

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

+ **RFA No. 433/2018**

% **21th May, 2018**

RAKESH KUMAR JAIN Appellant

Through: Mr. A. K. Bajpai, Adv. with
Mr. Mudit Sood, Mr. Nitin
Bajpai, Mr. Udit Grover, Advs.

versus

M/S UNEECOPS TECHNOLOGIES LTD. & ANR. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.21297-21298/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.Ms. stand disposed of.

C.M. No. 21299/2018 (for condonation of delay in re-filing)

2. The delay in re-filing is condoned subject to just exceptions.

C.M. stands disposed of.

RFA No.433/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff impugning

judgment of the trial court dated 15.12.2017 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of a sum of Rs.20,88,425/-.

4. Suit was filed by the appellant/plaintiff for the amount of Rs.20,88,425/- firstly by seeking refund of payment made by the appellant/plaintiff to the respondents/defendants with respect to a SAP software programme and secondly the balance amount is claimed as damages on account of mental tension, harassment etc caused to the appellant/plaintiff on account of delay in completion of the project of supply of software with modifications by the respondents/defendants to the appellant/plaintiff. How the suit amount is calculated is stated in paras 17 to 20 of the plaint and these paras read as under:-

“17. That the plaintiff has suffered monetarily also in addition to mental tension and agony and as such is entitled to claim the damages of Rs. 10.00 Lakhs (Rupees Ten Lakhs) in addition to the Principal amount of Rs.7,31,425/- and the interest accrued on it as Rs.1,36,000/- (Rupees One Lakh Thirty Six Thousand only) approximately and the total amount comes out to be Rs.8,67,425/- (Rupees Eight Lakhs Sixty Seven Thousand Four Hundred and Twenty Five only), from the Defendants.

18. That the plaintiff is entitled for the Principal amount of Rs. 7,31,425 (Rupees Seven Lakhs Thirty One Thousand four Hundred and Twenty Five) along with the interest @ 18% which comes out to be Rs.1,36,000/- (Rupees One Lakh Thirty Six Thousand only) at the time of sending the legal notice to the Defendants and total amount comes out to be Rs.8,67,425/- (Rupees Eight Lakhs Sixty Seven Thousand Four Hundred and Twenty Five only) and also a sum of Rs. 10.00 Lakhs (Rupees Twelve Lakhs only) as damages for causing financial losses to the status of the plaintiff & its institution. The Plaintiff is continuously

suffering damages as the new session has also started and facility which the plaintiff wanted to provide to this student could not be provided because of defendant. As such the plaintiff is continuing suffering.

19. That in the light of aforementioned facts and circumstances, there is hardly any doubt that the Defendants are intentionally avoiding to return the payment to the plaintiff Rs20,88,425/- (Rupees twenty lakhs eighty eight thousand four hundred twenty five only).

20. That the plaintiff is also entitled to charge the legal charges of Rs. 21,000/- in addition to the interest from the defendants @ 24% from the date of suit till its realization. The total amount comes to Rs.20,88,425/- (Rupees twenty lakhs eighty eight thousand only).”

5. The facts of the case are that the concern which is being run by the appellant/plaintiff being M/s FMG Academy sought to purchase a SAP software licence from the respondents/defendants. The respondents/defendants gave their proposal dated 01.04.2010 and the appellant/plaintiff issued its purchase order on 02.04.2010/ Ex.PW-1/2. The case of the appellant/plaintiff is that the respondents/defendants installed the software with delay and which caused harassment, mental torture and agony to the appellant/plaintiff. I note that the plaint is, in the opinion of this Court, unnecessarily vague as to whether or not appellant/plaintiff did or did not receive the subject software programme from the respondents/defendants, being the authorized resellers of the SAP software programme company. The sum and substance of the plaint is that time and performance was the essence and that since the respondents/defendants failed to

complete the project of installation of the software with necessary modification, and giving of training, therefore, the appellant/plaintiff is entitled to return of the monies paid for the software being Rs. 7,31,425/- as also damages on account of claim towards mental agony, tension etc etc caused to the appellant/plaintiff.

6. (i) During the course of hearing, I put a pointed query to the appellant/plaintiff as to whether or not the appellant/plaintiff has received the subject software from the respondents/defendants. To this learned counsel for the appellant/plaintiff has placed reliance upon the letter dated 15.10.2010 of the appellant/plaintiff to the respondents/defendants to argue that appellant/plaintiff has not received the subject software. This letter dated 15.10.2010 reads as under:-

“FMG Academy
To,
M/s Uneecops Technologies Ltd.
C-43, Sector 65, Noida
U.P. 201301

Subject : Advance paid vide cheque nos. 148144/02.04.10, 148183/21.04.10, 148184/15.05.10 for SAP

Dear Mr. Jain,

Further to your conversation with Mr. Rakesh Jain (Chairman), we requested you please return back our advance money paid vide aforementioned cheques viz. Rs.731425/- because every time your executive made commitments and do not fulfill them on time.

As you can see first payment we made in April 2010 its been about 7 months and still no software is installed in our college.

It's our humble request to you please return back the amount, your earliest response in this regard will be highly appreciated.

We thank you for kind cooperation.

Thanks and regards

For FMG Academy

Sd/-

Accounts Dept"

(ii) However, the learned counsel for the appellant/plaintiff admits that the appellant/plaintiff has received the letter dated 24.06.2011 from the respondents/defendants, and which gives the user ID and password to the appellant/plaintiff for his concern the FMG Academy, and such user ID and password will entitle the appellant/plaintiff from the customer portal of SAP company to download the original licence for use of SAP software. This letter dated 24.06.2011 reads as under:-

"Mr. Rakesh Jain
FMG Academy,
Knowledge Park 3, Plot 8, Greater Noida,
Gautam Buddha Nagar,
Noida U.P. 201307

Date: June 24, 2011

Dear Mr. Rakesh Jain

Sub: Delivery of Original SAP B1 Licenses and SAP Kit.

This has reference to your Purchase Order for SAP B1 licenses and implementation thereof.

We are pleased to advise you that we have received your S-user ID and password with the help of which you can now logon to the SAP customer portal (www.service.sap.com) and download your original licences. Following are the logon credentials:

Company 0001164612 –FMG Academy

User ID# S0007634392

Password# academy

The SAP kit is also being sent with this letter.

You are requested to kindly acknowledge receipt of your S-User ID, password and the SAP kit.

Thanking you
Yours sincerely
sd/-
Rakesh Chathli
Vice President
Uneecop Technologies Ltd.”

7. It is therefore seen that the appellant/plaintiff's concern M/s FMG Academy has received the necessary software licence and which would be the receipt of the user ID and password for downloading of the SAP software from the portal of the SAP company. In my opinion therefore the appellant/plaintiff cannot argue that it has not received SAP software from the respondents/defendants who are the authorized resellers of the software programme from the SAP company inasmuch as the letter dated 24.06.2011 is more than a year later than the letter dated 15.10.2010 of the appellant/plaintiff to the respondents/defendants.

8. Once therefore the appellant/plaintiff has received the software, the appellant/plaintiff is liable to pay the price for the same as the software license are the goods/services. I note that by the self same impugned judgment, the trial court has also dismissed the counter-claim filed by the respondents/defendants/counter-claimants claiming a balance amount towards training etc after supply of the

software, as the trial court has held by the impugned judgment that except giving software programme licence, no further act of training the employees of the appellant/plaintiff, modification of the software etc etc was done by the respondents/defendants/counter-claimants.

9.(i) The next aspect is whether the appellant/plaintiff is entitled to damages for delay in supply of the software and as to whether the appellant/plaintiff has suffered any mental tension and agony for being granted the relief of damages being the difference of Rs.20,88,425/- and Rs.8,67,425/-.

(ii) In this regard, appellant/plaintiff has no *locus standi* to claim damages for mental agony and harassment because the subject contract is not with the appellant/plaintiff but with the concern of the appellant/plaintiff viz M/s FMG Academy. I may note that what is the constitution of M/s FMG Academy is not stated in the plaint or in the affidavit by way of evidence filed by the appellant/plaintiff, i.e as to whether M/s FMG Academy is a sole proprietorship concern of the appellant/plaintiff or it is a partnership concern or it is a company, but be that as it may, in a contractual matter there does not arise any issue of grant of damages towards mental tension and agony.

10. In response to a Court query as to how the appellant/plaintiff has assessed the loss and damages allegedly caused on account of delay in supply of subject software by the respondents/defendants to the appellant/plaintiff, learned counsel for the appellant/plaintiff concedes that except a self-serving statement made in affidavit by way of evidence, and making certain statements in paras 7 and 8 of the legal notice dated 16.05.2011 sent by the appellant/plaintiff to the advocate of respondents/defendants, no other evidence was led. Paras 7 and 8 of the legal notice dated 16.05.2011 sent by the appellant/plaintiff to the advocate of respondents/defendants read as under:-

“7. That by installing this programme/system, my client wanted to project his institution as the one that has been upgrade with the latest technologies and gadgets.

8. That as my client's institution could not be upgraded because you failed to install the programme/system in time, you reckless act has caused serious lapses in technological advancement for the institution to match with the global standards.”

11. In my opinion, assuming for the sake of arguments that appellant/plaintiff has suffered loss on account of delay in installation of software by the respondents/defendants such loss would only have been granted if the appellant/plaintiff had proved the specific amount as loss/damages suffered, that too under specific heads, to the

satisfaction of the judicial conscience of the trial court as also this Court, but no credible evidence led by the appellant/plaintiff has been pointed out to this Court for this Court to hold that the appellant/plaintiff has suffered damages of the specific amount much less the amount claimed as stated in paras 16 and 19 of the plaint. Para 19 has already been reproduced above and para 16 reads as under:-

“16. That the mental tension and agony caused individually to the Chairman i.e. the plaintiff, his reputation and that of his Institution has been seriously hampered and taken a back-seat in the fast growing competitive market of self-financed Institutions and hereby causing his Institution a big financial loss and damages because the Defendants could not install the programme/system in time.”

12. Therefore in my opinion, once the appellant/plaintiff has miserably failed to prove that what is the exact loss, under which head and how that loss is caused to the appellant/plaintiff, the appellant/plaintiff cannot successfully claim the same as losses and damages on account of delay in supply of the software by the respondents/defendants to the appellant/plaintiff.

13. There is no merit in the appeal. Dismissed.

MAY 21, 2018
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VALMIKI J. MEHTA, J