

Order below exhibit-5

- (1) This is an application filed by the Plaintiffs under Order-39 Rule-1 & 2 read with Section-151 of the Code of Civil Procedure, 1908 for seeking interim injunction restraining defendants right of way of plaintiff on the alleged suit land neither by themselves nor by their servants or agents located at Eastern side of defendants property bearing new survey no-193 until final disposal of this suit. Plaintiff has submitted in support of his claim affidavit of Shree Arjanbhai Jethabhai Ram.
- (2) The summons were issued by the Court and it was duly served to the defendants. The defendants have appeared before the court through an Advocate. The defendants No.1 & 2 have submitted their written statement vide exhibit-12 and same was adopted by Defendants No.3 to 7. The defendants have submitted affidavits of Shree Mandanbhai Meramanbhai Bharga, Shree Nathubhai Karshanbhai Vala, Shree Bhikhabhai Samatbhai Pampaniya, Shree Rambhai Hajabhai Pampaniya in addition to their written statement. The Plaintiff has submitted counter affidavit vide Ex.14 and produced documents vide mark-3/1 to 3/16, mark - 7/1, mark - 10/1 and mark-15/1.
- (3) Heard the Ld. Adv. for the plaintiff Mr. H.C.Chauhan. He has argued as per application for temporary injunction. He further submitted that there is a way which is found out in the Village map of Sundarpara Simtal vide mark- 7/1 and panchnama carried out by the commissioner of court produced vide mark-10/1. And there is no other way for plaintiffs. He further submitted that the alleged way has been enjoying by the plaintiff and his ancestral for last appx.100 years. He further contended that plaintiff has also filed complaint in the Police Station against defendants with respect to incident happened on alleged way. He further contended that there is prima facie case in favour of the plaintiff against defendants and the balance of convenience is also in his favour. He further contended the plaintiff would suffer irreparable loss if the injunction would not be granted in favour of plaintiff. He further relied on the Judgement of Hon'ble Gujarat High Court delivered in case of Ganesh Kesha Hanath Versus Kantaben Lakhman Hanath. Hence prayed for temporary injunction.
- (4) Heard the the Ld. Adv. for the defendants Mr. K.I.Chandnani. He contended that the suit of the plaintiff should be dismissed along with application for temporary injunction since it does not disclose any cause of action in favour of plaintiff against defendants. He further submitted that the plaintiff has no right to use the alleged way for going to their farm and further submitted that the plaintiff has other way to northern Side of Old Survey No.99. He further

submitted that there is a way on the property bearing survey no-193 and It is carved out only from the Survey No.193 land for their own use only. He further submitted that Plaintiff has not mentioned in his application that how and under what kind of right they have been claiming on the disputed way. He further contended that there is no prima facie case in favour of the plaintiff against defendants. And the balance of convenience is not in his favour. He further contended that the plaintiff would not suffer irreparable injury if injunction would not be granted in his favour. Hence prayed for rejection of application for temporary injunction.

- (5) This is an application for temporary injunction and there are three basic principles for granting or refusing to grant temporary injunction i.e. Prima facie case in favour of the party seeking injunction, Balance of convenience in favour of such person and last there must be a irreparable loss which are likely to be caused to party if injunction is not granted to such person. Thus an injunction being an equitable remedy is always at the discretion of the court. However, such discretion must be based on sound judicial principles and guided by rules of Equity and the peculiar facts and circumstances of the case. Apart from three basic principles, the court is also required to see the conduct of party seeking equitable relief of temporary injunction.
- (6) Looking to the material on record and the arguments advanced by the Ld. Advocates for both the parties, it appears that the property bearing survey no-186 (old survey No.99/1) and no.189 (old survey No.100/1) belong to plaintiff.No.1, survey no- 187 (old survey No.99/2) and survey no.190 (old survey No.100/2) belong to plaintiff.No.2 and survey no- 188 (old survey No.99/3) and survey no.191 (old survey No.100/3) belong to plaintiff No.3 and property bearing survey no-193 (old survey No.101/ Paiki 2/ Paiki 1) belongs to defendants. It also appears that property bearing survey numbers of plaintiff were part and parcel of property bearing old survey no- 99 & 100 and they have been divided therefrom. It also appears that defendants bearing Survey No.193 (old survey no.101) land is adjacent to the land of plaintiff. It also appears in the Village map of Sundarpara Simtal produced vide mark- 7/1 and rojakm & map prepared by the commissioner of court produced vide mark-10/1 that there is a way as is alleged by the plaintiff in the plaint.
- (7) Before deciding this application, it would be appropriate to see legal position first governing right of way. It is well settled that before a right of way can be acquired as an easement it is necessary to prove (a) there has been an actual enjoyment of the right (b) that such enjoyment must have been open (c) that it has been peaceful (d)

that it has been as of right (e) that it has been as an easement and last (f) that the easement was enjoyed without interruption and it has been enjoyed for twenty years. Unless all these ingredients are proved, no right of easement can accrue to the owner of a dominant heritage. It is also well settled that in order to have easement over any property, there must be two properties one is dominant property and second is servient property. Furthermore the right of way may be public or private. Private rights of way are vested in private individuals or owners of particular tenement or property, and such right arise from grant or necessity. Public right exist in favour of all the members of the public and their origin is dedication. A third kind of right, intermediate besides, private and public right, may arise by custom in favour of particular class or the public.

(8) Reverting back to the case in hand, plaintiffs have pleaded in plaint that they have been using that alleged way appx. for last 100 years and there is a way which appears in the Village map of Sundarpara Simtal and in the report of commissioner of court. As is evident from the pleadings and written statements of the parties of Exh:-5, The plaintiffs & the defendants claim their right of way on the disputed way. It is to be clarified here that at the stage of disposal of an interim injunction application, question of right of way on the disputed way cannot be gone into by the court nor the same is relevant for purposes of disposal of the injunction application in as much as the rival claims as to right of way can only be decided at the trial and not at the stage of disposal of the interim injunction application. In the event of any interference / obstruction caused by defendants on disputed way, it is the plaintiff who would stand deprived of his use in daily course for farming and not the defendants. The balance of convenience with regard to the use lies in favour of the plaintiff. The plaintiff would have to suffer irreparable loss if deprived use of way.

(9) So in view of the above discussion, the plaintiff can be said to have raised triable issues to be investigated by the court at the time of trial on the basis of evidence.

(10) In the light of the observations made in the preceding paragraphs, the plaintiff has succeeded in establishing in his favour a clear prima facie case, balance of convenience and irreparable injury, necessary for grant of interim injunction, against the defendants. Under such circumstances, I hereby pass following order in the interest of justice.

ORDER

The application vide.Ex:-5 filed by plaintiff for temporary injunction is hereby allowed.

Defendants are restrained from interfering in the plaintiffs right of way on the alleged suit land neither by themselves nor by their servants or agents till the final disposal of suit.

Cost shall be the cost in the cause of the suit.

Pronounced today in open court on October 25, 2023.

Date: 25/10/2023

Place: Sutrapada.

(R.M.Chavda)
Principal Civil Judge
Sutrapada
Judge Code:- GJ01524