

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 6th January, 2017

+ CS(OS) 548/2016 & IAs No.13285/2016 (u/O 38 R-1&5 CPC) & 13286/2016 (u/O 39 R-1&2 CPC)

GAURAV MONGA

..... Plaintiff

Through: Mr. Ashim Sood and Mr. Dhruv Sood, Advs.

Versus

PREMIER INN INDIA PVT LTD & ORS

..... Defendants

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This suit accompanied with applications under Order XXXIX Rules 1&2 CPC and under Order XXXVIII Rules 1&5 CPC came up before this Court first on 25th October, 2016 for admission when the following order was passed:

“3. The plaintiff has instituted the present suit (i) for declaration that the defendants acted falsely and deceitfully in inducing the plaintiff to accept employment of the defendant No.1 and thereby violated their legal duties to the plaintiff; (ii) for declaration that the defendants acted negligently in inducing the plaintiff to accept employment with the defendant No.1; (iii) for declaration that the employment of the defendant No.1 was wrongly terminated by the defendants; and (iv) for recovery of an amount of Rs.4,50,00,000/- as and by way of compensation for damages and losses.

4. It is *inter alia* the case of the plaintiff:
- (a) that the plaintiff is an experienced and highly qualified investment professional;
 - (b) that the defendant No.1 is a company registered in India and is a wholly owned subsidiary of defendant No.3 Whitbread PLC, UK and an affiliate / associate of defendant No.2 Whitbread Hotels & Restaurants International, Dubai;
 - (c) that the defendant No.4 Mr. Ratnesh Verma resident of Dubai is the President and Managing Director of the defendant No.2 and Director of the defendant No.1;
 - (d) that the defendants No.7,8&9 namely Mr. Matthew Yates, Mr. Rakesh Garg and Mr. Sanjeev Kumar Jain, all resident of New Delhi are Directors on the Board of Directors of the defendant No.1;
 - (e) that the defendant No.5 Mr. Aly Shariff also resident of Dubai is the Brand Officer of the defendant No.2 and the defendant No.6 Ms. Tanya Bateman also resident of Dubai is the Head of Human Resources of defendant No.2;
 - (f) that in or around October, 2015, HVS Executive Search, not a party to the suit, acting on behalf of the defendants approached the plaintiff for recruitment for the position of Vice-President, Development of defendant No.1 and represented that the defendant No.1 targeted to have 50 hotels across Middle East, India and Southeast Asia and the post for which the plaintiff was approached would be responsible for expansion of Premier Inn Hotels portfolio in the said region;

- (g) that thereafter several meetings were held and in which also similar representations were made to the plaintiff and believing the said representations, the plaintiff agreed to join the defendant No.1 as Vice-President, Development and an appointment letter dated 19th January, 2016 was issued to the plaintiff;
- (h) that however the defendants did not make the investments promised and on the contrary have decided to withdraw from India and have terminated the employment of the plaintiff.

5. Finding, that the appointment letter admittedly issued to the plaintiff provided for a probation of six months and of termination of employment by notice of three months thereafter, it has been enquired from the counsel for the plaintiff, as to how the suit is maintainable and how can the plaintiff be said to be entitled to damages in the sum of Rs.4,50,00,000/- as claimed and owing to which claim the pecuniary jurisdiction of this Court has been invoked.

6. The counsel for the plaintiff has argued:

- (i) that the claim of the plaintiff is based on 'duty to care' owed by the defendants to the plaintiff and not on contract;
- (ii) that the representations made by the defendants to the plaintiff to lure the plaintiff to join the employment of the defendant No.1 were deceitful and if not deceitful, negligent;
- (iii) that the plaintiff has made the claim under the Law of Torts;
- (iv) under the Law of Contract, the plaintiff has only sought the relief of declaration that the termination of employment of the plaintiff was illegal;

(v) on specific query, the counsel for the plaintiff reiterates that the plaintiff is not claiming any consequential relief pursuant to the declaration of the termination of employment of the plaintiff by the defendant No.1 being illegal;

(vi) that on enquiry, as to the basis of the claim for Rs.4,50,00,000/-it is stated that the same is the amount of emoluments which the plaintiff would have earned for a period of three years employment.

7. To my mind, once the representations, even if any made by the defendants to the plaintiff in the context of employment of the plaintiff with the defendant No.1 and which employment ultimately fructified and terms whereof recorded in writing, there could be no claim under the Law of Torts.

8. Had the plaintiff acting on the said representations joined the employment of the defendants, the plaintiff who claims to be a highly qualified and highly qualified investment professional, would have insisted upon the same being recorded in the appointment letter and the defendant No.1 assuring employment at least for three years to the plaintiff and / or payment of the said sum of Rs.4,50,00,000/-. On the contrary, the plaintiff accepted to be on probation and after which period of probation, the services of the plaintiff were to be confirmed and were not confirmed and thereafter termination of the agreement by a three months' notice.

9. Thus, to my mind, the claim in the suit is misconceived and the suit is liable to be dismissed at threshold.

10. The counsel for the plaintiff seeks time till tomorrow to search case law that notwithstanding such a contract, a claim under the Law of Torts is maintainable, as made in the present suit.

11. The said search should have been carried out before drafting the plaint and not after institution of suit.

12. The counsel for the plaintiff, at this stage, states that he will also show that misrepresentation proceeding (sic for preceding) a contract gives cause of action for claim for damages *de hors* the written contract.

13. List tomorrow i.e. 26th October, 2016.”

2. Thereafter on 26th October, 2016, the following order was passed:

“1. This order is in continuation of the yesterday’s order.

2. The counsel for the plaintiff has been heard at length.

3. Orders reserved.

4. However for the sake of avoiding any confusion, the propositions which have emerged in today’s hearing are being recorded in the presence of the counsel for the plaintiff, inasmuch as they do not find place in the plaint.

5. The counsel for the plaintiff has firstly stated that the grouse of the plaintiff is not that the defendants did not invest £100 million in hotels in India as they had represented to the plaintiff before the plaintiff agreed to join the employment of the defendant No.1.

6. The counsel for the plaintiff has stated that whether or not the representations made by the defendants and as pleaded in the plaint which have turned out to be false resulted in an agreement or a contractual relationship or not, the plaintiff has a claim for damages on the basis of misrepresentation and even if the same resulted in a contract, then irrespective of the terms of the contract.

7. It has been enquired from the counsel, as to what would be the situation, if the terms of the contract were to be contrary.
8. The counsel states that according to him the contract in the subject case is silent on the aspect on which representations were made but concedes that if this Court were to hold that the contract is to the contrary, then the plaintiff would not have any cause of action on the misrepresentation.
9. It has also been argued that a pre-contract representation furnishes a cause of action in tort.
10. During the hearing, attention of the counsel has been invited to Sections 91&92 of the India Evidence Act, 1872 and particularly to the second Proviso to Section 92.
11. The counsel for the plaintiff states that he will file written submissions, including on the said aspect. The same be filed within one week, as sought.
12. The counsel for the plaintiff also states that the plaintiff is alternatively claiming for breach of contract with the representations aforesaid forming implied terms of contract.”

3. The counsel for the plaintiff during the hearing relied on:

- (a) The following passage in Chitty on Contracts, Thirty-Second Edition:

“1-159 **Representations.** Even at the time when it was doubtful whether a party to a contract could claim in tort against the other party in respect of matters relating to the performance of the contract, it was established that such a party could rely on established liabilities in tort arising from facts which occur in the course of the dealings of the parties before contract. A party to a

contract can therefore claim damages for a pre-contractual statement which induced him to contract under various headings: in the tort of deceit, where the statement was made fraudulently, in the tort of negligence, if the claimant can establish the conditions for the existence of a duty of care under *Hedley Byrne & Co. Ltd. Vs. Heller & Partners Ltd.* under the provisions of the Misrepresentation Act, 1967, or as a right to redress under the Consumer Protection from Unfair Trading Regulations 2008. It is also clear that these rights to damages in tort may exist whether or not the misrepresentation has been incorporated into the contract thereby giving rise to a claim for breach of contractual warranty, and whether or not the claimant chooses to exercise any right of rescission of the contract on the grounds of misrepresentation.”

- (b) The judgment of the Supreme Court of Canada in *Douglas J. Queen Vs. Cognos Incorporated* 1993 SCC OnLine Can SC 10.
- (c) *Imperial Match Co. (India) Ltd. Vs. Union of India* AIR 1957 MB 111.
- (d) *ESSO Petroleum Co. Ltd. Vs. Mardon* 1976 1 Q.B. 801.

- 4. The counsel for the plaintiff in the written submissions has contended:
 - (i) That the defendants wrongfully and / or negligently misstated their plans to invest 100 million pounds in the Indian business, thereby inducing the plaintiff to take up employment offer to his detriment.

- (ii) Pre-contractual misrepresentation and mis-statements furnish an independent cause of action in torts consequent to which damages can be claimed.
- (iii) The claim of the plaintiff in the present suit is also for post-contractual misrepresentations and mis-statements which continued from the day of signing of the contract right upto the wrongful termination of the plaintiff.
- (iv) The defendants owed a duty of care to the plaintiff at the time of making the wrongful and / or negligent mis-statements.
- (v) Concurrent liability can arise in both contract and tort from the same set of facts.
- (vi) Contract does not exclude a tortuous duty of care in any class of case.

5. I have considered the aforesaid contentions. At this stage, it is expedient to notice some of the terms of the letter dated 19th January, 2016 of appointment of the plaintiff. They are reproduced herein below:

“3. Emoluments

- 3.1 Annual Fixed Salary of Rs.71,00,000/- (Rupees Seventy-One Lakhs only). This includes Basic, House Rent Allowance, Flexible Allowance and Retirals.
- 3.2 You will also be entitled to an Annual variable Incentive of up to Rs.50,00,000/- (Rupees Fifty Lakhs Only).

The Annual Variable Incentive is based on the achievement of annual deal targets and paid in accordance with the payment schedule.

- 3.3 In addition to the above, you will be entitled to a Corporate Incentive of up to Rs.29,00,000/- (Rupees Twenty Nine Lakhs Only) per annum based upon WINcard (KPI's) and business profitability targets.

The Corporate Incentive is a discretionary scheme, details of which are provided annually under separate cover. Incentive applies to the annual Basic Salary and excludes other allowances and payments in its calculation.

- 3.4 The company will also provide you with a Comprehensive Medical Cover for yourself, your Spouse, Two dependent Children and Two dependent Parents. You would also be covered for a Personal Accident Insurance only for yourself. These benefits will be arranged by the Company but adjusted against your Annual Fixed Gross Salary as per the current company policy.

- 3.4 Location – Gurgaon, India.

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6. Place of Work

Your initial place of work will be at Gurgaon, however, your services are transferable, and can be seconded or deputed by the Company to:

- i. Any operation in India or Abroad of the company and its subsidiaries; whether existing as on date of your appointment or to be established thereafter.
- ii. You may be transferred to any location or office or associate company as per the requirement.
- iii. HR shall inform you of your report structure in the course of your employment with the company.

7. Probation and Confirmation

- 7.1 Your services will be on probation for a period of six months from the date of joining. During and at the end of your said probation period, your performance will be assessed and it will be open to the Management either to confirm your services in writing or extend your probationary period. If no confirmation letter is received by you in writing at the end of the probationary period, including the extended period of probation, if any, you shall be deemed to be on probation till you receive a written confirmation letter from the Company or till your services are terminated. Either party can terminate the services at any time during the probationary period, including the extended period of probation, if any, with 15 (fifteen) day's notice or pay in lieu of such notice and without assigning any reason thereof.
- 7.2 After confirmation, your services may be terminated by either side giving three months' notice in writing or payment of Basic Salary in lieu thereof. The Company may immediately terminate your services without any compensation or notice thereof, if you are found involved in material breach of any obligation,

responsibilities or in case of misconduct in terms of the violation of the Code of Conduct or policies of the Company.

8. Termination after Confirmation and Resignation

After confirmation, the Management reserves the right to terminate your appointment without assigning any reason whatsoever by giving you three months' notice in writing or giving three month's Basic Salary in lieu of the notice. Same conditions will apply to you when you wish to resign from the services of the Organization. In the event of your decision to resign and leave the services of the Organization, you are required to do so in writing to the management. You will be relieved only after your resignation is formally accepted in writing by the authorized representative of the Management. Upon your resignation being accepted you will be responsible for handing over charge of all pending work, papers, files and property of the Company which are in your possession, in an orderly and systematic manner. In the event of any failure to comply with the above you shall be liable to make good the consequent damage or loss caused, of which the Management shall be the sole judge and you shall not be entitled to receive any dues, arrears or terminal benefits from the Company.

However, the Company may immediately terminate your services without any compensation or notice thereof, if you are found involved in material breach of any obligation, responsibilities or in case of misconduct in terms of the violation of the Code of Conduct or policies of the Company.

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12.6 Code of Conduct: Your services and behaviour in the Company while performing your duties and even otherwise shall be governed by the Code of Conduct and all other prevalent policies of the Company. Any breach of the Code and or the policies will be treated as a serious breach and misconduct which could lead to termination of your services without any notice and / or compensation of any nature.”

6. The employment of the plaintiff was terminated vide letter dated 22nd July, 2016 in exercise of right under Clause 7.1 of the appointment letter aforesaid and 15 days annual fixed salary in lieu of notice period was tendered to the plaintiff.

7. The defendants in their response dated 25th August, 2016 to the legal notice preceding the suit, while denying any misrepresentation or inducement, stated:

“.....Any suggestion today of Mr. Monga’s reliance on any particular fact about our organization and its goals is completely something that Mr. Monga independently made without our knowledge or has today created for his own ulterior motives. We categorically state that no specific representations were made to Mr. Monga, and any representations that we or any specific individuals within our organization made to anyone in general were absolutely true at that time and not designed or intended to induce Mr. Monga either directly or indirectly in any manner.

Mr. Monga's assertions of specific individuals within our organization making any representations to him are false, libelous and slanderous and we reserve the right to pursue legal remedies against Mr. Monga for casting such aspersions.

Mr. Monga well knows or should have known, given his touted "experience and high qualifications", that businesses operate in a dynamic global environment which changes from time to time and businesses need to adapt to such changing global environment promptly. Any decision that we took about our future business plans was strictly in accordance with our need to adapt to changing business environment and not targeted towards Mr. Monga or any other employee."

8. Though the plaint does not appear to have been drafted with knowledge thereof and the same did not come up during the hearings aforesaid also but I find Sections 19 & 19A of the Contract Act, 1872 to be providing as under:

"19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose

consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—*A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.*

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

19-A. Power to set aside contract induced by undue influence.—*When consent to an agreement is caused by undue*

influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.”

and Section 64 providing the consequences of rescission of a voidable contract as under:

“64. Consequences of rescission of voidable contract.—*When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he had received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.”*

and Section 66 providing the mode of rescinding of a voidable contract as under:

“66. Mode of communicating or revoking rescission of voidable contract.—*The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of the proposal.”*

9. Thus, as far as India is concerned, the aforesaid provisions provide for the consequences of a pre-contract misrepresentation, which is the basis of the plaintiff's suit. Such misrepresentation makes the contract voidable at

the option of the party whose consent to the contract was caused by misrepresentation and entitles that party to insist that the contract be performed and he should be put in a position in which he should have been, if the representation made had been true. However, the exception to Section 19 clarifies that if the party, whose consent to contract was caused by misrepresentation, had the means of discovering the truth by ordinary diligence, the contract is not voidable. It thus follows that even if the plaintiff's consent to accepting employment with the defendant No.1 was caused by representations made by the defendants to the plaintiff as reproduced in the plaint and which at this stage have to be accepted as true and which have turned out to be misrepresentation, under the Indian Law, such a contract is voidable at the instance of the plaintiff and the remedy of the plaintiff is to rescind the contract of employment in accordance with Section 66 of the Contract Act or to insist that the contract be performed and that the plaintiff be put in the position in which he would have been, if the representation made had been true.

10. Misrepresentation is defined vide Section 18 of the Contract Act as,
a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

or, b) breach of duty which, without an intent to deceive, gains an advantage of the person committing it, by misleading another to his prejudice; or, c) causing, howsoever innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement. For the representations claimed by the plaintiff to have been made by the defendants to qualify as misrepresentation, they have to fall in either of the said categories.

11. The plaintiff, in the plaint has in this respect pleaded that it was represented to him:

that the defendants “international expansion will be across the 3 Regions of Middle East, India and Southeast Asia (which is the newest region). The company’s target is for 50 hotels across these 3 Regions by 2020”....that “the incumbent will be responsible for expansion of Premier Inn hotels portfolio in the region through a combination of owned and managed hotels”....that the plaintiff was given an overview of defendants’ “business plans for the Indian market, which included an investment in India to the tune of £100 million (approximately Rs.1000 crores) which was to be invested over the next three years”.... that the plaintiff was referred to “a presentation to be made in London to the Board of Directors of defendant No.3 to demonstrate that the defendants perceived India to be a high growth market with great opportunity”.... that “the defendant No.4 stated to the plaintiff that capital to the tune of £100 million had been allocated and made available for investment in India by defendants No.2&3 through defendant No.1”....“on the basis of the business plan of defendants No.1, 2 and 3 as stated and represented to the

plaintiff by defendants No.4&5, the plaintiff came to believe that the employment opportunity, as presented, was unique with excellent market timing and was worth considering”.... that “the defendant No.6 led the plaintiff to believe that the representations made to him by defendants No.2 – 5 were all true”....in another meeting “defendant No.4, inter alia, enquired with the plaintiff as to his views on implementing the defendants’ business plans, in particular, the manner in which the plaintiff intended to utilize the £100 million allocated for investment in India over the next three years by defendants No.2&3 through defendant No.1”....during a telephone call, the defendant No.5 said “that approval from defendant No.3’s Board for making the £100 million investment in India had been received by defendants No.1&2 only recently and that defendant No.1 was therefore now in a position to make a formal offer to the plaintiff”

12. Thereafter, the plaintiff, to label the aforesaid representations made to him as misrepresentations, has pleaded:

that “the defendants No.1 to 5 had secured the plaintiff’s services for a consideration that was made largely contingent upon the availability and utilization of the £100 million fund. Had the plaintiff been aware that in fact such a fund was not or may not be available, there would naturally have been no question of, or basis for, the plaintiff agreeing to such a significant variable incentive component: without the money there would be no acquisitions, and without such acquisitions none of the criteria for assessing the plaintiff’s performance would be triggered, let alone fulfilled”....that “because defendants No.1 to 5 had consistently represented and stated the immediate availability of the £100 million fund, the plaintiff accepted the remuneration package as set forth above. The plaintiff’s acceptance of this large component of variable performance-linked-pay was therefore solely due to this reliance on the defendants’ representations and statements

about their plans for acquisitions and developments of properties in India using the £100 million fund stated by them to be available for immediate investment”....that from the very joining of the plaintiff of the defendant No.1’s employment “it became apparent that the representations and statements made to the plaintiff regarding defendants No.1&2’s plans for India, including its supposed investment of £100 million over the next three years, were false and completely removed from reality and that in fact, rather than growing its India business, defendant No.2 was planning to exit this business”....that though the plaintiff finalised the investment memorandum for purchase of a hotel and sought the approval of the defendant No.3 therefor but “did not get any response”....that in the meeting held on 15th February, 2016, the defendant No.4 “informed the plaintiff that defendants No.1, 2 and 3 did not have enough funds available to make such a capital investment”....that in another meeting, the defendant No.4 informed that “the financial condition of defendant No.3 in the previous quarter was such that it did not justify making an investment of this magnitude....it was also represented to the plaintiff that defendant No.3’s debt to EBITDAR ratio was 3.3–3.4”....“this was in complete contradiction to what had been stated to the plaintiff before, and when, the plaintiff joined defendant No.1”....“thereafter, defendant No.4 approached the plaintiff with a proposal to send the plaintiff to defendant No.2’s office in Dubai for a period of three months”.... that the plaintiff “expressed his concern that investments in the Middle East may also be put on hold in the manner that they were put on hold in India”....in response, the defendant No.4 “assured the plaintiff, and once again represented, that defendants No.1&2 were continuing to pursue capital deals in India”....and “were continuing to make investments in India by utilizing the amount of £100 million allocated by the defendants for investment in India over the next three years”....that the plaintiff declined the offer....“on April 26, 2016, a presentation was made to the market by the CEO of defendant No.3, where it was represented that the debt to EBITDAR ratio of defendant

No.3 was 3.1, as opposed to 3.3 – 3.4 that was represented to the plaintiff by defendant No.4 in the meeting held on February 23, 2016. This fact suggests some financial misdealing on part of defendant No.3”....thereafter in June-July, 2016, defendant No.6 informed the plaintiff that “defendants No.1&2 had sufficient capital prior to, and at the time of, hiring the plaintiff, however, due to a purported change in circumstances, capital was no longer available with them. She also stated that the defendants were making efforts to allocate more capital to their India business, however, till such time, everything was on standby. She further went on to state that as and when capital was made available, targets would be re-set and incentives would be adjusted accordingly”....that the defendant No.6 in email dated July 12, 2016, stated “we entered the hiring process for this role on the basis that we wanted the growth, the business and with the understanding of available capital”....on July 13, 2016, “defendant No.3 issued a press-release stating that defendant No.2 was planning a phased withdrawal from defendant No.1 in India. It is evident from this press release that contrary to its representations to the plaintiff, defendant No.2 had in fact identified India as a market where not to invest its capital and management time”

13. I have analyzed, whether the aforesaid amount to a misrepresentation within the meaning of Section 18 supra. The plaintiff has not pleaded that the information of the defendants, who made representations to the plaintiff, did not warrant the representations. The plaintiff has also not pleaded as to what advantage any of the defendants who made the representations gained by misleading the plaintiff to his prejudice. The plaintiff has yet also not pleaded that the aforesaid representations made the plaintiff commit a

mistake as to the substance of the thing which is the subject of the agreement. The subject of the agreement was acceptance by the plaintiff of employment with the defendant No.1 on the terms offered by the defendant No.1. I may in this regard record that the plaintiff along with the plaint has filed a copy of the letter of offer dated 4th December, 2015, on acceptance whereof by the plaintiff, the appointment letter dated 19th January, 2016 was issued by the defendants to the plaintiff. The said letter of offer is on the same lines as the appointment letter, relevant terms whereof have been reproduced hereinabove. All that the plaintiff pleads is that because of the representations made, he agreed to an annual variable pay of upto Rs.50 lakhs based upon achievement of annual targets. The plaintiff has however not pleaded that his total assured annual emoluments were agreed to be inclusive of the said component of Rs.50 lakhs and he agreed to make the said component variable on the representations aforesaid. It appears that the plea of misrepresentation in the plaint is also without reference to Section 18 of the Contract Act.

14. The plaint, as aforesaid, drafted in ignorance of the aforesaid provisions, does not contain any averment of the plaintiff having issued any communication to the defendants of rescinding the contract. The plaintiff, in

the plaint also has not pleaded that the contract of employment be declared void. I may also notice that as per the Full Bench of the High Court of Allahabad in *Official Receiver, Jhansi Vs. Jugal Kishore Lachhi Ram Jaina, Hyderabad* AIR 1963 All. 459, section 19 of the Contract Act gives to the plaintiff the right either to treat the contract as void or to affirm it if he thinks fit to do so; no rights have been conferred to the person who practices fraud; all that the Legislature intended to provide was that whereas the person defrauding would have no rights under the agreement if rescinded, the person defrauded could either treat the agreement as void or affirm it either by declaring it as such or by passive act of not declaring it void and by purporting to act under it. Though the plaintiff has claimed damages but has in the pleadings not laid any foundation as to how they satisfy the requirement of putting him in the position in which he would have been if representation made had been true. I have also wondered that even if it were to be so, the remedy of the plaintiff under Section 19 in any case is to insist that the contract shall be performed and that the plaintiff be put in the position in which he would have been, if the representations made had been true.

15. However, when we look at the contract admittedly entered into by the plaintiff with the defendant No.1, it is found that (i) the services of the plaintiff were on probation for a period of six months from the date of joining; and (ii) even thereafter, were terminable by the defendant No.1 without assigning any reason whatsoever by giving to the plaintiff three months notice in writing or giving three months basic salary in lieu of notice. It is thus not as if the employment of the plaintiff with the defendant No.1 was for any fixed tenure. There is no averment that there was any misrepresentation in this respect. Thus, even if the representation as to investments proposed by the defendants had been true, the plaintiff would have been on probation and his services thereafter could have been terminated as aforesaid without any reason.

16. The services of the plaintiff were never confirmed and were terminated during probation only and in accordance with Clause 7.1 of the appointment letter. Thus, even if a case of the defendants having caused the consent of the plaintiff to accept the variable pay of upto Rs.50 lakhs per annum by misrepresentation were to be made out and the plaintiff were to insist that the defendant No.1 perform the contract of employment, the plaintiff under such performance also does not get anything more, as claimed

in this suit, than what he has already got. Even if the representations which are pleaded by the plaintiff to be misrepresentations were to be true, the same did not entitle the plaintiff to employment with the defendants for any fixed term and the defendants could have still not confirmed the employment of the plaintiff and terminated the same during probation and/or even if had confirmed the employment, could have terminated it thereafter without assigning any reason. I am therefore totally at a loss to understand as to on what basis the claim for compensation in the sum of Rs.4,50,00,000/- has been made.

17. The plaintiff has not pleaded any basis for the claim in the sum of Rs.4,50,00,000/-. All that the plaintiff has pleaded about his pre-contract status is that at the time when he was approached by the defendants for employment, he “was working with a large North American Real Estate Fund. His role in that Organisation involved raising funds for investments” and that he “gave up his engagement with a North American Real Estate Fund” to join employment of defendant no.1. The plaintiff has shied from even pleading the name of “large North American Real Estate Fund” with whom he claimed to be working. The plaintiff has hesitated from even pleading that he was in ‘employment’ of the said “large North American

Real Estate Fund” or from disclosing the emoluments earned therefrom. In the documents filed along with the plaint also no document in that respect is included. It is also not pleaded that claim of the plaintiff for Rs.4,50,00,000/- is, to be put in the position in which the plaintiff would have been if the representations made had been true. Had the case of the plaintiff been so, the plaintiff was required to plead that he would have in six months within which time his services were terminated by the defendant No.1, earned the said sum of Rs.4,50,00,000/- from the “large North American Real Estate Fund”.

18. I have also wondered whether the representations claimed to have been made constitute a ground for the plaintiff to claim under Section 19 supra of the Contract Act. The exception thereto provides that the contract is not voidable thereunder, if the party whose consent is caused by misrepresentation had the means of discovering the truth with ordinary diligence.

19. Investments across international borders are dependent upon a number of variables and factors and no person who is a highly qualified investment professional with a bachelor degree in engineering and an MBA and who has

worked with various Blue Chip Companies including banks, both in India and internationally, with expertise in mergers, acquisitions, deal structuring and financing, as the plaintiff claims himself to be, can with ordinary diligence be expected to believe that a plan for expansion / investment will definitely fructify. Such variables / factors depend on the venue of proposed investment, the internal economy and political stability of the country of investment, the laws of the country where the investment is proposed, fluctuations in international currency, other competing investment avenues etc and all of which change on a day to day basis. Any person of the stature of which the plaintiff claims to be, could with ordinarily diligence not have believed that the representations, even if any made of the plans for investment including of a resolution of a Board of Directors of a foreign company, have any certainty or that the investor company could be bound therewith and on failure thereof a claim for damages would lie. The decision of the plaintiff to join the defendants or to accept the annual variable pay of Rs.50 Lakhs could not thus with ordinary diligence have been caused on the basis of certainty of the investments which the defendants claimed to be planning. The plaintiff, with ordinary diligence ought to have known that

there was a huge gap between planning in investment of Rs.1000 crores in India and the actual investment.

20. Not only so, the annual variable incentive of upto Rs.50 lakhs only to which the plaintiff was entitled was based on achievement of annual deal targets and the plaintiff was not to become entitled thereto till the target was achieved. The plaintiff has not even pleaded as to what was the target. The said annual variable incentive was payable “in accordance with the payment schedule”; no payment schedule has been disclosed. The other corporate incentive of upto Rs.29 lakhs per annum to which the plaintiff was entitled, was discretionary, details whereof were to be provided annually under separate cover. No such details also are pleaded to have been provided. Suffice it is to state that a highly educated professional as the plaintiff claims to be, could not have consented to the employment on the basis of the said variables or could not have with ordinary diligence considered himself to be assured thereof.

21. The plaintiff has not pleaded or filed any document addressed by the defendants to him in which the defendants made any such representations as claimed. The plaintiff, besides the appointment letter, has filed copy of the

‘Letter of Offer’ dated 4th December, 2015 preceding the appointment letter and which is also not found to contain any such representation. The plaintiff before conveying his acceptance to the letter of offer without containing any such representations, did not insist upon the defendants confirming what the plaintiff claims to have been represented to him. The only logical deduction can be that the consent of the plaintiff to the acceptance of the Letter of Offer was not caused by the representations, even if any.

22. Once, a proposal for international investment is found to be dependent on variables, as aforesaid, in my view, a representation of a proposal for such investment can never qualify as misrepresentation within the meaning of Section 18 supra of the Contract Act, for it to constitute a ground for making a contract voidable.

23. The field of pre-contract misrepresentation having been covered by Section 19 of the Contract Act, there can be no claim in tort on the basis thereof. Supreme Court in ***Rajkot Municipal Corporation Vs. Manjulben Jayantilal Nakum*** (1997) 9 SCC 552 was concerned with a claim for damages in tort on account of death owing to a roadside tree falling on the pedestrian on the way to his office. It was held that if the statute creates a

right and remedy, damages are recoverable by establishing the breach of statute as the sole remedy available under the statute; but where a statute merely creates a duty without providing any remedy for breach, appropriate remedy, is *inter alia* the action for damages in respect of special damage suffered by an individual. It was further held that where special remedy is expressly provided, it is intended to be the only remedy and by implications excludes the resort to common law and that an action for damages will not lie if the damage suffered is not a type intended to be guarded against. A claim in tort cannot, in my opinion, be contrary to the statutory law of the land. The Legislature of our country having provided for the remedy for pre-contract representation, no claim for damages for pre-contract misrepresentation can be maintained under the law of tort. A Division Bench of High Court of Bombay also, in ***Sorabshah Pestonji Vs. The Secretary of State for India*** AIR 1928 Bom 17 (followed by me in ***Sikka Promoters Pvt. Ltd. Vs. National Agricultural Co-operative Marketing Federation of India Ltd.*** (2013) 202 DLT 49, appeal whereagainst was dismissed by Division Bench of this Court vide ***National Agricultural Co-operative Marketing Federation of India Ltd. Vs. Sikka Promoters Pvt. Ltd.*** 2016 SCC OnLine Del. 5037) held that the only remedy of a party to a

contract for omission of a material fact is one under Section 19 of the Contract Act and finding that the plaintiff therein had waited too long, the remedy of rescission was held to be no longer available and finding that the plaintiff had already been put in a position as if the representation had been true, the plaintiff was also not held entitled to relief in that regard. The judgment of the Supreme Court of Canada in *Douglas J. Queen* supra on which strong reliance was placed by the counsel for the plaintiff does not show the existence, in law prevalent in Canada, of a provision as Section 19 of the Contract Act. *Douglas J. Queen* supra turned on a finding of existence of duty. However because of Section 19 of Contract Act there is no such duty qua matters which could have been discovered with ordinary diligence.

24. That brings me back to the queries which were raised during the hearing and as recorded in the orders reproduced hereinabove.

25. A Division Bench of this Court in *India International Centre Vs. S.N. Pandit* ILR (1976) 1 Delhi 60 was concerned with a suit for damages for breach of contract of employment. The respondent Mr. S.N. Pandit therein, while applying for employment to India International Centre had

stated that he will be leaving an institution like the Reserve Bank of India which offered him fairly good prospects and security for joining employment and suggested that his employment be protected to some reasonable extent. The Division Bench held (i) that it is well settled that the meaning of the contract documents cannot be varied or influenced by what happened during the pre-contract negotiations; (ii) that though the normal presumption is that an ordinary contract is not terminable at the will of the parties unless it is discharged by performance, the contract of service stands in a special class; (iii) the unenforceability of such a contract by specific performance inclines the Court to view such a contract as of an uncertain or indefinite duration; (iv) the inevitable consequence is that it must be terminable by a reasonable notice; (v) terminability at will cannot be read as an implied term in a contract the duration of which is fixed; (vi) an employment contract of a fixed duration does not mean that the parties must stick to it at all events; (vii) it only means that none of the parties can terminate it at his sweet will or whim; (viii) it is always terminable for justification such as misconduct or inefficiency of the employee or some other objectionable conduct of the employer; (ix) if the contract of employment is for a specific term, the employee, in the event of early

termination would be entitled to damages in the amount he was deprived of, subject to the rule of mitigation- the employee would be entitled to the whole of the salary, benefits, which he would have earned had he continued the employment for the full term of the contract, subject to mitigation of damages by way of seeking alternative employment.

26. It is also the settled principle of law that when a party has entered into a formal contract, the contract must be construed according to its own terms and not be explained or interpreted by antecedent communication which led upto it. The resort to evidence as to previous negotiations is impermissible to the extent the contract is unambiguous. Section 91 of the Evidence Act, 1872 relates to evidence of terms of contract, grants and other dispositions of property reduced to form of documents and forbids proving the contents of a writing otherwise than by writing itself. Supreme Court in ***Roop Kumar Vs. Mohan Thedani*** (2003) 6 SCC 595 held (i) that Section 91 of the Evidence Act in reality declares a doctrine of the substantive law, namely, in the case of a written contract, all proceedings and contemporaneous oral expressions of the thing are merged in writing or displaced by it; it does not exclude certain data because they are for one or another reason untrustworthy or undesirable—what the rule does is to declare that certain kinds of facts are

legally ineffective in the substantive law; (ii) that the practical consequence of integration of a contract in a document is that the scattered parts of the contract in their former and inchoate shape, have no longer any jural effect—they are replaced by a single embodiment of the act; (iii) that in other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act; (iv) that this rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence; (v) that when persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed on oral statements; (vi) that written contracts presume deliberation on the part of the contracting parties and it is natural that they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties; (vii) that vide Section 92 of the Evidence Act, the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between

the parties to the contract but no such limitations are imposed under Section 91 of the Evidence Act; (viii) that Sections 91 & 92 of the Evidence Act apply when the document on the face of it contains or appears to contain all the terms of the contract.

27. Applying the said principles also, it has to be held that even if any representations as claimed by the plaintiff had been made by the defendants to the plaintiff, the same were not given any effect to, inasmuch as, the plaintiff and the defendants agreed that the plaintiff is joining the employment of the defendant No.1 on probation and during which time, the defendant No.1 would have a right to not confirm the services of the plaintiff and even if confirmed the services of the plaintiff, could terminate the services of the plaintiff at any time with notice or salary in lieu thereof as agreed. There was thus no certainty of the term of employment of the plaintiff with the defendants and of which breach can be alleged by sooner termination entitling the plaintiff to any compensation from the defendants. The judgment of the Supreme Court of Canada in *Douglas J. Queen* supra on which strong reliance was placed by the counsel for the plaintiff does not show the existence in the law prevalent in Canada, of a provision as Sections 91 & 92 of the Evidence Act either.

28. I am thus unable to agree with the view taken by the Supreme Court of Canada in *Douglas J. Queen* supra. My research also does not show the judgment to have been discussed or followed either in Canada or in any other jurisdiction. On the contrary, I find that the Court of Appeal (UK) in *Reid Vs. Rush & Tompkins Group PLC*. (1990) 1 W.L.R. 212, concerned with a claim by an employee against the employer in tort for damages on account of injury suffered in a road accident abroad with no possibility of recovering any compensation abroad therefor held (i) that the employer could not be held negligent in failing to discharge its duty of care as employer to protect the employee's economic welfare by providing appropriate insurance cover or by advising him to obtain such cover; (ii) that it was impossible to imply into every contract under which an employee was engaged to work abroad and thereby exposed to a special risk of which he was ignorant, a specific duty on the employer to provide, or to advise the employee to obtain specific insurance cover in respect of that risk; (iii) that in the light of express terms of the contract of employment which deal with the economic welfare of the employee, such duties could not be implied into it as terms which the parties must have agreed; (iv) that though the ordinary duty of care owed at law by a master to his servant might extend to warning

him of unavoidable risk of physical injury which would arise in the course of his employment, if did not require the employer to take care to protect the employee from economic loss and that duty could not be extended by imposing duties in tort which went beyond those contained in the express terms of the contract of employment; (v) that no duty of care in tort would arise from voluntary assumption of responsibility by one party to another where that responsibility had been assumed at the time of the making, and by reason only, of a contract between them.

29. Reference in this regard may also be made to the judgment of the Privy Council in *Tai Hing Cotton Mill Ltd. Vs. Liu Chong Hing Bank Ltd.* (1986) 1 AC 80 where, though in the context of a bank and customer, it was held (i) that implied obligations should be read into the contract as the nature of the contract itself requires, no more, no less; imposition is apt to describe a duty arising in tort, but inapt to describe the necessary incident arising from a contractual relationship; (ii) the relationship between banker and customer is a matter of contract—if the bank desires that their customer should make certain promises, they must expressly stipulate so; (iii) the submission of implied term of the contract thus could not be accepted; (iv) no liability in tort arises when the parties are in a contractual relationship

particularly a commercial relationship; (v) that in a relationship between employer and employee also there is no real distinction between the two sources of obligation—in modern time, the relationship between master and servant, between employer and employee is inherently one of contract; (vi) that the mutual obligations of the parties to a contract cannot be greater in tort than those found expressly or by necessary implication in their contract.

30. I entirely concur with the aforesaid and hold that there can be no claim in tort where the relationship of employer and employee is contractual. Our Supreme Court also in *Canara Bank Vs. Canara Sales Corporation* (1987) 2 SCC 666 approved of the aforesaid judgment as applicable to law in India also and held that no reliance could be placed on the American law which is not in consonance with the law in this country.

31. Reference may also be made to *C.B.S. Songs Ltd. Vs. Amstrad Consumer Electronics Plc.* (1988) A.C. 1013, *Caparo Industries Plc. Vs. Dickman* (1990) 2 A.C. 605 and *Murphy Vs. Brentwood District Council* (1991) 1 A.C. 398, all warning against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of

damage including economic loss. It was held that if the defined equitable duties attaching to mortgagees and to receivers and managers appointed by debenture holders are replaced or supplemented by a liability in negligence, the result will be confusion and injustice.

32. **ESSO Petroleum Co. Ltd.** supra relied on by the counsel for plaintiff also cannot thus be said to be representing the law as today prevalent. I may in this regard also state that Chitty on Contracts (32nd Edition, Vol.-I) also in para I-162 authors as under:

“Liability for non-disclosure. As will be seen, the courts draw a clear line between cases of misrepresentation or of non-disclosure for the purposes of deciding the availability of rescission for the other party. While in general the courts have echoed this distinction in the context of liability in damages, they have accepted that in principle a contractor may be liable in the tort of negligence for a failure to speak, but the modern approach has been to restrict liability in these circumstances to cases where the defendant has “voluntarily accepted responsibility”. Indeed, even in a case where the law exceptionally imposes a duty of pre-contractual disclosure on a party to a contract, the courts have refused to impose liability in damages in tort to sanction its breach.” While this result was reached before the House of Lords in Henderson v. Merrett Syndicates Ltd. had disapproved the idea that the existence of a contract between the parties is in itself a reason for denying a claim in tort, it may well be that a future court would hold that a person cannot be said to “assume responsibility” for a matter in relation to which he owes a legal duty. Moreover, the idea that the law of tort should not be allowed to “cut across the principles of contract law” could be considered as a consideration of policy arguing against the

existence of a duty of care in the tort of negligence, even where this was based on an “assumption of responsibility”.

The reliance placed by the counsel for plaintiff on ***Imperial Match Co. (India) Ltd.*** supra is also not found to have noticed Section 19 of the Contract Act and has not considered a situation of a contract contrary to the representation alleged. Reliance thereon also does not advance the case of the plaintiff any further.

33. I am therefore of the view that the plaint, on the pleaded facts, even on a demurrer, does not disclose any cause of action for the reliefs claimed and the reliefs claimed are barred by law as discussed above.

34. I have wondered whether to reject the plaint under Order VII Rule 11 of CPC or to dismiss the suit under Order XII Rule 6 of CPC. A rejection of the plaint under Order VII Rule 11 of CPC does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order XII Rule 6 of CPC empowers the Court to pass judgment “at any stage of the suit” “on its own motion”, where on admissions made either in pleading or otherwise no determination is required. The reasons aforesaid would also qualify for the suit to be dismissed at the threshold only under Order XII Rule 6 CPC. Supreme Court in ***Pearlite Liners (P) Ltd. Vs. Manorama Sirsi***

(2004) 3 SCC 172 was concerned with a suit for specific performance of a contract of personal service. The same was dismissed by the trial court and the first appellate court on a preliminary issue as to the maintainability thereof but was in second appeal restored by the High Court and remanded for trial. Supreme Court held that once the reliefs claimed of, declaration that the transfer order was illegal and void and of declaration that the plaintiff continued to be in service of the defendant could not be granted by the Court, such a suit should not be allowed to continue and go for trial and should be thrown out at the threshold on the ground of want of jurisdiction of a Court to grant the reliefs prayed for. Accordingly, the orders of the trial court and the first appellate court were upheld and restored and the order of the High Court of restoring the suit and remanding it for trial was set aside. Though in the facts of that case, the suit was dismissed after notice to the defendant and after framing a preliminary issue but the fact remains that in holding the suit to be barred, no notice of any plea of the defendant was taken. If that is so, then, in my opinion, the suit can also be dismissed without notice to the defendant, if the Court finds that it has no jurisdiction to grant the reliefs claimed. The same is the position here. Thus, the suit has to be dismissed.

35. No purpose will be served in entertaining the suit which is doomed to fail. A suit cannot be entertained to allow the plaintiff to, as it proceeds, keep on developing its case. If the plaintiff, on the date of institution of the suit, fails to disclose a cause of action and a right to the relief claimed, the suit has to be dismissed at the threshold.

36. This suit has to suffer the same fate and is dismissed. However, no order as to costs.

RAJIV SAHAI ENDLAW, J

JANUARY 06, 2017

‘gsr/bs’..