

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON :11.10.2017

JUDGMENT PRONOUNCED ON : 03.11.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.969 of 2009

Amalgamations Repco. Ltd.,
Regd. Office & Chennai Factory
"J" Gardens, G.N.T. Road,
Chennai 600 110
Rep by its Company Secretary

... Plaintiff

Vs

M/s.Vethon Communications,
79/1, Thillai Nagar, 200 Feet Road,
Chennai 600 099
Rep. By its Proprietor,
Mr.M.V.Srivatsan

... Defendant

Prayer : Complaint filed under Order IV Rule 1 of O.S. Rules read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

- (a) Directing the Defendants to repay the plaintiff the sum of Rs.15,06,304/- (Rupees Fifteen lakh six thousand three hundred and four only) Principal Rs.8,40,000/- (Rupees Eight lakh forty thousand only) + interest at the rate of 18% amounting to Rs.6,66,304/- (Rupees six lakh sixty six thousand three hundred and four only)

(b) Directing the defendant to repay the plaintiff the sum of Rs.27,71,764/- (Rupees twenty seven lakh seventy one thousand seven hundred and sixty four only) Principal Rs.17,55,000/- (Rupees Seventeen lakh fifty five thousand only) + interest at the rate of 18% amounting to Rs.10,16,764/- (Rupees ten lakh sixteen thousand seven hundred and sixty four only);

(c) Directing the defendant to pay interest at the rate of 18% per annum on the sum of Rs.25,95,000/- (Rupees twenty five lakh ninety five thousand only) from the date of this plaint until realisation; and

(d) Directing the defendant to pay the cost of the suit.

For Plaintiff : Mr. Jose John
for M/s. King and Partridge

For Defendant : Mr. Uma Shankar
for M/s. T. Ramesh

J U D G M E N T

The plaintiff has come forward with the above suit for recovery of Rs.42,78,068/- with subsequent interest at 18% per annum on the principal amounts of Rs.8,40,000/- paid under the contract dated 19.01.2005 for development of a Material Management Software and the principal of Rs.10,16,764/- paid under the contract dated 05.08.2005 for development of software relating to Payroll of the plaintiff company.

The sum and substance of the allegations made in the plaint are as follows:

2. The plaintiff is a manufacturing concern and it had developed a software, for Material Management Systems through one M/s.Sofia Systems. However, the said M/s.Sofia Systems, left the project abruptly and discontinued the development of Material Management Software and therefore, the plaintiff had required the defendant, who was looking after maintenance of the computers in the plaintiff's Company to complete the said software, so that the same could be put into use. Accordingly, a contract was entered into between the plaintiff and the defendant on 19.01.2005, setting out the terms for development of the Material Management Software. Though it was agreed that the Material Management Software was to be completed by August 2005, the same was not completed as accepted by the defendant. Several extensions of time were given up to 2008. The defendant claimed that the software has been completed and it could be put into use and when it was asked to demonstrate the functioning of the software, it was able to demonstrate the Material Management Software only during March 2009, and the software relating to Payroll was not even completed and was not taken up for demonstration. Even the Material Management Software contained

several defects and could not be effectively put into use. An expert was appointed by the plaintiff to test the demonstration, who informed the plaintiff by his letter dated 22.06.2009 that there was no output and the software could not be used effectively. Insofar as the Payroll Software is concerned, the plaintiff would claim that an agreement was entered into between the plaintiff and the defendant on 05.08.2005, in and by which, the requirements of the said software were set out in detail. Though the defendant collected the monies paid throughout the project, they did not do anything to complete the project. The total cost was Rs.17,55,000/- and though the entire amount was paid by the plaintiff, as per the payment schedule agreed under the contract dated 05.08.2005, the defendant did not complete the said project. Owing to the said failure on the part of the defendant in completing the projects, the plaintiff had, by its letter dated 26.03.2009, required the defendant to repay the amounts collected by it for installation of the said two software programmes, namely Material Management System and the Payroll software. Since the defendant did not send any reply, the plaintiff had come forward with the present suit for recovery of amounts as stated above.

3. The defendant resisted the suit contending that there was no concluded contract between the parties. According to the defendant, the

documents dated 19.01.2005 and 05.08.2005 were only quotations given by the defendant. Insofar as the Material Management software is concerned, it was contended by the defendant that it was only required to rectify the errors in the Material Management Software developed by M/s.sofia systems and the sum of Rs.7,50,000/- was only the estimated cost of the rectification and the payments were made every month after the plaintiff was satisfied with the work done by the defendant. It is also claimed that there was no agreement to complete the Material Management Software system by 16.09.2005. It is also contended that the suit in respect of the monies paid under the contract dated 19.01.2005 is barred by limitation, as the last payment under the said contract was made on 18.10.2005. Therefore, the suit filed on 23.10.2009, beyond 3 years from that date, is barred by limitation. Insofar as the software relating to the Payroll is concerned, the defendant would claim that the software was completed in all respects and it is only because of the failure on the part of the plaintiff's officials to feed in the require data for effective functioning of the Payroll Software, the same could not be operated upon. Even though the contract relating to the Payroll Software is dated 05.08.2005, the defendant would contend that there is no concluded contract and according to the defendant, the agreement dated 05.08.2005, was only an offer made by the defendant.

4. On the above rival pleadings, this Court had framed the following issues on 24.06.2011:-

1. *Whether there was a contract between the plaintiff and the defendant to complete the MMS software?*
2. *Whether the defendant did not complete the MMS software as agreed?*
3. *Whether the defendant is liable to repay the amount of Rs.8,40,000/- received for completing the MMS software?*
4. *Whether there was a contract between the plaintiff and the defendant to develop the payroll software?*
5. *Whether the defendant did not complete the development of the payroll software as agreed?*
6. *Whether the defendant is liable to repay the amount of Rs.17,55,000/- received for development of the payroll software?*
7. *Whether the plaintiff is entitled for recovery, when the payments were made only for the work done on monthly basis after getting satisfied with the work done by defendant?*
8. *Whether the entire claim relating to MMS ERP and the portion of the claim relating to PAYROLL ERP is barred by limitation?*
9. *Whether the plaintiff is entitled to interest at the rate of 18% as claimed?*
10. *To what other relief the parties are entitled to?*

5. At the time of trial, P.W.1 and P.W.2 were examined on the side of the plaintiff and D.W.1 and D.W.2 were examined on the side of the defendant. Exs.P1 to P40 were marked on the side of the plaintiff and no documentary evidence was produced on the side of the defendant.

6. I have heard Mr. Jose John, learned counsel appearing for M/s.King and Patridge, for the plaintiff and Mr.Umashankar, learned counsel appearing for Mr.T.Ramesh, for defendant.

Issue Nos. 1 to 3:

7. These issues are taken up together as they involve determination of the validity or otherwise the contract relating to the development of the MMS Software. It is not in dispute that the defendant was in-charge of the maintenance of the Computers in the Plaintiff's Company from the year 1999. The Heading of the contract relating to the Material Management Systems, dated 19.01.2005, reads as follows:

Designing and Recoding on Materials Management Systems for M/s. Amalgamation Repco Limited, "J" Gardens, G.N.T.Road, Chennai 600 110, by M/s. Vethon

Communications, Chennai.

The said document, which has been filed as Ex.P2, sets out the detailed analysis of the previous project done by M/s.sofia systems, the limitations of the previous project, a brief summary on the proposed work to be done, the time framed planned, the end use of the project after completion and estimation of the cost for upgradation. Even in the introduction, it is stated that the management of the plaintiff had requested M/s.Vethon Communication (defendant) **to undertake the project to rectify the bugs present in the software, to complete all the modules and install the software up to the requirement and satisfaction of the superiors based on the previous project done by Sofia.** The said contract also sets out the percentage of the contract completed by the previous incumbent, namely M/s. sofia systems and the balance that is required to be completed. A separate column is also given for the changes to be done by the present incumbent, namely the defendant. The estimation of the cost is given at Rs.7,50,000/- and the time for project completion is shown as six months plus one month. The payment schedule has also been given at Rs.1,00,000/- per month for the first six months and Rs.1,50,000/- for the 7th month.

8. It is also seen that the authorized signatory of M/s.Vethon Communications as well as the authorized signatory of M/s. Amalgamation Repco Limited, namely the defendant and the plaintiff respectively, are the signatories to the said documents. The first and foremost contention of the defendant is that there is no concluded contract and Ex.A2 could only be treated as an offer made by the defendant. The details contained in Ex.A2, have been set out above and the fact that both the authorized signatories of the plaintiff and the defendant had signed the documents would itself show that there was a completed contract between the parties.

9. Yet another factor which discredits the claim of the defendant regarding subsistence of the contract is that the defendant had accepted payments by raising various invoices. The Invoices produced as Ex.P36 series would show that the defendant has raised invoices stating as follows:

“Third Installment payment towards ‘Designing & Decoding of Materials Management Systems’ – Software Project.”

Similar invoices have been raised by the defendant on 02.04.2005, 01.06.2005 and 01.07.2005 etc. It is also seen from Ex.P5 dated

05.10.2005, that the defendant had demanded a sum of Rs.1,25,000/- over and above the agreed amount of Rs.7,50,000/- for the MMS Software and the plaintiff has accepted a part of the claim to the tune of Rs.90,000/- and the said amounts have also been paid by the plaintiff to the defendant in three installments on 13.10.2005, Rs.50,000/-, on 15.10.2005, Rs.25,000/- and on 18.10.2005, Rs.15,000/-. Thus the payment of a sum of Rs.8,40,000/- by the plaintiff for the work of designing and decoding the MMS Software, is not in dispute. All these facts would show that the defendant had agreed to design and decode the Materials Management System Software developed by M/s.sofia systems, for the plaintiff at a particular cost. The details of the work that were to be done and the total project cost were also estimated, and when it made the offer on 19.01.2005, the said offer was accepted by the plaintiff company and the defendant had raised invoices stating that the amounts are payable towards installment payments towards designing and decoding of the Material Management System Software. In the light of the above concrete documentary evidence, I do not think it is possible to accept the contention of the defendant that there was no contract between the parties.

10. The next contention of the defendant is that the payment was made by every month on the plaintiff being satisfied with the work done by

the defendant. Therefore, according to the defendant, the plaintiff cannot claim refund of the amounts paid due to non working of the software. A perusal of the contract dated 19.01.2005 would show that the contract was entered into for the purpose of rectifying the glitches that were found in the software that was developed by M/s. sofia systems. The proposals dated 19.01.2005, presented by the defendant to the plaintiff contains a brief summary of the proposed project. The same reads as follows:

"It is aimed to create a Software solution on materials management according to the practical environment present in AMREP based on the modules and masters created by Soffia. The actual purpose of the various departments like Marketing, Finance, Purchase, Works, Stores at Various Levels are taken into account in completing the software as created by Soffia; utilizing the modules already designed.

Vethon Communications has taken the skeleton of the software created and designed by Sophia Software Systems but the input on it are going to be framed according to the needs of the company by creating a strong data base input."

11. The above proposal by itself would show that it was a contract meant for completion of the software and installation of the same, so as to enable the plaintiff to put to use the said software. The defendant,

which claims to be an expert in creation of software, was in fact aware of its responsibilities under the contract. Unable to complete the contract/project and put it into use the defendant now attempts to take shelter by claiming that the payments were made on a monthly basis upon the plaintiff being satisfied with the work done by the defendant. The payment schedule that is given in the contract dated 19.01.2005, would itself show that it is not a project where the payment is made based on the work done. In Ex.A2, while setting out the time frame plan, the defendant had categorically stated that the up-gradation process will consume a minimum of six months from the date of commencement or maximum of seven months. Therefore, it is clear that what was agreed by the parties was completion of the entire project and its implementation, so as to achieve the best results. It was not a contract, where payments were made by the plaintiff, upon being satisfied with the work done by the defendant. The defendant agreed to complete the entirety of the work and if the end result is not achieved, it cannot be said that the defendant is not liable to repay the monies paid by the plaintiff under the contract. The software developed by M/s.sofia systems was only yielding 30% result as set out in Ex.A2 itself. Therefore, the claim of the defendant that the contract is in the nature of works contract and the plaintiff had made payments based on the work completed, cannot be accepted. Hence, I hold that the contract is a

contract for designing or decoding the software system and the completion or otherwise of the said contract depends on the fact as to whether it could be put into use by the plaintiff.

12. According to the plaintiff, the entire payments have been made and the plaintiff has agreed and paid a sum of Rs.90,000/- over and above the estimated cost. Even while claiming the said Rs.90,000/-, the defendant vide his letter dated 05.10.2005, would state that during the designing process, on the request of the staff members of the plaintiff, certain new modules were designed and introduced, for which the defendant had incurred an extra cost of Rs.1,25,000/- . Therefore, the said claim made by the defendant would itself show that the additional works were carried out in the project. Therefore, this also in my considered opinion, militates against the claim of the defendant that the payments made in monthly installments were made after the plaintiff was satisfied with the work done by the defendant.

13. The 3rd question that would arise is whether the plaintiff is entitled to claim that the defendant is liable to repay the amount of Rs.8,40,000/- received for completing the MMS Software. The defendant would claim that it has completed the MMS Software in its letter dated

05.10.2005, but the Minutes of the meeting held on 04.05.2007, which was marked as Ex.P7, shows that the proprietor of the defendant had also taken part in the meeting. The said minutes was also signed by the proprietor of the defendant, Mr.M.V.Srivatsan, wherein it is stated as follows:

“At that point, secretary inquired about the expected completion time of first Module, Material Management System. (MMS) Shri Gokul informed that he would complete the test on or before 4th June 2007. Secretary also enquired about the completion time for pay roll Module. Shri Gokul confirmed that this would be completed in 20 days time.”

This would show that both the MMS Software as well as the Pay Roll Software were not completed and made functional even as on 04.05.2007. Ex.P8 is a trail of E-mail communications between the plaintiff and the defendant. It is seen from the trail of E-mails that the project was not completed even till May 2007. Ex.P9 is the letter dated 08.06.2007 by the plaintiff to the defendant, wherein it has been pointed out that both the softwares, namely MMS Software and the Payroll Software had not been completed and the Group Auditors have expressed dissatisfaction about the non implementation of the ERP modules. The E-mail as well as the letter correspondences marked as Exs.P10 and P11, would show that the plaintiff has been demanding complete installation of the software and testing of the same. In its letter dated 25.07.2007, the plaintiff has again

pointed out that regarding the MMS module, the data entry work is on and after completion of the Master data entry and the entire software could be tested and its accuracy could be verified. It is also seen that the defendant has complained about non-cooperation on the part of the employees of the plaintiff under Ex.P14 dated 31.01.2008. It is also stated that the defendant had to finish off the entire project before 31.01.2007. It is also claimed in the said letter dated 31.01.2008 that if the plaintiff wants the defendant to continue and complete the project beyond 29.02.2008, i.e., from 01.03.2008, the plaintiff will have to pay a sum of Rs.25,000/- per month for their executives to visit the premises of the plaintiff on and from 01.03.2008. These correspondence would clearly show that the MMS Software project had not been fully completed and it had not become operational even in January 2008. Though Mr.Umashankar, learned counsel appearing for the defendant would vehemently contend that the software has been completed and it could not be operated for want of data, the said contention appears to be one made with an object to wriggle out of the obligations by the defendant. It could be seen from various correspondence that the defendant has not provided the source code and user manuals for the MMS Software. Even as late as 3rd February 2008, the defendant had sent an E-mail to the plaintiff, wherein it is stated that the user manual and source code for the ERP development would be

forwarded at the earliest.

14. At last, the plaintiff had issued a letter rescinding the contract and has demanded repayment of the monies paid by it, vide its letter dated 25.06.2008. The defendant has chosen to send a reply to the said letter dated 28.05.2008, claiming that it was the non-cooperation by the staff of the plaintiff that had led to the delay in the project. The plaintiff had, by its letter dated 12.01.2009, without pressing ahead with its claim for refund of the monies paid, had requested the defendant to demonstrate the Software System, and the defendant also agreed to the same and had sought for a demonstration, after 20 days review of the entire system. The plaintiff also agreed to re-schedule the demonstration on 16.02.2009. There again, the defendant by its letter dated 11.02.2009, expressed its inability to make a demonstration on 16.02.2009 and finally the plaintiff had requested the defendant to depute one of its executive to make a demonstration on 28.02.2009, in the presence of a group expert. By its letter dated 02.03.2009, the defendant had informed the plaintiff that it would offer its unconditional support from 02.03.2009 to 04.04.2009 for the progress of the MMS Software. But it is seen that the MMS System was demonstrated by using a stand alone Laptop without the data provided by the plaintiff. The demonstration was like a pre-sale demonstration without output

formats and validation functions. Again when the software was connected to the server of the plaintiff, it was flashing a run time error and the demonstration could not be completed. The expert engaged by the plaintiff, namely P.W.2 has given his report on its working, which is marked as Ex.P40. Thereafter, the plaintiff had issued the letter dated 26.03.2009 under Ex.P35 demanding the repayment and followed it up with the present suit.

15. The above documentary evidence would show that MMS software said to have been developed by the defendant, was not functional and could not be put use by the plaintiff at any point of time. Though the defendant would contend that it is because of the non-availability of the data, the same does not appear to be correct. Though the defendant would claim that the project has been completed even in August 2005, even after the expiry of nearly 3 years even in January 2009, the defendant would not demonstrate the project and make it available for the use of the plaintiff. It is also seen from the correspondence that even in the year 2008, the defendant has not provided the source code and the user manual and in one of its letter, the defendant company has clearly stated that the source code and the user manual would be provided on completion of the project. Therefore, it is clear that the project was never completed as claimed by

the defendant.

16. Though Mr.Umashankar, learned counsel would rely upon the certain portions of the oral evidence of P.W.1, particularly in cross examination to contend that the data was not provided to enable the defendant to run the programme. Mr.Jose John, learned counsel appearing for the plaintiff would point out that D.W.1, the proprietor of the defendant had in fact, admitted that the plaintiff has given all the Master details for demonstration of the Payroll Software seen in Ex.P13. He has also stated that from Ex.P15, it is evident that the plaintiff has given all Master data for MMS software also. He would also point out the admission by D.W.1, which runs as follows:-

“It is correct to state that the plaintiff has given all Master data for demonstration and operation of the ERP Software.”

Relying upon the above evidence, Mr.Jose John, learned counsel appearing for the plaintiff would contend that the claim of the defendant that the plaintiff did not supply the relevant data is an afterthought brought about by the defendant with a view to the wriggle out of the liability.

17. In the light of the above unimpeachable documentary evidence, I conclude that the defendant had not completed the project as agreed to under Ex.P4 dated 19.01.2005 and the non-functioning of the MMS Software is only attributable to the failure on the part of the defendant to complete the project. The Issue Nos. 1 to 3 are answered in favour of the plaintiff and the plaintiff is entitled to refund of all the monies under the contract dated 19.01.2005.

Issue Nos.4 to 6:-

18. These issues are dealt with together as they relate to the contract dated 05.08.2005 for development of Payroll software. Here again the defence of the defendant is same, namely that there is no concluded contract, the payments were made upon satisfaction of the work completed by the defendant on a monthly basis and the software could not be completed for lack of data on the part of the plaintiff. The plaintiff would claim that the functional specification submitted by the defendant on 05.08.2005, would amount to a concluded contract between the parties. The letter dated 05.08.2005, from the defendant to the plaintiff would show that the total cost of the project was envisaged at Rs.17,55,000/- and the payment was to be made at Rs.1,00,000/- per month for 15 months from

the date of the confirmed order. It is also stated therein that the proposed software will give the complete solution to Human Resource Department.

19. The entire specification has been marked as Ex.P2, and the said document contains several minute details of the proposed software to be installed. The same is counter-signed by the representatives of both the plaintiff as well as the defendant. It is also seen that the plaintiff has made payment for development of the payroll software, and a purchase order had also been issued by the plaintiff on 19.02.2007. A series of invoices filed as Ex.P36, show that the defendant has raised invoices from 02.01.2006, every month for a sum of Rs.1,17,000/-. Totally, 15 invoices were raised by the defendant from 02.01.2006 to 01.03.2007 and it is not in dispute that the entire payment had been made by the plaintiff. Mr.Umashankar, learned counsel appearing for the defendant would take me through the evidence of P.W.1 to contend that P.W.1 has admitted that no written instructions were given for development of the software. According to the learned counsel for the defendant, Ex.P2 dated 05.08.2005 would not amount to a concluded contract. As is in the case of contract dated 19.01.2005, the document Ex.P2 dated 05.08.2005, is also styled as functional specification and the same is signed by the representatives of the plaintiff as well as the defendant. A concluded contract requires an

offer and acceptance. Covering letter attached to Ex.P2, dated 05.08.2005 is an offer made by the defendant to the plaintiff, wherein it is stated that the defendant is forwarding its quotation for designing the Payroll software for the plaintiff's company. The document contains several details of the project and the technical specifications are also set out therein. The entire cost of the project is envisaged at Rs.17,55,000/- and the payment milestones are at Rs.1,17,000/- per month. As already stated, the said document is signed by the Executive Director, (Finance and Marketing) of the plaintiff and the Authorised Signatory of the defendant. Apart from that it is also seen from Ex.P.36 series that the defendant has raised monthly invoices and has collected a sum of Rs.1,17,000/- per month for almost 15 months. The invoices raised by the defendant read as follows:

“First Installment payment towards Designing “Easy Pay” Software – (Payroll Accounting Software).”

20. Nearly 15 invoices have been raised for each installment and in all the invoices, the description of the work is given as designing easy pay software. Therefore, the claim of the defendant that the monthly payments were made on the plaintiff being satisfied with the progress of

the work and the end use, namely the implementation of the software, was not a necessary pre-condition, cannot be accepted.

21. Though, Mr.Umashankar, learned counsel appearing for the defendant would vehemently contend that the work entrusted was in the nature of a works contract or a piece rate job, where payments are made based on the stage of the completion, I do not think, such contention could be accepted in view of the very nature of the work as well as the terms of the contract entered into. The letter dated 05.08.2005, addressed by the defendant to the plaintiff is clear and categorical in as much as it says that the total cost envisaged for the project is Rs.17,55,000/- and the time schedule the payments milestone are at Rs.1,17,000/- per month. This cannot at any stretch of imagination be taken as a piece rate contract or a works contract, where payment is made on completion of work at particular stage. Insofar as software development projects are concerned, it is only after completion of the whole project one could test the project and see whether it could be implemented or whether it is useful to the purchaser, unless and until the entire project is completed and the entire system is kept in place testing of a software project is not possible and therefore, the claim of the defendant militates against the very concept of a software project.

22. Mr.Umashankar, would compare the job of the defendant to that of the mason, who constructs a building on the basis of plan prepared by an architect, and on completion of work he is paid wages, and if the plan of the architect is found to be defective, according to the learned counsel the mason cannot be asked to repay his salary. This comparison in my considered view is wholly erroneous. The contract for development of a software cannot be equated to a contract for construction. The software development contract can be said to be completed, only after the installation of the software in the users system and it is tested in the users system, so that it could be used by the purchaser. Therefore, the contention of the learned counsel that there was no contract between the parties for development of Payroll software cannot be accepted. Even if the quotation dated 05.08.2005 is taken as an offer, the very letter states that the payment milestones at Rs.1,17,000/- per month for the following 15 months from the date of your confirmed order. The first invoice relating to the Payroll Software has been raised by the defendant on 02.01.2006. Therefore, it is clear that the confirmed order was received by the defendant some time in December 2005, from the plaintiff. The fact that the payments were made for those 15 invoices raised from 02.01.2006 to 01.03.2007 is not in dispute. Therefore, the claim of the defendant that

there was no concluded contract cannot be accepted and **the issue No.4 is answered against the defendant in favour of the plaintiff.**

23. It is not in dispute that the Payroll software was never completed and tested, it is the contention of the defendant that it could not be completed and tested due to lack of data on the side of the plaintiff. Mr.Umashankar, learned counsel would rely upon the evidence, particularly the oral evidence of P.W.1, to contend that the officers of the plaintiff have not given the required data to the defendant. The defendant has raised invoices in respect of Payroll Software from 02.01.2006 to 01.03.2007 for a period of 15 months, it has not raised the issue of absence of data. Even in the minutes of the meeting dated 04.05.2007, marked as Ex.P7, wherein it is specifically stated that the Payroll module will be completed within a period of 20 days, nowhere it appears that the defendant had complained about absence of cooperation or absence of data from the plaintiff to enable the defendant to work on the Payroll software. In fact the D.W.1 in his evidence has admitted that all the data was provided. His evidence in cross examination would show that the plaintiff cannot be blamed for non furnishing of the data. In cross examination the D.W.1 has deposed as follows:

“The plaintiff has given to us all the master details for demonstration of the payroll software as seen in Ex.P13”

24. In fact the letter dated 26.10.2007, Ex.P13, would show that the plaintiff has pointed out the short comings in the Payroll Software that was shown by the defendant and requested the same to be remedied at the earliest. It is only after the said letter the defendant had complained of non-cooperation on the part of the executives of the plaintiff. P.W.2, Mr.T.Vimalon Jacob, who has been deputed by the head of the group in Simpson & Co.Ltd., to check the softwares, viz., MMS as well as the Payroll software, developed by the defendant has submitted two reports, which marked as Exs.P39 and P40. Insofar as the Payroll software is concerned, it is stated that none of the required data, namely the source code, set up document, system flow, table structure are not available. He also stated that the representative of the defendant could not even demonstrate the Payroll Software on 28.02.2009. Therefore, it is clear that the defendant had not completed the project and made it operational though it had received the entire amount claimed by it towards development of the Payroll software. It is thus clear that the defendant has committed the breach of the contract and therefore, it is liable to refund the

entire amount received by it towards Payroll software. **Hence Issue Nos. 4, 5 and 6 are answered against the defendant and in favour of the plaintiff.**

Issue No.7:

25. In view of the findings to issues Nos. 1 to 6, Issue No.7 is also answered in favour of the plaintiff, to the effect that the payments were made in installments, only as per the request of the defendant and they were not payments made by the plaintiff on being satisfied with the completion of the work by the defendant.

Issue No.8:

26. This question relates to limitation. According to Mr.Uma Shankar, learned counsel appearing for the defendant, the last monthly payment for MMS software was made only on 18.01.2005 and therefore, the suit filed on 23.10.2009 last is barred by limitation. Though the issue framed regarding limitation is with reference to both the contracts, the learned counsel appearing for the defendant submitted that insofar as the Payroll software is concerned the last payment having been made on

02.03.2007. The claim is not barred by limitation but insofar as MMS software is concerned, according to the learned counsel, the last payment having been made on 18.10.2005. The suit filed on 23.10.2009 is barred by limitation.

27. The suit is one for recovery of money paid upon a contract for non-performance of the contract or defective execution of the contract. The cause of action for the suit itself would arise, in my considered opinion, only when the defects come to light. Admittedly, the period of time agreed to for completion of the contract relating to the MMS Software is six months from the date of commencement or a maximum of seven months. The contract is dated 19.01.2005, so it should have been completed by August 2005. But the same was not done and the payments commenced from 16.02.2005 and the last payment was made on 18.10.2005 by the plaintiff. As rightly pointed out by Mr. Jose John, learned counsel appearing for the plaintiff, there was several extensions of time granted by the plaintiff at the request of the defendant. He would contend that Ex.P7, which is the minutes of the meeting would show that the defendant had sought for extension of time for a test run the MMS contract till 04.06.2007. It is also seen from Ex.P34, were the defendant had written to the plaintiff stating that the MMS software could be implemented by 01.04.2009, therefore, it is

clear that the software developed by the defendant was not implemented even till the year 2009 and the actual testing or demonstration of the software was done only on 28.02.2009 as seen from the reports of the expert under Exs.P.39 and P.40. Though, the payments have been made even as early as on 18.10.2005, it could be seen from the various correspondence, the project was not completed and an attempt to demonstrate the project itself was made only on 28.02.2009.

28. Therefore, in my considered opinion the Limitation for the present suit, which is based on non-performance would commence only from the date on which the cause of action, namely the non-performance became known to the plaintiff. Therefore, the suit filed within 3 years from 28.02.2009 is within time. **This issue is also answered against the defendant, in favour of the plaintiff, to the effect that the suit is not barred by limitation.**

Issue No.9:

29. The plaintiff has claimed 18% interest for the payments made by it. Of course, the transaction is a commercial transaction, but there is no agreement for payment of interest between the parties. Considering the

Bank rates that were prevailing in the year 2005, namely period during which the plaintiff had made the payments, I am of the opinion, that the plaintiff would be entitled to interest at 12% per annum on the actual amounts paid by it under both the contracts from the date of payment till date of decree and thereafter at 6% per annum till date of payment.

30. Mr. Umashankar, learned counsel appearing for the defendant would contend that the suit is barred for mis-joinder of causes of action. According to him, the contracts dated 19.01.2005 and 05.08.2005 are two independent contracts. Therefore, the plaintiff was not entitled to file a single suit based on the above two contracts by joining the cause of action. Admittedly, this said issue has not been raised in the written statement and no issue has been framed on the basis of the said contention. Order II Rule 3 of the Code of Civil Procedure, enables the plaintiff to join causes of action, when the suit is between the same parties. Order II Rule 7 prohibits the defendant from raising the issue of mis-joinder of cause of action, after framing of issues and therefore, the said contention of the learned counsel has to be rejected at the threshold and hence the same is not taken up for consideration.

31. In fine, the suit is decreed as follows:

- 1) The defendant is directed to pay a sum of Rs.8,40,000/- with interest at 12% per annum on each instalment from the date of payment till the date of decree and 6% thereafter under the contract dated 19.01.2005.
- 2) The defendant is directed to pay a sum of Rs.17,55,000/- with interest at 12% per annum on each instalment from the date of payment till date of the decree and thereafter at 6% per annum.
- 3) The plaintiff is also entitled to proportionate costs.

03.11.2017

jv

Index: No
 Internet: Yes
 Speaking order

List of the Witnesses examined on the side of the Plaintiff:

- | | |
|----------|----------------------|
| 1. P.W.1 | M.P.Muthukumaraswamy |
| 2. P.W.2 | T.Vimalon Jacob |

List of Exhibits marked on the side of the Plaintiff:

<i>Sl.No</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
1	P - 1	The letter of authoriationgiven by the plaintiff company to give evidence on behalf of the plaintiff company	
2	P - 2	The quotation for the proposed AMREP Payroll software with functional specifications	05/08/05
3	P - 3	The purchase order No.D6273 issued by the plaintiff to the defendant	19/02/07
4	P - 4	The details of designing and recording on Material Management Systems	-
5	P - 5	The copy of the letter addressed by the defendant to the plaintiff	05/10/05
6	P - 6	The purchase order No.D6274 placed by the plaintiff on the defendant	19./02/07
7	P - 7	The minutes of the meeting of the plaintiff with the service provider	04/05/07
8	P - 8 (serires)	The status reports furnished by the defendant to the plaintiff through E-mails	-
9	P - 9	The copy of the letter sent by the plaintiff to the defendant	08/06/07
10	P -10	The copy of the E-mail sent by the defendant to the plaintiff	18/06/07
11	P - 11	The copy of the letter written by the plaintiff to the defendant	05/07/07
12	P - 12	The letter written by the plaintiff to the defendant	25/07/07
13	P -13	The letter written by the plaintiff to the defendant	26/10/07
14	P – 14	The letter written by the defendant to the plaintiff	31/01/08
15	P – 15	The copy of the letter written by the plaintiff to the defendant	06/02/08
16	P – 16	The copy of the letter written by the plaintiff to the defendant	14/02/08
17	P – 17	The letter written by the defendant to the plaintiff	15/02/08
18	P – 18	The copy of the letter written by the plaintiff to the defendant	18/02/08
19	P – 19	The copy of the E-mail sent by the defendant to the	21/02/08

<i>Sl.No</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
		plaintiff	
20	P – 20 (series)	The Copy of the E-mails exchanged between the plaintiff and the defendants	-
21	P – 21	The copy of the E-mail exchanged between the plaintiff and the defendant	-
22	P – 22	The copy of the E-mail sent by the defendant to the plaintiff	23/02/08
23	P – 23	The copy of the letter sent by the plaintiff to the defendant	26/05/08
24	P – 24	The letter written by the defendant to the plaintiff	28/05/08
25	P – 25	The copy of the letter written by the plaintiff to the defendant	12/01/09
26	P – 26	The letter written by the defendant to the plaintiff	20/01/09
27	P – 27	The copy of the letter sent by the plaintiff to the defendant	23/01/09
28	P – 28	The letter written by the defendant to the plaintiff	11/02/09
29	P – 29	The copy of the letter written by the plaintiff to the defendant	13/02/09
30	P – 30	The letter written by the defendant to the plaintiff	23/02/09
31	P – 31	The copy of the letter written by the plaintiff to the defendant	24/02/09
32	P – 32	The copy of the E-mail sent by the defendant to the plaintiff	25/02/09
33	P – 33	The copy of the E-mail exchanged between the plaintiff and the defendant	27/02/09
34	P – 34	The copy of the letter as well as soft copy received through E-mail	02/03/09
35	P – 35	The copy of the letter written by the plaintiff to the defendant	26/03/09
36	P – 36 (Series)	The invoices raised by the defendant on the plaintiff	-
37	P – 37	The statement of account of the plaintiff relating to the defendant	-

<i>Sl.No</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
38	P – 38	The letter of authorisation given by the Whole Time Director of the plaintiff to give evidence on behalf of the plaintiff	-
39	P – 39	The report submitted with regard to AMREP Systems Development Status	05/01/09
40	P – 40	The further report submitted in continuation of my earlier report dated 05.01.2009	19/03/09

List of the Witnesses examined on the side of the Defendant:

- | | | |
|---|-------|---------------|
| 1 | D.W.1 | M.V.Srivatsan |
| 2 | D.W.2 | R.Selvaraj |

List of Exhibits marked on the side of the Defendant: Nil

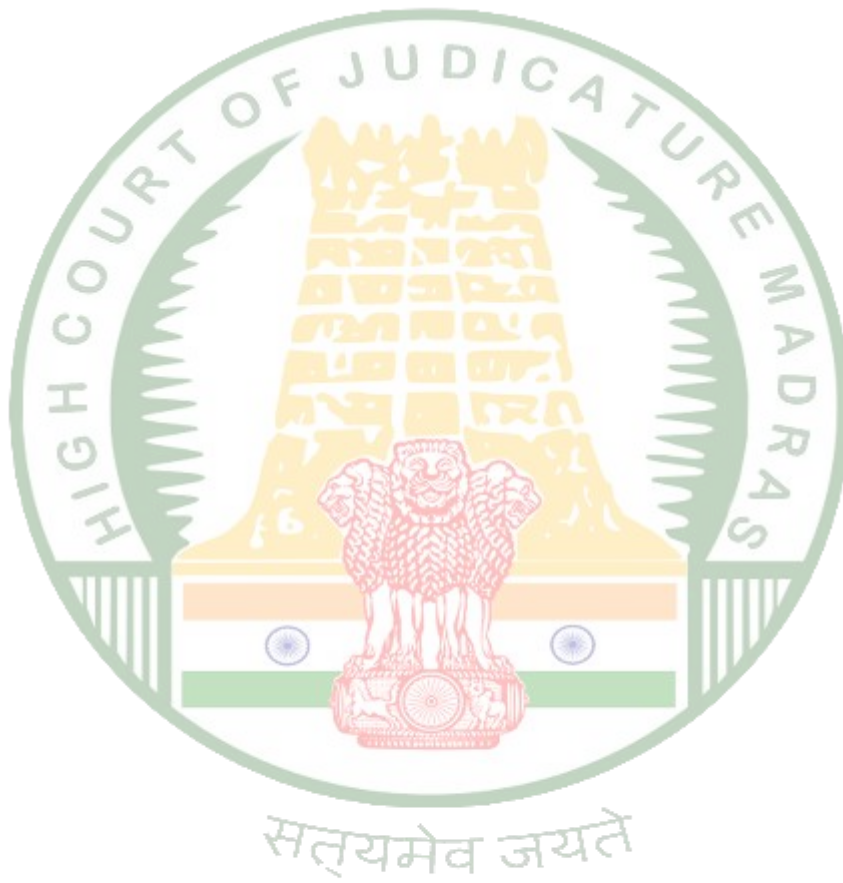
03.11.2017

jv

WEB COPY

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.



WEB COPY

R.SUBRAMANIAN,J.

jv

Pre Delivery Judgment
C.S.No.969 of 2009



03.11.2017

WEB COPY