ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.843 of 2015

Date	**Order with signature of Judge**

M/s. Aroma Travel Services (Pvt.) Ltd. & others.....Plaintiffs

Vs.

Faisal Al Abdullah Al Faisal Al Saud & others.....Defendants

Hearing of C.M.A No. 9436/2015

Dates of hearing: 22.10.2015, 29.02.2016, 6.09.2016 & 09.12.2016.

Khawaja Shams-ul-Islam and Mr. Imran Taj Advocates for the Plaintiffs.

M/s.Muhammad Akram Shaikh, Behzad Haider and Ms.Sundas Hoorain Advocates for the Defendant Nos.1 and 2.

Mr.Hasmatullah, Advocate for the Defendant No.19.

None present for the remaining defendants.

Muhammad Ali Mazhar, J. In essence, this suit for specific performance, declaration, injunction, rendition of accounts, recovery of money and damages has been characteristically brought to strive and aspire composite relief in tandem with the declaration that exchange of emails, memorandum of understanding (MOU), shareholders agreement, sub-contract, joint venture agreement and sale and purchase agreements between the plaintiff Nos.1-3 with the defendant Nos.1-10 and 21 are binding indentures. The plaintiff Nos.1-2 financed more than Rs.120 million for establishing and launching

the business activities of defendant No.2 all over Pakistan and in lieu thereof the defendant Nos.1-10 and 21 had agreed to transfer 25% shares of defendant No.2. The plaintiffs have also entreated for the appointment of Chartered Accountant to conduct audit of accounts of defendant No.2 and decree for the rendition of account of defendant No.2. The plaintiffs have also prayed for recovery of money as well as amount of damages articulated in prayer clause "H" to "J" of the plaint. The evanescent facts of this lawsuit are that the plaintiff Nos.1 and 2 premeditated to enter into certain contractual relationship with defendant Nos.1-4, 6-8, 10 and 21. Pursuant to extensive negotiations, draft versions of NDA, MOU, shareholders' agreement, sub-contract agreement and joint venture agreement were exchanged. It is further alleged that the defendant No.1 has majority shareholding in defendant Nos.2-4, 6-10 and 21 while the defendant No.1 is also local partner of defendant No.5 which is part of defendant No.11. The plaintiffs had partaken business relationship with the defendants Nos.1-9 and 9(a), however, due to introduction of biometric verification system, it was decided to form a local company as defendant No.2 with local partnership of plaintiff Nos.1-3.

2. The learned counsel for the defendant Nos.1 and 2 moved an application (CMA No.9436/2015) under Rule 3 of Order II, Rule 11 of Order VII and Section 151 of CPC for rejection of the plaint on the ground that the correspondence if any exchanged between the plaintiff Nos.1 to 3 with defendant Nos.1, 10, 21 cannot be treated as binding contract for transfer of 25% shareholding of defendant No.2 to the plaintiffs. It is further stated that the defendant Nos.4, 6 and 9 are

companies located in the Kingdom of Saudi Arabia, defendant Nos.7, 8, and 21 are different companies in UAE, defendant No.5 is based in Mumbai while the defendant No.11 is Swiss Company hence this court has no territorial jurisdiction to try the suit against them.

3. The learned counsel for the defendant No.1 and 2 argued that the suit does not disclose any cause of action. The plaintiffs are relying on mere negotiations with vague and generalized allegations without referring to a single binding contract. Such a non-actionable plaint is liable to be removed from the docket of the court. The pre-contractual negotiations were taking place under NDA which contained a nonbinding clause. The exchanged draft agreements were manifestly incomplete and unsigned different from one another and involved different parties. The suit is barred in law due to the mandatory foreign arbitration clauses and the exclusive jurisdiction clauses contained in all the draft agreements which oust the jurisdiction of this court. The reliefs claimed are barred under Sections 21 and Section 56 of the Specific Relief Act. A suit by multiple set of plaintiffs, claiming different reliefs, against different sets of defendants is bad for multifariousness and barred under Order 2 Rule 3 CPC and Section 28 of the Contract Act. Most of the defendants do not have a permanent place of business in Pakistan. The payments made on behalf of the defendant No.2 by the plaintiffs under a pre-existing relationship three months prior to the beginning of any negotiations or the signing of the NDA cannot be construed as performance or acceptance.

4. It was further contended that the court has inherent powers to examine the plaint at any stage of the suit. The

wisdom of this power is to enable the court to nip a frivolous suit in the bud by rejecting the plaint in order to retain its docket and time for more serious claims. It contemplates that a still-born suit should be properly buried at its inception so that no further time is consumed on a fruitless litigation. He further argued that there was no concluded contract or any kind of communication between the parties disclosing a *consensus ad idem* and the material terms remained undecided at all times. It is settled law that *consensus ad idem* must be shown to exist and any ambiguity in the same will adversely reflect on the existence of a contract. At best the forwarding of these drafts constituted mere invitation to treat which did not materialize into an agreement between the parties. The tone and tenor of the email attached with the plaint speaks volumes of the kind of engagement which the plaintiff's No.2 and 3 had with Etimad. It is reiterated that they were merely facilitating the launch of Etimad, with no say in the management and the local facilitation by the Plaintiffs began after the meeting in Dubai on 02.10.2012 and all services provided to the Applicants were as a result of and in consideration of this. The learned counsel quoted following Judicial precedents:-

(1) PLD 2015 S.C. 187 (Farzand Ali and another v. Khuda Bakhsh and others). Specific Relief Act. Sections 12 & 22. Even in cases where the agreement to sell was validly proved by the plaintiff, the courts may refuse to allow the relief of specific enforcement.

(2) PLD 2013 Lahore 716 (Gulistan Textile Mills Ltd. v. Askari Bank Ltd). Court enjoyed an independent, suo motu and sua sponte power to examine the plaint at any stage of the suit under Order VII, Rule 11, C.P.C. under the wisdom that the court could always, nip a frivolous suit in the bud by rejecting the plaint in order to retain its docket and time for more serious claims.

(3) 1994 SCMR 826 (Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad). A plain reading of the Order VII, Rule 11, C.P.C. would show that the rejection of plaint under this provision of law is contemplated at a stage when the Court has not recorded any evidence in the suit. It is for this reason precisely, that the law permit consideration of only averments made in the plaint for the purpose of deciding whether the plaint should be rejected or not for failure to disclose cause of action or the suit being barred under some provisions of law.

(4) PLD 2006 Karachi 523 (Muhammad Matloob and 10 others v. Jamshed K. Marker and others). To constitute a valid contract between parties one of the essential conditions is that consensus ad idem must exist between the parties with regard to all the terms of contract and in case of any ambiguity, the same can adversely reflect about existence of the contract.

(5) 2002 CLD 218 (Al-Huda Hotels & Tourism Co. and others v. Paktel Limited and others). Whether the parties had reached a concluded contract or not, is a question of fact to be deduced from the correspondence and other documentary or oral evidence. True test for deciding the question is to ascertain whether the parties were of one mind on all the material terms at the time the contract was said to have been finalized between them and whether the parties intended that the matter was closed and concluded between them.

(6) 2008 CLC 418 (Anwer Hussain Surya v. Sumair Builders through Partners). In absence of specific terms, contract capable of specific performance was not concluded. Such agreement was not enforceable under Section 21(c) of Specific Relief Act, 1877.

(7) 153 I11. App.3d 810 (1987), 506 N.E.2d 338. In re Marriage of Judith M. Chaltin, Petitioner and Arthur A. Chaltin, Respondent. Where the reduction of an agreement to writing and its formal execution is intended by the parties as a condition precedent to its completion, there can be no contract until then, even if the actual terms have been agreed upon. (Baltimore & Ohio Southwestern R.R. Co. v. People ex rel. Allen (1902), 195 Ill. 423, 428, 63 N.E. 262; Brunette v. Vulcan Materials Co. (1970), 119 Ill.App.2d 390, 395, 256 N.E.2d 44, appeal denied (1970), 43 Ill.2d 397; Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc. 814*814 (1986), 114 Ill.2d 133.) In determining whether a party intended that a contract should be reduced to writing, a court can consider the following factors: whether the contract is one usually put into writing, whether

there are few or many details, whether the amount involved is large or small, whether the agreement requires a formal writing for a full expression of covenants and promises, and whether negotiations themselves indicate that a written draft is contemplated as the final conclusion of negotiations.

(8) 494 F.Supp.2d 161 (2007). Tri-County Motors, Inc., Plaintiff vs. American Suzuki Motor Corporation, Defendant. 170*170. Where all contract terms have been agreed upon, leaving nothing for "future settlement," and "there is no understanding that an agreement should not be binding until reduced to writing and formally executed," an informal agreement can be binding even though the parties contemplated ultimately memorializing their contract in a formal document.

(9) 670 F.Supp. 491 (1987). Teachers Insurance and Annuity Association of America, Plaintiff, v. Tribune Company, Defendant. A primary concern for courts in such disputes is to avoid trapping parties in surprise contractual obligations that they never intended. It is fundamental to contract law that mere participation in negotiations and discussions does not create binding obligation, even if agreement is reached on all disputed terms.

(10) 128 Walford and Others Appellants v. Miles and Another Respondents. House of Lords. 23 January 1992 [1992] 2 W.L.R. 174. [1992] 2 A.C. 128. An agreement to negotiate is not recognized as an enforceable contract. This was first decided in terms in Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd [1975] 1 W.L.R. 297, where Lord Denning M.R. said, at pp. 301-302: "If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognize a contract to negotiate. The reason is because it is too uncertain to have any binding force...."

5. On the contrary, the learned counsel for the plaintiffs argued that from October, 2012 to December 2012, initial business modalities, purpose of business, line of actions between parties and shareholding of plaintiffs was decided and agreed between the plaintiff Nos.1 and 2 and defendant Nos.1-10 and 21 thereafter NDA was sent by the defendants Nos.3 and 21 to plaintiff Nos.1 which was signed by plaintiff No.1's CEO. The defendant Nos.3 and 21 acknowledged this through email. The

Director of Defendants Nos.2 and 9a, emailed MOU, Shareholders' Agreement and also shared Sub-Contract Agreement. It was further averred that the plaintiff Nos.1 and 2 were asked to travel Dubai for signing the agreed SHA which was given the shape of a joint venture agreement vide email dated 2.9.2013. The director of defendant No.2 and 9a, Fayaz Hamid Siddiqui was demanding 7% shareholding from plaintiffs shareholding which shocked defendant Nos.3 and 21, who apologized and assured plaintiffs that agreement signing is a mere formality. In October 2013, the plaintiff Nos.1 and 2 travelled to Dubai to meet the defendant No.1 thereafter fresh drafts were once again sent by the Director of defendant No.2 and 9a to the plaintiff No.2. The CFO of defendant No.6 shared the final version of SHA and SPA with plaintiff No.2. The terms and conditions were accepted by the plaintiff No.2 except the change in the plaintiffs shareholding from 25% to 20%.

6. The learned counsel robustly argued that the plaintiffs, along with defendants successfully launched defendant No.2 company across Pakistan in first week of November, 2013. The opening ceremonies in Defendant No.2's Islamabad and Karachi offices were attended by defendant No.1, along with various representatives of defendant Nos.1-10 and 21 and plaintiff Nos.1-5 Saudi Ambassador, Saudi Consulate General and various Embassy and Saudi Foreign Ministry officials. The Chief Operating officer of Defendant No.7 also explained the Director Exchange Policy Department, State Bank of Pakistan, Karachi Pakistan the relationship between DefendantNo.1-4, 7-10 and 21 and plaintiffs No.1-2 in which the structure of shareholding of plaintiffs in Defendant No.2 was also outlined. He further argued

that all investment ledgers were duly reconciled by the Finance Department of plaintiff No.1-3 as per the instructions of the Finance Department of defendant Nos.2, 3, 6 and 21 and were received and acknowledged by the defendant No.2. On 17.6.2014 defendant No.1 resigned from defendant No.2 company and inducted Tariq Elahi as Director by giving him 0.01% share and 94.99% shares were transferred to defendant No.07. In the month of June 2014, the Director of defendant No.2 & 9a, acting on behalf of defendant No.1 informed that the defendant No.1 does not wish to continue with the shareholding of plaintiff No.2 and he would spare no expense to inflict damage on plaintiffs and their existing businesses in Pakistan. The learned counsel further contended that the documents attached with the plaint and the correspondence exchanged between the parties manifestly showing more than enough cause of action to sue the defendants en bloc. It was further averred that for the purpose of deciding application under Order 7 Rule 11 C.P.C, the contents of the plaint are to be looked into alone which in this case are demonstrating a number of triable issues. On the face of it neither the suit appears to be barred by any law nor is without cause of action. The learned counsel in support of his argument cited following judicial precedents:-

(1) 2015 SCMR 905 (Messrs Sezei Turkes Fayzi Akkaya Construction Company (STFA) v. Messrs Ekon Yapi Onarim Ticaretve Sanayi Ltd. and others). Civil Procedure Code. Section 20. Foreign companies entering into a contract to be performed in Pakistan. Contract was to be performed in Karachi, as such the cause of action vested jurisdiction in the courts at Karachi.

(2) 1981 SCMR 494 (Messrs Brady & Co. (Pakistan) Ltd v. Messrs Sayed Saigol Industries Ltd.). Civil Procedure Code. Suits by or against Corporation-Local jurisdiction-Corporation can be said to be

carrying on business at head office, or at place where its branch exists in respect of a cause of action.

(3) 1992 SCMR 1174 (Messrs Kadir Motors (Regd). Rawalpindi v. Messrs National Motors Ltd., Karachi and 3 others). Original contract between the parties which had given rise to the filing of the suit for recovery was negotiated and entered into at Karachi. Primarily the courts at Karachi had jurisdiction to try the suit according to Section 20(1)(c), C.P.C.

(4) PLD 2009 Lahore 518 (Government of Punjab through Secretary Health Department, Lahore and 2 others v. Khyber International Printer through Proprietor). Section 10 of the Contract Act, 1872 does not exclude an oral contract from being enforced although in case of an oral contract, clearest and more satisfactory evidence would be demanded by the Court.

(5) 1997 MLD 1294 (Khalifo Haji Muhammad Hanif through Lrs. v. Khalifo Haji Ghulam Hussain and others). All agreements were valid and enforceable as a written agreement provided it fulfilled all the requirements of valid contract. No legal bar existed to specific performance of contract made orally which was otherwise valid and lawful.

(6) 1994 SCMR 2189 (Mrs.Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others). Oral agreement of sale of property. Buyer tendered receipt in evidence to prove payment of part of sale consideration. Absence of the details of the other terms and conditions of sale were of no significance and the buyer was entitled to prove the terms of sale by leading oral evidence in circumstances.

(7) PLD 2014 Sindh 175 (Messrs Raziq International (Pvt) Ltd. through Vice President v. Panalpina Management Ltd.). Doctrine of "forum non-conveniens". As per agreement courts of Switzerland had the exclusive jurisdiction to adjudicate any dispute between the parties in accordance with the laws of Switzerland. Forum selection clause could not be held against public policy or arbitrary in nature as presumption of law was that parties were oblivious to their relative convenience or inconvenience at the time entering into a contract.

7. Heard the arguments. The cumulative effect of 37 pages plaint with voluminous documents attached in two separate parts of court file put on view indeed that the negotiations activated by dint of project introduction

thereafter the plaintiffs were somehow engaged and engrossed back and forth correspondence encompassing defendant Nos.1 to 10 and 21 every now and then. The plaintiffs have also attached various documents at pages 305 to 433 to demonstrate the initial correspondence and modalities to establish some business relationship. At page 439 a copy of NDA is attached. On 15.01.2013, the director of defendant Nos.2 and 9a emailed a Memorandum of Understanding. The plaintiffs confirmed the terms and conditions of MOU vide email dated 17.01.2013 which are available at pages 481 to 493. It is further averred that director of defendants Nos.2 and 9a emailed Shareholders' Agreement and also shared Sub-Contract. Copies of drafts and emails are attached at page 811 and 841 to 933. In September, 2013 the plaintiff Nos. 1 and 2 were asked to travel to Dubai for finalizing the Shareholders' Agreement and to support this contention, the documents are attached at page 1029 to 1083 with correspondence. It is alleged that on 28.01.2014, the CFO of defendant No.6 shared final version of Shareholders' Agreement and Share Purchase Agreement with plaintiff No.2 and also endorsed the copy to defendant No.1 and director of Defendant Nos.2 and 9a. It is further stated that the plaintiffs along with defendants successfully launched defendant No.2 company across Pakistan in November, 2013. The opening ceremonies in Islamabad and Karachi offices were attended by defendant No.1 along with various representatives of defendant Nos.1–10 and 21 and plaintiff Nos.1–5 with other dignitaries. In order to substantiate, the plaintiffs have attached various photographs available at page 1425 to 1445. The Chief Operating Officer of defendant No.7 also addressed a letter to Director Exchange of Policy Department, State

Bank of Pakistan to explain the relationship between defendant Nos.1–4, 7–10 and 21 and plaintiff Nos.1–2. This letter highlights the structure of shareholding of plaintiffs in defendant No.2 company which is available at page 1447 of the part file. So far as the investments made by the plaintiffs is concerned, they have attached some documents at pages 1453 to1891 including the extract of their ledgers available at page 1893 to 1941. It is further stated that the investments ledgers were reconciled by the Finance Department of plaintiff Nos. 1–3 on instructions of defendant Nos.2, 3, 6 and 21. The plaintiffs also confirmed the auditor in writing that the amount was spent against capital expenditure in defendant No.2 and correspondence in this regard is available at page 2007 to 2075. It is further avowed that on 05.06.2014, a letter was received from defendant No.2 asking the plaintiff No.1 to issue NOC for making changes in the object clauses of Memorandum of Association for which an application was moved to the Security & Exchange Commission of Pakistan which email was replied by plaintiff No.1 on 26.06.2014.

8. Quite the reverse, the learned counsel for the defendant Nos.1 and 2 at length argued the ouster of jurisdiction of this court, pleaded rejection of the plaint on account of having no cause of action and misjoinder of causes of action but in tandem, he himself bring to light some triable issues in which right approach would be to allow the parties to lead evidence to substantiate or controvert the claim vice versa rather than rejection of plaint summarily or instantaneously. For instance, the learned counsel pleaded that the plaintiffs are relying on mere negotiations and failed to refer to one single binding contract. The pre-contractual negotiations

were made under NDA containing nonbinding clause. In unison he pleaded that due to the mandatory foreign arbitration clauses and the exclusive jurisdiction clauses contained in all the draft agreements, the jurisdiction of this court is ousted but at one fell swoop, he pleaded that there was no signed or binding contract so in my considered sight such pleas are mutually destructive. It is further argued that payments made on behalf of the defendant No.2 by the plaintiffs were under pre-existing relationship three months prior to the beginning of any negotiations or the signing of the NDA. He further argued that drafts annexed with the plaint do not show any concluded contract or disclosing a consensus ad idem. At best the forwarding of these drafts constituted mere invitation and the answering defendants have no obligation to transfer any shares of defendant No.2 to the plaintiffs. The tone and tenor of the email attached with the plaint speaks volumes of the kind of engagement which the plaintiff's No.2 and 3 had with Etimad. They were merely facilitating the launch of Etimad and local facilitation by the plaintiffs began after the meeting in Dubai on 02.10.2012. Nothing said in response to the photographs attached with the plaint to controvert the role and presence of plaintiffs at the time of inauguration of different offices of the defendant No.2 except that plaintiffs were facilitating the launch but nothing said in which capacity and status. The controversy roaming around in the suit in hand that plaintiffs claimed that they made huge investment on account of promise made through detailed negotiations and exchange of drafts agreement to make the plaintiffs shareholders in the defendant No.2 company and due to this promise and assurances, they made investment while the counsel for the defendant No.1 and 2 took the

plea that payments were made on behalf of the Defendant No.2 under a pre-existing relationship prior to start of negotiations and signing of NDA.

9. The plaintiffs are Dominus litis, masters of suit whom this suit belongs and who have real and direct interest in the decision of the case. They will derive benefits if the judgment comes in their favor or suffers the consequences of an adverse decision. The general rule with regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. A necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a necessary party is not impleaded, the suit itself is liable to be dismissed. A proper party is a party who, though not a necessary party but is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made.

10. It is well settled that Order VII Rule 11 CPC enlightens and expounds rejection of plaint if it appears from the statement sculpted therein to be barred by any law or disclosed no cause of action. The court is under obligation to must give a meaningful reading to the plaint if it is manifestly vexatious or meritless in the sense of not disclosing a clear right to sue, the court may reject the plaint. Even if the expression of the statement in the plaint is given a liberal meaning, documents filed with the plaint may be looked into but

nothing more. With the aim of deciding whether the plaint discloses cause of action or not, the court has to perceive and grasp the averments made in the plaint and the accompanying documents. The court has also to presume the facts stated in the plaint as correct and for the determination of any such application, court cannot look into the defence. In case of any mix question of law and facts, the right methodology and approach is to let the suit proceed to written statement and discovery and determine the matter either on framing preliminary issues or regular trial. This Rule does not justify the rejection of any particular portion of the plaint or in piecemeal as the concept of partial rejection is seemingly incongruous to the provisions of Order VII Rule 11 CPC. Nevertheless court is bound to reject the plaint if it does not disclose any cause of action but at the same time a plea that there is no cause of action for the suit is different from the plea that the plaint does not disclose a cause of action. Astute drafting for creating illusions of cause of action are not permitted in law but a clear right to sue ought to be shown in the plaint. A plea that the plaint does not disclose a cause of action can be taken only when on that plea the plaintiff can be entirely non-suited. Where there is a joinder of a number of causes of action on some of which at least a decree could be passed, no plea of demurrer may be admitted to reject the plaint. Where there are several parties and the plaint discloses a cause of action against one or more of them then also the plaint cannot be rejected as what is required in law is not the piecemeal reading of the plaint but reading it in its entirety.

11. Likewise, a plaint cannot be rejected for misjoinder of plaintiffs or misjoinder of causes of action. Even if the

averments made in the plaint are not in conformity with the provisions contained in Order I or Order II of the CPC regarding misjoinder of parties or causes of action, such defects cannot be put forward as a bar so as to attract provisions of Order VII Rule 11 CPC. Misjoinder of parties or misjoinder of causes of action is a procedural objection which does not create any embargo against entertaining a suit or the trial simply for the reason that no such prohibition is mete out in the scheme of CPC at the admission of suit defective for misjoinder of parties or causes of action, therefore, by no stretch of imagination, a suit bad for misjoinder of the parties or misjoinder of causes of action can be held barred by any law within the meaning of Order VII Rule 11 CPC. When there are two or more defendants and two or more causes of action, the plaintiff may unite in the same suit several causes of action against the same defendants jointly but the joint interest is the paramount question and also a condition precedent to the joinder of several causes of action against several defendants. There is no provision in CPC allowing distinct causes of action against distinct sets of defendants. Ordinarily every cause of action must be a basis for single suit but by reason of this Rule and subject to the provision mentioned therein, several causes of action may be united in one action. If the right to the relief claimed does not arise from the same act or transaction or if there is no common question of law or fact, the plaintiffs cannot all join in one suit unless they are jointly interested in the causes of action. Anyhow if the court reaches to the conclusion that the suit is bad for misjoinder of plaintiffs and or causes of action, the court cannot dismiss the suit without providing plaintiffs an opportunity of amendment and if the issues

in the suit arise out of the same set of circumstances, there is no multifariousness i.e. misjoinder of causes of action and putting the plaintiff to elect. In the case of **Rana Imran versus Fahad Noor Khan** reported in **2011 YLR 1473, (authored by me)** the expression cause of action has been discussed comprehensively in the following words:

> **"7. After hearing the pros and cons of the matter, we have reached to the conclusion that the word "cause of action" means bundle of facts which if traversed, a suitor claiming relief is required to prove for obtaining judgment. Nevertheless, it does not mean that even if one such fact, a constituent of cause of action is in existence, the claim can succeed. The totality of the facts must co-exist and if anything is wanting the claim would be incompetent. A part is included in the whole but the whole can never be equal to the part. It is also well understood that not only the party seeking relief should have a cause of action when the transaction or the alleged act is done but also at the time of the institution of the claim. A suitor is required to show that not only a right has been infringed in a manner to entitle him to a relief but also that when he approached the Court the right to seek the relief was in existence. At this juncture, we would like to rely on a judgment "Ghulam Ali v. Asmatullah" reported in 1990 SCMR 1630, in which, the honourable Supreme Court has held that assertion made in the plaint had to be seen for the purposes of determining whether plaint disclosed any cause of action. Lack of proof or weakness of proof in circumstances of the case did not furnish any justification for coming to conclusion that there was no cause of action shown in the plaint. In another judgment reported in case of Jewan v. Federation of Pakistan, 1994 SCMR 826, the honourable Supreme Court has held that while taking action for rejection of plaint under Order VII, Rule 11, C.P.C., the Court cannot take into consideration pleas raised by the defendants in the suit in his defence as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the Court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the Court while rejecting the plaint. In the case reported in PLD 2008 Supreme Court 650 (Saleem Malik v. Pakistan Cricket Board (PCB)), it was held that the rejection of plaint on technical grounds would amount to deprive a person from his legitimate right**

of availing the legal remedy for undoing the wrong done in respect of his such rights, therefore, the Court may, in exceptional cases, consider the legal objection in the light of averments of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint. Subject to the certain exception to the general principle, the plaint in the suit cannot be rejected on the basis of defence plea or material supplied by the opposite party with the written statement. This is settled law that in case of controversial questions of fact or law, the provision of Order VII, Rule 11, C.P.C., cannot be invoked rather the proper course for the court in such cases is to frame issues on such question and decide the same on merits in the light of evidence in accordance with law."

12. In the Law Dictionary, 5th edition, page 291, Black has given the meaning of 'contract' as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter of a legal consideration, mutuality of agreement and mutuality of obligations." 'Contract' has been defined as "an agreement between two or more persons intended to create a legal obligation between them and to be legally enforceable". **Ref: David M. Walker Oxford Companion to Law, 1980 Ed. P. 284**. Anson has defined the word contract in the following words: "A contract consists in an actionable promise or promises. Every such promise involves two parties, a promisor and promisee, and an expression of a common intention and expectation as to the act or forbearance promised". **Ref: Anson's Law of Contract, 23rd Edition, by A.G. Guest, 1971, p. 23**. According to Treitel, "A contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on agreement of the contracting parties. This proposition remains generally true, in spite of the fact that it is

subject to a number of important qualifications." **Ref: G.H. Treitel, The Law of Contract, Tenth Edition (1999) by Sir Guenter Treitel, Sweet & Maxwell (1999), p. 1. (Source: MOITRA'S Law of Contract & Specific Relief, Fifth Edition).**

13. An oral contract is valid and enforceable but it requires strong and satisfactory evidence vis-à-vis its formation and contents. Where a party seeks to enforce an oral agreement, heavy burden lies on him to prove that a contract is concluded and the terms of oral contract were meant to be given effect to. Where a contract is said to be made orally, the ascertainment of its terms raises in the first place the pure question of fact what did the parties say? The conditions of essential validity are: (i) competent parties; (ii) existence of consent of parties; (iii) consent being free; (iv) existence of consideration; (v) consideration and object being lawful and (vi) the agreement not being expressly declared to be void. No rigid or tenacious stipulation is imparted or divulged under Section 10 of the Contract Act which may rationally exclude the existence of oral contract from being enforced although in the case of seeking enforcement of or specific performance of oral contract, more satisfactory evidence is required to be led. Agreement in writing is not necessary nor mandatorily required under the provisions of Contract Act. The making of the contract or its terms may be proved like any other fact by oral or documentary evidence. Whether a concluded contract has been made or not is a question of fact to be determined in each case by considering all relevant circumstance and facts. No doubt to constitute a valid contract the one of the conditions is "consensus ad idem" which must exist with

regard to the terms and conditions of contract and in case of any ambiguity it may adversely reflect on its very existence. In order to convert a proposal or negotiation between the parties into a valid contract, the acceptance of proposal must be absolute and unqualified.

14. The ratio decidendi of the judicial precedents cited for and against is jot down as under:-

1. Grant of specific enforcement of an agreement to sell pertaining to an immovable property is a discretionary relief. Courts may refuse even in the case of validly proved agreement to sell.

2. Court enjoyed suo motu and sua sponte power to examine the plaint at any stage of the suit under Order VII, Rule 11, C.P.C.

3. A plain reading of the Order VII, Rule 11, C.P.C. would show that the rejection of plaint under this provision of law is contemplated at a stage when the Court has not recorded any evidence in the suit. It is for this reason precisely, that the law permit consideration of only averments made in the plaint.

4. To constitute a valid contract between parties one of the essential conditions is that consensus ad idem with regard to all the terms of contract.

5. Whether the parties had reached a concluded contract or not, is a question of fact to be deduced from the correspondence and other documentary or oral evidence. True test for deciding the question is to ascertain whether the parties were of one mind on all the material terms at the time the contract was said to have been finalized.

6. In absence of specific terms, contract capable of specific performance was not concluded. Such agreement was not enforceable.

7. Where the reduction of an agreement to writing and its formal execution is intended by the parties as a condition precedent to its completion, there can be no contract until then, even if the actual terms have been agreed upon.

8. It is fundamental to contract law that mere participation in negotiations and discussions does not create binding obligation, even if agreement is reached on all disputed terms.

9. An agreement to negotiate is not recognized as an enforceable contract.

10. Foreign companies entering into a contract to be performed in Pakistan. Contract was to be performed in

Karachi, as such the cause of action vested jurisdiction in the courts at Karachi.

11. Suits by or against Corporation-Local jurisdiction-Corporation can be said to be carrying on business at head office, or at place where its branch exists in respect of a cause of action arising wholly or in part at place where its branch office situated.

12. Section 10 of the Contract Act, 1872 does not exclude an oral contract from being enforced although in case of an oral contract, clearest and more satisfactory evidence would be demanded by the court.

13. All agreements are valid and enforceable as a written agreement provided it fulfilled all the requirements of valid contract. No legal bar existed to specific performance of contract made orally.

14. Oral agreement of sale of property is not prohibited in law.

15. Doctrine of "forum non-conveniens". Defendant sought rejection of plaint on the plea that as per agreement courts of Switzerland had the exclusive jurisdiction. Forum selection clause could not be held against public policy or arbitrary in nature as presumption of law is that parties were oblivious to their relative convenience or inconvenience at the time entering into a contract.

15. I have minutely surveyed and studied the judicial precedents alluded to by the learned counsel of the defendant No.1 and 2 but none of it attracted which may warrant the rejection of plaint in the present facts and circumstances of the case while the case law cited by the plaintiffs' counsel is almost based on well settled proposition that for rejection of plaint only averments of the plaint are to be looked into. It is also deducible from the said dictums that oral agreement is not barred under the law however in order to prove oral agreement solid and concrete evidence is required. In my analysis and appraisal, the communal and concentrated nucleus of the plaint and its heated discussion overtly indicative of close nexus and proximity of defendant No.1 to 10 and 21 who were directly or indirectly or by some means were in the loop of discussion or negotiation and due to alleged nonfulfillment and renunciation of settled

stipulations and promises or assurances made for grant of shareholding of defendant No.2, (incorporated in this country) the plaintiffs have claimed relief including damages and recovery of money. In paragraph 49 of the plaint, the plaintiffs have asserted the claim of damages against defendant No.1 to 10 and 21 and also separately mentioned the claim of damages against defendant No. 9 & 9a while in prayer clauses other reliefs have also been claimed including money decree whereas other defendants have been impleaded in the role of proforma parties. The exchanged of correspondence and the drafts of agreements tentatively expand on indeed the negotiations continued to a levelheaded span and the plaintiffs made huge funding in lieu of agreed shareholding ratio of defendant No.2 but subsequently the defendant No.1 and 2 refuted any such relationship. One more essential facet cannot be disregarded that the plaintiffs have also prayed for money decree and damages which means even at trial, the plaintiffs are failed to prove oral agreement and or alleged promise/understanding for the transfer of shares of defendant No.2 in plaintiffs favour, then they have to prove alternative limb of their claim of damages and recovery of money so in my well-thought-out view, the controversy involved herein cannot be decided summarily without providing fair opportunity to the parties to lead evidence.

16. So far as the plea that some of the defendants are situated out of Pakistan, I would like to make it clear that it is not within the province of counsel for defendant No.1 and 2 to fight out the case of other defendants whom he does not represent. They may be served according to the tenet of service of foreign

summons in their jurisdiction and if they need be, they may file application if they feel to have been impleaded improperly or without any cause of action. No doubt the court on its own motion may add or strike out the names of the parties if does not find out them proper or necessary party in the suit. But here the averments made in the plaint sufficiently make obvious the cause of action against the defendants. Anyway, at the present only the application for rejection of plaint is under consideration and in my view no case is made out for rejection of plaint or nonsuiting the plaintiffs at this stage as a whole or in piecemeal.

17. The learned counsel for the defendant No.1 and 2 exuberantly argued that in some draft agreements, choice of jurisdiction to sue and foreign arbitration clause was also integrated. This plea is disproportionate as admittedly the fundamental defence is that no agreement was signed between the parties whereas plaintiffs assert sustenance of an oral agreement and promises against which they made funding. When the learned counsel for the defendant No.1 and 2 vigorously denied having any concluded contract between the concerned parties then how the plaintiffs can be called upon to first invoke arbitration clause or to apply in the courts of elected jurisdiction accentuated in the drafts agreements.

18. In the wake of above discussion, application filed by the defendant No.1 and 2 (C.M.A No.9436/2015) for rejection of plaint is dismissed.

Karachi:-
Dated.30.1.2017 **Judge**