

Order below Ex.5

1. This order of mine shall dispose of the application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 (in short CPC) of applicants/plaintiffs dated 01/10/2015.
2. Briefly stated, facts necessary for the disposal of the present application are that the plaintiffs instituted present suit for the declaration of easementary right of way over the shedha of survey no 35 and 32 and through the western shedha of survey no.37 situated between survey no. 31 and 38 situated in the village-Bakrol, Taluka-Ankleshwar, and District-Bharuch as described in Para 1 of the plaint (hereinafter referred as Suit Property). The plaintiffs are using the right to way since last 50 years; the plaintiffs have prayed for the above mentioned relief of declaration and permanent injunction.
3. The plaintiffs further submit in Para 7 of the plaint that the cause of action arose in 2011 when one Mr. Ganpatbhai threatened them not to use that way. And then the plaintiffs approached the Mamlatdar court, after that in Deputy Collector court and lastly the High Court of Gujarat. And to support their case the xerox copies of various documents were also produced vide mark 3/1 to 3/10 and affidavits of third parties vide Ex.6 and 7 and has also relied upon Ex.15 i.e. the report of Court commissioner .
4. On the lines of the suit, instant application under Order XXXIX Rule 1 and 2 CPC is also filed.
5. Notice was issued to all the defendants and the defendants

no. 2 and 4 to 10 appeared before the court and filed his written statement within time vide Ex-14 inter alia taking certain preliminary objections of maintainability, concealment of material facts, bad for non-joinder of necessary parties, cause of action and suit barred by provisions of law. On merits it is claimed that as claimed by the plaintiffs, there is no such way existing in the actual place of site and further that earlier also a case was filed by the plaintiffs in Mamlatdar Court but the same was dismissed and the Hon'ble High Court of Gujarat in Civil Revision Application No.267/2012 dated 10/07/2015 has rejected the claim of the plaintiffs and also that there is no easementary right as such and thus plaintiffs are not entitled for the relief as prayed. And they have produced the xerox copy of the orders passed by Deputy Collector and the Hon'ble High Court of Gujarat vide mark 20/1 to 20/2 and the persons who have made the affidavits are not added as parties, though they are claiming right. Refuting all other averments of the plaint, dismissal of the suit is prayed for with costs.

7. Arguments heard. File perused and gone through the judgment of Ganesh keshu Hanath v.Kantaben GLR 2007(2) 1590 produced from plaintiff side.

8. Before deciding the application of temporary injunction i.e. Ex-5, the following issues are to be decided:-

1. Whether prima facie case is made out in favour of the plaintiff?

2. Whether balance of convenience tilts in favour of the plaintiff?

3. Whether irreparable injury will be caused to the plaintiff if the relief of injunction is not passed in his favour?

4. What Order?

The decision of the court on the above issues is as following:

*4th Additional Civil Judge
Ankleshwar (Dist. Bharuch)*

1. in Negative
2. in Negative
3. in Negative
4. as per the final order

REASONS

9. As issue No. 1 to issue No. 3 are inter-linked with each other, so all these issues are being discussed jointly.

10. Before going into the merits of the present application first it has to be seen what the meaning of prima facie case is. Prima facie case means whether the contention of the plaintiff in the suit appears to be plausible i.e. whether the suit of applicant/plaintiff has some such substance in the suit to have to continue further. At this stage the merits of the case are not examined and the court has only to see whether the allegation on which the application has been made is prima facie sustainable or not. The Hon'ble Supreme Court in the case of **Martin Burn Ltd. Vs Banerjee AIR 1958 SC 79** explaining the ambit and scope of the connotation "prima facie" case, observed

"A prima facie case does not mean a case proved to the tilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie 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."

11. The second one is balance of convenience which means that if the order of temporary injunction has not been passed, what will be the adverse effect upon the interest of the

applicant and further that if temporary injunction is passed what is the extent of adverse effect upon the interest of the other party. Then the court will have to weigh as to which loss will be greater and then it will be decided in favour of the person to whom the greater loss will be caused. It will be said that the balance of convenience tilts in his favour and accordingly the order will be passed.

12. The third one is irreparable injury. It is something which cannot be compensated as there is no other remedy open to the applicant by which he can protect himself from the consequence of the apprehended injury. The injury must be material one. Here it is appropriate to quote the remarkable observations of **Lord Diplock** made in the case of **American Cyanamid Co. Vs Ethicon Ltd. 1975 AC 396**:

“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; but the plaintiff’s need for such protection must 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 under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies.

13. In **Gujarat Bottling Co. Ltd. versus Coca-Cola Co. (1995)5 SCC 545**, the Hon’ble Supreme court has held – *“Under Order XXXIX of the Code of Civil Procedure, jurisdiction of the court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the*

court, on being approached, will apart from other considerations, also look to the conduct of the parties invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest.....”

15. And in the present case the plaintiff has himself pleaded in para 6 of the plaint that he has purchased the property in year 2006, but has not produced the copy of sale-deed, whereas vide mark 3/6, he has produced the agreement of easementary rights executed before Notary on 24/08/2015, though the same is inadmissible in evidence as per the provisions of Registration Act. Moreover the said agreement has been executed after the order of the Hon'ble High Court of Gujarat. And it is the cardinal principle of civil jurisprudence that “one who comes to court must come with clean hands”. Thus conduct of the plaintiff seems prima-facie unfair. And further the essential requirements as per Easementary law are not averred or proved and they have not produced anything by which it can be inferred that they are using the right to way since last 40 years by any evidence or document as produced. It was also held by the Hon'ble High Court of Gujarat that alternative Government road is there to access the land of the plaintiffs. Taking into consideration the whole facts of the case file no prima facie case is made out in favour of the plaintiffs. It is the cardinal principle of the Civil jurisprudence that if no prima facie case is made out in favour of the plaintiff, the other two issues will also not lie in favour of the plaintiff.

17. But at the same time it is mentioned that these observations will not have any bearing on the merits of the

case. Hence in the interest of justice, I pass the following order:

Order

The present application of the applicants/plaintiffs of temporary injunction i.e. Exhibit-5 is hereby rejected.

The plaintiffs are ordered to bear their own expenses and to pay Rs. 5000/- to the defendants as costs and also to deposit Rs 5000/- in District legal Services Authority as per the ratio laid down by the Hon'ble Supreme Court of India in the case of Ram Rameshwari versus Nirmala Devi 2011.

Order signed and pronounced today in open court on this 1st day of July 2016.

Date : 01.07.2016
Place: Ankleshwar

(Narender Kumar)
(GJ01440)
4th Additional Civil Judge
Ankleshwar (Dist. Bharuch)

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