

ORDER BELOW EXHIBIT NO. 5

This order shall dispose of the application filed by the plaintiffs U/Order XXXIX Rule 1 and 2 for granting of interim injunction restraining the defendants from using the suit path.

1) Before deciding this application it is appropriate to give a brief resume of the facts as averred in the plaint, which are as follows:

- 1) By the Statement of plaint, the Plaintiff claimed that defendants have no right of way from the western side suit property sited at *Kankapura* bearing survey no. 290 admeasuring hectare 00-47-65 ARE since the time of his forefathers. There is another track to reach the land of defendants.
- 2) Defendants are trying to create new right over the suit path.
- 3) Therefore the plaintiff was constrained to file the suit, seeking injunctive reliefs. Along with this suit plaintiffs also filed an application under order 39 rule 1& 2 of CPC seeking temporary injunction to restrain the defendant and his men or agents from using the suit path in any way.
- 4) Plaintiff submitted the written arguments of this application vide exhibit 25

2) Defendant's version

- The defendant after his appearance file the written statement and reply of present application *vide* exhibit 18 and written argument *vide* exhibit 26.
- The defendant has denied the facts mentioned in the plaint.

- There is no prima facie case in favour of plaintiff and Balance of balance of convenience lies in favour of defendant and defendant will suffer irreparable loss if interim injunction is granted to plaintiff.
- It was, therefore, prayed that to disallow the present application.

3) Evidence forwarded by the contesting parties as follows:

- Plaintiffs' Evidence: List of Documents *vide* **Exhibit no.3**
- Defendant's Evidence: List of Documents *vide* **Exhibit no. 19 & 21**

FINDINGS

- 1) It is elementary that grant of an interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court normally applies the following tests:-
 1. Whether the plaintiff has a prima facie case;
 2. Whether the balance of convenience is in favour of the plaintiff;
and
 3. Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.
- 2) The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that

uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the "balance of convenience" lies.

- 3) In the present case court proceeds to see if all these three ingredients are fulfilled. The existence of a prima facie case and infraction of such right is a condition precedent for grant of temporary injunction. The prima facie case doesn't mean a case proved to the hilt. The only requirement is that on the face of it there should be a case in favour of the plaintiff. While determining whether a prima-facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.
- 4) Existence of the prima facie case alone does not entitle the applicant for a temporary injunction, but the applicant must satisfy the court that he will suffer *irreparable injury* if the injunction as prayed for is not granted and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.

- 5) Other essential condition for granting interim injunction is that the *balance of convenience* must be in favor of the applicant. In other words, court must be satisfied that the comparative mischief hardship or inconveniences which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.
- 6) Therefore the principal question which requires consideration is; whether the plaintiff is in a position to establish his prima facie case and is entitled to get interim injunction during the pendency of the suit.
- 7) To settle this controversy it is necessary to peruse the documents produced and record of the case in hand. After hearing the arguments from the contesting parties and on perusal of records it transpired that plaintiff has produced a copy of map *vide* **Mark 3/3** and two affidavits *vide* **Mark 3/9 and 3/10** but failed to produce the factual condition of suit property. So at this juncture, without knowing the factum of position of suit property, if defendant is restrained then it will lead to irreparable loss to the defendant.
- 8) Moreover the defendant has produced the copy of order of *Mamlatdar* *vide* **Mark 21/1** in which it has been held that there is a way over the west side of suit property, which is being used by the defendants and the same has also been supported by the affidavits of **Bhikhabhai Khumansinh, Shivabhai Ganpatbhai Parmar, Fatabhai Chimanbhai**. So prima facie it transpired that defendant is using the suit path but whether he is using from the time of his forefathers is a

question which cannot be decided at this juncture. Therefore plaintiff has miserably failed to prove his prima facie case by cogent evidence.

9) As the plaintiff has failed to establish his prima facie case. It is immaterial to delve into the aspect of the balance of convenience or irreparable loss.

4) In the light of the facts stated in the application and in the reply and the arguments advanced by learned counsels, at this juncture, I pass the following final order:

-: ORDER:-

- A. The present application for temporary injunction is devoid of merits at this stage and therefore hereby **Disallowed**.
- B. Looking to the facts and circumstances of the case, there shall be no order on costs.
- C. Put up this matter for plaintiff's evidence.

Signed and Pronounced in this open court.

Date: 18/11/2015

(Arun Soni)

Place: Borsad

Judge Code: GJ01422

ISSUES

1. Whether the suit is maintainable?
2. Whether the plaintiff is entitled for the relief of permanent injunction as prayed?
3. Whether the defendant proves that he has a right of way over the western side of suit property?
4. Whether the plaintiff is entitled to get relief as prayed for?
5. What order and decree?

Date: 18/11/2015

(Arun Soni)

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