

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Suit No.669 of 2012

Date	Order with signature of Judge
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Present:

Mr. Justice Muhammad Ali Mazhar

Abdul Jabbar MotiwalaPlaintiff

Versus

Ismail Abdul Shakoor Securities (Pvt.) Ltd.

& othersDefendants

For hearing of CMA Nos.5861/2012 & 10911/2016.

13.8.2018

Dates of hearing: 6.3, 10.4, 13.8.2018

Mr. Ravi R. Pinjani, Advocate for the Plaintiff.

Syed Haider Imam Rizvi, Advocate for Defendant No. 1 to 3 along with M/s. Abdul Rauf Malik, Jamal Bukhari & Syed Ahsan Imam Rizvi, Advocates.

Mr. Tariq Qureshi, Advocate for Defendant No.4.

Atif Islam Siddiqui, Manager, Regulatory Affairs, PSX.

M/s. Imran Shamsi, Saad Abbasi & Syed Hafiz Ebad, Law Officers, SECP.

Muhammad Ali Mazhar, J. This lawsuit has been brought for declaration, injunction, recovery and damages. In the first instance the plaintiff has entreated for a declaration that Regulation 6 of the General Rules & Regulations of Karachi Stock Exchange (Guarantee) Ltd. and Regulation 10 of the Members Default Management Regulation of the Karachi Stock Exchange are discriminatory and unlawful. What is more is direction against the defendant No. 1 to 3 to return to the plaintiff 680197 shares of the different companies as allude to in paragraph No.8 of the plaint

with compensation for the loss of value. Furthermore an alternative prayer has also been contoured that if the defendant No.1 is not in possession of shares then directions may be issued to defendant No. 1 to 3 to pay off the value of securities along with compensation. The plaintiff has also sought the recovery of Rs.2,435,125/- allegedly passed on to the defendant No.1 for the purpose of buying out 10% bonus shares of Engro Chemical along with interest/markup of 17%. In consort with the main suit, the plaintiff has also filed an injunction application under Order XXXIX Rule 1 & 2 read with Section 94 C.P.C. for restraining the defendant No. 4 & 5 from disbursing or disposing of proceeds from the sale of membership card or any other property of the defendant No.1 to 3 until disposal of the suit. The matter was fixed before the learned Single Judge of this court on 19.09.2013 for hearing of injunction application, when the defendant No. 4 & 5 were restrained not to dispose of sale proceeds of membership card or any other properties of the defendant No. 1 to 3 till next date. In contrast, the defendant No. 1 to 3 has filed an application under Order VII Rule 11 C.P.C for rejection of the plaint on the ground that suit is barred by Limitation Act; Section 42, 52 and 56 of the Specific Relief Act and that the plaintiff has no cause of action to maintain this suit.

2. The learned counsel for the plaintiff argued that in 2002-2004, the brokerage license was in the name of the defendant No.2 as a member of the Karachi Stock Exchange (Guarantee) Limited. The Karachi Stock Exchange was corporatized and as a part of this corporatization, all members of the exchange were required to be corporatized as well. Accordingly, the defendant No.2's status as a member of the exchange was corporatized by creating the defendant No.1. As demonstrated by the inquiry report of defendant No.4, the plaintiff's shares were originally kept in a sub-account but subsequently transferred to House Account of the defendant No.2 and then transferred to the Main account of the defendant No.1. He further argued that defendant Nos.1 and 2 are not independent of

each other but the defendant No.2 sold its license to defendant No.1 so the defendant Nos. 1 to 3 are jointly and severally liable to the plaintiff for his shares for which the defendant No.1 gave a written acknowledgement of liability to the plaintiff. The learned counsel also challenged the defendant No.4's intention to distribute sale proceeds of the membership card of the defendant No.1 as on sale of membership card, the defendant No.1 will become valueless hulk.

3. It was further contended that no doubt the instant suit was instituted on 04.06.2012 i.e. prior to any decision of the defendant No.4 but the complaint lodged to the defendant No.4 against the defendant No.1 to 3 was pending. The learned counsel invited attention to paragraph No. 8 of the defendant No. 4's written statement in which it was stated that the independent auditors were in process of verifying the investors' claims including of the plaintiff. The last admission of liability by the defendant No.1 was made on 18.06.2010 and the instant suit has been instituted well within time. He concluded that if injunctive relief is denied, the defendant No.1 would be rendered a worthless enterprise by distribution of its assets.

4. The learned counsel for the defendant No.1 to 3 argued that the suit is barred by Limitation Act; Section 9 of CPC; Sections 42, 54 and 56 of the Specific Relief Act, 1877 including Sections 11, 3 and 18 of the CDC Act 1997; Sections 33 and 34 of the SECP Act 1997. Since there was no privity of contract between the plaintiff and the defendants, as such the plaintiff has failed to disclose any cause of action against the defendants hence the plaint is liable to be rejected. The plaintiff claims to be a client/customer of the defendant No. 1 and that the said defendant was his broker from 2002 to 2004 which he has failed to establish in the plaint. The plaintiff was a client of the defendant No. 2's sole proprietorship and stopped trading through the said proprietorship after 2004

whereas the defendant No.1 as a private limited company incorporated in May 2006. When the membership of the said proprietorship was taken over by the defendant No. 1, the plaintiff did not open any account or sub-account with the defendant No.1. As per Account Opening Form, it is established that plaintiff was a customer of the proprietorship concern and not the defendant No. 1. The Participant ID No.00893 was related to the proprietorship concern which account was closed on 12-01-2007, whereas the plaintiff has filed this suit on 04-06-2012 after a lapse of five years and six months. Till date the plaintiff failed to produce any document including the Account Opening Form with the defendant No. 1 before the KSE, SECP and CDC to establish that he was ever a client of the defendant No. 1. He further argued that CDC Act, 1997 is a special law providing a special/specific relief and since it is settled law that special law prevails over general law as such the relief of rectification, declaration of title of shares and their recovery are specifically barred by law, the plaintiff cannot claim the said reliefs from this court and the only relief that the plaintiff could have claimed was damages. Reliance was placed on PLD 1986 SC 74 rel. at page 81 and 2013 CLD 981 rel. at page 986. He further argued that Section 11 of the CDC Act 1997 is a non-obstante clause and if it is read with Section 3, it is clear that the same has an overriding effect over all other laws and remedies including general law. Since special remedy is provided under a special law the general remedy under Section 9 of the CPC, 1908 cannot be invoked. He placed reliance on 2004 SCMR 265 rel. at para 6, 2017 SCMR 1218 rel. at paras 9 and 10.

5. It was further contended that the suit is barred by the principles of Constructive Res judicata and the provision of Appeal before a statutory forum under a special law i.e. Sections 33 and 34 of the SECP Act, 1997. On 20-10-2008 the plaintiff wrote to the defendant No. 4 for recovery of shares to which the said defendant replied on 19.11.2008 requesting him to submit an investor claim form which

was submitted by the plaintiff on 15-07-2010. The plaintiff was required to submit the certain documents along with the said Claim Form which the plaintiff failed to provide. After thorough enquiry conducted under Regulation 7 the General Regulations of KSE (Guarantee) Ltd, the claim of the plaintiff was rejected. Aforementioned orders were passed by two statutory bodies i.e. SECP and KSE, the regulators, which orders have not been challenged by the plaintiff till date and the same have attained finality. The present suit is causing impediments in the distribution of amount to 40 genuine claimants who were actually clients of the defendant No. 1. Furthermore the plaintiff has not sought any declaration as regards the ownership of the securities which are the subject matter of this suit. The plaintiff has also not prayed for permanent injunction. It well settled proposition of law that where permanent injunction is not sought temporary injunction cannot be granted. The learned counsel placed reliance on PLD 1965 SC 83, 1974 SCMR 519, PLD 2004 SC 860 and PLD 1968 KHI 222.

6. The learned counsel for the defendant No.4 (Pakistan Stock Exchange Ltd.) argued that it is a front-line regulator of the stock market and mandated the functions to protect the interest of the investors. Presently total 87 verified investors' claims amounting to Rs. 180,940,214/- against the defendant No.1 are pending with the defendant No.4 for settlement. The plaintiff completely failed to substantiate validity of his claim before the Committee of the defendant No.4 hence his claim against defendant No.1 was not included in list of approved claimants. The defendant No.1 was declared defaulter by the defendant No.4. Subsequently, the Stock Exchange Membership Card of the defendant No.1 was also sold through sealed bids by the defendant No.4 for Rs. 55 Million which is presently kept in separate bank account along with interest accrued thereon. As per clause 6 of the Members' Default Management Regulations of the defendant No.4, a member who has been declared defaulter ceases to be a member of the Exchange and

his membership card and other assets vest in the Exchange hence the request for restraining order is unjustified.

7. The law officers of SECP argued that the relief sought by the plaintiff, if granted, will restrict the Regulators' ability to take appropriate measures for the protection of the investors and settlement of their claims. The membership card of the defendant No.1, was sold and the proceeds are presently kept in separate bank account. It was further contended that SECP and PSX have their own mechanism and procedure for dealing the claims of stakeholders of capital markets including investors. The Securities Act, 2015 is the parent law associated with the capital market which emphasizes to ensure investor protection as its primary objective and this Act introduced a customized licensing regimes for the securities exchange, securities brokers, clearing house and depository company for securing the interest of customers.

8. Heard the arguments. The record reflects that during pendency of this suit, the complaint lodged by the plaintiff against the defendant No.1 was also taken up by Pakistan Stock Exchange Ltd. and the extract of the order dated 10.07.2014 passed by the Committee in respect of plaintiff's claim is available on record. The plaintiff had filed the claim against M/s. Ismail Abdul Shakoor Securities (Pvt.) Ltd. (defaulter member of KSE) but he started business with Ismail Abdul Shakoor as an individual member of KSE in the year 2002 and not the defaulter member KSE. He had a trading account and CDC sub-account under the participant I.D of an individual member. According to this report, in August, 2006 the corporate status of individual member was changed to corporate member but the trading account of plaintiff was not shifted to M/s. Ismail Abdul Shakoor Securities Ltd. According to the report, no record was found by the Stock Exchange in the portfolio of corporate member. In Point No.3.6 of the report, the Committee observed that some shares of the claimant were transferred from

sub-account of the plaintiff to the house account of individual member and details of some shares are also mentioned but in paragraph No.4 of the report it is avowed that the exercise was conducted to find out the trail of missing shares but it does not provide conclusive evidence that shares called by respective pledgers belongs to the claimant only but it may include the shares of other claimants which would have been transferred from their respective sub-accounts to house account of member with their consent. It is further stated in paragraph No.5 of the report that as per criteria and procedure for verification of investors claims approved by the Board constituted committee for hearing in disciplinary matters, the claim may only be considered for approval for which UIN should be mapped with NCCPL; CDC sub-account under the participant ID of member should be maintained; trading account in the name of claimant in back office record of member should be found; payment evidences should be provided by claimant for purchase of shares and in case of transfer from other house/sub account/investor account etc. the same should be substantiated through CDC and any dividend warrants in the name of claimant should be provided. According to the report, none of the above evidences were made available by the claimant despite multiple written and oral reminders. Upon verbal request of the plaintiff the deadline was extended for 10 days but no documentary evidence was made available thus the management was of considered view that the plaintiff has completely failed to substantiate valid claim against the defendant No.1 hence his claim was not included in the list of approved claimants.

9. Likewise, the Securities Exchange Commission of Pakistan, Security Market Division also conducted an inquiry with respect to the claim of plaintiff. According to this report, the Inquiry Committee asked the CDC to provide CDC sub-account, registration details and account setup report relating to the plaintiff. The CDC informed the committee that no CDC account was opened under

the participant I.D 07385 relating to the brokerage house. In this inquiry report also it is clearly mentioned that the committee requested the plaintiff to furnish documents i.e. copy of account opening form; copy of ledger showing statement of account of trading/transactions carried out by the claimant with the brokerage house showing details including purchase and sale of shares and receipts and payment made against; copy of cheque issued, if any, from personal bank account in favour of the brokerage house; copy of cheque received from the brokerage house and deposited in personal bank account; supporting evidence relating to shares purchased/sold through the brokerage house; nature and details of the CDC account where shares purchased on claimant's behalf were parked by the brokerage house; copy of confirmation, if any, provided by the said brokerage house in respect of transactions carried out by the claimant with the said brokerage house and copies of correspondence between claimant and the said brokerage house relating to settlement of claim but no evidences/documents were provided by the plaintiff. However the learned counsel for the plaintiff argued that both the inquiries were conducted in a slipshod manner, he further argued that in the inquiry report of Pakistan Stock Exchange Ltd. in Paragraph 3.10 it was highlighted that the status of member was converted from individual to corporate on 09.08.2006 and some shares were transferred to main account of corporate member.

10. The term specific relief means those genres of reliefs which are defined by and granted in civil suits under the provisions of Specific Relief Act except in the cases where a statute gives an absolute right of an injunction whether temporary or permanent as a general rule by stay as a matter of right but its grant or refusal rests in the commonsensical and well-structured discretion of the court under the facts and circumstances of each case which may be exercised in judicial manner and only in clear cases. The court has to delve into whether the plaintiff has made out a prima facie case, irreparable

injury will accrue if the injunction is not granted, there is no other remedy by which the plaintiff can protect himself from the consequences of the apprehended injury and the injury is one that cannot be adequately compensated for any damages. In order to obtain an interlocutory injunction it is not only to show that the plaintiff has a prima facie case but he must further demonstrate that in the event of withholding the relief of temporary injunction he will suffer irreparable injury and adequate damages would not be appropriate alleviation but then again in such state of affairs the plaintiff has to articulate strong inevitability of affording immediate protection of his alleged right or interest which would otherwise be seriously devastated or fade out. The plaintiff has to put across that his own acts and dealings in the matter have been scrupulous and upright free from any contamination or unlawfulness and in dealing with the person against whom he pursues the relief, he acted fairly and equitably. However it is within the sphere and domain of the court to mull over whether the grant of an injunction would be more inequitable rather than refusing it so in such eventuality, the proper exercise of discretion is to refuse it.

11. In agreement with Chapter 9, Section 52 of the Specific Relief Act, the preventive relief is granted at the discretion of the court by injunction, temporary or perpetual. The court by an injunction ties up the hands of the defendant and preserves unchanged not only the property itself but also the relations of all the parties thereto. In order to investigate substantial question the matter may be preserved till the final adjudication. Temporary injunctions may carry on up to quantified time or till further order. According to Section 53 of the Specific Relief Act it may be granted at any period of a suit and is regulated by Code of Civil Procedure, whereas, perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the

plaintiff. Concomitantly, under Order XXXIX Rule 1 C.P.C., temporary injunction may be granted where in any suit it is proved by an affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any part of the suit or wrongfully sold in execution of decree for that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditor, the court may grant temporary injunction to restrain such act until the disposal of the suit or until further orders. Whereas under Section 94 of the C.P.C. in order to prevent the ends of justice from being defeated the courts have been given certain powers including grant of temporary injunction and make such other interlocutory orders as may appear to the court to be just and convenient. To pass an interim order is a sense of duty attached to our judicial system functioning where the circumstances so demand and sometimes in the interest of justice no separate or specific provision is de rigueur to give power to the court to pass an interim order. The court has inherent powers to act as *ex debito justitiae* even in cases not provided for by the rules but such powers are structured and put into effect on examination of facts and circumstances of each case whether the equitable jurisdiction may be exercised in favour of the plaintiff or not. In the case of a temporary injunction the plaintiff has to demonstrate a *prima facie* case in backing of right claimed; an actual or threatened violation of the right; productive of irreparable or at least serious damage is caused which must be such as not to disentitle him to assistance but it should be fair and honest and in particular there must be no acquiescence or delay; there must be a greater convenience in granting than refusing the injunction and equally efficacious relief must not be obtainable by any other mode or proceeding **(Ref: PLD 190 Dacca 153, PLD 1973 Azad Jamu & Kashmir 62 and PLD 1969 Karachi 227)**.

12. It is axiomatic that in order to be able to obtain a temporary injunction from court the plaintiff must show that there is a serious

question to be tried at the hearing, and there is a probability that he will be entitled to the relief sought by him and in other words that he has a prima facie case to go to trial; the courts' 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 that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. All these essentials must coexist and absence of any one will disentitle the claimant from the discretionary relief. **(Ref: PLD 1968 Karachi 846, PLD 1954 Sindh 61, PLD 1990 Lahore 22 and 1990 CLC 1053)**. To justify temporary injunction, not only must the case to be such that the injunction is an appropriate relief but there must be further ingredients that unless defendant is restrained forthwith by temporary injunction irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon merits and where the damages claimed in the alternative can afford adequate relief and injunction may not be granted. An injunction is never granted as of course or on the consideration that it will do the defendant no harm, or on the ground, merely that withholding the injunction would render the suit infructuous and without going into the merits. In my view there is extremely large distinction in the midst of two species of equitable reliefs such as injunction and attachment before judgment. What lead me to tentative assessment is that the plaintiff in two enquires mentioned supra failed to substantiate his claim and in this suit too failed to produce relevant documents so in my solicitous outlook, the plaintiff has failed to demonstrate any prima facie case nor any balance of convenience or irreparable loss in case injunction is refused. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e.

greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. However the gist of plaint unequivocally demonstrate that the plaintiff besides other reliefs has also claimed recovery of his invested amount, damages and compensation so it does not mean in my outlook that that he should be non-suited here rather in my considerate view he should be allowed to lead evidence and produce the documents if any in support of his claim. Nevertheless in the intervening phase, he cannot implore to continue the stay order or its confirmation till final adjudication of this lawsuit which will severely deprive and prejudice the verified claims of a long list of general public who are waiting for refund of their money from membership card proceeds.

13. One more important facet cannot be lost sight that in the plaint though the plaintiff has entreated for declaration and directions but no relief of permanent injunction has been claimed either against the disposal of alleged shares nor against the sale proceeds of membership card. Where no perpetual injunction is claimed no question of granting ad-interim injunction can possibly arise. **Ref: 1974 SCMR 519. [Marghub Siddiqi versus Hamid Ahmad Khan]**

14. Perusal of Order 7 Rule 11 shows that the plaint can be rejected only if it appears from the statement in the plaint to be barred by any law. 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. The court has not only the power but also an imperative duty to strike out pleadings in appropriate cases under Order 6 Rule 16 CPC at any stage and to reject the plaint itself under Order 7 Rule 11 CPC if it does not disclose any cause of action. Even the court can reject the plaint suo motu before admitting the plaint and not to wait till the defendant files

application or points out the defect; however, it does not justify the rejection of any particular portion of the plaint as the concept of partial rejection is apparently inapplicable to this provision. Clever drafting creating illusions of cause of action are not permitted in law but a clear right to sue should be shown in the plaint. A plaint cannot be rejected for the mere reasons that in the opinion of the Judge the plaintiff may not succeed. What's more a plea of demurrer that the plaint does not disclose a cause of action could be taken only when on that the plaintiff may be wholly non-suited. Where the plaintiff deliberately suppressed material facts and the real cause of action was not set out in the plaint but something illusory has been stated to get out of Order 7 Rule 11 CPC, such clever drafting and suppression of facts are not permitted in law and continuance of the suit would amount to an abuse of process of court hence in that situation the plaint must be rejected. In the case of **Virendra Nath Gautam vs. Satpal Singh, AIR 2007 S.C. 581**, a fine distinction in between material facts and particulars has been laid down in the following terms:

“33. A distinction between ‘material facts’ and ‘particulars’, however, must not be overlooked. ‘Material facts’ are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. ‘Particulars’, on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. ‘Particulars’ thus ensure conduct of fair trial and would not take the opposite party by surprise.”

15. As far as an application under Order VII Rule 11 C.P.C. is concerned, I would like to append here that the plaintiff has also sought a declaration that Regulation 6 of General Rules & Regulation of the Karachi Stock Exchange (Guarantee) Ltd. is discriminatory against public investors and unlawful in so far as it gives a priority to the claims of the members of Karachi Stock Exchange. In fact this Regulation germane to disposal of forfeited card and proceeds under which the card or right of membership is forfeited and vests in the Exchange particularly of all rights, claims

or interest and the Board is entitled to deal with or dispose of the card as the said Board may think fit. The Board may also sell such card and the sale proceeds shall in the first place be applied to satisfy the liabilities of the member whose card is sold to other member in respect of any contract made subject to the Regulations of the Exchange and the balance shall be paid in the funds of the Exchange and in case the investors' claim has been admitted by the Exchange against a member then the balance amount left unutilized out of the sale proceeds of membership card shall retain for satisfying such claims on pro-rata basis. In addition, the plaintiff has also challenged Regulation 10 of Members' Default Management Regulations of Karachi Stock Exchange (Guarantee) Limited which is also relevant to the settlement of claims from surplus fund in accordance with Regulation 8.6 in the priority order but the proviso attached to this Regulation amplifies that in case the investors' claims admitted by the Exchange against a member are more than the amount of surplus as mentioned in this Regulation, all the claims will be satisfied on pro-rata basis. Whether plaintiff succeeds or not? This is totally a different scenario but at least at this stage the suit cannot be treated barred nor it is liable to be rejected.

16. A scanned look to the other prayer clauses demonstrate that the plaintiff has also claimed the damages including an alternate prayer that if the defendant No.1 is not in possession of any securities as claimed by the plaintiff then defendant No. 1 to 3 shall pay the value of securities particularized in paragraph No.8 of the plaint along with compensation. It is duty of the court to examine the plaint for the purpose of determining whether plaint should be rejected but before passing any rejection order, the averments of the plaint are to be looked into to ascertain whether it discloses a cause of action or whether the suit appear from the statement in the plaint to be barred by any law. In the application moved under Order VII Rule 11 C.P.C. the defendant No.1 to 3 failed to point out

any specific article of the Limitation Act under which the suit may be treated as time barred. Sometimes the question of limitation appears to be mix question of law and facts in which this cannot be decided as to whether the suit is barred by limitation or not without recording evidence which is precisely ascended and happened in this case. Further it is alleged that the plaint does not disclose any cause of action and it is also barred under Sections 42, 54 & 56 of the Specific Relief Act but at the same time it is stated in the application that the suit has been filed on bogus, tailored, forged and fake documents. I recapitulate here that for the purpose of rejection of plaint it is well settled exposition of law that only the averments made in the plaint are to be looked into and the defendants on their own showing raised plea that suit has been filed on the basis of some forged documents which cannot be mull it over at this stage which obviously requires evidence to find out whether the suit is based on forged documents or not? Insofar as the plea of res judicata has to do with, I must hold here that though, the plaintiff approached to the Karachi Stock Exchange and Security Exchange Commission of Pakistan and lodged the complaints but could not substantiate his claim. This inability in no way means that the plaintiff cannot maintain this suit or his claim is collided with res judicata. Section 11 of C.P.C. envisages that no court shall try any suit or issue in which matter directly and substantially in issue in a former suit between the same party has been heard and finally decided by the said court. The expression former suit denotes a suit which has been decided prior to the suit in question. The enquiries conducted by the Pakistan Stock Exchange and Security Exchange Commission of Pakistan cannot be gauged literally as a judicial proceedings embarks on and or undertakes in the civil suits so in all fairness, I am not convinced to sustain and indorse even the plea of res judicata. 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. 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.”

17. In the wake of above discussion, the injunction application (C.M.A No. 5861/2012) and application moved under Order 7 Rule 11 C.P.C (C.M.A No. 10911/2016) both are dismissed.

Karachi:-

Dated. 29.11.2018

Judge