

ORDER BELOW EX-5

1. The plaintiff has preferred an ad-interim application under Order-39, Rule (1) and (2) and Section 151 of the Civil Procedure Code to obtain relief as prayed in para (6) of the present application supporting with affidavit along with the suit. The suit property is mentioned in Para-1 of the present application. The property of Lot-A is owned by the plaintiff and the property of Lot-B is owned by the defendant. Property no.2642 was a house on Eastern side of the suit property; which is demolished and there is open Gabhan. On Northern side of the suit property there was a house-Property no.2641 which was demolished and there is open space. The plaintiff has three properties viz., Property no.2641, 2642 and 2643. The plaintiff had constructed a new house in Property no.2643. There was open space of 5 feet on Western side of the said house. The open space was meant for cattle. When the plaintiff was out of station, the defendant had constructed toilet bathroom in the open space of 5 feet. The defendant had also threatened the plaintiff to construct in the open space. Therefore, the plaintiff has filed the present suit and has prayed for temporary injunction as per Para-6 of the present application.

2. The defendant was duly served with the notice and he has appeared through his Ld. Advocate Mr. A. S. Karmadwala. He has filed written statement vide Ex.13; wherein the defendant has

denied the facts of the plaint and has contended that the plaintiff had constructed his house before three years and there was no open space left at that time. The defendant's house is adjacent to the plaintiff's Western side wall. The defendant's house is 8x11 feet from East-West and North side. There is a boundary on Northern side of defendant's house. The defendant had constructed toilet bathroom in his boundary before 14 years. The defendant's house was old therefore he has dismantled it and has started construction of new house. The plaintiff has filed the present suit with a view to prevent the defendant from constructing his new house. The defendant has prayed for rejection of the present application with compensatory cost.

3. The plaintiff has filed Counter affidavit vide Exh.-17. Wherein he has denied the facts of the written statement and has contended that the plaintiff had constructed his house before 25 years. The defendant has encroached upon the public road and had constructed toilet bathroom in 5 feet space on western side of plaintiff's house.

4. The following issues arise for the determination of the present application :

1. Whether the plaintiff has prima-facie case?
2. Whether the balance of convenience is in favour of the plaintiff?

3. Whether the plaintiff prove that if the injunction is not granted in his favour then he will suffer irreparable loss which cannot be compensated in terms of money?
4. What order?
5. My findings for the above stated issues are as follows :
 1. In negative.
 2. In negative.
 3. In negative.
 4. As per final order.

REASONS

6. The learned advocate for the plaintiff Mr. G.S.Patel has argued on behalf of the plaintiff. The learned advocate for the defendants Mr. A.S.Karmadwala has argued on behalf of the defendant.

7. The plaintiff has produced documents vide Marks-3/1 to 3/3. The defendant has produced documents vide Marks-15/1 to 15/3. The plaintiff had applied for appointment of Court Commissioner vide Exh.-6. The said application was allowed. The Court Commissioner had filed his report vide Mark-12/1 to 12/4. Thereafter the plaintiff had again prayed for appointment of Court Commissioner vide Exh.-20; which was allowed and the Court Commissioner had filed his report vide Exh.-22. Perused

the documents on record. Heard learned advocates for both the parties.

8. The plaintiff has mainly prayed for temporary injunction against the defendant to prevent him from entering into the suit property or doing any construction over it during pendency of the present suit. The present plaintiff has produced documentary evidences to show his prima-facie case vide Mark 3/1 to 3/3. It is not in dispute that the plaintiff and defendant's houses are adjacent to each other. The plaintiff has averred that the defendant has constructed in the open space on Western side of plaintiff's house which is encroachment. Therefore he should be prevented from doing such construction. Looking to the documents on record; especially the two Maps prepared by the Court commissioners, it appears that the toilet and bathroom is situated in front of the defendant's house. The issue between the parties is regarding the said toilet and bathroom only. Looking to the facts of the present suit, I am of the view that there is a fair triable issue between the parties to the suit which can be decided only after recording of evidence. The interlocutory remedy is intended to preserve the rights of the parties, which may appear on a prima facie case. The Court also should not be oblivious of the fact that in restraining one party from exercising what is considered its legal rights the comparative loss or injury likely to be caused to other side has also to be considered. For the above stated reasons I am of the view that the plaintiff has not proved that he has prima facie case and balance of

convenience is in his favour. It is also not proved that if he is denied the injunction; he will suffer irreparable loss which cannot be compensated in terms of money. Therefore my reply to Issue no. 1, 2 and 3 is in negative and for Issue no. 4 I order as follows in the interest of justice:

: O R D E R :

- 1.** The ad-interim application presented by the plaintiff under Order-39, Rule 1 and 2, and Section - 151 of CPC is hereby ordered to be rejected.
- 2.** Cost shall follow the final judgment of the suit.

Pronounced in the open Court today the 6th day of August, 2021.

Date :06/08/2021.
Jambusar.

(Sheetal Venkateson Mudaliar)
Additional Civil Judge, Jambusar
Code no. GJ01217.