly, the impugned judgement/decree dated 21-09-2021, passed by Civil Judge-I, Kalaya, District Orakzai is set aside and the case is remanded back to the Trial Court with the direction to issue a local commission for making investigation on the spot on the point of availability of alternate pathway for the approach of respondent/appellant to his house and to decide the case afresh on the basis of merits. Needless to mention that the TORs for local commission be framed by the trial court with consultation of counsels for the parties*".

12. Both the counsel representing parties have agreed on recommending Mr. Insaf Ali Advocate for investigation of the prime issue relating to availability of alternate route. This was the core issue of the suit and may be termed actual and real apple of discord between the parties and was requiring on the spot information for which Hon'ble the District & Sessions Judge has issued the commission. The Local Commissioner visited the spot; collected the evidence; recorded the statements; captured the photos and submitted report Ex.CW-1/1. He prepared site plan Ex.CW-1/2 and pictorial evidence as Ex.CW-1/3. The parties have been invited to file objection and then the local commissioner was examined as CW-1.

13. It was in the terms of reference framed by learned Trial Judge for commission that whether the disputed course is single approach for the plaintiff to their dwelling

house? The Commission Report Ex.CW-1/1 has categorically answered this prime question in the following words:

○ راستہ متدعوئیہ کی جنوبی طرف مدعی اور مدعا علیہ کا گھر ہے۔ مدعی کے گھر کی آمدورفت کا راستہ شمال کی طرف سے ہے اور مدعا علیہ کے گھر کی

آمدورفت کا راستہ جنوب کی طرف سے ہے۔ مدعی کے گھر کو اراضی متدعوئیہ / راستہ متدعوئیہ کے علاوہ کوئی اور راستہ بروئے آمدورفت

موجود نہ ہے کیونکہ مدعی کے شرقاً، غرباً اور جنوباً کی طرف سے کوئی راستہ بروئے آمدورفت موجود نہ ہے۔ راستہ متدعوئیہ کے غرباً طرف

سے ایک پختہ راستہ شہاب علی کے گھر کو جاتا ہے لیکن مدعی کی آمدورفت کے قابل نہ ہے کیونکہ مدعی کی اراضی کی شمالاً میں ایک پختہ دیوار

ہے جسکی لمبائی تقریباً 20 فٹ اور اونچائی تقریباً 07 فٹ ہے۔

○ یہ کہ مدعی کے گھر کو بروئے آمدورفت موجودہ وقت میں راستہ متدعوئیہ کے متبادل کوئی اور راستہ موجود نہ ہے۔ اراضی متدعوئیہ / راستہ

متدعوئیہ کے اطراف کا تصاویر بھی لف ایل کمیشن رپورٹ ہے۔ اراضی متدعوئیہ / راستہ متدعوئیہ کئی سالوں سے بنجر ہے۔

The site plan Ex.CW-1/2 and pictorial evidence in shape of Ex.CW-1/3 further confirms the fact that disputed passage is the single course available for approaching the dwelling house of the plaintiff. Where the parties undertake to be bound by the report of Local Commissioner, such report can be treated as verdict of a referee as was settled in Judgement reported as 2009 SCMR 594. The parties have jointly submitted the terms of reference and agreed on recommending Mr. Insaf Ali Advocate for local investigation of the matter in issue and thus implied agreement between the parties on acceptance of such report is the inference which is within the natural flow of events. Similarly, it has further been settled that the Court ought not to interfere with the result of a careful investigation by the commissioner except on clearly defined on sufficient grounds (1999 YLR 2250). There was no clearly defined and sufficient ground for the learned trial judge nor available for this court to interfere in the report about the state of things actually exist. Commission report has been prepared carefully and strictly in accordance with the jointly agreed terms

of reference; that too, conducted by the mutually agreed person and there was no ground for not concurring with the commission report.

14. As far as objection on commission report raised by learned counsel for defendant is concerned, the crux of such objections is that the commission report is contradictory on the issue of availability of the alternate route. There is no contradiction as the local commissioner has categorically mentioned in report Ex.CW-1/1 that the disputed way is the single available course for approaching the dwelling house of the plaintiff. The objection so raised is just mechanical for fabricating the paper and is obviously overruled for being devoid of merits. The commission report has been prepared in accordance with the law which shall not be lightly deprecated.

15. The plaintiff and his brother have jointly constructed dwelling house in the area; they are utilizing the disputed passage since 2006; the property was earlier owned and possessed by one Sayed Hashim Jan; dispute regarding the utilization of property as approach path was earlier popped up in the year 2012; defendant has acquired ownership of the land from Sayed Hashim Jan through exchange of property later on; and, parties are neighbors; all these facts are admitted in pleadings as well as in evidence of the parties. The dispute was resolved through Jirga in the year 2012 and verdict Ex.PW-1/2 was delivered in favor of plaintiff. The Jirga members have been examined as PW-2 and PW-3. They have testified the contents and execution of the Jirga Deed. Plaintiff has established probability in his favor which was required to be shattered by the defendant which he failed to do so. He, on turn, recorded his sole statement and produced photographs Ex.DW-1/2 and Ex.DW-1/3 which by no sketch of imagination can be considered sufficient for basing judicial determination in their favor.

16. For what has been discussed above, it can safely be held that the learned Trial Court has erred in conclusion drawn; that too, for the reasoning not backed by proper

application of law and thus not sustainable. Appeal in hand is allowed and consequently, the impugned Judgement and Decree dated 16-03-2023 is reversed. Suit of the plaintiff stands decreed as prayed for. Costs shall follow the events. Requisitioned record be returned back with copy of this Judgement; whereas, File of this Court be consigned to District Record Room, Orakzai as prescribed within span allowed for.

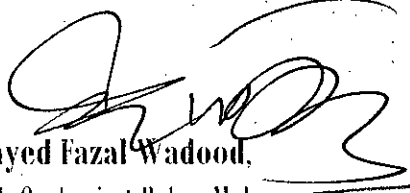
Announced in the open Court
31.05.2023



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela.

CERTIFICATE.

Certified that this Judgment is consisting upon eight (08) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela.