

Order below Exhibit-5

1. This is an application filed by the plaintiffs for seeking temporary injunction under Order-39, Rule-1 & 2 read with Section-151 of the Code of Civil Procedure, 1908 restraining defendants from obstructing or interfering the plaintiff's right of way. Furthermore it is prayed for mandatory order against the defendants to open the way which has been closed by them.
  
2. The Ld. Advocate for the plaintiffs filed an application to ask for appointment of a Court Commissioner to draw *Panchnama* and the same was granted by the Hon'ble Court. The Court Commissioner produced *Panchnama* and map vide mark- and mark- respectively. The Ld. Advocate for the plaintiffs relied on this *Panchnama* and argued that the defendants have cultivated the way which was available for the plaintiffs to pass through. He filed documents vide mark 4/1 to 4/8. He filed his written argument vide ex.23. He argued that the defendants obstructed the plaintiffs from enjoying their right of way which they have been enjoying since more than 100 years. He further contended that

the defendants have cultivated the alleged way so as to close the right of way of the plaintiffs and they are not entitled to do so as per the law. He further contended that there is no other way to enter into the Survey nos.446 and no.447 except this way which was closed by the defendants. He further contended that there is prima facie case in favour of the plaintiffs and the balance of convenience is also in their favour and if the temporary injunction is not granted in their favour, they will have to suffer irreparable loss which could not be compensated in terms of money.

3. The notices were issued by the court to the defendants and the same were duly served upon them. They appeared through their Ld. Advocate. The Ld. Advocate for the defendants too asked for the appointment of the Court Commissioner to draw *Panchnama* and map to show the existence of another way which is available for the plaintiffs to reach to the plaintiffs' farms and the same application was granted by the Hon'ble Court. The Court Commissioner produced *Panchnama* and map vide mark 15/3 and mark 15/4. The Ld. Advocate filed his written statement vide ex.18 denying the whole case of the plaintiffs.

He relied on *Panchnama* produced by the Court Commissioner vide mark 15/3 and stated that there is another way also available to the plaintiffs which has been passed through the Survey Numbers of their family only. He filed documents vide mark 19/1 to 19/24. He filed his written arguments vide ex.25. He has contended that the suit of the plaintiffs is liable to be rejected along with the injunction application since it does not disclose any cause of action against the defendants. He further contended that there is no way as averred by the plaintiffs and the plaintiffs have been enjoying way which is situated at the east side of the properties of their brothers only. He contended that there exists another way to enter into the plaintiffs' farms which is passing through the Survey No.443 and 445. The owners of these Survey nos. belong to the same family of the plaintiffs and the Survey no.441 to no.446 have been partitioned amongst the brothers of the plaintiffs. He further contended that there is no prima facie case established by the plaintiffs in their favour and the balance of convenience is also not in their favour since there exists another way from where the plaintiffs have been enjoying such way i.e. on the east side of the properties of brothers

of the plaintiffs. Hence, prayed for the rejection of the application for temporary injunction.

4. There are three basic principles for granting or refusing the temporary injunction, i.e., 1) *prima facie* case in favour of the party seeking temporary injunction, 2) balance of convenience in favour of such person and lastly, 3) there must be an irreparable loss which is likely to be caused to such person if injunction is not granted to such person. 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. In addition to these three basic principles for granting or refusing the injunction, the conduct of the person seeking injunction should also be taken into consideration because the granting of injunction is an equitable relief and is drastic or serious order. There are two basic maxims of equity which are important to be considered at the time of deciding injunction application; 1) "He who seeks equity must do equity" and 2) "He who comes to equity must come with clean hand".

5. Having perused the material on record, it appears to this Court that the case of the plaintiffs is based on easementary right of way wherein the plaintiffs have to disclose the subservient property over which they claim easement which is not mentioned by the plaintiffs. The plaintiffs have not filed any evidence to prove such easementary right by prescription. Furthermore, the plaintiffs have not satisfied the requirement of the Easement Act and it is required to be satisfied since the case of the plaintiffs is based on the easement and the plaintiffs claim right to way in their plaint by averment. In the case of **Agriculture Produce Market Committee V/s Bhanderi Dhirubhai Narshibhai reported in 2008 (1) GCD 366 (Guj.)** the Hon'ble High Court of Gujarat has held that pleadings made by the party before the court are required to be proved and substantiated by the party by producing necessary evidence in support of such pleading. Pleading cannot take place of evidence. Pleading are mere contentions raised by the party before the court. Party is required to prove the same by leading proper evidence before the court. The plaintiffs have to prove their case by leading necessary evidence to prove their case.

6. Looking to the facts and circumstances of the case and the documents filed by the plaintiffs, the written statement of the defendants, the arguments advanced by the Id. Advocates for both the parties, and the reports of both the court commissioners, it is found that there exists an another way too for the plaintiffs to pass through the properties of their brothers only. Looking to the *Panchnama* produced vide mark-15/3 and a map vide mark-15/4, it can be seen that there exists an another way too available to enter into the plaintiffs' farms which is passing through the Survey No.443 and 445. The Id. Advocate for the defendants contended that these owners are the brothers of the plaintiffs and the Id. Advocate for the plaintiffs did not challenge this relationship. Thus, it can be presumed that the owners of Survey no.443 and no.445 are belonged to the same family of the plaintiffs and the Survey no.441 to no.446 have been partitioned amongst the brothers. Thus, the plaintiffs can pass through the Coal-tar road which is situated on the western side of Survey No.443 and by using this road, entering through the Survey no.443 there is an another way which goes through the Survey No.445 to reach to the Survey nos. of the plaintiffs. Under such

circumstances, the equitable remedy of temporary injunction cannot be invoked in favour of the plaintiffs.

7. So, in view of the aforesaid discussion and reasons, it is crystal clear that the plaintiffs have miserably failed to establish *prima facie* case in their favour against defendants. This court declines to invoke equitable jurisdiction of granting temporary injunction in favour of the plaintiffs against defendants. Hence, the following order has been passed in the interest of justice:

**-:: ORDER ::-**

1. The application for temporary injunction filed by the plaintiffs vide ex.5 is hereby rejected.
2. No order as to cost is made.

Pronounced in the open court on June 6, 2023.

**Place:Vadnagar**  
**Date :6/06/2023**

**(Alpa Prabhudas Kadiwar)**  
**Principal Civil Judge,**  
**Vadnagar.**  
**(Judge Code : GJ-01554)**