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

Case #	=	97/1 of 2019.
Date of Original Institution	=	26.06.2019.
Date of Present Institution	=	19.06.2021.
Date of Decision	=	21.09.2022.

Inaz Ali S/O Gul Khan Ali R/O Qaum Mani Khel, Village Ahmad Khel, Tehsil Lower, District Orakzai.

.....(Plaintiff)

Versus

Ilham Ali S/O Ikram Ali R/O Qaum Mani Khel, Village Ahmad Khel, Tehsil Lower, District Orakzai.

.....(Defendant)


SUIT FOR DECLARATION CUM-PERMENTENT INJUNCTION AND POSSESSION AS ALTERNTE

JUDGEMENT
21.09.2022

Parties present. Arguments already heard and record perused.

Through this judgement, I am going to decide the suit in hand filed by plaintiff Inaz Ali against the defendant Ilham Ali.

- (1). Brief facts of the case in hand are that plaintiff has filed the instant suit for declaration, perpetual injunction and possession as alternate against the defendant to the effect that plaintiff is being using the suit pathway passing through the fields of defendant as the only access to his residential house since 2006 and defendant has got no right to block the same. That the matter in controversy was resolved with the father of defendant through a Jirga held in the year 2012. The Jirga members


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delivered their verdict and it was reduced into writing on 31.08.2012. Per Jirga decision, plaintiff was allowed to use the pathway free of any encumbrance and obstruction forever and defendant was restrained from blocking/making hinderance in the pathway. That defendant was asked time and again to admit the legal claim of plaintiff but in vain, hence, the present suit.

- (2). With due process of law and procedure, defendant was summoned, who appeared before the court and contested the suit by filing written statement and reply. Defendant raised several legal and factual objections in his written statement.
- (3). From divergent pleadings of the parties, the following issues were framed for adjudication of real controversy between the parties.

ISSUES

1. Whether the plaintiff has got cause of action? OPP
2. Whether disputed path is the exclusive ownership of plaintiff? OPP
3. Whether plaintiff has affected an agreement with the father of the defendant through Jirga verdict in year 2012 regarding the use of disputed path free of any encumbrance and obstruction forever and its affect? OPP
4. Whether the disputed path is the only pathway for access and exit to the plaintiff's house? OPP
5. Whether suit of the plaintiff is competent in its present form? OPD
6. Whether plaintiff is entitled to the decree as prayed for? OPP



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7. Relief?

- (4). Upon submission of list of witnesses, both the parties on being provided with an opportunity to adduce their desired evidence, the parties produced their respective evidence.
- (5). After the completion of evidence, arguments of the learned counsel for the parties were heard and record of the case file was gone through with their valuable assistance.
- (6). During course of recording evidence, plaintiff in support of his claim and contention produced 03 witnesses.
- (7). Plaintiff himself appeared and deposed as PW-01. He reiterated the averments of plaint. He produced sketch of his house/disputed path taken through Google Earth as Ex. PW-1/1. Copy of Jirga verdict dated 31.08.2012 is Ex. PW-1/2. He lastly requested for decree of suit against the defendant as prayed for.
- (8). Syed Haziq Ali Shah, one of the Jirga members, appeared and deposed as PW-02. He stated that in order to resolve the matter in controversy, a Jirga was held per customs and traditions of the locality. At the time of Jirga, Ikram Ali (father of defendant) was also present. He further stated that Jirga decision dated 31.08.2021 correctly bears his signature.
- (9). Mustafa Hassan, appeared and deposed as PW-03. He stated that he has signed the Jirga decision Ex. PW-1/2 as witness and the same correctly bears his signature. Copy of his CNIC is Ex. PW-3/1.



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Thereafter, evidence of plaintiff was closed.

(10).Defendant in support of his claim and contention produced only one witness.

(11).Ilham Ali, defendant himself appeared and deposed as DW-01. He denied the claim of plaintiff asserting that the property through which the suit pathway passes, is his ancestral ownership and that there is an alternate passage available to plaintiff. He produced document pertaining to exchange of land with one Syed Hashim Jan as Ex. DW-1/1. Photographs of the fields and alleged alternate passage available to plaintiff are Ex. DW-1/2 and Ex. DW-1/3. He lastly requested for dismissal of the suit of plaintiff.

Thereafter, evidence of defendant was closed.

(12).After completion of evidence of the parties, arguments of the learned counsel for the parties were heard and record of the case file was gone through with their valuable assistance.

My issue wise findings are as under: -

Issue No.02.

Whether disputed path is the exclusive ownership of plaintiff?

OPP

(13).Record transpires that plaintiff has not claimed ownership of the disputed path. Plaintiff, in his plaint and in evidence produced by him, has categorically admitted that the disputed path passes through the field/land of defendant but he has a legal right to use the same on



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the strength of agreement/Jirga decision dated 31.08.2012. On the other hand, defendant produced documentary proof establishing his ownership in respect of the field/land through which the disputed pathway passes, resultantly, issue No. 2 become redundant and decided accordingly.

Issue No.03.

Whether plaintiff has affected an agreement with the father of the defendant through Jirga verdict in year 2012 regarding the use of disputed path free of any encumbrance and obstruction forever and its affect? OPP

(14).Burden of proof regarding issue No. 3 was on plaintiff. Claim of plaintiff is that the suit pathway is being used by him since 2006 and that defendant has got no right to make hinderance by blocking the pathway leading to his house passes through the field/land of defendant. An agreement in respect of the disputed pathway was executed on 31.08.2012. Agreement/Jirga decision dated 31.08.2012 is Ex. PW-1/2.

(15).Ex. PW-1/2, is copy of the agreement/Jirga decision dated 31.08.2012. Plaintiff was allowed to produce secondary evidence in respect of Jirga decision vide order dated 10.03.2021 as original Jirga verdict was neither in possession of plaintiff nor in his reach and the person, alleged to be in possession of original document, has already died.


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(16).As per version of the plaintiff, the matter in controversy was resolved with the father of defendant through Jirga decision dated 31.08.2012. Jirga decision was reduced into writing. The document exhibited as Ex. PW-1/2 is the only documentary proof of claim of plaintiff. According to Ex. PW-1/2, Ikram Ali (father of defendant) and children of Gul Khan (father of plaintiff) were allowed by the Jirga members to use the pathway and it was agreed that the pathway will be kept open for children of Ikram Ali and children of Gul Khan free of encumbrance and obstruction forever.

(17).The contents of Jirga verdict Ex. PW-1/2 are as under;

مسی سید ہاشم جان و برادران، میں نے ایک چیرہ اکرام علی ولد کرم علی سے زمین کے بدلے تبدیل کیا تھا۔ جس پر حشمت علی و ایناز علی پسران گل خان احمد خیل نے آواز کیا تھا۔ جو آج مورخہ 31.08.2012 وہ اپنے آواز سے پھر گئے اور اکرام علی کو کھیت استعمال کرنے کی اجازت دی۔ میں نے اکرام علی کی اجازت سے پسران گل خان کو مکان کے لیے راستہ دیا۔ جس پر اکرام علی اور پسران گل خان آمد و رفت کرے گا۔ راستہ دونوں کے استعمال کا ہے۔ یہ راستہ اکرام علی اور گل خان کے بیٹوں کے لیے ہمیشہ کے لیے کھلا رہے گا۔

نوٹ: اس راستہ پر اکرام علی ولد کرم علی نے حشمت علی اور ایناز علی سے کوئی معاوضہ نہ لیا۔

(18).As stated above, the claim of plaintiff moves around the decision of Jirga dated 31.08.2012 whereby matter in controversy was resolved between the parties. Burdon was on plaintiff to establish that per Jirga decision, he was allowed to use the passage. Jirga member namely Syed Haziq Ali Shah, who deposed as PW-02, fully


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supported the claim of plaintiff. He admitted Ex. PW-1/2 to be correct and correctly bears his signature. Similarly, Mustafa Hassan, who deposed as PW-03 also supported the plea of plaintiff. He was not a Jirga member but he has signed the Jirga decision Ex. PW-1/2. He also stated that Ex. PW-1/2 was signed by Jirga members and other witnesses in his presence.

(19).Defendant, objecting Ex. PW-1/2 has contended that he is lawful owner of the field/land through which the disputed pathway passes. That Jirga was held between plaintiff's father and Syed Hashim (first owner of the property). The said Syed Hashim was not owner of the property at the time of Jirga decision, therefore, the same is not binding on defendant. Defendant has further objected that there is no specification of pathway in Ex. PW-1/2 and that there is an alternate access available to plaintiff. Plaintiff has no prerogative to claim easement of passage on the ground of convenience as easement of necessity was not to be allowed at wish and whims of plaintiff if other alternate access was available. It is further contended that execution of Ex. PW-1/2 has been denied by defendant, therefore, production of attesting witnesses was mandatory requirement of law but plaintiff failed to prove the execution of the said document as per law.



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(20).As far as objection of defendant regarding non-specification of pathway in Ex. PW-1/2 is concerned, PW-02 in his cross

examination clarified that as per local customs and traditions, path/way means a path for funeral procession and a path for donkey with load on it etc.

یہ درست ہے کہ Ex. PW-1/2 میں ٹرک اور موٹر کار کے راستے کا ذکر نہ ہے از خود کہا کہ تحریر میں جملہ

تفصیل نہیں لاتے۔ از خود کہا کہ ہمارے رواج کے مطابق گدھے کا بیچ بار و جنازہ کے لئے راستہ دیا جاتا تھا۔ اور اب رواج

کے مطابق موٹر کار، ٹرک کا راستہ تصور کیا جاتا ہے۔ یہ بھی درست ہے کہ Ex. PW-1/2 میں راستے کے تعین کی بابت

بھی کوئی ذکر موجود نہ ہے از خود کہا کہ موقع پر ہم نے راستہ کی نشاندہی کی تھی۔

(21).As per practice prevailed in the Erstwhile FATA, the Jirga members used to highlight/mention the main matter in controversy avoiding mentioning minute details in the Jirga decisions. The Jirga member has categorically stated that the disputed path was specified/identified and parties knew the matter in controversy.

(22).As far as objection of defendant that document Ex. PW-1/2 has not been proved per law. It is held that Ex. PW-1/2 is supported by all PWs produced by plaintiff. PW-02 is a Jirga member while PW-03 is witness to Ex. PW-1/2. As per Article 79 of the Qanon-e-Shahadat, 1984 where a document by law was required to be attested, then in case of denial of its execution, production of attesting witnesses would be mandatory requirement. As stated above, PWs produced by plaintiff supported Ex. PW-1/2. Even otherwise, Ex. PW-1/2 was executed prior to merger of Erstwhile FATA into Khyber Pakhtunkhwa, therefore, it was not required by



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law to be attested. If a document was not required by law to be attested by a witness, then there would be no legal requirement to produce attesting witnesses.

(23). Record also transpires that when the field/land was exchanged by father of defendant with one Syed Hashim Jan, plaintiff objected the same through "Ghag". The matter was referred to Jirga. Jirga allowed father of defendant to cultivate/use the exchanged field/land and sons of Gul Khan (plaintiff and his brother namely Hashmat) were allowed to use the passage through the said field/land. There is no revenue record in the this newly merged district of Orakzai. The only documentary proof on which plaintiff has based his claim is the Jirga decision/agreement dated 31.08.2012 exhibited as Ex. PW-1/2. This document has not been specifically denied by defendant in his written statement. Defendant, who deposed as DW-01, admitted in his cross examination that Ex. PW-1/2 was executed between plaintiff and Syed Hashim Jan.

سید ہاشم جان فوت شدہ ہے اس لئے اسکو پیش نہیں کر سکتا اور یہ وہی ہاشم جان ہے جس کے ساتھ

مدعی کا Ex. PW-1/2 تحریر ہے۔

(24). Before merger of Erstwhile FATA into Khyber Pakhtunkhwa, there was a mechanism of conflict resolution through the Jirga system in FATA. The Jirga system was a conflict resolution body in the tribal areas in the absence of formal legal and justice system. Elders of the locality would act as Jirga members to resolve the matter in


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controversy. The parties would be abided by the Jirga decision. In the instant case, the matter in controversy was resolved through Jirga in favour of plaintiff.

(25). Keeping in view the above discussion, it is held that plaintiff executed an agreement with father of the defendant through Jirga decision dated 31.08.2012 regarding the use of disputed pathway free of any encumbrance and obstruction forever having a binding affect, resultantly, issue No.03 is decided in positive in favor of plaintiff and against the defendant.

Issue No. 4

Whether the disputed path is the only pathway for access and exit to the plaintiff's house? OPP

(26). As per claim of plaintiff, plaintiff is being using the disputed pathway as the only access to his house since 2006 and defendant has no right to block the same. That the matter in controversy was resolved with the father of defendant through Jirga in the year 2012 and the Jirga decision was reduced into writing accordingly. Copy of the same is Ex. PW-1/2. Per contention of plaintiff, there is no alternate access available to plaintiff. On the other hand, defendant has alleged that there is an alternate access available to the plaintiff which has been blocked by plaintiff by planting trees and in order to grab field/land of defendant, plaintiff has filed the instant suit which is liable to be dismissed.



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(27).Plaintiff has placed reliance on Jirga decision exhibited as Ex. PW-1/2 which is discussed in detail while discussing issue No. 3. During course of trial, plaintiff, who deposed as PW-01, produced Google Earth Sketch as Ex. PW-1/1, wherein the pathway in question is mentioned at point 'A' and 'B'. Point 'E' is the house of defendant. Point 'D' is the house of plaintiff. Point 'C' is the house of one Safeer Ali. Point 'F' is the place where plaintiff has planted trees and there is property of the said Safeer Ali adjacent to the disputed path.

(28).On the other hand, defendant, who deposed as DW-01 produced photographs Ex. DW-1/2 and Ex. DW-1/3 alleging that there is an alternate access available to the plaintiff at point 'F' of Ex. PW-1/1 which has been blocked by plaintiff by planting trees. It is further alleged that the alternate passage is a paved way but plaintiff, instead of opting to use that paved way, is bent upon using the suit pathway which passes through the property/land owned by defendant. It is alleged that point 'F' is the alternate access available to plaintiff.

(29).Burdon of proof was on plaintiff to establish that the suit path is the only access available to him to his house. Per record, the alleged alternate pathway passes through the land of one Safeer Ali and there are trees and boundary wall of the house of the said Safeer Ali.

At the time of Jirga, father of defendant and Syed Hashim Jan did


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not advance this objection. It was never alleged/claimed before the Jirga that plaintiff has the option of an alternate access. Father of defendant was allowed to use the exchanged land and construct house only when it was agreed that father of defendant will allow plaintiff to use the suit pathway. The agreement was executed between the parties in respect of the suit pathway. It was decided that plaintiff is entitled to use the suit pathway leading to his house passes through the field of defendant free of encumbrance and obstruction forever.

(30).Defendant, who deposed as DW-01, admitted in his cross examination that point 'F' (of Ex. PW-1/1) is the property of Safeer Ali. He further admitted that there is boundary wall of the house of the said Safeer Ali at the relevant point which means that there is no alternate pathway available to plaintiff at point 'F'. The suit path is the only access to the house of plaintiff. Even otherwise, it was the father of defendant who agreed that plaintiff will use the suit pathway free of any encumbrance and obstruction forever not the said Safeer Ali.

(31).Furthermore, plaintiff filed application for appointment of local commission for spot inspection to determine that the suit pathway exists at the spot and petitioner/plaintiff is being using it since long and that there is no alternate pathway available to the plaintiff. This application was strongly contested by defendant. DW-01, in his



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cross examination, categorically refused to determine this fact of alternate pathway through local commission.

- (32). Keeping in view the above discussion, it is held that the disputed path is the only access and exit to the plaintiff's house, hence, issue decided in affirmative in favour of plaintiff against the defendant.

Issue No. 05:

Whether suit of the plaintiff is competent in its present form?

OPP

- (33). Law requires that plaintiff should claim entire relief. Suit has to be framed so to afford ground for final decision upon the subject in dispute and to prevent further litigation. Nothing has been brought on record which could show that suit of plaintiff is not competent in its present form. No formal defect has been established, hence, suit of plaintiff is held to be competent in its present form. Issue decided in affirmative.

Issue No. 1 & 6.

- (34). In the light of foregoing discussion, plaintiff has proved his stance through cogent, convincing and reliable documentary and oral evidence, therefore, he has got cause of action and is entitled to the decree in his favour against the defendant. Plaintiff has the right to use the pathway as access to his house and defendant shall not restrain plaintiff from using the pathway leading to his house.



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Defendant shall not hinder the pathway in any way for plaintiff.

Both these issues are decided in positive in favour of plaintiff.

Relief?

(35).Crux of my issue wise discussion is that suit of the plaintiff is hereby decreed in his favour against the defendant. Plaintiff has the right to use the pathway as access to his house and defendant is directed not to restrain plaintiff from using the pathway leading to his house. Defendant shall not hinder the pathway in any way for plaintiff. No order as to cost.

(36).File be consigned to record room after the necessary completion and compilation.

ANNOUNCED

21.09.2022



Zahir Khan

Civil Judge-I, Kalaya, Orakzai