

Order below Exhibit-5

- 1.This is an application filed by the plaintiff for seeking temporary injunction under Order-39, Rule-1 & 2 read with Section-151 of the Code of Civil Procedure, 1908 restraining defendant from obstructing or interfering the plaintiff's right of way.
- 2.The Ld. Advocate for the plaintiff argued that by keeping a big heap of the clay over the open way, the defendant has closed that way which was available for the him to pass through. He filed documents vide mark 4/1 to 4/18. He argued that the defendant obstructed the plaintiff from enjoying their right of way which they have been enjoying since years. He further bmitted that the defendant has closed the alleged way so as to interrupt the right of way of the plaintiff and he is not entitled to do so as per the law. He further submitted that he is facing trouble to reach into his farm because of the heap of clay made by the defendant. He further argued that there is prima facie case in favour of the plaintiff and the balance of convenience is also in his

favour and if the temporary injunction is not granted in their favour, he will have to suffer irreparable loss which could not be compensated in terms of money.

3. The notice was issued by the court to the defendant and the same was duly served upon him. He appeared through his Ld. Advocate. The Ld. Advocate filed his written statement vide ex.12 denying the whole case of the plaintiff. He vehemently contended that the plaintiff and another person namely Sendhabhai Manchharam Patel had beaten and abused the defendant for which the defendant has made a complaint which criminal case no.1745/2021 is pending in this Court only. Again he vehemently contended that the plaintiff has sued this case against the defendant just to torture him. He also stated that there is another way also available to the plaintiff which has been passed through the south of the Survey Number 105 without any hindrances. He filed documents vide mark 13/1 to 13/4. 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 plaintiff has been enjoying such way Hence, prayed for the rejection of the application for temporary injunction with cost.

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 plaintiff is based on easementary right of way wherein the plaintiff has to disclose the subservient property over which he claims easement which is not mentioned by the plaintiff. The plaintiff has not filed any evidence to prove such easementary right by prescription. Furthermore, the plaintiff has not satisfied the requirement of the Easement Act and it is required to be satisfied since the case of the plaintiff is based on the easement and the plaintiff claims right to way in his 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 pleadings. Pleadings cannot take place of evidence. Pleadings 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 plaintiff has to prove his case by leading necessary evidence to prove his case.

6. Looking to the facts and circumstances of the case and the documents filed by the plaintiff, the written statement of the defendant and the arguments advanced by the Ld. Advocates for both the parties, it cannot be decided prima facie stage without any concrete evidence, such as *Panchnama* to be made by a Court Commissioner that if there is no other way to pass for the plaintiff except the way he pleaded in his application. In other words, the Court cannot decide without any evidence that there is a way to pass for the plaintiff through the farm of the defendant which has been used by the plaintiff and now the defendant has closed it by making a big heap of clay over it. Under such circumstances, the

equitable remedy of temporary injunction cannot be invoked in favour of the plaintiff.

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

-:: ORDER ::-

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

Pronounced in the open court on October 27, 2023.

Place: Vadnagar

Date : 27/10/2023

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