

ORDER BELOW THE APPLICATION FOR INTERIM INJUNCTION AS PER ORDER XXXIX, RULE 1,2 OF THE CODE OF CIVIL PROCEDURE

1. Present application filed by the Plaintiffs under Order-XXXIX, Rule-1 & 2 of the Code of Civil Procedure, 1908. The suit is preferred by the Plaintiff seeking declaration as to the effect that the Defendants have no right to close the passage way/door situated at the south side wall of the suit property and further to grant permanent injunction against the defendants from creating any interference or hindrance in the said disputed passage either personally or through agent, assignees or servants etc. till final disposal of the main suit.

FACTS:

2. The facts of the present suit, in brief, are such that suit property i.e. a shop having Tika No.11, Ward Nadiad-2, CC No.712/2, Ad-measuring Hectors 45-4272 of Shop No.02, Ad-measuring Hectors – 20.96 Sq. Mtrs., Mu. Ward No.3, House No.1319 Village Dabhan, Tal. Nadiad belonging to the Plaintiff and is duly in the possession of the Plaintiff of this suit has a passageway/door to the basement in the south side wall of the said shop in which the defendants are creation obstacles in the usage of the said door or passage. The Plaintiff pleads that the defendants are illegally making hindrance in the property and engaged in illegal acts to cause damage to the ownership and possession of land. Thus, the present suit filed by the Plaintiffs. The Plaintiff has further contended that the seller must transfer all the rights he had and there shall not be any subsequent changes to be made after selling the property.
3. Plaintiffs have filed various documents vied Exhibit-3 whereby Mark-3/1 and Mark-2 are copies of Sale deed, Mark-3/3 is a copy of Banakhat No.5636, Mark-3/4 is a copy of Assignment of Possession, Mark-3/5 and Mark-3/6 are Photocopies of Defendants Property, Mark-3/7 and Mark-3/8 are Photocopies of Plaintiffs Property, Mark-3/9 and Mark-3/9 and Mark-3/10 are Photocopies of said passage and current status of the same. This court has duly gone through the above documents.

4. It is contended that Plaintiff has a strong *Prima Facie* case and balance of convenience in his favor. If relief as sought for is not granted then the Plaintiff will suffer irreparable loss which cannot be compensated in terms of money. It is prayed that relief as sought in present application should be given in favor of Plaintiff.

REPLY OF THE DEFENDANT ON EXH-12:

5. The Defendant has filed a written statement in reply upon service of the summons he appeared through respective Advocate and filed reply at Exh-12 denying all facts of the Plaintiffs. The defendant says that the suit property was sold to the Plaintiff by him and that there existed no such pathway/door towards the basement through the southwall in the original property. The Defendant has further stated that all the facts which are told by the plaintiff are not true and there is major suppression of fact as to other alternate ways/passage being available to the Plaintiff. He has further stated that the Plaintiff is trying to connect the present property with her husband's property for better business opportunities and ease but the same cannot be allowed as it was not the part of original property. Defendant also stated that the Plaintiff of this suit has falsely brought a claim on the photo attached in the documents and has tried to divert the court against the true facts. Defendant has further stated that there are several properties situated in the said complex above the suit property and allowing the disputed path to be used by the Plaintiff will cause huge inconvenience to the other property holders. Further, what was not the part of original property, can not be given to the Plaintiff.
6. Further, the Ld. Adv. for the defendants have argued that the Plaintiff have no *Locus Standee* to file the present suit. Plaintiff has suppressed material facts and not came before court with clean hands. It is stated that Plaintiff has no *Prima Facie* case in his favor. Further, the suit of the Plaintiff is not tenable in the eyes of law. Hence, prayed for rejection of present application.

ON MERITS:

7. 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 favor of the party seeking injunction, Balance of convenience in favor 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 facts and circumstance of case while deciding any application seeking equitable relief of temporary injunction.
8. Looking to the plaint, written statement, application for temporary injunction and the documents filed by the parties and the arguments advanced by the Ld. Adv. for both the parties, it appears that dispute is related to the right of passageway/gate to the basement situated at the south side wall of the Plaintiff's property . The Plaintiff has filed the present for the relief relating to passage/way from his shop to the basement. The Plaintiff has contended that the suit property was purchased from the Defendant No.1 in the present state. The Plaintiff states that the present dispute relates to the passage/way to the basement which was originally situated in the suit property as and when purchased but now the Defendant is intending and trying to close the way to the basement. The Plaintiff pleads that the Defendant shall transfer the property as received and any right of the Plaintiff shall not be curtailed and that one must pass what he has received. However, the Plaintiff has not denied to the fact that there exist alternative ways and has admitted to the same.
9. The Defendant on the other hand has pleaded that as per the original map and marcation, the disputed path way was not a part of the property and was created by one of the previous owners for his ease and comfort and that the Plaintiff has

no right over the said door. Further the Defendant has also contended that there has been major suppression of facts by the Plaintiff in stating that there are more than one alternate ways available to the Plaintiff for reaching the basement apart from the present disputed way. It has been further contended that even if the said door/way to the basement is closed the Plaintiff will have no impact or discomfort to the Plaintiff as there is a more direct and convenient path available to the Plaintiff. The Defendant further pleads that the sale deed executed by the Defendant in favour of the Plaintiff has nowhere mentioned of the said disputed door/path and that the right has never existed. The Defendant has stated that if any special right was to be given, it shall have been mentioned in the deed and that the buyer shall remain aware for the same.

10. To grant the present application, it must primarily prove that 1. There exists utmost necessity to use that particular disputed path and 2. That there is no alternate remedial pathway/door is available to enjoy the right over the basement. In the present case, both the elements are missing. The present application can not be granted solely on the ground that the Plaintiff claims his right over the suit property and the disputed pathway/door as that shall be decided with appreciating evidence adduced through trial. Thus where the Plaintiff has miserably failed to establish his primary necessity and need of granting the present application, this court comes to the conclusion that the ***Plaintiff has no Prima Facie Case.***
11. Further, in the present case, if the injunction is not granted the balance of comparative loss caused to the applicant would be none as the facts of the case and admission by the Plaintiff makes it clear that the Plaintiff has an alternate path. Mere assertion that there exists any right to use passage is not sufficient to attain the balance in his favour. Thus, the ***Balance of Convenience is not in the favor of the Plaintiff.***
12. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of Plaintiff only if it is proved to the satisfaction of the

court that unless the defendant is restrained by an order of injunction, an irreparable injury be caused to Plaintiff. In the present case, Plaintiff has failed to satisfy the court as to what irreparable loss will be done to the Plaintiff if the present application is not granted. Now, considering the fact that there is another way/door to the basement available to the Plaintiff, it can not be said that if the present application is not granted the Plaintiff will face irreparable loss which can not be compensated in terms of money. The pathway/door at this juncture can never be said to be a necessity. For the sake of clarity, if the present application is not allowed, the Plaintiff's way to the basement will not be closed as he has alternate ways available. Thereby *it cannot be said that the Plaintiff will face any Irreparable Loss* if the application is rejected.

13. Considering the above merits the conclusion arrived is that there is no prima facie case in favour of Plaintiff for the reason that an alternative and direct passage was available. The balance of convenience was also not found in favour of the Plaintiff on the ground that alternative passage was available. The third ingredient of suffering from irreparable loss is also found missing and consequently this court finds no reasonable or sufficient ground to allow the present application. Thereby in the light of facts, circumstances and reasoning stated above following order is passed;

: O R D E R :

- The present application is hereby rejected.
- No order as to costs.

Pronounced today in the open court on September 21, 2023.

Date : 21/09/2023
Place : Nadiad

(MS. PREETI SAGAR)
3rd ADDL. CIVIL JUDGE & J.M.F.C.
NADIAD, KHEDA
J.O. CODE: GJ01674