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**IN THE COURT OF SAMI ULLAH, CIVIL JUDGE-I,  
ORAKZAI (AT BABER MELA).**

Civil suit No 10/1 of 2023  
Date of institution 23.01.2023  
Date of decision 27.11.2023

**Shabbir Ahmad S/o Nawab Gul**

**Resident of Qoam Rabia Khel, Tappa Payao Khel, Sarmeela, PO Samana, Saifal  
Dara (Seeri Bela), Tehsil Ismialzai District Orakzai.**

..... (Plaintiff)

**Versus**

**1. Naimat Ullah S/o Gharib Gul**

**2. Saadat Khan S/o Gharib Gul**

**Both residents of Qoam Rabia Khel, Tappa Payao Khel, Sarmeela, PO Samana,  
Saifal Dara (Seeri Bela), Tehsil Ismialzai District Orakzai.**

**3. Okhair Gul S/o Khan Sher, resident of Sifat Banda, District Hangu.**

.....(Defendants)

**SUIT FOR DECLARATION CUM PERMANENT AND MANDATORY  
INJUNCTION**

**JUDGMENT:**

1. Brief facts of the case are that the plaintiff have filed the instant suit for declaration and permanent injunction to the effect that the disputed thoroughfare detailed in the head note of the pliant is a public path way used by the villagers from time immemorial and were enjoying quiet and uninterrupted right of way over the same until recently. That the plaintiff wants to construct the same. That the defendants have blocked the same near their house and is creating hurdles and inconvenience to the people whose houses are situated ahead along the pathway, in the use of the

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same. That the defendants were asked not to interfere in the disputed thoroughfare, but they refused, hence the present suit.

2. After due process of summons the defendants appeared in person and contested the suit by submitting written statement in which contention of the plaintiff were resisted on many legal as well as factual grounds. They denied the claim of plaintiff, contending that the disputed thorough fare is not wide enough for moving vehicle and it is open for approaching on foot. However, defendants have not denied the fact in the plaint that they have not blocked the thoroughfare rather contented that its open for approaching on foot.
3. The divergent pleadings of the parties were reduced into the following issues.

**ISSUES.**

1. *Whether the plaintiff has got cause of action?*
2. *Whether the plaintiff is estopped to sue?*
3. *Whether the suit of the plaintiff is time barred?*
4. *Whether the plaintiff has a right of way over the non-constructed pathway in the disputed property?*
5. *Whether the plaintiff has a right to construct the disputed pathway for his use?*
6. *Whether there is any alternate way available to the plaintiff to approach his house?*
7. *Whether the disputed pathway can only be used by foot and is not enough for passing a vehicle on the same?*
8. *Whether the plaintiff is entitled to the decree as prayed for?*
9. *Relief.*

4. Parties were afforded with ample opportunity to adduce evidence. Plaintiff in support of his claim and contention produced 05 Witnesses.

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Detail of the plaintiff's witnesses and exhibited documents are as under;

|      | WITNESSES  | EXHIBITIS |
|------|--|-----------|
| PW-1 | Shabbir Ahmad S/o Nawab Gul R/O Qoam Rabia Khel, Tappa Payao Khel, Tehsil Ismialzai, District Orakzai. | Nil       |
| PW-2 | Abdul Basir S/o Nasir Khan R/O Heera Banda, District Hangu.  | Nil       |
| PW-3 | Maseem Shah alias Musa Khan S/o Nasim Shah R/O Sifat Banda, District Hangu.                            | Nil       |
| PW-4 | Hasham Gul S/o Haider Gul R/O Qoam Rabia Khel, Tappa Payao Khel, District Orakzai.                     | Nil       |
| PW-5 | Rafi Ullah Khan S/o Ahmad Gul Heera Banda, District Hangu.   | Nil       |

Defendants in support of his claim and contention produced three (03) witnesses. Detail of defendant's witnesses and exhibited documents are as under;

|      | WITNESSES  | EXHIBITIONS  |
|------|--|--|
| DW-1 | Naimat Ullah S/o Gharib Gul R/O Qoam Rabia Khel, Tappa Payao Khel, Tehsil Ismialzai, District Orakzai. | Power of attorney of defendant No.2 is Ex.DW-1/2.<br>Power of attorney of defendant No.3 is Ex.DW-2/2.<br>Copy of CNIC as Ex.DW-1/3. |
| DW-2 | Naseeb Khan S/o Asghari Shah R/O Qoam Rabia Khel, Ghari  | Nil  |

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|      |   |                                |
|------|---|--------------------------------|
|      | Anjawar, District Orakzai.  |                                |
| DW-3 | Moeen Afzal S/o Abdul Jalil<br>R/O Qoam Rabia Khel, Tappa<br>Afzal Khel, Tehsil Ismialzai,<br>District Orakzai. | Copy of CNIC as Ex.DW-<br>3/1. |

5. Learned counsel for the plaintiff, Mr. Asif Kareem Orakzai Advocate argued that plaintiff has produced cogent evidence and reliable witnesses to prove that the disputed thoroughfare is a public pathway and defendants have blocked the same by placing stones and thereby allowing the inhabitants of the village to approach the same by foot only. The witnesses are consistent in their statements that disputed thoroughfare is not private path and is use by the inhabitants of the village from time immemorial. He further argued that the public is facing hardships at the hands of the defendants regarding approaching their village and as the plaintiff wants to construct it according to the existing dimensions, the defendants are creating hurdles in the same.
6. Learned counsel for the defendants Mr. Shaheen Muhammad Advocate argued that the plaintiff has not produced sufficient evidence in order to proof their case. That the plaintiff don't have any documentary proof in support of their stance. That the disputed thoroughfare is open to public for approaching the same on foot. He lastly prayed for dismissal of the suit
7. After hearing arguments and after gone through the record of the case with valuable assistance of learned Counsels for both the parties, my issue-wise findings are as under:

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**ISSUE NO.2:**

*Whether the plaintiff is estopped to sue?*

8. Burden of proof regarding this issue was on defendants. Estoppel needs cogent, convincing and reliable evidence which is lacking on the part of defendants, therefore issue is decided in negative and against the defendants.

**ISSUE NO.3:**

*Whether the suit of the plaintiff is time barred?*

9. The onus to prove this issue was on the defendants. The plaintiff filed suit for declaration and permanent injunction. Defendants neither produced any evidence nor the point was agitated before the court at the time of arguments. Even otherwise, there is nothing available on record which suggests that the suit is time barred.
10. Moreover, period of limitation for filing declaratory suit Under Article 120 of limitation Act, is six years. Furthermore, after the 25<sup>th</sup> constitutional Amendment Act, 2018, all federal and provincial laws extended to the newly merged Districts in 2018. Therefore, it is held that the suit is well within time. Hence, the issue is decided in negative.

**ISSUE NO.4 and 5:**

*Whether the plaintiff has a right of way over the non-constructed pathway in the disputed property?*

*Whether the plaintiff has a right to construct the disputed pathway for his use?*

11. The claim of the plaintiff is that that the disputed thoroughfare detailed in the head note of the plicant is a public path way used by the villagers

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from time immemorial and they want to construct it. The plaintiff and the villagers have a right of way over the pathway and were enjoying quiet and uninterrupted right of way over the same until recently. Burden of proof regarding the issues were on plaintiff. Plaintiff in order to discharge this duty, produced five witnesses. The essence of their statements which helped in deciding the issue are as under.

12. Shabeer Ahmad, who himself is plaintiff deposed as PW-01, while supporting the claim of the plaintiff stated in his examination in chief that the disputed thoroughfare is been used by them(villagers) even before his birth. He stated that the disputed thoroughfare was closed by the defendant No.2 recently, regarding which they have also filed a report in the PS Ghiljo and after that the defendants have opened the pathway but only for using it on foot and have placed stones in the same, leaving only a small pathway. Further stated that many encounters of the villagers with the defendants have taken place regarding the disputed thoroughfare and failed jirga attempts have been made but of no avail due the behavior of the defendants. The said PW recorded in his cross examination that there are seven more households who are effected by the act of the defendants. The said PW stated that the pathway is open for approaching the same on foot. He also stated that there isn't any alternate way.

13. PW-02 is the statement of Abdul Basir, who supported the stance and contention of plaintiff in his examination in chief and stated that the disputed thoroughfare is used by the villagers from time immemorial and a tractor according to his knowledge has passed over the same. Nothing

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incriminating regarding the stance of the plaintiff and regarding the instant issues was recorded in his cross-examination.

14. PW-03 is the statement of Maseem Shah, who supported the stance and contention of plaintiff in his examination in chief and stated that the disputed thoroughfare is used by the villagers from time immemorial. He stated in his cross examination the disputed thoroughfare is six feet wide.

15. Hasham Gul deposed as PW-04 and stated in his examination in chief that the thoroughfare is disputed between the parties and is an old pathway and a jirga was conducted over the same and they decided that the disputed thoroughfare would be open. Further stated that it is 14/15 feet wide and if the defendants open 6 feet from it then it would be sufficient. He recorded in his cross examination that he was a jirga member in the jirga over the disputed thoroughfare and that the disputed thoroughfare is in between the houses of defendant No.1 and 2.

16. Rafi Ullah deposed as PW-04 and stated in his examination in chief that he was a jirga member of the jirga which was unsuccessful. He stated in his cross examination that the defendants have not consented to the jirga and the pathway is open for approaching on foot.

17. The statements of the plaintiff witnesses brought the facts before the court, mentioned here in after, which provided reason for deciding the issues in his favor. Firstly, the witnesses were consistent in their statement that the disputed thoroughfare is a public pathway used from time immemorial. Secondly, defendants have not contented that there isn't any public path or they have not blocked the same. Thirdly, the statement of the PWs reveals that the width of the disputed thoroughfare

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is more then to be used for walk/on foot only. Moreover, no fact was brought before the court which indicates that the disputed thoroughfare had been interrupted form use in the past or the same has been the private pathway. Furthermore, the cross examination of PW-04 revels that the pathway is in between the house of the defendant No.01 and 02 but it doesn't create any ownership right of them over the same, as their houses are situated on the ends of pathway.

18. Keeping in view the above discussion, it is held that plaintiff produced cogent, convincing and reliable evidence in support of their claim, therefore, issue No.04 and 05 is decided in favor of plaintiff based on their evidence.

**ISSUE NO.06 and 7:**

*Whether there is any alternate way available to the plaintiff to approach his house?*

*Whether the disputed pathway can only be used by foot and is not enough for passing a vehicle on the same?*

19. Defendants in their written statement have contended that the disputed thoroughfare is a pathway to be approached and used by foot only and not is not vide enough for passing vehicles. The burden of proof regarding the issue was on defendants. Defendants in order to prove their stance, produced three witnesses in their favour. The essence of their statements which helped in deciding the issue are as under.
20. Naimat Ullah who is defendant No.01 and power of attorney for defendant No.02 and 03 recorded his statement on oath as DW-01 and stated that the disputed thoroughfare is his personal pathway and is only

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used for approaching on foot and is opened to that extent. Further stated that if it is constructed then his house would be affected by the same. He further stated that there is alternate way for plaintiff to approach his house. The said PW admitted in his cross examination that the disputed thoroughfare is used by public from time immemorial. He also admitted that the point where he has placed stones is not his personal property.

21. Naseeb Khan recorded his statement as DW-02 in favour of the defendants and stated that he has passed through the disputed thoroughfare and it is open. He further stated that he don't know about the width of the disputed thoroughfare. The said PW admitted in his cross examination that stones were placed on the disputed thoroughfare when he visited the spot and the pathway was opened for moving along the same on foot. He also admitted that he don't know about an alternate way. Further stated in his cross examination that he don't know whether a vehicle can be passed on the disputed thoroughfare or not.

22. Moeen Afzal, recorded his statement as DW-03 in favour of the defendants and stated that the disputed thoroughfare is opened for public and the defendants have houses situated on both ends of the pathway. The said PW admitted in his cross examination that the pathway is approximately six feet wide and is joint ownership.

23. The statements of the defendants' witnesses brought the facts before the court, mentioned-above and crux of which is discussed here in after, which provided reason for deciding the issues. Firstly, the defendants have not proved that the disputed pathway is not wide enough to move a vehicle on the same and there is an alternate way/path. Secondly,

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defendants in their written statement contended that the disputed thoroughfare is their personal pathway but no documentary or oral evidence has been produced by defendants to this extent. Moreover, the defendant No.02 in his statement admitted the use of the disputed thoroughfare by general public from time of immemorial. Furthermore, DW-03 admitted in his statement that the disputed thoroughfare is joint pathway. Thirdly, DW-02 admitted in his statement that stones are laying in the disputed thoroughfare and DW-01 stated in his statement that he has placed the same. It is pertinent to mention here that admittedly the pathway at present is used by approaching on foot only due to laying of stones on the same.

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- 24. Keeping in view the above discussion, it is held that defendants have failed to produced cogent, convincing and reliable oral and documentary evidence in support of their claim, therefore, issue No.06 and 07 are decided in negative and against the defendants.

**ISSUE NO. 1 and 6:**

*Whether plaintiff has got cause of action?*  
*Whether plaintiff is entitled to the decree as prayed for?*

- 25. Both these issues are interlinked, therefore, are taken together for discussion.
- 26. Keeping in view my issue wise discussion, it is held that plaintiff have got cause of action and are entitled to the decree as prayed for. Both these issues are decided in favor of plaintiff and against the defendants.

**RELIEF:**

- 27. As a result of issue wise findings, suit of the plaintiff succeeds. It is therefore, decreed as prayed for.

28. Cost to follow the events.
29. File be consigned to record room after its necessary completion and compilation.

**Announced**  
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**CERTIFICATE: -**

Certified that this judgment consists of Eleven (11) pages. Each and every page has been read over, corrected and signed by me where ever necessary.

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