

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1163 of 2009

BEFORE:

Mr. Justice Arshad Hussain Khan.

Shahid Shafi son of Muhammad Shafi

Vs.

M/s. Quice Food Industries and 07 others

Plaintiff: Through Mr. Ch. Abdul Rasheed Advocate.

Defendants No.1 Through Mr. Abid Naseem, Advocate.

Date of Hg: 04.11.2019, 17.12.2019 and 24.12.2019

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was filed on 18.08.2009 against the Defendants for Recovery of Rs.2,37,00,000/-, Damages of Rs. 40 Million and Permanent Injunction with the following prayers:-

- A) Recovery of Rs.2,37,00,000/- against the Defendants severally & jointly with interest at bank rate till the realization of the decretal amount.
- B) Recovery of the Damages amounting to Rs.40.00 Million against the Defendants.
- C) Permanent Injunction restraining the Defendants, their servants, agents, executants, attorneys, administrators, sub-ordinate and any other persons(s) acting on their behalf from selling, disposing of, alienating and creating third party interest to the assests & properties of Defendant No.1, except in due course of law.
- D) Cost.
- E) Any other relief(s) deemed to be fit under the special circumstances of the case.

2. Briefly stated the facts of the case as narrated in the plaint are that Defendant No.1, a public limited company, carrying its business of fruit gardening, dairy products, processing, producing/manufacturing jams, jellies and squashes etc. under trade mark 'QUICE FOOD INDUSTRIES'. It is stated that Defendants No.2 to 7 are the directors of Defendant No.1 and have personal friendship with the Plaintiff. On the enticement of Defendants 2, 4, & 5, the Plaintiff had paid an amount of Rs.1,00,12,534/- to them and acquired the share of

Defendant No.1 (company) being 13,67,476 shares at the rate of Rs.8/- per share on the terms that the said Defendants would buy back the said shares at the rate of Rs.10/- per share within 3 months w.e.f. 01.07.2004. It has been further stated that the said Defendants 2 (chief Executive of Defendant No.1), 4 & 5 failed to make the payment of the said amount and buy back the shares of the Plaintiff within the stipulated period of 03 months which expired on 01.11.2004. Faced with such a situation all the three Defendants offered the Plaintiff to work with them in the company as director. The Plaintiff accepted the offer and subsequently he was elected / appointed as one of the directors of Defendant No.1-Company where he performed his duties as its Director with effect from the year 2005 to 18.08.2008 without getting any remuneration or any other financial benefits. The Plaintiff and Defendant No.5 used to look after the affairs and matters of the factory of Defendant No.1 situated at Mingora, Swat, where huge quantity of products were being produced. It has also been stated that the Plaintiff during the period from 2005 to August, 2006 invested an amount of Rs.2,37,00,000/- towards purchase of the raw material for the productions of Defendant No.1, as Defendants 2 to 7 were unable to arrange the funds as they were under a heavy burden of repayment of debt of Allied Bank of Pakistan, which has filed Execution No.6/2008 after obtaining Decree in suit No.70/2001 for the recovery of loan amount of Rs.46 million against Defendants 1 to 7. It has also been stated that in the year 2008, Defendants 2 to 5 had started negotiations with Defendant No.8 for transfer of management and assets of Defendant No.1, to get rid of heavy financial liabilities from the creditors. The Defendant No.1 to 7 owed Rs.7,55,81,000/- to the creditors including the amount of Rs.2,37,00,000/- of the Plaintiff. It has been stated that after lengthy negotiations, Defendants 2 to 5 including the Plaintiff entered into a Memorandum of Understanding on 18.08.2008 [MOU] with Defendant No.8 for taking over the management of Defendant No.1. Pursuant to the terms of the MOU, the Defendant No.8 had agreed to the pay amount of Rs.2,37,00,000/- to the Plaintiff along with other creditors. In this regard, a list of creditors was also prepared and annexed with the MOU. On 18.08.2008 after the execution of MOU, the Plaintiff had relinquished his charge of the Directorship of Defendant No.1, he however, retained the

abovementioned shares with it. It has been further stated that it was the entire responsibility of Defendants 2 to 8 to pay-off the amount of Rs. 2,37,00,000/- to the Plaintiff but all of them kept him on false pretext. It is further stated that all of a sudden Defendants 1 to 5 published public notices in Daily "Express", Karachi, dated 4/5/6th November 2008, mentioning the numbers of the share certificates in possession of the Plaintiff as 'Missing' with the information that the claimant should inform them within 21 days otherwise the duplicate share certificates will be issued in favour of the original shareholders. On 22.11.2008, the Plaintiff came to know about the said public notices and smelling the foul play at the hands of the said Defendants, immediately informed Defendant No.1 in writing that the said share certificates had been acquired by him and were/are in his possession. The Plaintiff also informed the Registrar of Defendant No.1, M/s. Technology Trade [Pvt.] Limited, Karachi, about the possession of the share certificates and public notice dated 4/5/6th November 2008, of Defendants 1, 3 & 5, vide letter dated 26.12.2008, which was also got received by the Plaintiff personally in their office on 29.12.2008. It has been further stated that in view of the malafides of Defendants 1, 3 & 5, the Plaintiff had also sent legal notices dated 13.01.2009 to the Defendants and the joint Registrar, SECP, informing all the facts regarding the possession of the said share certificates. The said legal notices were replied by the company secretary of Defendant No.1 replied through his reply legal notice dated 15.01.2009 wherein he totally denied the claim of the Plaintiff. The Defendants 6 & 7 also replied the said legal notice of the Plaintiff showing their ignorance about the said share certificates and the amount. On 08.04.2009, the Plaintiff also sent the said share certificates to M/s. Technology Trade [Pvt] Limited for transfer in his favour but the said company replied vide letter dated 15.04.2009 disclosing that they were not providing Registrar services of Defendant No.1. Thereafter, the Plaintiff filed an Appeal U/S 78-A of the Companies Ordinance, 1984, to the Chairman Securities & Exchange Commission of Pakistan [SECP], Islamabad, on 09.05.2009, against Defendant No.1 for transfer of the said share certificates in his favour who has sent letter dated 19.05.2009 to the Plaintiff for completing the formalities mentioned in the said letter. The Plaintiff from the reply of SECP also came to know that Defendants No.1 to 7 filed suit bearing

No.939 of 2009 before this court, inter alia, against SECP and the Plaintiff. In the plaint of the said suit, the subject MOU along with list of creditors was also filed wherein the Plaintiff was shown at serial No. 5, as one of the creditors. Further stated that as the SECP was requiring the verified copy of share certificates, transfer deeds and name of the broker. Consequently, the Plaintiff sent legal notices dated 22.06.2009 and 26.06.2009 to Defendant No.1 for verifying the said documents but neither these documents were verified nor the legal notices were replied. Hence the present suit.

3. Upon summons of the present suit, all the Defendants have filed their written statements in the matter.

The **Defendant No.1** [M/s Quice Food Industries], represented by Mr. Muhammad Atif, one of the Director of the Company, has filed his written statement and taken the following preliminary legal objections:

1. That the suit as framed is barred under Article 61 of the Limitation Act, 1908, as the limitation period to file the recovery suit is within 03 years and the instant suit has been filed after the lapse of 05 years and the same is squarely hit by Order VII, Rule 11 of the Code of Civil Procedure, 1908.
2. That the instant suit as framed and relief claimed therein are malafide, not maintainable under the law viz. under Section 42 of the Specific Relief Act, 1877. Liable to be rejected with compensatory costs under Section 35-A of the Code of Civil Procedure, 1908.
3. That the Annex-P/4 annexed with the plaint has no sanctity in the eyes of law as the same was signed by the unauthorized person, no Board Resolution has been filed along with the said document and the same is inadmissible under the law.
4. The Plaintiff has no lawful cause of action in its favour and has not approached this Court with clean hands.
5. That no audited balance sheet verified by any chartered accountant has been filed to substantiate the claim of the Plaintiff.
6. That the approval of the so-called transaction has never ever sought or brought in any meeting of the Board of Directors.

Apart from the above preliminary legal objections, Defendant No.1 while denying the claim of the Plaintiff has stated that the

Company's Directors / Management have been changed since 31st December, 2008. The relation and any terms and conditions between the other Defendants and the Plaintiff are unknown to the answering Defendant and there is no record exists regarding so-called transaction, if ever made between the Plaintiff and Defendant Nos. 2, 4 & 5, neither in the Books of Accounts nor in the Annual Report of the year 2008 of the Company. It has been stated that it is astonishing that the purported transaction was of the year 2004 whereas the Plaintiff, thereafter had remained as one of the Directors of the answering Defendant from the year 2005 to 2008, however, he never raised any demand in respect of purported transaction. It has been stated that as per the annual report of the year 2009 of the Company, the total equity and liabilities of the Company were Rs.51,841,168/- as per the balance sheet and not as stated by the Plaintiff. The MOU is not an agreement or a contract hence not binding on Defendant No.1 or Defendant No.8. furthermore, as per contents of clause 12 of the alleged MOU, all questions, dispute, controversies or claims arising directly or indirectly put off or consequent to the MOU shall be settled by mutual negotiations and in case of failure, the matter shall be referred to Arbitration in accordance with and subject to the Arbitration Act, 1940. Whereas, the Plaintiff has not approached the answering Defendant regarding controversy, if any, for the appointment or arbitrator, therefore, the suit is barred under Order VII Rule 10 of the CPC. It has been stated that the suit 939/2009 was filed in the year 2009 and whereas the management was changed in the month of December, 2008, as per settlement agreement dated 31.12.2008, hence the previous director / management had no legal character to file the said suit and resultantly the same was withdrawn unconditionally by the ex-management of the answering Defendant. Furthermore, suit 939/2009 has no legal value in the eyes of law as the same was withdrawn simplicitor. It has been further stated that in the record of answering Defendant only 5100 shares are lying, the answering Defendant is ready to transfer those 5100 shares in favour of the Plaintiff. Lastly, stated that the present suit is liable to be dismissed with costs under Section 35 and 35-A of the Code of Civil Procedure, 1908.

4. The **Defendants No.3, 6 & 7** filed their written statement wherein they have taken similar objections and stance as that of Defendant No.1 in its written statement. The said Defendants while denying claim of the Plaintiff has stated that neither they are signatory of Annexure P/1 nor they are the Directors of the answering Defendants, therefore, the names of the answering Defendants may be deleted from the title of the suit as envisaged in Order 1 Rule 10(2) of the Code of Civil Procedure, 1908. It has been stated that Defendant No.8 has no concern with the answering Defendant, his identity is an investor [third party], which is admitted by the Plaintiff himself. It is stated that the MOU, as stated in the Plaint, is not an agreement or a contract hence not binding upon the answering Defendants or Defendant No.8, who is not a director, executive director and /or secretary of the company. It has been further stated that the legal notice was an attempt to put pressure on the Defendants malafidely. The Annexure P/16 & P/17 to the Plaint, clearly shows only 51 hundred shares of the answering Defendant and the same quantity of shares also lies in the record of the answering Defendant which negates the stance of the Plaintiff in the instant case. It has been further stated that the MOU as alleged is signed by an un-authorized person, the answering Defendants have no concern with the so-called transaction, therefore, the claim of the Plaintiff is false and frivolous. Finally, it is stated that the Plaintiff has no lawful cause of action against the answering Defendants and therefore, instant suit is not maintainable under the law and the same is liable to be dismissed.

5. Thereafter, on 08.12.2010 a statement in writing on behalf of Defendants 2, 4 & 5 were brought on the record, stating therein that they have adopted the contents of the written statement filed by Defendant No.1 in the matter. Similarly, Defendant No.8 has also filed his written statement stating therein that he has adopted the contents of the written statement filed by Defendant No.1.

6. Subsequently, on 20.12.2010, out of the pleadings and by consent of the parties following issues have been framed by the Court :-

1. Whether the suit is barred by law, if so its effects ?

2. Whether the Plaintiff is entitled for recovery of Rs.2,37,00,000/- against the Defendants severally and jointly, if so its effects ?
3. Whether the Defendants have caused financial losses and injuries to the personal feelings and reputation of the Plaintiff or not, if so its effects ?
4. Whether the Plaintiff is entitled for the recovery of damages of Rs.40.00 Million against the Defendants severally and jointly, if so its effects ?
5. What should the decree be ?

Then on the same day, i.e. 20.12.2010, by consent of the parties, a Commissioner for recording evidence was appointed in the matter who after completing the commission submitted his report dated 05.09.2012, which was taken on the record on 25.09.2012, and thereafter the matter has come up for arguments.

7. Perusal of the commissioner's report reflects that the Plaintiff in support of his case has examined himself as 'P' and produced the following documents :-

DESCRIPTION	EXHIBIT
Affidavit in evidence	P
Photocopy of Certificate dated 1.7.2004	P/1
Photocopy of Execution Application 06/2008	P/3
Photocopy of the MOU dated 18.04.2008 along with list of creditors	P/4 & P/5
Photocopy of letter dated 18.08.2008	P/6
Photocopy of letter dated 23.09.2008	P/7
Photocopy of public notices dated 04.11.2008.	P/8,P/9 & P/10
Photocopy of letter dated 22.11.2008	P/11
Photocopy of list of Shares	P/12
Photocopy of letter dated 26.12.2008	P/13
Photocopy of Legal Notice dated 13.01.2009	P/14
Photocopy of Legal Notices dated 15.01.2009.	P/15.P/16 & P/17

Photocopy of Letter dated 08.04.2009	P/18
Photocopy of Letter dated 15.04.2009	P/19
Photocopy of Letter dated 09.05.2009	P/20
Photocopy of Letter dated 19.05.2009	P/21
Photocopy of Legal Notices dated 22.6.2009 and 26.06.2009	P/233 & P/23
Photocopy of Letter dated 24.07.2009	P/24
Photocopy of Letter dated 30.07.2009	P/25
Photocopy of Complaint in Suit No.939/2009	P/26
Photocopy of Order dated 05.10.2009	P/27
Photocopy of Notice dated 25.05.2010	P/28

The Plaintiff was subsequently cross-examined by the Defendants' counsel. Thereafter, Plaintiff examined his witness namely Tariq Saeed who produced his affidavit in evidence as Exh. PW-1, and thereafter, he was also cross examined.

8. Whereas the Defendants in support their case examined Muhammad Farooque, [Defendant No.5], who has produced his affidavit-in-evidence as DW-1 and subsequently he was cross-examined by the Plaintiff's counsel. Thereafter, one of the Directors of Defendant No.1, Muhammad Atif, has been examined, who has produced following documents:

DESCRIPTION	EXHIBIT
Affidavit in evidence	D/1
Certified copy of written statement of Defendant No.1	D/2
Certified copy of Form A	D/3
Original Annual Reports for the year 2008 and 2009	D/4 & D/5
Certified copy of Order dated 04.09.2009 in suit 939/2009	D/6
Certified copy of written statement of Defendants 3,6 and 7	D/7
Certified copy of Board Resolution of Defendant No.1	D/8 Objected upon certified copy

The said witness was also cross examined by the Plaintiff's counsel.

9. During the arguments learned counsel for the Plaintiff while reiterating the contents of plaintiff has contended that Defendants despite having admitted the amount of Plaintiff failed to pay him. In order to support his argument, he has referred to MOU and the list of creditors attached with it wherein name of the Plaintiff is appearing at serial No.5. Learned counsel has also emphasized that the subject MOU and the list of creditors were also filed by Defendant No.1 along with the plaint of suit No.939 of 2009, which suit was filed by Defendant No.1 inter alia, against Defendant No.8 for performance of the contract, declaration and damages. In the said suit, though the Plaintiff was also arrayed as Defendant No.50, yet before the notice could be served on the Plaintiff and other parties (Defendants in the said suit), the suit was withdrawn. It is further contended that the Defendant in his cross examination has also admitted the payment of the Plaintiff. It is also contended that besides above, the Plaintiff is in possession of 13,67,479 share certificates of Defendant No.1, however, when Defendant No.1 failed to transfer the said shares in the name of the Plaintiff despite having valid transfer deed, the Plaintiff filed appeal before the SECP which appeal was allowed vide order dated 05.10.2009. By the said order the Defendants were directed to transfer the shares in the name of the Plaintiff. However, when the said order was not complied with by the Defendants the SECP passed punitive order dated 25.5.2010. Further argued that the Plaintiff is also entitled to the damages claimed in the suit as the Defendant failed to cross examine the Plaintiff in respect of para-24 of his affidavit-in-evidence, wherein the Plaintiff has specifically stated about damages he suffered, as it is settled position of law that deposition of witness if not cross examined the same shall be deemed to have been admitted. Lastly, contended that the Plaintiff has proved his case through evidence and as such the present suit may decreed as prayed.

10. On the other hand, learned counsel for the Defendants, during the course of arguments at the outset submits that he does not press his objection in respect of maintainability of the present case and the issue in respect thereof. However, he, while reiterating the contents of the

written statement and the affidavits in evidence of Defendants' witness has argued that the claim of the Plaintiff with regard to the investment of Defendant is not sustainable in law as the Plaintiff has failed to produce any evidence in this regard. It is also argued that the company runs under the Companies law, which says that without the approval of the Board of the Directors no one can invest in the company and as such this clearly bars any investment without approval. Furthermore, there is nothing available on the record, which could show that the Plaintiff invested such a huge amount; neither any board meeting resolution, nor authorization nor even in the annual report of the company from the year 2005 to 2008 any such transaction is mentioned. Further contended that the Plaintiff in his cross examination in clear terms admitted that he did not produce any document pertaining to the amount of Rs.2,37,00,000/- except MOU and the List of creditors attached therewith. It is also contended that the said MOU and the list of creditors are not liable to be considered on various accounts; (i) the Plaintiff produced photo copies of the said documents which are not admissible according to article 76 of the Qanun-e-Shahadat Order 1984, (ii) There is no mention in the MOU regarding the credit list, (iii) this document was obtained by the Plaintiff from suit 939/2009 filed by unauthorized person and was subsequently withdrawn. It is also argued that Defendants' witness in his cross examination specifically denied the Credit list annexed with MOU. Furthermore, the said witness also filed original annual report of the company for the year 2008 and 2009, which clearly shows that there is no such outstanding of the Plaintiff against the company. It is also argued that the annual report of the company is a public document and presumption of truth is assumed upon the same. Insofar as the share certificates are concerned, learned counsel submits that only 5100 shares of the Plaintiff are lying with the Defendant-company to which the company is ready to transfer those 5100 shares in favor of the Plaintiff. Learned counsel for the Defendant on the point of admission of Plaintiff's liability by Defendant No.1 in suit No. 939/2009, has submitted that the said suit was filed in the year 2009 by an unauthorized person of previous Management, which was changed in the year December 2008 as per settlement agreement dated 31-12-2008 hence the previous Director/Management had no legal character to file

the said suit and that was the reason the said suit was withdrawn unconditionally. It is also contended that the Plaintiff in his cross-examination admitted that he has a knowledge of the agreements executed between the outgoing Directors and the incoming Directors i.e. 31.12.2008, 05.01.2009, 31.01.2009 and 11.02. 2009, which were executed admittedly after the execution of alleged MOU and there is no mention in these agreements in respect of the amount claimed by the Plaintiff. It is also contended that the Plaintiff never challenged these agreements before any forum. It is also argued that the Allied Bank filed an Execution Application bearing No. 06 of 2008 (Suit No 70/2001) Allied Bank vs Quice Food Industries Ltd. and others before this Court. On 14.06.2016 an Application was filed Under Order XXIII Rule 3 CPC., which was signed by the Decree Holder, Judgment Debtors including the ex-director of the Quice Food and the Auction Purchaser (Furqan Hussain-Defendant No. 8 in the present proceedings). In paragraph No. 9 of the compromise application the Judgment Debtors acknowledged that the auction purchaser is the rightful owner of Judgment Debtor No. 1 and the same has been rightfully purchased by the purchaser and there are no pending claims of the Judgment Debtors against the purchaser. This acknowledgment of the ex-directors of the Quice Food clearly shows that there is no outstanding against Defendant No 8. It is also argued that the Plaintiff has also failed to substantiate his claim of damages through evidence. Lastly, learned counsel argued that the Plaintiff has failed to prove his claim through evince hence the instant suit may be dismissed with costs. In support of his stance, he has relied upon the case of **SHAH MUHAMMAD and 2 others v. DULLA and 2 others [2000 SCMR 1588]** and **MACDONALD LAYTON & COMPANY PAKISTAN LTD. v. UZIN EXPORT-IMPORT FOREIGN TRADE CO and others [1996 SMCR 696]**.

11. I have heard learned counsel for the parties, perused the record minutely and have also gone through the relevant law as well as the case law relied upon by the learned counsel for the parties and my findings on the above issues are as follows :-

ISSUE NO.1:

This issue has been framed on the basis of the objection raised by the Defendants in their written statement, however, since learned counsel for the Defendants, during the course of his arguments, did not press this issue, therefore, the findings are not required to be made on this issue, as the same has become redundant.

12. **ISSUE NO.2:**

Through instant suit the Plaintiff is seeking recovery of the amount he invested in Defendant-company and the damages, he suffered on account of non-payment of said invested money. The plea of the Plaintiff is that upon purchase of shares of worth more than Rs.10 million he had been appointed/elected as one of the directors of Defendant No.1(the company) and remained there from the period 2005 to 2008. During the said period of his Directorship, he had invested Rs.2,37,00,000/- in the Defendant-company in the shape of procurement of raw material for the production of Defendant-company as the Defendant No. 2 to 7 were unable to arrange funds. Whereas the Defendants in their written statements though not disputed the Plaintiff's directorship in the company from 2005 to 2008, however, they denied the assertion of the Plaintiff regarding his investment in the Defendant's Company.

Record of the present case transpires that the Plaintiff's entire claim is based on Exh. P/4 [MOU dated 18.08.2008 and a list of creditors attached therewith] as there is no other documentary evidence available on the record in this regard. The Plaintiff in support of his stance has mainly relied upon List of Creditors attached to MoU dated 18.08.2008 [Exh.P/4] besides, he has also examined witness namely Tariq Saeed [Exh. PW-1].

From the perusal of Memorandum of Understanding [Exh. P/4], it appears that it was entered into amongst First Party; Muhammad Afaq Shamsi [*Defendant No.3 in the present case*], Muhammad Ahmed [*Defendant No.4*], Muhammad Farooq [*Defendant No.5*], Jawed Yamin [*Defendant No.6*], Shakeel Ahmed [*Defendant No.7*], Shahid Shafi [*Plaintiff*] being outgoing Directors and transferor of shares And Second Party; Quice Food Industries [Defendant No.1]

through its CEO Akhtar Rasheed [*Defendant No.2*] And Third Party; Farquan Hussain [*Defendant No.8*] being incoming Director and transferee.

13. Before going into further discussion, it would be appropriate to reproduce the relevant portions of the MOU [Exh.P/4] hereunder:

“2. The “outgoing directors and transferors of shares” are the legal and beneficial owners of 5,941,861 fully paid up shares of the par value of Rs.10/- each, of the company, constituting 55.00% of the equity share capital of the Company and carrying proportionate voting rights, as per the list of shareholdings annexed hereto as Annexure “A” indicating respective holding of each one of them.”

“5. The company is also indebted to certain other creditors in respect of some disputed amount not yet recorded in the books of accounts of the company on account of advances against sales, payable against purchase from suppliers of store Material and other liabilities as per Annexure “B” aggregates to Rs.58 million approximately. The “incoming directors, chief executive and transferees” will make payments settle of these liabilities at such amount as is mutually agreed by injecting funds in the Company and subject to such terms and conditions as may be agreed mutually with the said creditors;

6. The long term loans, mentioned in para 3 above, is inter alia secured by mortgage over the company’s fixed assets at Hattar charge over Company’s stocks and receivable of Hattar Unit and in addition thereto by the mortgages over the personal properties and personal properties and personal guarantees of some of the “outgoing directors and transferors of shares, as per the List of personal Guarantees, Personal Mortgages and personal securities that are listed as Annexure “C” annexed to this MOU (hereinafter referred to as “guarantees and securities”);

7. The parties for the purpose of formulating the agreement reached between them have entered into this MOU with respect to transfer of 5,941,861 ordinary shares of Rs.10/- each by the “outgoing directors and transferors of shares” as listed in Annexure “A” being 100% of the fully paid up controlling shares held by the “outgoing directors and transferors of shares” in the company to the “incoming directors, chief executive and transferees” with right of corporate control and management in consideration for taking over the assets and liabilities of the company as recorded hereunder:

NOW THEREFORE THIS MOU WITNESSETH AS FOLLOWS:-

1.
2. The Party of the Third Part have inspected the fixed assets, including the plant & machinery and have agreed to take over the management of the company subject to the terms of this MOU on the basis of the Balance Sheet as at June 30, 2008 annexed hereto as Annexure “D” and on “as is where is” basis and the party of the First Part have made no representation of warranty as to the condition, quantity, soundness or profitability of the assets or the project or the company as a whole.

3.
4.
5. The parties agree that all encumbrances on the properties and other assets of the company are as disclosed in the Annexures attached hereto and the “outgoing directors and transferors of shares” undertake and guarantee that there are no other encumbrances or charge on the properties or assets otherwise than as set in the said Annexures and that the titles of the properties and assets vested in the company are good and marketable.
6.
7.
8. The Party of the First Part agree that the amount of loan due to directors of Rs.39.5 million appearing in the books of account being installments of long term loan paid by them to Allied Bank Limited be reversed and shall no longer be payable to them by the company. That in lieu thereof the party of the Third Part has agreed to take over company’ s disputed and unrecorded liabilities amounting to Rs.58 million to listed in Annexure “B” to this MOU subject to settlement of such amount and payment in such manner as is mutually agreed by it with the said creditors.
9. That all the cases pending against the outgoing management or any legal proceedings instituted by anybody against the outgoing management regarding Quice Foods Industries Limited will be defended and all the relating costs will be borne by the party of the Third part but not more than the detail of which is attached herewith as Annexure “E” and subject to the fact that the maximum aggregate including these shall not exceed the consideration of Rs.100million.
10. (c) That all taxation returns which have been made by the company are correct and on a proper basis that all such return which shall have been made and that no such return is the subject of any dispute with the tax authorities except for as in Annexure “F” and for that appeals filed in due course from time to time.
11.
12. All questions, disputes, controversies or claims arising directly or indirectly out of or consequent to this MOU shall be settled by mutual negotiations. Should such negotiations fail, the matter shall be referred to Arbitration in accordance with and subject to the Arbitration Act, 1940, or any statutory modification or re-enactment thereof for the time being in force, two Arbitrators one to be appointed by each Party and the Arbitrators shall by instrument in writing appoint an umpire immediately after they themselves are appointed. The decision given by the Arbitrators or the Umpire as the case may be, shall be final and binding upon both the parties.”

[Emphasis supplied]

From perusal of the abovementioned MOU, it also transpires that there are six (6) attachments/annexures to the MOU whereas the Plaintiff only attached document titled as “CREDITORS’ LIST” having company’s seal and signature apparently of Defendant No.2. The Plaintiff neither in his pleadings nor his evidence has stated about

other annexures mentioned in the MOU. Moreover, in the MOU the creditors' list was mentioned as Annexure 'B' and it talks about company's disputed and unrecorded liabilities amounting to Rs.58 million that too subject to settlement of such amount and payment in such manner as it mutually agreed by it with the said creditors. Whereas the creditors' list does not show that the said document is Annexure-B, and further it reflects an amount more than Rs.75 Million. Besides, there is nothing available on the record, which could show that any settlement, in terms of the MOU, has been reached between the Plaintiff, being creditor, and the company/incoming Management of the company. Moreover, the list relied upon by the Plaintiff should have been signed by all the signatories of MOU, whereas it is only signed by Defendant No.2. though the company's seal is appearing on the list but said seal is not appearing on the MOU had the company seal was used at the time of execution of the MOU the same should have also been appeared on each and every page of the MOU with the sign of Defendant No.2. Learned counsel for the Plaintiff has also failed to clarify such position. He has candidly admitted that the Plaintiff is not in possession of copy of the MOU and annexures mentioned therein except the photocopy of the MOU alongwith Creditors filed in the case that too the Plaintiff obtained the same from another case viz: Suit No.939 of 2009. In the circumstances, such facts create doubt about the genuineness of the said list and as such the same is not liable to be considered.

14. Even otherwise, record also reveals that the present Defendants No.2, 3, 4 and 5 amongst others being judgment debtors entered into a compromise/settlement with Allied Bank Limited and purchaser (Furqan Hussain) in respect of debt of Defendant No.1 (Quice Food Industries Ltd.) and in this regard filed application (CMA No.340 of 2012) in Execution No. 06/2008 before this Court on 04.06.2012, wherein, inter alia, it was agreed amongst the parties as under:

“9. That the Judgment Debtors acknowledge/agrees/accede that the Purchaser is the rightful owner of Judgment Debtor No.1 and the same has been rightfully purchased by the Purchaser and there are no pending claims of the Judgment Debtors against the Purchaser. That in addition the Judgment Debtors also confirm having executed the Share Purchase Agreements attached with the instant application and having transferred their entire shareholding in Judgment Debtor No.1, together with their entire

directors' loan to the Judgment Debtor No.1, to the Purchaser of their free will and consent. The Judgment Debtors further confirm that upon payment of Rs.13,000,000/- the Purchaser shall have performed all its obligations towards the Judgment Debtors under the Settlement Agreement dated 31.12.2008, this Compromise Application and / or any other previous, agreement Memorandum of Understanding and the Purchaser shall not have any further obligation towards the Judgment Debtors and the Purchaser shall have all the rights and interest in the Judgment Debtor No.1 free from all claims from Judgment Debtors No. 2 to 7 and 9 to 11.

10. The Judgment Debtors No. 2 to 7 and 9 to 11 also confirm that they are signing on behalf of the legal heirs and family members who were a party to the Share Purchase Agreement and agreeing to the conditions stipulated in the instant Application on their behalf.

[Emphasis supplied]

A perusal of the above application, which was duly supported by the affidavit of the respective parties, it appears that after the execution of the above application the subject MOU has also now ceased to exist.

15. Besides above, the Plaintiff has also failed to produce any documentary proof in respect of his invested amount. It also does not seem logical that the Plaintiff had remained as one of the Directors of the Company from 2005 to 2008 and without any approval of the Board of Directors of the Company, he invested such a huge amount in the Company during the period of his Directorship and the said amount is nowhere shown in books of account and he kept mum for all such period as neither he demanded the said amount nor raised any objection in this regard nor invoked arbitration proceedings under the terms of the MOU.

The Plaintiff in order to corroborate his stance, though examined one Tariq Saeed, however, the said witness was neither the marginal witness of the MOU nor his presence at the time of execution of MOU was shown in any of the documents available on the record. More so, the Plaintiff neither in plaint nor in his affidavit in evidence has stated such fact that said Tariq Saeed was present at the time of execution of MOU. The said witness also failed to substantiate his statement that payments made by the Plaintiff in his presence through plausible evidence. Even otherwise, it does not appeal to a prudent mind that a person (Tariq Saeed) who is a resident of Karachi [Province of Sindh] how could he be a witness of the payment made by the Plaintiff in Mingora, Sawat [Province of KPK] on different occasions and specially

when the said person is not the employee of the Plaintiff's company. In the circumstances, the testimony of the witness has been failed to inspire confidence.

It is imperative to mention here that Defendant No.5 namely Muhammad Farooq also put himself into the witness box and gave evidence in support of the Plaintiff, against the stance taken by him in the written statement. From perusal of the record, it appears that Muhammad Farooq (Defendant No.5), initially on 11.10.2010 signed *Vakalatnama* of Syed Amir Ali, Advocate along with other Defendants viz. 2, 3, 4, 6 and 7. The said Syed Amir Ali, Advocate on 08.12.2010 made a statement in writing [at page 241 of Court file] on behalf of Defendants No. 2, 4 and 5 that the said Defendants have adopted the contents of the written statement filed by Defendant No.1. The Defendant No.5, subsequently on 12.2.2011 signed another *Vakalatnama* of one Muhammad Abdullah, Advocate, however, there is nothing available on the record, which could show that the said Defendant through his newly appointed advocate had either challenged the statement dated 08.12.2010 or filed any application seeking permission for filing a separate written statement in the case. Interestingly, the said Defendant No.5 was examined as DW-1, whereas from the perusal of the affidavits-in-evidence of the Plaintiff and Plaintiff's witness (Tariq Saeed) as well as of the Defendant No.5 [at Pages 1, 161 & 175 (respectively) of evidence file], it appears that all of them have been typed from one and the same machine/computer as font of all the three affidavits are the same. More so, paras 2, 3, 6 and 8 of affidavit-in-evidence of Tariq Saeed and Defendant No.5 are one and the same. Besides, the affidavits of Tariq Saeed and Muhammad Farooq were sworn with a gap of one day, that is, 20.1.2011 and 22.01.2011 respectively but both were verified by Ch. Abdul Rasheed, counsel for the Plaintiff and were filed on 29.1.2011. Not only this, Defendant No.5 was subsequently cross examined by the Plaintiff's counsel who had verified latter's affidavit-in-evidence in like manner as an examination-in-chief. Such facts clearly cast doubt on the evidence of Defendant No.5 and not only reflects malafide on the part of the Plaintiff and Defendant No.5 but also speaks volumes about the conduct of the advocates representing the said parties. In the backdrop

of the above said scenario, the evidence of Defendant No.5 is not at all liable to be considered.

The upshot of the above discussion is that the Plaintiff has utterly failed to establish his claim of investment in the Defendant No.1's [Company] and as such the question of recovery of the said amount does not arise. Accordingly, this issue is answered in negative.

16. **ISSUES NO. 3 & 4:**

Since these issues are interconnected therefore, the same are taken up together.

The above issues have been framed on the basis of claim of the Plaintiff as mentioned in para No.23 of the plaint, which for the sake of ready reference is reproduced as under :-

“23. That due to the malafide intention, ulterior motives and fraudulent acts of the Defendants the Plaintiff has no option but to come to this Hon'ble Court for the relief through present suit. In case of the Defendants succeed to dispose of the assets and properties of Defendant No.1 collusively the Plaintiff shall suffer financially losses and injuries to personal feeling and reputation. He claims damages of Rs.40.00 Million against all the Defendants who are avoiding to pay the said amount of the Plaintiff.”

The Plaintiff has asserted similar words in para-24 of his affidavit-in-evidence, except the amount of damages; in place of 40 million the Plaintiff claims Rs.10 million in the affidavit in evidence.

It is an admitted position that the Plaintiff, in support of his stance, did not produce any evidence. However, learned counsel for the Plaintiff during the course of his argument has contended that the Defendants' side has failed to cross-examine the Plaintiff on such point specially regarding para-24 of affidavit in evidence, therefore, the testimony of Plaintiff shall be deemed to have been admitted. No doubt, the Defendant has failed to cross-examine the Plaintiff on this point but the Plaintiff cannot take any benefit of any weakness of the Defendant. As it is well-settled principle of law that a party approaching to the Court for seeking relief has to stand on his own legs for that purpose and no benefit of any weakness in the case of the opposite party could be extended to him. Reliance, in this regard can be placed on the cases of M.D. ANWARULLAH MAZUMDAR v. TAMINA BIBI and others

[1971 SCMR 94], Haji MUHAMMAD SARWAR KHAN v. HUSSAIN NAWAB [1992 CLC 1915] and Mst. ZAINAB and another v. MAJEED ALI and another [1993 SCMR 356].

Besides above, perusal of the record shows that the nature of the damages claimed by the Plaintiff in the instant case falls within the ambit of general damages, which is required to be established through a cogent and reliable evidence, mere feeling of resentment in one's mind is not sufficient to establish general damages. And if a person claims mental torture/agonny or damage/injury, initial burden would lie upon him to lead evidence on such point. Furthermore, determining the general damages for mental torture, agony, defamation and financial losses, they are to be assessed following the "rule of thumb" and the said exercise falls in the discretionary jurisdiction of the Court, which has to decide in the facts and circumstances of each case. Reliance in this regard can be placed upon cases of *Mst. NAGINA BEGUM v. Mst. TAHZIM AKHTAR and others* [2009 SCMR 623], *MUBASHIR AHMAD v. Syed MUHAMMAD SHAH through Legal Heirs* (2011 SCMR 1009), *Dr. M. RAZA ZAIDI v. GLAXO WELLCOME PAKISTAN LIMITED, KARACHI* [2018 MLD 1268].

In the present case, the Plaintiff did not lead any evidence to establish his claim in respect of damages, hence I am of the opinion that the Plaintiff has failed to discharge his burden to prove his stance. Accordingly, these issues are also answered in negative.

17. **ISSUE No. 5**

In view of the foregoing discussion and my findings on Issues 2 to 4, I am of the view that the Plaintiff has failed to establish his claim and as such the suit is dismissed with cost.

JUDGE

Karachi
Dated: 30.04.2020