

Order below Exh.5 in Regular Civil Suit No. 52 of 2013 :-

1. By filing this suit, the plaintiff has prayed as under :-

(૧૪) સબબ દાદ માંગવાની કે,

(એ) અમો વાદીનુ શ્રી મેરૂપર દુધ ઉત્પાદક કેન્દ્ર આ કામના પ્રતિવાદીઓ જાતે કે તેમના એજન્ટ, નોકર, માણસો કે અધિકારીઓ તરફથી કાયદેસરની કાર્યવાહી કર્યા વિના બંધ કરે કે કરાવે નહી કે દુધ કેન્દ્ર બંધ કરવા અંગેની કોઈ કાર્યવાહી કરે કે કરાવે નહી એવો કાયમી મનાઈ હુકમ અમો વાદીના લાભમાં તથા પ્રતિવાદીઓની વિરુદ્ધ ફરમાવવા ન્યાય કરવા હુકમ કરવા અરજ છે.

(બી) અમો વાદી શ્રી મેરૂપર દુધ ઉત્પાદક સંસ્થાના સહાયક છીએ અને આ સંસ્થાના સહાયક તરીકે અમારી સંસ્થા દુધ કેન્દ્ર ચલાવવા હકકદાર છીએ તેવુ વિજ્ઞાપનથી અમો વાદીના લાભમાં તથા પ્રતિવાદીઓની વિરુદ્ધમાં ફરમાવવા ન્યાય કરવા હુકમ કરવા અરજ છે.

(સી) અમો વાદીને મળવાપાત્ર તમામ દાદ અપાવવા અરજ છે.

(ડી) આ દાવાનુ તમામ ખર્ચ પ્રતિવાદીઓ પાસેથી અપાવવા હુકમ કરવા અરજ છે.

Alongwith the suit, present application is filed by the plaintiff, wherein it has been prayed as under :-

(૧૪) સબબ દાદ માંગવાની કે,

(એ) અમો વાદીના શ્રી મેરૂપર દુધ ઉત્પાદક કેન્દ્ર આ કામના પ્રતિવાદીઓ જાતે કે તેમના એજન્ટ, નોકર, માણસો કે અધિકારીઓ તરફથી કાયદેસરની કાર્યવાહી કર્યા વિના બંધ કરે કે કરાવે નહી કે દુધ કેન્દ્ર બંધ કરવા અંગેની કોઈ કાર્યવાહી કરે કે કરાવે નહી એવો કામ ચલાઉ મનાઈ હુકમ અમો વાદીના લાભમાં તથા પ્રતિવાદીઓની વિરુદ્ધ ફરમાવવા ન્યાય કરવા હુકમ કરવા અરજ છે.

(બી) અમો વાદીને મળવાપાત્ર તમામ દાદ અપાવવા અરજ છે.

2. Upon filing of this application alongwith the suit, an order to issue urgent show cause notice was ordered to be issued upon the defendants. The defendant no.1 &

2, what it appears from the Vakalatnama, Exh.10, have appeared through its ld. adv. Mr. A.G. Kotak. 3. The defendants have resisted the suit as well as this application by filing the written statement at Exh.19. The defendants have specifically denied each and every allegations made byd the plaintiff in his plaint. In the written statement, it is pleading of the defendants that there is no such designation of deft. no.2 as pleaded by the plaintiff who manage the unit at Halvad. The defts. have submitted that there is no such institution named as Merupar Dudh Utpadak Sanstha in existence as stated by the plaintiff in the title clause and the plaintiff do not work as *Sahayak* of Dudh Utpadak Mandli. It is further submitted by the defendants that the agreement, Mark 4/1 was executed by the plaintiff in his personal capacity and not as an institution named Merupar Dudh Utpadak Sanstha. It is further submitted by the defendant no.1 that the plaintiff has economically damaged the defendants by wrongfully activities which are detailed in the written statement. According to the defendants, there is no existence of plaintiff institution. The agreement, dtd. 18/3/2013 was carried out with the plaintiff in his personal capacity and not with any institution. According to the defendants, this court has no jurisdiction to try hear and try the case in view of provision of Section 20 of CPC; the suit is also not maintainable and the plaintiff has continued to damage the defendants. The defendants have submitted detailed pleadings regarding their defense and have also prayed to dismiss the suit and this application with costs.

4. Heard Ld. advs. Mr. V.C. Jani for the plaintiff, Ld. adv. Mr. A.G. Kotak. and also taken into

considerations the documents produced by the plaintiff with the Lists, Exh.3 and by the defendants at Exh.15 and 20.

6. Having heard the Ld. advs. for both the parties and considering the pleadings of the parties and the documents produced on record, following points arise for my determination to decide this application on merits.

POINTS

1. Whether the plaintiff proves that there is a prima facie case in his favour ?
2. Whether the plaintiff proves that balance of convenience lies in his favour ?
3. Whether the plaintiff would suffer the irreparable injuries which cannot be compensated in terms of money if the relief of injunction as prayed is not granted in his favour ?
4. What order and relief ?
7. My answers to the above points are as under for the reasons that follow :

- | | |
|------------|-----------------------|
| Point No.1 | : In the negative. |
| Point No.2 | : In the negative. |
| Point No.3 | : In the negative. |
| Point No.4 | : As per final order. |

REASONS

Points No. 1 to 4 :-

7. As all the points are interconnected with each others, with a view to avoid repetition of discussion of facts, all the points are discussed and decided together.

8. The issuance of injunction is governed by virtue of provision of Order 39, Rule-1 of Code of Civil Procedure. It is in respect of granting of temporary injunction. When there is a question of preservation of the disputed property and or protection for disposition thereof, Rule 2 of Order 39 of Code of Civil Procedure, lays down a procedure for issuance of injunction for restraining breach of contract or other injury of any kind. Moreover, the provisions of Rule 1 & 2 of Order 39 lays down the circumstances under which a temporary injunction can be granted and unless these circumstances exists, the Court has no jurisdiction to grant it, but, the fact that these circumstances exists does not compel the Court to grant it in all cases in as much as the Rule only shows that in the cases mentioned therein, the Court may grant an injunction. Thus, the grant of an injunction under the Rule is purely within the discretion of the Court and the grant of injunction is a very serious matter and the Court should take a good care to grant an injunction in cases only where such an injunction is essential. It being an equitable relief, it would be refused to the person who himself has failed to do equity. The principles which govern the exercise of discretion are to affect firstly, there is a serious question to be tried in the suit and that on the facts before the Court, there is probability of applicants being entitled to the relief asked for by him. Secondly, the Court's interference is necessary to protect him from that species of injury, which the Court calls irreparable before his legal right can be established on trial and thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction, will be greater than that which is likely to arise from granting it. The first of the above

conditions, is what is generally termed as a prima facie case. In other words, prima facie existence of right and its infringement but, the existence of a prima facie case is not by itself, sufficient. The applicant should further satisfy the second condition by showing that irreparable injury will occur to him. If the injunction is not granted and that there is no other remedy open to him by which he can protect him from the consequences or apprehended injury. The term 'irreparable injury' only means that the injury must be material one, which can not be adequately be compensated for damages. The third condition is balance of convenience. The Court should compare amount of substantial mischief likely to be done to the applicant, if the injunction is refused and also compare it with, that which is likely to be caused to the other side of if the injunction is granted. To grant or to refuse temporary injunction, is within the jurisdiction of the Trial Court. To grant or to refuse temporary injunction is discretionary order but, the discretion must be used in a judicious manner. The Trial Court can not use its discretionary power arbitrarily, capriciously or perversely.

9. I have heard Ld. Advocate Mr. V.C. Jani for the plaintiff. Ld. Advocate for the plaintiff has argued that plaintiff has submitted as per the pleadings of the plaintiff. He has further submitted that the suit of the plaintiff is for declaration and injunction. The review application preferred by the defendants against the order passed by this court below application, Exh. 14 submitted by the defendants has been rejected on merits by this court and the said order is not challenged by the defendants before the higher forum; as against the disputed amount of Rs.2,21,000/-, the plaintiff has paid

the amount of Rs.55,000/-with objections. Ld. adv. has further submitted that the plaintiff has not violated any condition of the contract and the plaintiff has also not received any instruction from the defendant regarding termination of the contract. The plaintiff has filed the present suit as Sahayak and Sanchalak of Shree Merupar Dudh Utpadak Sanstha and has not, in any way, acted wrongfully or mismanaged the activities. Ld. adv. has further submitted that if the defendants close the centre, then sixty shareholders of the plaintiff institution would suffer damage and thereby, the plaintiff would suffer irreparable injuries which cannot be compensated in terms of money. Ld. adv. has further submitted that the plaintiff has prima facie case; balance of convenience also lies in his favour and it would suffer irreparable injuries which cannot be compensated in terms of money, and, therefore, he has prayed to allow the application and to issue injunction order as prayed.

10. On the other hand, ld. adv. Mr. A.G. Kotak for the defendants has heavily contested this application and has submitted that there is no such agreement in between the plaintiff institution and the defendant no.1; Mark 3/1 is a incomplete agreement and a complete agreement is produced by the defendant at Mark 15/1 which goes to show that the defendant no.1 has entered into an agreement with Indrajitsinh Pathubha Kher in his personal capacity and he has been appointed as Sahayak of the defendant no.1 and has to act in accordance with the agreement at Mark 15. But, since the suit is instituted by plaintiff Shree Merupar Dudh Utpadak Sanstha through its Sahayak and Sanchalak, Indrajitsinh Pathubhai Kher and since they have not entered into

agreement with any such institution, the pleadings are against the documents produced on record. Ld. adv. has further submitted that the Mark 3/3 is a notice which has been issued in the personal capacity and not to any institution; the plaintiff has not come with clean hands; the equity is also not in favour of the plaintiff; the say of the plaintiff that to prevent the shareholders from the damage, the injunction may be issued against the defendants in favour of the plaintiff is also not believable; that the court cannot travel what it has held previously. Ld. adv. for the defendants has further submitted that there is no prima facie case in favour of the plaintiff; balance of convenience also does not lie in its favour and there would be no damage to the plaintiff which cannot be compensated in terms of money if the injunction as prayed for is not granted in its favour, and, therefore, this application may kindly be rejected on merits.

11. I have perused the record and proceedings and considering the submissions advanced at hearing of this application and upon consideration of the pleadings of parties together with the documents produced on record, it appears from a copy of agreement produced at Mark 3/1 and 15/1 that an agreement was entered into in between the defendant no.1 and by that agreement, Shri Indrajitsinh Pathubhai Kher is appointed as Sahayak of defendant no.1 in his personal capacity and the parties of the said agreement has to act as per the agreement. Mark 3/2 is a Leave and License Contract entered in between deft. no.1 and Kher Indrajit Pathubhai, whereby his premise was allowed to use the property situated at Main Bazar, Merupar for the period shown in the contract. Mark 3/3 is a notice issued by deft. no.1 to

Indrasinh P. Kher in his personal capacity and not as Sahayak and Sanchalak of Merupar Dudh Utpadak Sangh and vide Mark 3/4, Indraajitsinh P. Kher has filed reply to deft. no.1, which reply is also filed in personal capacity and not as Sanchalak and Sahayak of Merupar Dudh Utpadak Sangh. Mark 3/5 is a calculation of disputed amount. Mark 3/6 and 3/7 are receipts issued. Mark 15/1 is also a agreement which is produced by the pltf. at Mark 3/1. Mark 15/2 is a calculation of disputed amount. Vide List, Exh.20, other calculations are produced on behalf of the defendants. Having considered the pleadings of the parties and the documents produced by them in support of their pleadings and also considering the submissions advanced at the hearing of this application, if we consider the prayer made by the plaintiff in this application, then, by filing this application, the plaintiff has prayed, IN PARA-14, as under

(એ) અમો વાદીના શ્રી મેરુપર દુધ ઉત્પાદક કેન્દ્ર આ કામના પ્રતિવાદીઓ જાતે કે તેમના એજન્ટ, નોકર, માણસો કે અધિકારીઓ તરફથી કાયદેસરની કાર્યવાહી કર્યા વિના બંધ કરે કે કરાવે નહીં કે દુધ કેન્દ્ર બંધ કરવા અંગેની કોઈ કાર્યવાહી કરે કે કરાવે નહીં એવો કામ ચલાઉ મનાઈ હુકમ અમો વાદીના લાભમાં તથા પ્રતિવાદીઓની વિરુદ્ધ ફરમાવવા ન્યાય કરવા હુકમ કરવા અરજ છે.

(બી) અમો વાદીને મળવાપાત્ર તમામ દાદ અપાવવા અરજ છે.

If we look at the agreement Mark 15/1 and 3/1, Indraajitsinh Pathubhai Kher is appointed as Sahayak of deft. no.1, in his personal capacity, to carry out the activities at Merupar as stated in the agreement, whereas if we look at the above prayer together with the pleadings of the plaintiff alongwith the cause title, the present suit is filed by Shree Merupar Dudh Utpadak Sanstha through its Sahayak and Sanchalak Indraajitsinh

Pathubhai Kher. So, in my humble view, what it appears from the pleadings of the plaintiff, the plaintiff is Shree Merupar Dudh Utpadak Sanstha and not Indrajitsinh Pathubhai Kher in his personal capacity. Suit is not filed in the personal capacity. It is filed by an institution said to be named as Shree Merupar Dudh Utpadak Sanstha. An issue regarding territorial jurisdiction raised by the defts. is decided by this court as per the order passed below application, Exh.13 holding that this court has a jurisdiction to try this suit. While disallowing the application, Exh.14 submitted on behalf of the defendants to refer the suit to the Arbitrator under section 8 of the Arbitration and Reconciliation Act, 1996, this court has held that there is no agreement in existence in between the defendant no.1 and Shri Merupar Dudh Utpadak Sanstha which contain the arbitration clause, and, hence, in absence of any such agreement between the plaintiff institution and the defendant no.1, institution, which contain the arbitration clause, the parties may not be referred to the Arbitration under section 8 of the Arbitration and Conciliation Act, 1996 for resolution of their dispute. A Review Application No.1/14 was filed by the defendant no.2 to review the order below application, Exh.14, which came to be rejected by this court on its merits by passing the judgment, dtd.15/12/2014. However, thereafter, the said judgment is not been challenged by any of the parties and the same is not reversed, so far, by the Hon'ble Higher Forum. Citing this observation, relying upon the decision of the Hon'ble High Court in the case of Hindustan Zinc Ltd. v. Vijaysinh & Co., reported in 1994(1) GLR 161, has argued that court cannot go beyond its findings and if it goes, it would be committing the contempt. In my humble view, the argument

of the ld. adv. for the defendants is out of the way and the facts of the case before the Hon'ble High Court and in the present case are quite different. Hence, there is no force in the argument and the same is not helpful to the ld. adv. for the defendants for deciding the present application on merits. By filing the present application, it is prayed by the plaintiff that defendants, their agents, servants, persons officers etc. may be restrained from closing the Milk Centre of Shri Merupar Dudh Utpadak Sanstha, pending the suit. In the facts of the case, considering the pleadings of the plaintiff together with the documents produced by the plaintiff in support of its pleadings, there is nothing on record, prima facie, to show that there is an institution registered in the name and style of Shri Merupar Dudh Utpadak Sanstha which has entered into an agreement with the defendant no.1 to run any milk centre, which has share holders such as pleaded by the plaintiff. No document of registration of plaintiff institution is produced on record. Under the circumstances, in my humble view, the plaintiff may not be said to have proved its prima facie case. The suit is filed in an institutional capacity and not in a personal capacity.

14. Thus, in view of the foregoing discussion, I am of the view that it can not be said that the plaintiff would receive irreparable injury which can not be compensated in terms of money if the prayer as sought by the plaintiff is not granted. Furthermore, the plaintiff has failed to satisfy that the Court's interference is necessary to protect it from that species of injury, which the Court calls irreparable before the legal right can be established on trial and

that the comparative mischief or inconvenience which is likely to issue from withholding the injunction, will be greater than that which is likely to arise from granting it. Furthermore, the first of the three conditions required to be satisfied for obtaining the discretionary relief of equity jurisdiction is what is generally termed as a prima facie case. In other words, prima facie existence of right and its infringement but, the existence of a prima facie case is not by itself, sufficient. The applicant should further satisfy the second condition by showing that irreparable injury will occur to him. If the injunction is not granted and that there is no other remedy open to him by which he can protect him from the consequences or apprehended injury. The term 'irreparable injury' only means that the injury must be material one, which cannot adequately be compensated for damages. The third condition is balance of convenience. To grant or to refuse temporary injunction, is within the jurisdiction of the Trial Court. This court is very much aware of the fact that to grant or to refuse temporary injunction, is within the jurisdiction of the Trial Court. This court is very much aware of the fact that to grant or to refuse temporary injunction is discretionary order but, the discretion must be used in a judicious manner. And, this court can not use its discretionary power arbitrarily, capriciously or perversely. As such in view of foregoing discussion, the plaintiff has failed to satisfy his prima facie case and he has also failed to show that balance of convenience lies more in his favour than the defendants. Moreover, in view of above discussion, the plaintiff is not going to suffer irreparable injury which can not be compensated adequately by money. Hence, I answer issue no.1 to 3 in the negative.

Point No.4 :-

15. Hence, I answer all the three points in the negative and pass following final order for point no.4.

ORDER

The application, Exh.5 is hereby rejected on merits.

No order as to costs.

Pronounced in open court, today on 12th the day of February, 2015.

Place: Halvad
Date: 12/02/2015

SD/-
[D, V. Patel]
Principal Civil Judge,
HALVAD