IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 486 of 2019

Plaintiff:	**NSED Development Limited Through Mr. Qazi Umair Ali & Jibran Peerzada, Advocates.**
Defendants No.1 to 3:	**HBL & others Through M/s. Jahanzeb Awan and Rashid Mahar, Advocates.**
Defendant No.4:	**DHA Cogen Private Limited through M/s. Mehmood Y. Mandiwala, Hassan Mandiwala and Hassan Ali, Advocates.**

For hearing of CMA No. 4003/19 (U/O 39 Rule 1 & 2 CPC)

Dates of hearing:	**31.10.2019, 13.11.2019, 03.12.2019 & 10.12.2019.**
Date of Order:	**10.12.2019**

O R D E R

Muhammad Junaid Ghaffar J. This Suit has been filed for Specific Performance, Declaration and Permanent Injunction and through listed application, the Plaintiff seeks a restraining order against the defendants and / or their agents, officers and representatives from creating any third party rights in Defendant No.4 or the desalination plant of Defendant No.4.

2. Learned Counsel for the Plaintiff submits that Plaintiff is a Company incorporated under the laws of United Kingdom, whereas, Defendants No.1 to 3 are private Banks with whom a Memorandum of Understanding **(MOU)**, was entered into by the Plaintiff in March, 2018; that defendant No.4 is a Company which was incorporated to operate a desalination plant, whereas, defendant No.5 is a proforma defendant against whom no substantial relief is being sought in the present Suit; that on 26.08.2016, Plaintiff signed a confidentiality agreement with defendant No.1 for entering into an open bidding organized by defendant No.1 on behalf of defendants No.2 to 4 and thereafter Plaintiff was qualified and Acknowledgement Letter dated 01.12.2016 was issued; that thereafter various correspondence was exchanged and finally the MOU in question was entered into by defendants No.1,2 & 3 with free consent and voluntarily and is a legally binding instrument; that Plaintiff acted upon the MOU and has incurred heavy

expenditure as well investment in shape of hiring consultants in carrying out inspection of the site, whereas, the Site was handed over for due diligence; that substantial part of the MOU has been acted upon by the Plaintiff; that the MOU could not be denied by the defendants as it has been made part of a pending litigation in this Court against Defendant No.4 in Suit No. B-12/2011; that Plaintiff has conducted a detailed study in respect of gas turbine and has substantially incurred expenses in this context as well as incurring legal cost(s) and in support he has referred to various Invoices placed on record through his rejoinder; that the Plaintiff has acquired vested rights; that though the initial investor namely CarVal Investors LLC (**"CarVal"**), the proforma defendants in this matter, is no more interested in buying the project in question; however, the Plaintiff is a signatory to the MOU in its own capacity, whereas, another investor / acquirer has been arranged but the defendants have backed out without any lawful justification; that the credentials of the prospective investor was given at the request of Defendant No.4; but no positive response has been given; that the Plaintiff seeks performance of the MOU, which is legally permissible. In support he has relied upon the cases reported as **PLD 2015 Sindh 142** ***(Pakarab Fertilizers Limited v. Dawood Hercules Corporation Limited through Secretary and 8 others),*** **2011 MLD 1368 (Dewan Development (Pvt.) Ltd. and 2 others v. Messrs Mybank Ltd. through Regional General Manager Karachi and 2016 SCMR 1831 (Abid Mehmood v Noor Muhammad and others).**

3. Learned Counsel for Defendants No.1,2 & 3 has, at the very outset, relied upon **2017 SCMR 2022** (***(Hamood Mehmood v. Shabana Ishaque and others),*** and submits that for seeking specific performance, the Plaintiff ought to have made an application for depositing the entire consideration, which the Plaintiff has not done, and therefore, in view of this judgment of the Hon'ble Supreme Court, the Suit is liable to be dismissed; that not a single cent has been paid by the Plaintiff to the defendants nor any intention to do so has been shown; that Plaintiff admittedly is not the investor and has no funds but has relied upon other investor who has since backed out; that no valid MOU is in field as the time for entering into a final and definitive agreement pursuant to the MOU has already lapsed; that CarVal, the proposed defendant No.5 has backed out, whereas, the investor's KYC (Know Your Customer) is to be conducted pursuant to regulations of State Bank of Pakistan as the amount for investment has to come from abroad for which the defendants have no mandate; that even otherwise the relief of specific performance of an Agreement / MOU is a discretionary and equitable relief, which the Court is not bound to grant as a matter of right; that the Plaintiff has concealed important facts inasmuch as the MOU was never signed and accepted by CarVal and was returned with certain corrections and conditions including an

amended Schedule, which the defendants No.1,2 & 3 had refused to accept; that an amended schedule was annexed with such amended / modified MOU, which has been concealed by the Plaintiff, for which a separate application has been file under Section 476 Cr.P.C; that there is no consent or acceptance of the MOU insofar as Defendants No.1,2 & 3 are concerned; that the negotiation period of 120 days as provided in the agreement, has expired and no definitive agreement has been signed; that the relief, as prayed for, is barred under Section 21(b) of the Specific Relief Act, 1877; that without prejudice even if the MOU is deemed to be accepted; but at least the additional terms were never agreed upon, whereas, the original investor itself has now backed out and has shown its reluctance to proceed any further by addressing a letter directly to the Registrar of this Court, which has been placed on record through statement; that insofar as access to the site in question is concerned, in such cases it is a routine matter enabling the prospective buyer to inspect the property which is being purchased; however, this does not amount to consenting to the amended MOU, whereas, no final agreement has been signed; that the Plaintiff intends to substitute the very investor / party to the MOU, which cannot be forced upon the parties by the Court; that even otherwise as per the MOU, there is no obligation on the parties and in terms of Clause-9, it shall not constitute, be construed or relied upon as a commitment by any of the parties; that the damages, so claimed by the Plaintiff, is without any supporting material; that no case for injunctive relief is made out as all the ingredients are lacking in this case. In support he has relied upon the cases reported as **2017 SCMR 2022** ***(Hamood Mehmood v. Shabana Ishaque and others)***, **2015 SCMR 828** ***(Adil Tiwana and others v. Shaukat Ullah Khan Bangash)***, **2018 YLR 2767** (***Hameed Mehmood v. Shabana Ishaque)***, **2003 CLC 991** (***Islamic Republic of Pakistan and others v. Nawab Din & sons)***, **2002 CLD 218** ***(Al-Huda Hotels and Tourism Co. and others v. Paktel Limited and others***), **1965 PLD (W.P.) Karachi 202** ***(Pakistan Industrial Development Corporation v. Aziz Qureshi)***, **2015 YLR 2141** ***Karachi (Bank Alfalah Ltd., v. NEU Multiplex and Entertainment Square Company (Pvt) Ltd.),*** **1982 PLD (Karachi) 76** ***(Shalsons Fisheries Ltd., Karachi v. Lohmann & Co and another)***, **2002 YLR 2865 (DB)** ***(Ismat Ara Begum v. Iftikharuddin)***, **2005 PLJ (Lahore) 217** ***(Abdul Ghafoor v. Mst. Anwar Jehan Begum)***, **2007 CLC 1** ***(Muhammad Yousaf v. Hadayatullah and others)***, **2002 CLD [Karachi] 218** ***Al-Huda Hotels and Tourism v. Paktel Limited and others***, **NLR 1991 Civ. 128 (Lahore)** (***Khurshid Ali V. Abdur Rauf)***, **AIR 1939 All. 64** ***(Ambika Parsad v. Mst. Naziran Bibi and others)***,

4. Insofar as Counsel for Defendant No.4 is concerned, he has adopted the arguments of the learned Counsel for the Defendants No.1,2 & 3 and additionally

submits that Defendant No.4 after completion of the project in question went in default; and thereafter the Project has been taken over by the consortium of Banks / lenders i.e. Defendants No.1,2 & 3; that presently his instructions are that Defence Housing Authority, the original promotor / owner of Defendant No.4 is in the process of making arrangements for paying the Banks directly and is taking over the Project; that Defendant No.4 was never a party to the MOU, whereas, the potential acquirer including CarVal, who was the investor, has already backed out; that the Plaintiff's case does not have any merits; that the period of negotiation, which was to be completed within 120 days has expired; that pursuant to the clause 10.2(b) of the MOU the lapse of negotiation period results in implied termination of the MOU; that Defendant No.5 has already approached this Court through a letter to the Registrar and has backed out, whereas, the Korean Investor subsequently brought in by the Plaintiff cannot be made party to the MOU for seeking enforcement, and therefore, he prays for dismissal of the listed application.

5. While exercising his right of Rebuttal, learned Counsel for the Plaintiff has once again referred to the affidavit of the Bank in the pending litigation, wherein, the MOU was relied upon; that Site access and calling of experts establishes the existence of the MOU; that the Plaintiff seeks performance of the same and is willing to deposit the amount as per MOU, if so directed by the Court; that the Plaintiff was a signatory to the MOU in its own capacity; hence independently can seek its performance in view of the Judgment reported as **2016 SCMR 1831 (Abid Mehmood v Noor Muhammad and others)**.

6. I have heard all the learned Counsel and perused the record. The precise case of the Plaintiff is in respect of the purported MOU and it specific performance as according to the Plaintiff after entering into the MOU and allowing access to the Site of Defendant No.4, the Defendants No.1,2 & 3 have now resiled and are not willing to perform their part of the MOU. At the very outset, I may observe that there is a serious objection raised on behalf of Defendants No.1, 2 & 3 to the effect that there wasn't any concluded MOU between the parties and it had never materialized, as after exchange of the same, there were certain conditions incorporated / added by the potential acquirer No.1 i.e. CarVal Investors GB-LLP. From perusal of the MOU, it reflects that the name was proposed to be changed to *CarVal Investors LLC on behalf of certain funds* and similarly another condition on the signature page is to the effect that *conditional execution or acceptance and agreement dated 18.05.2018 of amended schedule, only valid upon acceptance of MOU amendment schedule*. Surprisingly, the Plaintiff has not annexed the amended schedule as proposed by one of the then

potential acquirer namely CarVal. The Counsel for Defendants No.1, 2 & 3 has annexed the said amended schedule, which incorporate seven (7) additional conditions. It is the case of the defendants that firstly the additional conditions could not have been agreed upon by them as there was a change in the name of Potential Acquirer No.1 and originally the due diligence was done by them in respect of the said original Company. Though the learned Counsel for the Plaintiff has made a feeble attempt to dispute this; however, as per the record before the Court, admittedly, the correction and or modification was sought by CarVal, who was the investor of the project and on whose behalf the Plaintiff was acting. Therefore, it is not, at this stage of the proceedings conceivable that the Plaintiff had no knowledge of the proposal / request of CarVal in respect of amendment / modification of the MOU. It further appears that the Plaintiff's lead lawyers *Aldo Schuuman* had sent through email "Reservation of Rights" on 18.2.2019 in respect of the MOU, which was replied by Defendants No.1 to 3's lawyers on 7.3.2019, wherein they have categorically made reference to the proposed amendments / modifications sought by CarVal and the amended Schedule as well as their reservations in respect of signing and accepting the same. This fact apparently cannot be denied by the Plaintiff as admittedly issues were raised to that effect, whereas, the Plaintiff has failed to bring the same on record and while confronted, the learned Counsel for the Plaintiff has shown ignorance about this, and has in fact denied any such fact. In my view the Plaintiff has not come with clean hands before the Court in this regard; and consequently, this disentitles the Plaintiff to seek any equitable relief of specific performance.

7. Now adverting to the MOU and various pre-conditions which were required to be fulfilled before its conclusion / closing, it would be advantageous to reproduce the important and relevant clauses of the MOU which read as under:-

> **"Closing Conditions"** means completion of the following activities:
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> (i) receipt of the Consents;
> (ii) execution of the Definitive Agreements;
> (iii) firm approvals from the parties' respective boards and / or investment committee as may be required;
> (iv) approval of the Car Val investment committee following future completion of commercial, financial, technical diligence on terms satisfactory to the Car Val investment committee in its sole determination;
> (v) occurrence of Commercial Operations Date;
> (vi) payment of all Liability Payments; and
> (vii) all conditions precedent to Share Transfer stated in the Definitive Agreements;
>
> **"Definitive Agreements"** means the agreement(s) (including the share purchase agreement) to be entered into between the Target Shareholders and the Potential Acquirers in the Agreed Form, for the purposes of the Potential Acquirers acquiring the Sale Shares from the Target Shareholders;
>
> **"Negotiation Period"** means a period of one hundred and twenty (120) calendar days from the date this MOU is executed, or such other date as may be mutually

agreed between the parties in writing, within which the Parties shall enter into the Definitive Agreements;

STRUCTURE

(a) **Share Sale & Purchase**

Subject to (i) the terms of this MOU; (ii) compliance with the applicable laws; and (iii) achievement of the Closing Conditions, the Potential Acquirers propose to purchase the Sale Shares form the Target Shareholders for USD 10 (United States Dollars Ten Only)(the "**Share Transfer**")

10. TERM AND TERMINATION OF MOU

10.1 This MOU and the terms herein set forth shall come into effect immediately upon signature by both Parties.

10.2 Unless otherwise mutually agreed in writing, this MOU shall terminate upon the earlier of:

(a) the execution of Definitive Agreement expressly superseding this MOU; or

(b) lapse of the Negotiation Period; or

(c) failure by NSED to pay Monthly Proceeds or failure to illustrate that unencumbered funds in respect of the Baseline Expenses for the period from 1 December 2016 till the date of this MOU are available and maintained as per the terms of the Expenses Agreement;

Provided that in the case of termination under Clause 9.2(c) termination shall be effective only upon issuance of a written termination notice by the Target Shareholders to the Potential Acquirers."

8. From perusal of the aforesaid clauses of the MOU, it reflects that even if it exists and was a validly signed instrument and notwithstanding the objections of Defendants No.1 to 3, there are various conditions in the MOU, which require further acts on the part of the parties after its signing, including additional conditions, to which the Defendants had never consented. On this premise it has been argued on their behalf that it has no legal value. On perusal of the same to this extent, I am in agreement with the contention of the defendants' Counsel that though the MOU was exchanged; however, it was not signed by the Potential Acquirer No.1 i.e. CarVal, unconditionally; rather several conditions including the change in the name of the acquirer were incorporated and corrected, whereas, their approval was only subject to the acceptance of all conditions. Insofar as the other conditions are concerned, it further appears that after signing of the MOU, there was a condition for closing the transaction and entering into a definitive agreement, which was required to be done within a period of 120 calendar days and admittedly such period stood expired long ago. It further provides in Clause-

10 that unless otherwise mutually agreed in writing, *this MOU shall terminate* upon earlier of the execution of Definitive Agreements expressly superseding this MOU; or lapse of the negotiation period (120 days); or failure by the Plaintiff to pay Monthly Proceeds or failure to illustrate that unencumbered funds in respect of the Baseline Expenses for the period from 1 December 2016 till the date of MOU are available and maintained as per the terms of the Expenses Agreement. It further appears that the negotiation period provided in the MOU is of 120 days from the date of MOU within which the parties shall enter into Definitive Agreements. Admittedly no further Definitive Agreement was signed by the parties within such period, and therefore, for the present purposes, the MOU in question has apparently lost its validity as well as its efficacy. As to the argument regarding giving access to the Site is concerned, it may be observed that it is a normal practice in these transactions of purchase of assets / properties, as the prospective buyer is permitted to inspect the site / property he is purchasing, and this can even be allowed without any MOU between the parties; however, under no circumstances this alone can be construed as an event for enforcing the agreement /MOU by way of specific performance.

9. Insofar as the argument of the learned Counsel for the Plaintiff that MOU can be specifically performed in view of the case law relied upon by him is concerned, it may observed that (barring exceptions) there is no cavil to such proposition. However, the facts of the present case fall within this exception as of today, disentitling the Plaintiff from seeking an injunctive relief. It is to be seen first by examining the peculiar facts and circumstances of the case. Such principle of law is not universal in its nature and is materially dependent on the individual facts before the Court. Insofar as the facts of this case are concerned, it needs to be appreciated that the MOU in question required acting upon certain conditions, which apparently have not been fulfilled, whereas, the negotiation period stands expired and the Plaintiff has not come before the Court before expiration of such period. This is coupled with the fact that the Potential Acquirer No.1 as well as the main investor on whose credentials the Defendants had proceeded further has never signed the MOU, whereas, the Plaintiff i.e. Potential Acquirer No.2 is not in essence the investor. This fact is further supplemented by the pleadings in the Plaint as well as the arguments made before the Court that if CarVal is not coming up and is no more interested, the Plaintiff has arranged another investor i.e. POSCO Energy (Pvt) Ltd. a Company incorporated under the law of South Korea. It needs to be appreciated that this Court cannot compel the Defendants to allow substitution of a purported signatory to the MOU; and secondly, and as rightly argued by the Defendants' Counsel that any investor showing interest in

acquiring Defendant No.4 has to go through the rigors of KYC and the State Bank Regulations. Therefore, this Court at this stage of the proceedings cannot issue directions or compel the defendants to proceed further and perform their part of the MOU.

10. Insofar as the other objections of the defendants' Counsel regarding failure to pay and deposit the balance sale consideration and dismissal of the Suit on such failure is concerned, I may observe that though in rebuttal, the Plaintiff's Counsel has contended that the Plaintiff is ready and willing to deposit such amount, if so directed by the Court; however, while confronted, he has not been able to show any such willingness from the pleadings or for that matter, there is no such interlocutory application seeking permission or directions of the Court to deposit the balance sale consideration. Therefore, at this injunctive stage, I am not inclined to give any findings on such aspect of the matter which would only be dealt with, once Plaintiff comes up with some application and amend its pleadings in this regard, by showing such willingness.

11. It is by now a settled proposition that relief of Specific Performance is discretionary in nature. It is not that in every case of Specific Performance the Court is bound to grant the Specific Performance of the agreement. It is the peculiar facts and circumstances as well as ***conduct of the parties***, which is to be kept in mind. The relevant provision dealing with Specific Performance under Specific Relief Act, 1877, are Sections 22 and 24, and clearly provide that the Courts power and authority to pass a decree of specific performance is discretionary, whereas, the Court is not bound to grant such relief merely because it is lawful to do so. The Hon'ble Supreme Court in the case reported as ***Liaqat Ali Khan and others v. Falak Sher and others*** **(PLD 2014 SC 506)** has been pleased to observe as under;

> 18….. "A careful reading of these instances, which are self-explanatory, further amplify vast powers of the Court in the matter of exercise of its discretion for ordering specific performance or otherwise. When the above reproduced provision of law is read in conjunction with the case-law cited at the Bar by both the learned Senior Advocate Supreme Courts, the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised in favour of specific performance or not. Besides, some well-articulated judgments on the subject, have further broadened the scope of exercise of such discretion of the Court by way of awarding reasonable compensation to the parties, keeping in view the other surrounding circumstances, such as rate of

> inflation, having direct bearing the value of suit property, inordinate delay/ passage of time, and change in the circumstances or status of the subject property etc….."

12. Insofar as reliance by the Plaintiff's Counsel on the case of ***Abid Mehmood (Supra)*** regarding maintaining a claim of Specific Performance by any of the signatories to an agreement is concerned, it is distinguishable in facts inasmuch in that case it was the sellers (not buyers as is the case in hand) out of which some had backed out, whereas, the Agreement was signed by two on behalf of others. Further the case was in respect of an Agreement and not an MOU. And lastly, in that case the Agreement was by itself a registered document; hence, as a natural consequence had attached to it a legal value. Therefore, I am of the view that this case is of no help to Plaintiffs case in hand.

13. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiff has failed to make out a prima facie case and balance of convenience also does not lie in its favour, whereas, irreparable loss, if any, would be caused to the defendants as of today, if the injunctive relief as prayed for is granted, whereas, even otherwise, the Plaintiff has also quantified the claim regarding purported substantial damages, and therefore, by a means of a short order in the earlier part of the day, this application was dismissed and these are the reasons thereof.

J U D G E

Ayaz.