

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

Case #	=	2/4 of 2020.
Date of Original Institution	=	17.08.2020.
Date of Present Institution	=	10.07.2021.
Date of Decision	=	28.10.2022.

Abdul Wahid S/O Akram Khan, R/O Qaum Malak Din Khel, Tappa Daulat Khel presently residing at Qaum Mandra Khel, Tappa Madad Khel, Village Laghonay, Tehsil Lower, District Orakzai.

.....(Applicant)

Versus

1. Shehzad Khan S/O Nadar Khan,
2. Palos Khan S/O Musharaf Khan and
3. Asmat Ullah S/O Zaref Khan all residents of Qaum Mandra Khel, Tappa Madad Khel, Village Laghonay, Tehsil Lower, District Orakzai.

.....(Respondents)


COMPLAINT U/S 133 Cr. P.C.**ORDER**

28.10.2022

Parties present. Arguments already heard and record perused.

Through this order, I am going to decide the complainant U/S 133 Cr. PC in hand filed by applicant Abdul Wahid against the respondent Shehzad Khan etc.


- (1). Brief facts as per contents of complaint U/S 133 Cr. PC are that complainant namely Abdul Wahid hails from Qoum Malak Din Khel, Tappa Doulat Khel, Alam Khel, District Khyber and presently he is living in village Laghonay, Tehsil Lower, District Orakzai since long time. There is a public road/thoroughfare used by general public for


ZAHIR KHAN
 Civil Judge/JM
 Kalaya Orakzai
 28/10/22

more than 100 years but respondents have blocked the said road/thoroughfare by putting woods which has caused inconvenience to the complainant and other co-villagers and has become a public nuisance. That respondents were asked time and again to open the road/thoroughfare but in vain, hence, the present complaint.

(2). Complaint was filed on 17.08.2020. Statement of applicant was recorded U/S 200 Cr.PC. SHO concerned was directed to hold inquiry and submit report on date fixed. Inquiry report was submitted by SHO concerned. The court did not agree with the said report and SHO was again directed to conduct fresh inquiry, record statements of applicant's witnesses. Fresh inquiry was conducted and inquiry report was received and placed on file, resultantly, the court, vide order dated: 16.01.2021, passed conditional order directing the respondents to remove the obstruction and open the road/thoroughfare, otherwise, show cause/file objection, if any for setting aside/modification of the said order.


(3). Respondent No.01 and No. 2 appeared and recorded their statements wherein they stated that they have no concern whatsoever with the road/thoroughfare in question and that they have got no objection if the road/thoroughfare is ordered to be opened. Respondent No. 3 filed objections to the effect that there is no road/thoroughfare and the property in question is his ancestral ownership. It was further alleged that there is another road constructed by the government for public use.


ZAHIR KHAN
Civil Judge/JM
Kalaya Orakzai
28/10/22

- (4). Thereafter, parties were directed to produce their desired evidence. Parties submitted their list of witnesses and produced their respective evidence.
- (5). During course of recording evidence, applicant produced four witnesses.
- (6). Applicant himself appeared and deposed as PW-01. He reiterated the averments of complaint. He stated that his family has been residing in village laghonay for the last 120 years. That respondent No. 3 has constructed his new house and has blocked the thoroughfare leading to his house/village. Jirga was held to resolve the issue but contesting respondent is reluctant to open the road. He lastly requested that conditional order already passed by the court be confirmed and contesting respondent be directed to open the road.
- (7). Aziz Khan, Mazhar Khan and Hadi Khan, appeared and deposed as PW-02 to PW-04 respectively. They stated that contesting respondent has blocked the road/thoroughfare leading to the house of applicant and co-villagers. They also stated that a Jirga was constituted to resolve the matter in controversy.

Thereafter, evidence of applicant was closed.

- (8). Contesting respondent in support of his claim and contention produced three witnesses.
- (9). Asmat Ullah Khan, contesting respondent himself appeared and deposed as RW-01. Copy of his CNIC is Ex. RW-1/1. He denied the claim of applicant asserting that the property through which the


ZAHIR KHAN
 Civil Judge/JM
 Kalaya Orakzai

28/10/22

thoroughfare passes, is a cultivatable land and the same is his ancestral ownership. He further stated that there is an alternate passage available to applicant in shape of a metaled public road and that applicant has sought road/thoroughfare through his dwelling house. He lastly requested for dismissal of complaint.


- (10). Wajid Khan and Muhammad Sahib appeared and deposed as RW-02 and RW-03 respectively. Copies of their CNICs are Ex. RW-2/1 and Ex. RW-3/1 respectively. They supported the version of respondent No. 03.

Thereafter, evidence of respondents was closed.

- (11). Muhammad Shafique ASI, who had conducted inquiry on the directions of the court, was summoned as CW. He appeared and was examined as CW-01. He stated that as per court directions, he recorded statements of the parties and the persons acquainted with the facts and circumstances of the matter in issue. Statements of Abdul Wahid, Hadi Khan, Mazhar Khan and Sabir Khan are Ex. CW-01 to Ex. CW-04. He submitted inquiry reports before the court which are Ex. CW-1/5 and Ex. CW-1/6. He was cross examined by counsel for applicant while contesting respondent opted not to cross examine CW despite opportunity.

- (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.

- (13). Chapter X of Cr. PC deals with the public nuisances. The law clearly stipulates every step which the Magistrate has to take when an


ZAHIR KHAN
 Civil Judge/JM
 Kalaya Orakzai
 28/10/22


information regarding public nuisance is placed before him. Section 133 Cr. PC gives the power to Magistrates for removal of a nuisance including the power to prohibit the conduct of any trade or occupation or the keeping of any goods or merchandise which is injurious to the health, physical comfort of the community and also gives the power for the removal of such trade or occupation and obstruction.

Section 133 Cr. PC is attracted only in case of emergency and imminent danger. The idea behind the section is that the danger complained of should be such that if the Magistrate does not take action under this section and directs the public to have recourse to the ordinary courts of law, irreparable damage would be done.

(14).As stated above, Section 133 Cr. PC deals with public nuisance.


Public nuisance means an act or illegal omission, which causes any common injury, danger or annoyance to the public at large or to the people in general for which complaint U/S 133 Cr. PC can be invoked only in a case of public nuisance which deals with public rights i.e., obstruction to any way, path, river or water channel lawfully used by the public at large.

(15). On the other hand, an obstruction etc, in respect of a private place is not within the ambit of Section 133 Cr. PC. Where the dispute is about the ownership of a private path claimed by two parties, Section 133 Cr. PC is not attracted. Private property cannot be treated as public property merely because a section of the public has enjoyed permissible user over it. Proceedings under section 133 Cr.


ZAHIR KHAN
Civil Judge/JM
Kalaya Orakzai
28/10/22

PC are not intended to settle a private dispute between two members of the public. The Section is intended to protect the public as a whole against inconvenience. Therefore, where only the right of the passage of one person is obstructed, he cannot move the Court under this section.

(16).As stated above, applicant Abdul Wahid is claiming that respondents have obstructed/blocked public road/public thoroughfare leading to his house since long and in order to resolve the matter in controversy, a Jirga was held to resolve the issue. Per Jirga decision, respondents were asked to provide an alternate way/passage to applicant. Copy of Jirga decision is annexed with the complaint. Evidence produced by applicant shows that there is a private dispute regarding path between the parties. Jirga verdict annexed with the complaint does not bear any date. Applicant, on query disclosed that Jirga was held in the year 2010-11. Evidence produced by the parties suggests that there is no public road/public thoroughfare at the spot. As per Ex. CW-1/5, applicant has sought right of passage/way in the land/fields owned by contesting respondent. The pictures, placed on file show that the alleged way falls within the boundary wall of the dwelling house of contesting respondent.


ZAHIR KHAN
Civil Judge/JM
Kalaya Orak

28/10/02 2

(17).Per record, there is a long-standing dispute between the parties in respect of the way in question which indicates that there is no such emergency or imminent danger to the public interest. Therefore, action cannot be taken under section 133 Cr. PC.

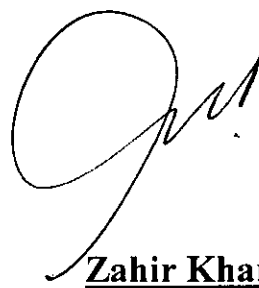
(18).Record suggests that there is grievance relating to private nuisance allegedly suffered by applicant. Provision of Section 133 Cr. PC is meant to redress complaint of public nuisance and not grievance relating to private nuisance suffered by an individual person. The application for removal of obstruction on a private path would not lie under section 133 Cr. PC. Proceedings U/S 133 Cr. PC are not intended to settle private disputes between members of public or to be used as a substitute to settle civil disputes.

(19).For the reasons mentioned above, proceedings are hereby dropped.

Complaint stands dismissed.

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

ANNOUNCED
28.10.2022



Zahir Khan
JMIC-I, Kalaya, Orakzai