

ORDER BELOW EXHIBIT 5
IN
REGULAR CIVIL SUIT NO. 05 OF 2013

(1) The present suit is filed by the plaintiff for the Permanent and mandatory Injunction along with the said interim relief application of mandatory injunction. The facts in brief of the present application is that the plaintiff no 1 is mother of plaintiff no 2, 3 and defendant no 5 is mother of defendant no 6. The father of plaintiff no 1 was deceased Jaggubhai Mavjibhai Patel and plaintiff no 1 got married to Natwarlal Harilal Patel. Thakorbhai Jaggubhai Patel was real brother of plaintiff no 1 and defendant no 5 is widow of Thakorbhai Jaggubhai Patel. The defendant no 1 to 4 are the first buyer of the north portion of property number 510 whereas defendant number 7 to 10 are the second buyers the north portion of property number 510.

** The plaintiff further asserts that father of plaintiff no 1 and deceased Thakorbhai Jaggubhai Patel were siblings of Jaggubhai Mavjibhai Patel who during his life did Will of various separate property in Kamrej village but disputed property is survey number 553 and block no as 510 to be referred as 'disputed property' and dispute is with regard to claim of right to way from north portion of said property to be referred as 'suit way'. Plaintiff further asserted that he (Jaggubhai Mavjibhai Patel) did Will with regard to said property on 14/8/1978 and it was registered on 27/4/1979 with entry number 171 before Sub-Registrar kamrej. The said disputed property was equally distributed wherein South portion admeasuring 02-59-00 was given to plaintiff no 1 and North portion admeasuring 02-59-00 was given to husband of defendant no 5 (Thakorbhai Jaggubhai Patel) wherein out of his share he sold 00-47-55 and left with 02-11-45.

** Plaintiff further asserted that in Para 4 of said Will it was specifically mentioned that whenever any of the shareholder intends to sell his share then other share-holder residing in Kamrej will get (preemption right) first right to buy with mentioned price per bighas. Plaintiff further asserted that he gave

the notice to defendant no 5, 6 and 1, 3 dated 16/6/2009 stating that we are ready and willing to buy the other portion if you are intending to sell but defendant 1, 3 refused to accept the notice and defendant 5, 6 merely accepted the notice but later it was found that defendant no 5, 6 sold their north share to defendant 1 to 4 vide a registered sale deed dated 9/10/2009 registered as 3917 and hence special civil suit number 469/2012 for cancellation of said sale on the bases of Will was filled which is still under consideration before court.

** The plaintiff further asserts that defendant no 1 to 4 has further sold the North portion of disputed property to defendant no 7 to 10 via registered sale deed number 2512 dated 20/2/2015 wherein they have failed to mention about right to way, which was part of will and first sale, and hence they have been creating hurdles with regard to use of said way.

** The plaintiff further asserts that since from inception and even after first sell they have been using right to way from North portion of land to enter their south portion of land and further said 'right to way' was even mentioned in sale document done between defendant no 5, 6 and defendant 1, 2, 3, 4. The plaintiff asserts that he has Easementary right over North portion of land to enter along with agricultural tool and machines in his property situated towards south. The plaintiff further asserts that he possess South portion of property 510 whereas other side possess North portion of property 510 and they have right to use suit way from north side of the said portion of property 510 possessed by other side.

** The plaintiff further asserted that they have been using the way from North side of disputed portion to enter their South portion since from more than 20 years but other side restricted them after the second sale and other side came over the land on 23/3/2012 drilled the way with the help of JCB and other machines without hearing any say of the plaintiff. The plaintiff further asserted that since from 2012 they have been left with no other option and other side has fetched their bread and butter and right to livelihood as they have not been doing agricultural since from 2012. Hence, the need was felt to file the said suit along with present application for mandatory injunction for obtaining relief as

prayed for, so that the no unjust is been done till the final decision of court.

(2) Now, the said suit was heard for admissibility and it was registered as regular civil suit. Then, as per procedure notice to other side was issued wherein notice to all was served. Now, it is found that in the said case defendant no 5, 6 are the family members of plaintiff and defendant no 1 to 4 are those to whom property was sold by defendant no 5, 6 and defendant no 7 to 10 are those to whom property was lastly sold by 1 to 4. So, it is must to firstly peruse the reply of defendant no 5, 6 then of defendant 1 to 4 and then of 7 to 10.

**** Now, in the said case notice to defendant no 5, 6 was dully served and they filled their reply vide exhibit 22.** They have strongly objected the suit of the plaintiff being affected by many defaults such as estoppel, limitation, jurisdiction, non-joinder of necessary parties, delay and laches, not coming with clean hands and lastly plaintiff should have gone to Mamlatdar Court under section 5 of the Mamlatdar Courts Act etc. They further asserted that plaintiff before filling this suit has filed another suit number as SPCS 469/2012 so plaintiff should have claimed said relief in that suit only hence this suit is barred Order 2 Rule 2 of the CPC and such suit should be stayed till decision of first suit. He further asserted that right to way shown in 'schedule A' was never there and it is not there at present also and further asserted that they temporary allowed to use to their land for right to way but regularly they are using other way. They further asserted that in one suit plaintiff is claiming ownership and in said suit he is claiming from same property Easementary right so plaintiff himself is not clear about his rights and stand. They further asserted that if said relief is allowed then it will amount to allowing the final suit of the plaintiff which is against the basic principle of interim injunction. He further asserted that plaintiff and Thakorbbhai Jagubhai took NA permission of 4768 Sq. Mtrs out of total property of 510 and they sold it Prakashchand Chandrakant on 11/7/1983 and then right to way was used from our property but on sale it was agreed that each one will do arrangement for them for the right to way wherein defendant no

5, 6 make their arrangement towards North side and plaintiff made their arrangement towards south. They asserted that they used way from 508, 509, 494 to reach kamrej Gam and sometime even plaintiff used the same way from my land then to 508, 509, 494 to kamrej Gam as being easy way but he has no right to claim Easement over it. Further they asserted that they sold their North side of 510 to defendant no 1 to 4 who did levelling and other work over land to make fertile and at that time also there was no way used by plaintiff so their claim of using it since from 20 years is false and they have no right to claim any Easementary right. Hence, said application be rejected with cost.

**** Now, in the said case notice to defendant no 1 to 4 were dully served and they filled their reply vide exhibit 29.** They have strongly objected the suit of the plaintiff being affected by many defaults such as no cause of action, improper court fee stamp, suppression of facts, estoppel, limitation, jurisdiction, non-joinder of necessary parties, delay and laches, not coming with clean hands and lastly plaintiff should have gone to Mamlatdar Court under section 5 of the Mamlatdar Courts Act etc. They further asserted that plaintiff filed one suit numbered as SPCS 469/2012 for cancellation of sale (done by defendant no 5, 6 in favor 1 to 4) and in the same suit he should have claimed said relief but he failed to do, so, this suit be stayed till decision of said suit or suit is barred due to O2 R2 of the CPC. They further asserted that plaintiff claimed way from defendant land going from 509, 511 but he has failed to join owner of 509, 511 as party to the suit. They stated that plaintiff has challenged first sale document and they want to rely over it also for the way so one cannot be allowed to accept and deny same document. They further asserted that Map produced by plaintiff is of Gram Panchayat which prima facei show that it has been tampered, so necessary action be taken against them. They further asserted that averment of plaintiff that they have stopped plaintiff from farming and taking fruits of agricultural are false as there was no way from their portion in past and at present also. They further asserted that if said relief is allowed then it will amount to allowing the final suit of the plaintiff which is against the basic principle of interim injunction. He further asserted that in actual Jagubhai Mavjibhai was tenant over disputed land where he paid

full amount decided by Mamlatdar in Tenancy case in 1959 and he became sole owner of it and said property after amalgamation was numbered as 510 that is disputed property. Jaggubhai Mavjibhai expired on 21/7/1979 and he made one Will in his lifetime which was registered with number 171 dated 27/4/1979 and according mutation entry was done with number 2349 dated 26/5/1980. Then North portion admeasuring Acre 06-16 Gunthas was given to his son Thakorbhai Jaggubhai and enjoyed by them since from years. Then the remaining portion that is 4768 Sq. Mtrs. Was sold by Thakorbhai and plaintiff no 1 to Prakashbhai dated 11/7/1983 and due to said sale right to way joined to Kamrej road was blocked and they both (plaintiff and defendant no 5, 6) agreed to make their own arrangements for the way. They further asserted that defendant no 5, 6 used their way from 508, 509, 494 to reach Kamrej road and being easier way sometime even plaintiff were allowed to do so but not permanently. They asserted that no such way has been mentioned in Will or first sale and plaintiff is asserting false statement. Further they asserted that they sold their North side 510 to defendant no 1 to 4 who did levelling and other work over land to make fertile and at that time also there was no way used by plaintiff so their claim of using it since from 20 years is false and they have no right to claim any Easementary right. Hence, said application be rejected with cost.

**** Now, in the said case notice to defendant no 1 to 4 was dully served and they filled their reply vide exhibit 100.** They have strongly objected the suit of the plaintiff being affected by many defaults such as no cause of action, improper court fee stamp, suppression of facts, estoppel, limitation, jurisdiction, non-joinder of necessary parties, delay and laches, not coming with clean hands and lastly plaintiff should have gone to Mamlatdar Court under section 5 of the Mamlatdar Courts Act etc. They further asserted that one suit 469/3012 between same party with regard to same disputed property is pending before another court so, this suit be stayed till decision of said suit or suit is barred due to O2R2 of the CPC. They further asserted that plaintiff claimed way from defendant land going from 509, 511 but he has failed to join owner of 509, 511 as party to the suit. They stated that plaintiff has challenged first sale document and they wants to rely over it also for the way so one cannot be allowed to accept and

deny same document. They asserted that while going from Kamrej to Vav from nearby to Bhutmata Devini Ambali there is a farm of Thakorbhai Premjibhai numbered as 513 which directly goes to plaintiff farm which is shortest and easier way as claimed by plaintiff from defendant's land. They further asserted that when they bought the property from defendant no 1 to 4 then no such mention of way was done in the sale document. They further assert that plaintiff is asserting falsely that he has no other way apart from stated in the plaint because they have other way too. They further asserted that in actual Jaggubhai Mavjibhai was tenant over disputed land where he paid full amount decided by Mamlatdar in Tenancy case in 1959 and he became sole owner of it and said property after amalgamation was numbered as 510 that is disputed property. Jaggubhai Mavjibhai expired on 21/7/1979 and he made one Will in his lifetime which was registered with number 171 dated 27/4/1979 and according mutation entry was done with number 2349 dated 26/5/1980. Then North portion admeasuring Acre 06-16 Gunthas was given to his son Thakorbhai Jaggubhai and enjoyed by them since from years. Then the remaining portion that is 4768 Sq. Mtrs. was sold by Thakorbhai and plaintiff no 1 to Prakashbhai dated 7/9/1983 and due to said sale right to way joined to Kamrej road was blocked and they both agreed to make their own arrangements for the way. They further asserted that defendant no 5, 6 used their way from 508, 509, 494 to reach Kamrej road and being easier way sometime even plaintiff were allowed to do so but not permanently. They asserted that no such way has been mentioned in Will or first sale or second sale hence cannot be believed. Further they asserted that they bought North side 510 from defendant no 1 to 4 who did levelling and other work over land to make fertile and at that time also there was no way used by plaintiff so their claim of using it since from 20 years is false and they have no right to claim any Easementary right. They asserted that while going from Kamrej to Vav from nearby to Uma Complex wall there is road which goes to 512 and reaches to west side plaintiff land which is shortest and easier way as claimed by plaintiff from defendant's land. So, the said application be rejected with cost.

(3) Now, after the reply by the other side the plaintiff has filed counter affidavit against the reply of other side. **The plaintiff filed counter affidavit vide exhibit 37 against the reply of the defendant number 1 to 4, 5, 6.** He asserted that said suit and SPCS 469/2012 are two different suits with different cause of action and one cannot be relied upon outcome of other. He further asserted that right to way is adjacent to block number 509, 511 but it is actually from north portion of 510 that is defendants' land hence owners of 509, 511 are not necessary parties to the suit. He further asserted that he has not produced forged Map rather he has produced true Map so that true fact could be brought before court. He has asserted that as other side defended that plaintiff has suppressed revenue cases details but it is to be seen that documents relating to same have been produced vide 3/14, 3/15, 3/26, 3/27, 3/28, 3/29, 3/73. He further asserted that defendant in name of levelling the land drilled the right to way which need to be restored. He asserted that in-spite after NA and sale of some portion still they have been using the right to way from North Portion of 510 to reach their portion. He further asserted that defendant number 1 to 4 said that they are bona-fide purchaser for value without notice but actually they have been given notice stating preemption right of plaintiff but that was refused by defendant number 1 to 3.

**** The plaintiff filed counter affidavit vide exhibit 104 against the reply of the defendant number 7 to 10.** He asserted that in-spite he has registered Lis-pendence vide number 8159/2012 defendant number 7 to 10 entered into sale from defendant number 1 to 4 dated 20/2/2015 hence he cannot be treated as Bona-fide purchaser for value without notice. He further asserted that defendant number 1 to 4 moves application Order 7 Rule 11 of CPC which was rejected by court on 12/8/2014 and in same way defendant number 7 to 10 are trying to linger on the matter. He further asserted that on 25/3/2012 defendant drilled the way then at that time sugarcane was not harvested and defendant denied to cooperate to use their land and finally as a last option on 14/12/2012, 15/12/2012 sugarcane was carried over head from property number 513 till the point truck was kept standing which is painful. He further asserted that in 2012 defendant drilled the way and since then plaintiff cannot do

agricultural work as they are left with no other way and they have been left in limbo. He further stated that way from North portion of 510 reach to Kamrej touching 509, 511, 494. He further asserted that he has produced documentary with regard to existing suit way being drilled way which plaintiff is trying to restore to start his livelihood. He asserted that his suit way was mentioned in Will and first sale of 2009 but it was not mentioned in second sale in 2015 hence it does not mean that there is no suit way at all. He further asserted that defendant number 1 to 4 bought the north portion then they even tried to buy south portion but when they could not then they played a negative trick of drilling a way so that it can force plaintiff to sell the same to them.

(4) In the present case, the plaintiff relied upon the document produced at mark 3/1 to 3/100 and mark 109/1 to 109/2. The defendant no 1 to 4 relied upon the document produced at mark 30/1 to 30/14 and 70/1 to 70/25. The defendant no 5, 6 relied upon the document produced at mark 23/1, 23/7. The defendant no 7 to 10 relied upon the document produced at mark 101/1 to 101/10.

** The plaintiff along with plaint, counter affidavits and documentary list also adduced written argument in support vide exhibit 64. The defendant number 1 to 4 along with reply and documentary list also adduced written argument in support of his defense along with list of case laws. The defendant number 7 to 10 along with reply and documentary list also adduced written argument in support vide exhibit 110.

(5) The plaintiff relied on Articles on Violations of Easementray rights, Temporry and Mandatory Injunctions and various rulings such as Dipen vs. Rishi, Smt. Henriketa vs. Linofalcon, Anilkumar vs. Bindu Bhushan, Bhagwati Prasad shah vs. Bhagwati Prasad Shah, Manoharlal Chopra vs. Raibahardue Rai, AIR 1972 PAT 490, Hamirram vs. Varsinh Raimal, Fazal hak vs. Fazal Hak, Mariten SDN vs. Hindalako Industries Ltd, Vijay Srivastav vs. Mirahul Enterprises, Birmaram vs. Tejaram, Varnasinh subeya vs. Varnasinh Somalingam, AIR 1959 RAJ 97, AIR 1984 GUJ 50, AIR

1995 GUJ 92, AIR 2007 GUJ 165, AIR 1964 BOM 165, Tarachand vs. Kumari Rajni Jain, Sudhirsinh vs. Durgaprasad Patel, Dhobi Gulamhussain Abdullah case, Mohmd Mehtab Khan vs. Khusnumia Ibbrahim Khan, AIR 1998 GUJ 120. Various other case laws produced vide exhibit 65 with list and their rulings.

** The defendant number 1 to 4 has relied on various rulings such as 1980(1) GLR 728, 1976 GLR 67, AIR 2004 MAD 185, AIR 1978 MAD 97, AIR 1968 ORRISA 74, AIR 2005 SC 1444, AIR 2013 SC 1099, AIR 2006 PATNA 141, AIR 2014 SC 937, 2001(3) GLR 2740, AIR 2008 SC 2291, 1997(2) GLH 307, AIR 2004 AP 222.

** The defendant no 7 to 10 has relied on various rulings such as 1977(0) AIJ-TN 1205919, 1985(0) AIJ-OR 1503772, 2001(0) AIJEL-HC 203822, 2004(0) AIJEL-SC, 17600, 2006(0) AIJ-PT 1704093.

** This Court has perused all the documents and considered all the relevant pleadings along with produced case laws and Articles and the same will be discussed and referred as and when felt applicable and necessary according to facts.

(6) For the proper adjudication of the present application, following points of determination are raised as follow;

- (a) Whether the plaintiff has prima facie case?
- (b) Whether Balance of convenience lies in favour of plaintiff?
- (c) Whether irreparable loss is likely to be caused to the present plaintiff if interim injunction as prayed for is not granted?
- (d) What order?

(7) My answers to the above issues are as follows.

- (a) In the Affirmative.
- (b) In the Affirmative.
- (c) In the Affirmative.
- (d) As per the final order.

-: R E A S O N S :-

For issue Nos.1 to 4:

8. As findings of one issue is depended on upon another, whereas all the above-mentioned issues are so interconnected and inter linked with each other, so to avoid frequent repetition of one fact it is preferable to deal & decide them in a common discussion and common reasoning for the sake of convenience. Now, the Honorable Supreme Court in the below case rightly observed that;

Thus rational behind the provision of Order XXXIX of the Code of Civil Procedure, 1908 as laid down by *Hon'ble Supreme Court in the case of M. Gurudas and Ors.*, can be summarized as "While considering an application for injunction, the Court would pass an order thereupon having regard to prima facie, balance of convenience and irreparable injury and court has to be more careful while passing order relating to mandatory injunction".

9. Read the contention made in the plaint and considered the documents produced and heard the argument of the party. It is a settled law that at the time of adjudicating interim injunction application, the court is not required to decide the real disputes between parties stated below exhibit 1, which means court is supposed to take a 'bird eye view look' while deciding the Exhibit 5 and in no way Exhibit 1 should be decided but application of mandatory injunction application is one kind of exception to such facts. Now, the court is supposed to see that the party approaching the court has plausible case and there is an apparent reason to believe the claim of the plaintiff or not and the court is also supposed to see that whether the plaintiff is coming with pious case & clean hands or not. The real crux of the grant of injunction application is not depended upon the prove of the case but rather it depends upon the fact that the party is successful in satisfying the court that he should be given a chance to explain his case in detail and for that injunction is needed so that a final

order of the court does not become infructuous later on when the matter comes at rest.

8. After going through the record and pleadings, perusing the documentary evidence, considering the oral and written arguments of the party, the court finds that plaintiff is claiming relief of mandatory injunction in form of direction to other side to make/construct suit way which was drilled by them established over north portion of 510. Per contra, the other side has claimed that there no way as claimed by plaintiff rather he has an alternative easier way. The plaintiff in order to succeed in said application need to show that there was a road/way from North portion of 510 starting from his south portion reaching to main Kamrej road which was actually drilled by the other side in name of levelling of property in 2012. Now, in order to decide the said application, it is must to peruse the facts of the case in relations to herewith all above issue. So, in order to succeed, plaintiff need to show his prima facie case along with balance of convenience in his favor and irreparable loss if said application is not allowed.

9. **PRIMA FACIE CASE:-** Now, to reach the said conclusion, the first thing to be proved is about the prima facie case of the plaintiff. *A prima facie case is the establishment of a legally required rebuttable presumption. It is generally understood as a flexible evidentiary standard that measures the effect of evidence as meeting, or tending to meet, the proponent's burden of proof on a given issue.* Further for a detailed understanding *prima facie in Latin means for "at first look," or "on its face,"* referring to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial.

**** Now, in the said application plaintiff is claiming Mandatory injunction in form of direction being given to other side for making 'suit way' which was drilled by defendant coming over defendant's land so that earlier position could be restored. So, in order to succeed and show his prima facie case, plaintiff firstly need to show that there was a way in form**

Easementary right which he was enjoying from North portion of 510 to reach to his land that is south portion of 510. Secondly plaintiff need to show that he has been using such suit way since from more than 20 years. Lastly, plaintiff need to show that such right to way has been drilled by the other side. Per contra, the defendant only needs to show that way/road claimed by plaintiff was never in existence and they have other alternative easier way to reach their property through main road. So, this certain burden of question rested upon each party and whosoever found to establish such queries will be set to establish his prima facie case.

**** Now, starting with the first query where burden is upon plaintiff to show that there was a way in form Easementary right which he was enjoying from North portion of 510 to reach to his land that is south portion of 510.** For the same, plaintiff in his plaint, counter affidavit, written argument and with the help of documentary list and case laws asserted that Will was done on 27/4/1979 wherein North portion of property number 510 was given to Defendant number 5,6 and whereas South portion of property number 510 was given to plaintiff by their father. He further asserted that such way was even mentioned in Will produced vide a mark 3/1. He further asserted that Defendant number 5, 6 sold their share to defendant number 1 to 4 vide a registered sale deed in 2009 such document is produced vide a mark 3/13 wherein on page number 35 it is specifically mentioned about the way of the plaintiff. Challenging the same, the other side has also produced their reply along with written argument and documentary list and case law and they have only asserted that plaintiff is mis-interpreting the page number 35 of first sale document as there is no specifically mentioning about right to way and they have no such easmentary right but they were allowed for their sake of convenience that too on one or more occasion being the same road easier. So, after considering argument from each side it becomes necessary to peruse all referred and relevant documents. Document vide mark 3/1 that is Will it is found that property 510 was shared as claimed between plaintiff and defendant number 5,6 but there is no mentioning of suit way in it.

Further referring registered sale document produced vide a mark 3/13 that is first sale between defendant number 5, 6 and 1 to 4 with the regard to North Portion of 510 it is found that on page 35 it specifically mentioned about suit way in favor of plaintiff in form of Easementary right to plaintiff. It further shows that name of plaintiff and state that they have right to use suit way from North portion of property 510 to reach their portion and said sale is done with such liability. *Further first sale of 2009 fulfills the criteria of section 17 of the Registration act as it is duly registered well supported by section 6(c) and 54 of the Transfer of property act which talks about transfer of easement and not creation of easement.* Now, it is document of defendants wherein they have been found to make an admission about the plaintiff right to way in form of easmentary right in 2009. Further perusing the written reply it is found that even other side has admitted that they were allowing plaintiff to use their land sometime as their way is easier. So, without going into further discussion it can said that other side themselves orally in reply and in writing in sale document has admitted about the established right to way/suit way of plaintiff as claimed by him. So, it can be said that plaintiff has prima facielly establishes his suit way from defendant's land that is North portion of property number 510 of Kamrej. *The same submission gets corroboration from observation made by Hon'ble High Court in case of Dipen vs. Rishi 2008 where court observe that if right to way is mentioned in sale document then court can reply over same for the order of injunction.*

**** Secondly plaintiff need to show that he has been using such way since from more than 20 years.** Now, in order to establish the same, the plaintiff has asserted in his plaint, counter affidavit with the help of Affidavit on oath of neighbors produced on record vide exhibit 7, 8, 9 along the plaint to show that he has been using the way since from many years further relied upon admission of other side. Over the same, the other side has strongly asserted that there was no such way as mentioned in schedule 'A' and they have forged such Map of Gram Panchayat and they have right to way from other side so there is no question of using it for more than 20 years. Now, perusing the documents and arguments from both sides, it is found that Defendant number 5, 6 admitted suit way in first sale of 2009 further he also

admitted in his reply vide exhibit 22 stating that plaintiff was temporary allowed to use to their land for right to way but regularly they are using other way. So, it can be presumed that even before 2009 also plaintiffs were allowed to use way from North Portion of defendants. So, this case being civil where burden is not as high as needed in criminal case further it being interim injunction application where plaintiff only need to establish his prima facie case. So, it can be said that with the admission of other side and with the help of averment of plaintiff and affidavit on oath of neighbors it can be found that plaintiff was using said way since from many years which for the time being can be treated as more than 20 years.

**** Lastly, plaintiff need to show that such right to way has been drilled by the other side.** Now, plaintiff has claimed that there was a way from North side which was actually drilled by other side in name of levelling of their property whereas other side denied of such fact and they even claimed that there was no such suit way rather plaintiff is malafidely using generosity of defendant allowing them to use their way for one or more occasions. Now, for the same it is must to peruse the court commissioner report produced vide a mark 13 A showing that there are two part north used by defendant and south used by plaintiff and at present there is a road portion found reaching towards plaintiff south portion from defendant's north portion which was dilled for making levelling of the property due to which the property level has gone down to many feet. He further asserted that on such drilled portion new tress of Amba and limbda are sowed which left plaintiff with no other option. So, there was a suit way is duly admitted by defendant in his first sale document of 2009 and further he admitted that in 2012 he brought JCB machine on disputed land for levelling the land which in turn gives prima facies idea in mind of court about drilling the way. Though defendant claims drilling a name of levelling of property but plaintiff claim it to be drilling of suit way in order to refrain plaintiff from using it and leaving them in limbo. So, it is on record that JCB machines and other heavy machines were brought over suit way in 2012 but actually it was for levelling or drilling will be proved after taking evidence till then court finds rational to move with the facts of the plaintiff as it gets corroboration from

admission of other side and they have been found to be at making wrong averison because they stated that there was no suit way at all but they themselves admitted in their sale document of 2009. Hence, it can be concluded that prima facie case is established in favor of plaintiff.

**** Per contra, the defendant only needs to show that way/road claimed by plaintiff was never in existence and they have other alternative easier way to reach their property through main road.** Now, in the said point defendant has to show that plaintiff has other alternative way to reach to main road of Kamrej Road. In the same, the other side has asserted various other ways in thier reply vide exhibit 22 and 29 that while going from Kamrej to Vav from nearby to Bhutmata Devini Ambali there is a farm of Thakorbhai Premjibhai numbered as 513 which directly goes to plaintiff farm which is shortest and easier way and he further asserted that they used way from 508, 509, 494 to reach kamrej Gam and other side also stated another way nearby to property 513. Now, over the same, the plaintiff has claimed that for them there is no other way except using the north portion of defendant land and due to drilling of road they have been left with no other means of earning since from 2012. Now, from above discussion it is found that plaintiff has strictly adhered to one way that is from north side property 510 whereas other side has given alternative 2 options for them but once they admit in first sale document and even in their reply vide exhibit 22 and 29 they were allowing plaintiff which means it is just to accept at this juncture that plaintiff has no other way except as claimed in said suit. The said point also gets corroborations from Affidavit produced of neighbor vide exhibit 7, 8, 9 which stated that plaintiff has no other way apart from north side of property 510 and no such counter has been done by other side. Hence, it can be seen that defendant failed to establish his prima facie point.

**** WITH REGARD TO OTHER DEFENSE:-** Now, above points are duly discussed which prima facie shows that plaintiff was having suit way from north side of property 510 which was drilled by other side. So, now defendant has raised various other objection that one cannot claim easement over the land over which one is claiming ownership. Now, in SPCS 469/2012 plaintiff

is claiming PREEMPTION RIGHT over north property on the bases of WILL of 1979 so there is a difference between claiming ownership and asking for preemption rights. Further other side has taken objection that said suit is barred due to non-joining on necessary party but as plaintiff has claimed suit way from north side of 510 which is duly owned by defendant so it is not must in Easementary suit to join owners of all property from where the suit way passes but it is sufficient if owner of disputed property is joined. Now, the other side has claimed that Mandatory injunction is remedy to be given in rarest of rare case and too on urgent bases but said case is not fit for it because interim injunction application of 2012 is pending till 2019. This court finds that if someone's right to way is drilled by other side leaving other side in limbo for their livelihood comes well within the rarest of rare case and it is on court to decide on bases of judicial discretion that what actually is rarest of rare case because there cannot be a straight jacket formula for the same. Further court cannot ignore the fact that matter was even delayed due to compromise talk going between the parties. Further objection by other side that plaintiff should have gone to Mamlatdar court is also not acceptable because Mamlatdar court cannot decide Easementary rights which is prerogative of only civil court. So, it can be said that all the objection taken by other side are well countered factually and legally by plaintiff in order to succeed in said application of mandatory injunction.

*** Further as observed in case of WS Maritime SDN BHD vs. Hindalco Ind Ltd. 2008, hon'ble court observed that no injunction under Order 39 Rule 1 can be granted unless the plaintiff establishes a prima facie case and serious question to be tried. Now, in the said case plaintiff has establish his prima facie case and also shown triable question at hand. Hence, in view of above discussion this court finds that plaintiff has duly established his prima facie case. So, it can be said that said issue results in affirmative.*

10. BALANCE OF CONVENIENCE: - Now, as the plaintiff has succeeded in proving his prima facie case, so the duty remains to see whether the plaintiff can show any Balance of convenience in

his favor. Now, as the plaintiff has shown that there was a way from north side of property number 510 starting from south portion of 510 to Kamrej main road which was actually drilled by the other side leaving behind plaintiff without any means and way for doing agriculture and they were put in limbo for their livelihood. So, it can be seen that prima facie case was established by plaintiff which also helps him in establishing his balance of convenience in his favor.

11. IRREPARABLE LOSS: - Lastly the point of irreparable loss is to be discussed before the deciding the said application. In literal terms, it means if the said application is disallowed then the loss of the plaintiff will be irreparable in all terms and if it is allowed then there will be no hardship to the other side. So, taking into consideration the relief claimed is that the defendant should be ordered to construct him a right to way drilled by him. Now, as the plaintiff has prima facie established that there was a way from north side of property number 510 which was actually drilled by other side leaving behind plaintiff no other way for using their south portion of land. Now, if the said application is rejected then there will be irreparable loss to plaintiff because their livelihood is put in limbo but if said application is allowed then plaintiff can start his livelihood and other side will have to face no hardship except the cost of making such way which they are bound when they have done so. Now, as the plaintiff has succeeded in showing his prima facie case and he has also succeeded in showing balance of convenience in his favor, hence, if the said application is rejected then it will cause injustice to one who is entitled for the interim justice. So, the said issue also results in affirmative.

12. CONCLUSION: - Now, it can be seen that plaintiff has prima facie shown that he being owner of south portion of 510 is dominant tenement whereas other side being in possession of north side from which the plaintiff has established his way is servient tenement. So, lastly this court finds that Plaintiff has established his prima facie case, balance of convenience in his favor and irreparable lose, so it is need of law and justice to allow said application till the final decision of the suit.

*** In the case of Mohanlal Shamji Soni vs. Union Of India 1991 Supp (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions- whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.*

*** Now, it is duty of the court to impart justice and not to act like a silent spectator, hence, if one person established his right to way and of fact of such way being drilled then it becomes duty of court to do everything to bring that person in same position where he was actually which can help in in staring his livelihood. Now, this court finds that defendant should be ordered to make a suit way but the question remains who should be bounded with such duty. Now, it is to be seen that defendant number 7 to 10 bought the north portion of 510 in 2015 whereas plaintiff is claiming of drilling of such suit way in 2012 so, it is not just to cast burden upon defendant number 7 to 10 but court finds that defendant number 1 to 6 should be made responsible for making such suit way at their own cost so that plaintiff can use his south portion of land for the agriculture purpose. Further this court finds that all the defendants should be restricted to cause any kind of interference in peaceful use of such suit way till the final decision of the suit. Further court also find rational to bind plaintiff with declaration to restore such changes of order if he fails in final suit because it will help for doing justice to whom injustice if nay done.*

*** Lastly, perusing provisions of Order 39 Rule 1 and 2 along with section 151 of the CPC, 1908 the court finds that nothing shall be deemed to limit or otherwise affects the inherent power of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the powers of the court.*

*** Further in case of Varanasi Subbayya vs. Varanasi Somalingam 1919 and Chhaganlal vs. Kesarlal 1958 Hon'ble court observed that if there is common property and if there are other remedies open to the party who has been affected by the wrongful act of the co-owner, the court should not ordinarily grant a mandatory injunction. Now, in the said case, there is no common property but there are adjacent owner who were earlier co-owner and it is on record that after drilling the suit way the plaintiff has not been able to do agriculture since 2012 and they have been waiting for the justice and if they are doing agriculture then other side has not brought any such evidence which in turn forces court to grant mandatory injunction considering it to be rarest of rare case where one is waiting for justice since 2012.*

*** In the case of Jivambhai Jerambhai Patadai vs. Bhavanjee Vinasjee Thakkar of the Hon'ble High Court of Gujarat of 1993 stating that the relief of interlocutory mandatory injunction are this granted generally to preserve or to restore the status quo of the last non contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. Court further observe that grant of such relief may cause injustice if plaintiff fails to win, hence court need to take extra care while granting such extraordinary relief. Now, in the case at hand there was a suit way non-contested by defendant number 1 to 6 as it was specifically mentioned in first sale of 2009 by them only and then drilling it means, it is fit case for the court to do everything for restoring the suit way so that party being aggrieved can believe justice system with open eyes.*

*** In the case of Krishnan vs. Kilasa Thammal AIR 1928 Mad 810, Hon'ble court observed that a mandatory injunction is an order requiring the defendants to do some positive act for the purpose of putting an end to a wrongful state of thing created by him or otherwise in fulfillment of his legal obligation. The avowed object of mandatory injunctions is prevention and their aim is to maintain status quo ante. Now, in said case, other side admit suit way in first sale of 2009 produced vide a mark 3/13 then act of drilling such suit way is wrongful act which need to be restored in order to being an end to wrongful act of drilling of such suit way.*

Hence this court finds this case to be fit case for allowing of such mandatory injunction application for ordering defendant number 1 to 6 to temporarily make suit way till the final decision of suit and taking declaration by plaintiff to restore such act at his cost if he fails in suit keep balance between justice and injustice. This court feels painfully to pass such order because court has to be decide between two aspects one whether to perpetuate the wrongful act and second to undo wrongful act by passing such mandatory injunctions. Hence, court after perusing all above pleadings, arguments and law at hand finds this case to be fit case for taking harsh step of allowing mandatory injunction.

** Hence, it can be said as a whole that a plaintiff has succeed in showing his prima facie case, it can be said that the result of the above three issue is in affirmative as the plaintiff has proved the facts of the above issues accordingly. Hence, the following final order is passed in the interest of justice as follow: -

-: O R D E R :-

1. The mandatory injunction application at Exhibit 5 of the plaintiffs is hereby allowed till the final decision of the suit.
2. Defendant No 1 to 4 and 5, 6 are hereby equally directed to make a temporary way/suit way for plaintiff exactly same as mentioned on page number 35 of registered sale document dated 09/10/2009 produced vide a mark 3/13 so that purpose for the same can be fulfilled. It should be done within 30 days of passing of said order. Suit way should be such made so that agricultural tools, machinery, loaded and unloaded vehicle can easily do 'to and fro' from such suit way. Further suit way should be such made so that height difference between north and south portion nowhere become hurdle in peaceful enjoyment for plaintiff.
3. Plaintiff is hereby directed to furnish a declaration on affidavit cum oath that he will restore such changes of said order to same position at his own cost if he does not succeed in said suit.
4. All the defendants are hereby directed not to obstruct or interfere with the peaceful use of suit way till the final decision of suit.
5. No order as to cost.

Today Pronounced in the open Court.

Date:- 15/03/2019

Kathor

(R. K. AGARWAL)

2nd Additional Civil Judge \$ JMFC

GJ01341

Kathor

RCS No:- 05/2013

Exhibit:-

-.: ISSUES :-

1. Whether the plaintiff proves that he has Easementary right from North portion of property number 510?
2. Whether the plaintiff proves that other side has wrongfully drilled the suit way from North Portion of 510?
3. Whether the defendant proves that the plaintiff has an alternative way apart from suit way?
3. Whether the defendant proves that the suit of the plaintiff is not tenable due to various legal barrier and hurdle?
4. Whether plaintiff proves that he is entitled for the relief claimed for?
5. What Order and Decree?

Date:- 15/03/2019

kathor

(R. K. AGARWAL)

2nd Additional Civil judge \$ JMFC

GJ01341

Endorsement of P/F Advocate	
Endorsement of D/F 1 to 4 Advocate	
Endorsement of D/F 5, 6 Advocate	
Endorsement of D/F 7 to 10 Advocate	

