

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	12.06.2019
Pronounced on	19.08.2019

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

C.S.No.760 of 2006

Academy for Quality and Excellence
in Higher Education (India) Pvt. Ltd.,
G.R.Mansion, No.11, Srinivasa Road,
T.Nagar,
Chennai – 600 017.

...Plaintiff

Versus

1.Mrs.Megha Goswami
2.Mr.Shyam Goswami
3.Mr.Deepak Goswami
4.Vallabh Soft Systems Pvt. Ltd.,
No.16, Ekambareswarar Koil Street,
Park Town, Chennai – 600 003.
5.KT Arvind

...Defendants

Prayer:

This suit is filed under Order VII Rule 1 CPC r/w. Order IV Rule 1 O.S.Rules r/w. Sections 55, 62 of the Copyrights Act, 1957 for the following reliefs:

(a) a permanent injunction restraining the defendants, their men, agents, successors in business, assigns, representatives or any other person of entity claiming through or under them from in any

manner infringing the plaintiff's registered copyright in the software U CAMPUS XL 1.0 registered under No.SW-1727/2005 by using, marketing, installing, reproducing or in any other manner dealing with the said software or by any other means whatsoever;

(b) An order of mandatory injunction directing the defendants, their men, agents, successors in business, assigns, representatives or any other person or entity claiming through or under them, not to hold themselves as representatives, agents, distributors of the software U CAMPUS XL 1.0 or in any manner connected with the plaintiff;

(c) An order directing the 5th defendant to return the source code and security key and other materials relating to the software U CAMPUS XL 1.0 and not to use the said source code, security key or project himself as agent, representative, employee or in any manner connected with the plaintiff;

(d) direct the defendants to pay a sum of Rs.25,00,000/- as liquidated damages to the plaintiff;

(e) direct the defendants to return the Compact Disks and instruction manuals of the software U CAMPUS XL 1.0 handed over to the defendants by the plaintiff without making or retaining any copy, alteration, reproduction or duplicate of the same;

(f) pay the plaintiff costs of the suit.

For Plaintiff : Mr.Arun C.Mohan

For Defendants – 1 to 4 : Mr.Rajnish Pathiyil

Defendant – 5 : Set *ex parte* by order
dated 26.03.2013

J U D G M E N T

1.1. It is the case of the plaintiff that their Company was incorporated with a vision of promoting and aiding the development of education, especially, higher education in India. The plaintiff Company has developed the software, "U CAMPUS XL 1.0" which has been used by educational Institutions all over India and the same was registered under the Copyrights Act, 1957 under No.SW-1727/2005 dated 15.03.2005. The author of the said software are Mr.D.Victor, Dr.R.Rukmani and Dr.Indhrani Sridharan. The said copyright is valid for the life term of the last surviving author plus 60 years thereafter. The owners, as stated above, have assigned these rights to the plaintiff Company, whereby, all the rights of the said authors stand devolved in the name of the plaintiff. Therefore, the plaintiff is the owner of the copyright in the software U CAMPUS XL 1.0. The plaintiff has exclusive right to use the software against all others in the World.

1.2. After the successful launch of the software U CAMPUS XL 1.0 at Osmania University, Hyderabad on 13.09.2003, the plaintiff

Company ventured into finding a suitable partner for effective marketing and distribution of the same to various educational Institutions on all-India basis. While so, the defendants 2 & 3 approached the plaintiff for marketing and distribution of the software U CAMPUS XL 1.0 in South India. The first defendant is the proprietrix of the firm called Vishruth IT Services (hereinafter referred to as VITS) and is the wife of the third defendant. The third defendant is the second defendant's brother. The plaintiff entered into a Marketing Agreement with VITS, represented by its proprietrix the first defendant on 15.06.2004 and on the same day, they also entered into a Guarantee Agreement with the defendants 2 & 3 for guaranteeing the performance of the agreement.

1.3. The said Marketing agreement dated 15.06.2004, also specifies the targets to be achieved at specific intervals. By virtue of Clause 7 of the Marketing agreement, VITS should sell a minimum of 4 units for the first three months i.e., from July to October 2004; a minimum of 6 units for the next three months i.e., from October 2004 to January 2005; and a minimum of 8 units, thereafter i.e., from January 2005 till the termination of the agreement. By virtue

of Clause 11 of the Marketing Agreement, the clauses for termination are provided for. According to the plaintiff, the reasons for termination under Clause 11.1 specifically states that if VITS is unable to achieve minimum targets prescribed in Clause 7 of the agreement and/or Clause 11.2 states that if there is any material breach of the terms and obligations in the Marketing Agreement, the agreement can be terminated. The plaintiff handed over 4 sets of compact discs containing the software U CAMPUS XL 1.0 along with the user manual as demo units towards meeting the sales target for the first three months. Apart from those 4 sets of compact discs, the plaintiff also handed over 30 more sets of compact discs and user manuals. However, the VITS did not meet with the sales target right from the beginning.

1.4. The fifth defendant was employed by the plaintiff for coordinating with the defendants 1 to 4 and he was also taken to Bihar by the defendants. The plaintiff arranged for the fifth defendant's travel and also paid the remuneration to him for his stay at Bihar. The other defendants requested the plaintiff to spare the fifth defendant for 15 days, whereas, the fifth defendant acting in

collusion with the other defendants, extended the period of his stay at Bihar . However, the defendants have not made any claim for payment towards the remuneration or travel expenses of the fifth defendant for his stay in Bihar. The fifth defendant as an employee of the plaintiff Company was entrusted with the source code of the software U CAMPUS XL 1.0 and also the security key to enable him to deal with the software more effectively.

1.5. The Director of the plaintiff Company, Prof. Dr.D.Victor received a letter dated 25.02.2006 from the second defendant herein and the said letter contained various allegations against the plaintiff (which are ill-founded and baseless), for which, the plaintiff sent a reply dated 28.02.2006 clarifying their stand and stated that in spite of their patience and support, the defendants have not been able to make any sale of the software. While so, in the month of July 2006, the plaintiff came to know that the second defendant has flouted a new private limited company, viz., the fourth defendant herein to solicit orders for marketing and distribution of software U CAMPUS XL 1.0. The fourth defendant has also entered into an agreement with Karnataka State Electronics Development

Corporation Limited (KEONICS) for marketing the U CAMPUS XL 1.0 software. Further, the third defendant is a director of the fourth defendant Company which has entered into an agreement with KEONICS and started soliciting orders for the marketing of software U CAMPUS XL 1.0. The second defendant has supplied the software U CAMPUS XL 1.0 to the University of Madras and Anna University, Chennai. The understanding between the plaintiff and the defendants 1 to 3 is that when the software is installed in any educational institution and the due amounts are paid to the plaintiff, the plaintiff would release the key which would make the software functional and work regularly. The defendants failed to make any payments and not even they have disclosed the final price at which software was sold to the University of Madras and Anna University, Chennai. The defendants have not only failed to achieve the sales targets but also misrepresented that they are the owners of the software, U CAMPUS XL 1.0. The defendants in order to achieve their illegal object, flouted the fourth defendant company and by entering into an agreement with KEONICS has defrauded the plaintiff of its lawful profits and also more importantly, set up a claim against the plaintiff's intellectual property right in the

registered copyright. The fifth defendant who has the security key and the source code of the plaintiff's software U CAMPUS XL 1.0 has clandestinely taken away the same and is now in the rolls of the defendants, committing acts of copyright piracy.

1.6. By virtue of the agreements dated 15.06.2004, the plaintiff is entitled to receive the entire sale consideration made by the defendants or their assignee, licensees or representatives besides compensation for wrongful loss of legitimate profits because of the defendants' failure to achieve their sales targets. The plaintiff is also entitled to recovery of 34 sets of compact discs and instruction manuals from the defendants without retaining or making any copy or reproduction of the same or modified version of the software U CAMPUS XL 1.0. The plaintiff is also entitled to obtain a relief against the defendants that they shall not represent or hold themselves out as representatives or otherwise connected to the plaintiff and/or the software U CAMPUS XL 1.0 in any manner. In order to amicably resolve the matter, the plaintiff sent a Legal Notices dated 07.07.2006 and 14.07.2006 to the defendants through their counsel. The defendants received the said notice and

also sent a holding reply dated 21.07.2006, stating that they require 15 days time to send a detailed reply. The plaintiff's counsel sent another reply to the letter dated 21.07.2006, sent by the defendants, stating that a reply to be sent by 31.07.2006 failing which appropriate legal action would be taken by the plaintiff. The plaintiff's counsel received a reply notice from the defendants' Advocates dated 27.07.2006, wherein the defendants made a serious allegations which are false and misleading. The defendants have stated that the plaintiff is aware of their tie up with KEONICS which is false and untenable. The defendants are liable to compensate the plaintiff a sum of Rs.1,62,000/- (Rupees One Lakh Sixty Two Thousand only) being the price of the software installed at Universities of Madras and Anna University respectively, Chennai.

1.7. The plaintiff and the defendants have agreed for the sales target as per Clause 7 of the agreement. On that basis, the defendants ought to have achieved a sales target of 166 units till date but the defendants failed to achieve the same. So far the defendants have installed only 2 units at University of Madras and Anna University Chennai for Rs.81,000/- each. Therefore, the

plaintiff estimated the loss of revenue and projected profits is entitled to receive Rs.1,32,84,000/- (Rupees One Crore Thirty Two Lakh Eighty Four Thousand only). Since the defendants were entitled to a fixed commission of 25% of sale price, deducting the said commission payable to the defendants, the plaintiff is entitled to receive Rs.99,62,000/- (Rupees Ninety Nine Lakh Sixty Two Thousand only) towards projected sales at price for the period of the contract. However, the plaintiff limits its claim to the tune of Rs.25,00,000/- (Rupees Twenty Five Lakh only) as damages due to failure of performance of the contract.

1.8. The fifth defendant is an employee of the plaintiff Company and he was entrusted with the source code and the security key which has been taken away by him. Since the defendants are setting up a claim against the plaintiff with regard to the said software U CAMPUS XL 1.0, the fifth defendant is no longer entitled to retain the source code and the security key. The fifth defendant is working for a rival company against the plaintiff. The plaintiff is entitled to receive the source code and security key from the fifth defendant. The defendants 1 to 4 having violated the

agreement in its entirety both the non-completion of requisite targets as also by setting up a right over the software U CAMPUS XL 1.0 can no longer hold themselves out as representatives, agents, marketers of the plaintiff. The plaintiff is entitled to a declaration that the defendants shall not do the same.

1.9. The cause of action arose at Chennai, when the plaintiff created the software U CAMPUS XL 1.0 was applied for copyright registration in the year 2003; when the said software was registered under No.SW-1727/2005 on 15.03.2005; when the plaintiff entered into two agreements with the defendants 1 to 3 on 15.06.2004; when the plaintiff handed over 34 sets of compact discs and instruction manuals to the defendants; when the defendants failed to achieve their sales targets as per the terms of the agreement; on 25.02.2006, when the second defendant sent a Letter to the Director of the plaintiff Company making false allegations and on 28.02.2006, when the Director of the plaintiff Company clarified their stand by a Letter; in July 2006, when the plaintiff became aware that the second defendant has set up the fourth defendant Company and has entered into an agreement with KEONICS

claiming that the fourth defendant is the proprietor of the software U CAMPUS XL 1.0; when the plaintiff became aware that the defendant has installed 2 units of the software to University of Madras and Anna University, Chennai for Rs.81,000/- each; when due to the defendant's inaction and failure to achieve sales targets as per the terms of the agreement has caused a loss to the plaintiff to the tune of Rs.99,62,000/-; when the fifth defendant is retained the source code and security key of the software U CAMPUS XL 1.0; when the defendants continue to hold out themselves as representatives or set up a claim for the copyright in the software U CAMPUS XL 1.0. Further, the cause of action continues to arise each and every day when the defendant solicits, markets, installs or deals with the software U CAMPUS XL 1.0 in any customer's place and thereby infringe the plaintiff's registered copyright in the software U CAMPUS XL 1.0 under No.SW-1727/2005 and until restrained by this Court by an order of injunction. Hence, left with no other alternative, the plaintiff has filed the present suit for the reliefs stated *supra*.

2. The defendants 1 to 4 have filed their written statement in which they have stated as follows:

(i) In terms of Clause 15 of the Marketing Agreement dated 15.06.2004, if at all there is a dispute between the parties, the same has to be referred only to Arbitration and therefore, the suit is liable to be dismissed in *limine* for want of maintainability. At the time of entering into the said agreement, the defendants were told that the software was copyright protected, however, the copyright certificate was granted only in March 2005, which is 9 months after the defendants signed the Marketing Agreement dated 15.06.2004, which contemplated marketing and distribution of the software only in South India. The aforesaid agreement is a non-exclusive Marketing Agreement and on the very same day, the plaintiff and the defendants 2 & 3 had entered into a Guarantee Agreement, guaranteeing the terms of the Marketing Agreement entered between the plaintiff and the first defendant.

(ii) Clause 11.1 & 11.2 of the Marketing Agreement dated 15.06.2004, relates to the termination of the agreement, in the event, if the defendants failed to achieve the sales targets. The

second defendant sent a Letter dated 25.02.2006, setting out of the ground realities and facts about the non co-operation of the plaintiff and the same was turned down by the plaintiff by a Letter dated 28.02.2006 on certain false premises and it would show that the plaintiff has not fully supported the defendants in marketing the said software and the defendants 1 to 4 encountered various difficulties all through. In this regard, the second defendant had also sent an e-mail to the plaintiff on 02.12.2004, pointing out gross violations of the Agreement dated 15.06.2004, and suggested revision of the agreement.

(iii) The fourth defendant is a private company of which third defendant is only a representative and the said company was flouted at the instance of the plaintiff so as to tie up with State Government Organizations, Central Government Organizations and market the software channelizing them through the said agreement. The said agreement was mooted by the plaintiff and the plaintiff encouraged the fourth defendant represented by third defendant to enter into agreement with KEONICS for marketing the said software as the plaintiff's Managing Director, Prof.D.Victor claimed that the marketing through a government organization would give credibility

to the said software and marketing the same would be easier. By virtue of the said agreement, the defendants could obtain two orders from University of Madras and Anna University respectively.

(iv) The terms of supply in the case of University of Madras and Anna University was only after about 30 days of installation of the said software and to claim that only after the payments was received from the defendants, the security key would be given is nothing but a far fetched belief of the plaintiff that people are queuing up to buy the said software. On the other hand, after the amounts were received from University of Madras and Anna University and after adjusting the amounts already paid to the plaintiff and the Managing Director of the plaintiff Company, there was nothing to be given to the plaintiff since from the year 2004 to 2006 itself, the plaintiff has received various amounts in all amounting to Rs.2,06,000/- and it is the plaintiff who has to refund the amount. The defendants denied all other allegation of the plaintiff especially, with regard to the allegation that the security key taken away by the fifth defendant. The defendants 1 to 4 contended that at no point of time, they engaged or had any dealing with the fifth defendant except treat him as an employee of the

plaintiff Company and therefore, the theft of security key and source code by the defendants 1 to 4 does not arise.

(iv) The averments made in paragraph No.15 of the plaint is nothing but a vain attempt by the plaintiff to portray as if the defendants have not achieved the sales target as stated in the aforesaid agreements. The Marketing Agreement was never adhered to by the plaintiff as the intention of the plaintiff was not to go solely by the agreement and the plaintiff had given a go by to the said agreement and furthermore paragraph No.7 at page 2 of the Marketing Agreement reads as follows:

"AQEIIE appoints VITS as non exclusive marketing service providers of the software U CAMPUS XL 1.0 in the territory of States of Tamil Nadu, Karnataka, Andhra Pradesh, Kerala and Union Territory of Pondicherry. This agreement does not prevent AQEHE from marketing the software U CAMPUS XL 1.0 on its own to educational institutions and government/statutory bodies in the territory. AQEIIE is at liberty to appoint other marketing agents for the territory for marketing the software U CAMPUS XL 1.0."

(v) The aforesaid Marketing Agreement was a non exclusive agreement and the plaintiff is entitled to appoint any one else in the event of non achievement of target. It is open to the plaintiff to

appoint other person to market the software. The plaintiff was aware that the marketing of the said software was a herculean task and they did not even find a person who would readily accept the said job. They further submit that in the Reply Notice dated 25.07.2006, itself it was clearly pointed out that the plaintiff stand is really superfluous in claiming that non meeting of targets would have give rise to any damages.

(vi) The defendants 2 & 3 had guaranteed the agreement dated 15.06.2004 and they are in no way responsible for non meeting of the so called targets and on the other hand, the defendants had already paid various sums to the Managing Director, Prof.D.Victor of the plaintiff company and after reconciliation of accounts, it is the plaintiff who has to pay a sum of Rs.2,06,000/- (Rupees Two Lakh Six Thousand only) to the defendants 1 to 4.

(vii) The plaintiff had given 34 sets of compact discs and instruction manuals and after 2 of these were supplied to Anna University and University of Madras, the remaining 32 are being returned by the defendants. The plaintiff is well aware that the said software cannot be implemented or installed or utilized without the security key which has to be generated by the plaintiff in their office

using a special software available only with them and therefore, there cannot be any misuse of the same. Therefore, the plaintiff is not entitled to any damages much less the damage of Rs.25,00,000/- as claimed.

(viii) Since the said Marketing Agreement entered between the plaintiff and the first defendant does not provide anything about the liquidated damages, in such an event, the suit filed by the plaintiff is not maintainable and therefore, the same is liable to be dismissed with costs.

3. By order dated 23.04.2014, this Court framed the following issues:

Issue No.1:

Whether the plaintiff is entitled to permanent injunction restraining the defendants for their acts of infringement of plaintiff's registered copyright in the software U CAMPUS XL 1.0 under No.SW -1727/2005 by using marketing, installing, reproducing or in any manner dealing with said software?

Issue No.2:

Whether the plaintiff is entitled to an order of mandatory injunction restraining the defendants from holding themselves as representatives, agents, distributors of the software U CAMPUS XL 1.0 or in any manner connected with the plaintiff?

Issue No.3:

Whether the plaintiff is entitled to an order directing the fifth defendant to return the source code and security key and other materials relating to the software U CAMPUS XL 1.0 and not to use the same in any manner whatsoever?

Issue No.4:

Whether the plaintiff is entitled to return the Compact Disks and instruction manuals of the software U CAMPUS XL 1.0 handed over to the defendants by the plaintiff without making or retaining any copy alienation, reproduction, or duplication of the same?

Issue No.5:

Whether the plaintiff is entitled to a sum of Rs.25,00,000/- as liquidated damages for acts of infringement and passing off committed by the defendants?

4.1. The learned counsel appearing for the plaintiff submitted that VITS is a proprietary firm owned by the first defendant Mrs.Megha Goswami. The plaintiff and the first defendant entered into an Marketing Agreement dated 15.06.2004, for marketing and distribution of the software U CAMPUS XL 1.0 in South India and the Clause 3 of the said Marketing Agreement authorizes the defendants to make improvements to the software as they deem fit in the course of marketing and as per the aforesaid Marketing Agreement, the first defendant has to sell minimum 4 units for the period between 01.07.2004 to 01.10.2004 and 6 units for the period 01.10.2004 to 01.01.2005 and 8 units per month after 01.01.2005, till termination of the said agreement. The aforesaid Marketing Agreement is also containing a Clause for termination of the said Agreement, in the event of the first defendant fails to achieve the sales target.

4.2. The learned counsel for the plaintiff would contend that as per the aforesaid Marketing Agreement dated 15.06.2004, entered between the plaintiff and the first defendant, defendants 2 & 3 have stood as guarantors by signing the guarantee agreements.

As per the Marketing Agreement dated 15.06.2004, and the Guarantee Agreement dated 15.06.2004, the defendants 1 to 3 failed to achieve the sale targets as agreed by them. Further the defendants 1 to 3 had agreed that they would not claim any right in the software U CAMPUS XL 1.0 at any time during the subsistence of the Agreement or on termination of the same vide Clause 4 of the Agreement. However, the defendants 1 to 3 have conspired and flouted the fourth defendant Company with a view to defraud the plaintiff and have set up an adverse claim of copyright as against the plaintiff and committed breach of the agreement by claiming themselves to have developed the software.

4.3. The learned counsel further argued that in order to achieve illegal object, the defendants have entered into an agreement with KEONICS to defraud the plaintiff of its lawful profits, and also more importantly, set up a claim against the plaintiff's intellectual property right in the registered copyright. However, the defendants are guilty of infringement of the plaintiff's registered copyright under No.SW 1727/2005 dated 15.03.2005 in respect of the software U CAMPUS XL 1.0 particularly under Section 51(b)(ii) of

the Copyright Act.

4.4. The learned counsel for plaintiff would contend that the moral rights are rights under Section 57 of the Copyright Act that the creator of a work is automatically entitled to and which no one else can claim. An author's right to be "made known to the public as the creator of the work" and an author can "prevent others from usurping his work by naming another person as the author" and "prevent others from wrongfully attributing to him a work he has not authored". However, the defendants 1 to 4 have acted in contra to the rights vested with the plaintiff by claiming themselves to be the author and as per Section 57 of the Copyright Act, the author has the special right, which is independent of the author's copyright, to claim authorship of the work and to also restrain or claim damages in respect of any act which would be prejudicial to his honour or reputation.

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5.1. *Per contra*, the learned counsel appearing for the defendants 1 to 4 refuted the allegation of the plaintiff that defendants 1 to 3 have flouted the fourth defendant Company with a

intention to defraud the plaintiff and also the defendants have set up an adverse claim of copyright as against the plaintiff in breach of the agreement. He fairly submitted that as on date, the plaintiff Company is not at all using the said software and also not developing the same, so far the defendants have supplied the software U CAMPUS XL 1.0 only to the University of Madras and Anna University, Chennai, apart from that no software was sold by the defendants and out of 34 sets of compact disks and instruction manuals of the software, only 2 sets were sold out by the defendants and the remaining 32 sets of compact disks and instruction manuals were returned and this fact was also admitted by the plaintiff.

5.2. The learned counsel appearing for defendants 1 to 4 further submitted that as far as Issue Nos.1 & 2 are concerned, he has no objection for granting an order of injunction in favour of the plaintiff since the defendants 1 to 4 were not at all coordinating on any business with the plaintiff's software U CAMPUS XL 1.0 and therefore, the question of infringement of plaintiff's registered copyright does not arise.

Issue Nos. I, II & III

6. In view of the submission made by the learned counsel appearing for the defendants 1 to 4, Issue Nos.1 & 2 are decided in favour of the plaintiff. As far as Issue No.3 is concerned, whether the plaintiff is entitled to an order directing the fifth defendant to return the source code and security key and other materials relating to the software U CAMPUS XL 1.0 and not to use the same in any manner, the learned counsels on both sides submitted in unison that the fifth defendant was set *ex parte* by the learned Master vide order dated 26.03.2013, and that the defendants 1 to 4 are contesting the case. Therefore, Issue No.3 is also decided in favour of the plaintiff.

Issue No. IV

7. As far as Issue No.4 is concerned, the learned counsels on both sides also fairly submitted that out of the said 34 sets of compact disks, the plaintiff sold only 2 sets of compact disks to Anna University and University of Madras and handed over the remaining 32 sets of compact disks and instruction manuals to the plaintiff's counsel vide a Letter dated 12.02.2007 and the counsel for

the plaintiff has also acknowledged the same by affixing his signature. Therefore, this issue is answered against the plaintiff.

Issue No. V

8.1. The learned counsel appearing for the plaintiff submitted that as per the Marketing Agreement dated 15.06.2004, entered between the plaintiff and the first defendant, the defendants 1 to 3 have agreed to sell minimum 4 units for the period 01.07.2004 to 01.10.2004 and 6 units for the period 01.10.2004 to 01.01.2005 and 8 units per month after 01.01.2005 till termination of the said agreement and the said Agreement is valid for a period of two years from 01.07.2004. As per the Marketing Agreement dated 15.02.2004, the defendants are liable to achieve the targets and in case, if they fail to achieve the sales targets, the plaintiff can claim damages and the defendants are liable to compensate the plaintiff for loss of revenue and projected profits.

8.2. The learned counsel for plaintiff would contend that the defendants 1 to 3 are well aware of the fact that as per the agreement, in case of failure to achieve the said sales target, the

plaintiff is entitled to claim damages and the failure of achieving the sales target amounts to breach of Agreement and therefore, the defendants are liable to pay damages. Further, the first defendant was well aware of marketing commitments she held toward the plaintiff and flouted the terms of the agreement. Since they did not achieve the target, it amounts to breach of contract and the defendants have to pay the damages to the plaintiff.

8.3. Further, the learned counsel for plaintiff would contend that the third defendant admitted the fact that the software had market potential and in spite of being hired to market the said software, has failed to do so. The third defendant also admitted the fact that they had specific contractual targets and these targets/obligations were not met by the defendants.

8.4. The learned counsel would submit that the plaintiff is entitled to claim damages due to the non-performance of contractual terms by the defendants. He would further submit that the defendants also caused damages to the reputation of the plaintiff Company by failing to supply and install the software to

Magadh University, in spite of receiving payment from them and this reckless action of the defendants is contrary to the terms of the contract and also tarnished the reputation of the plaintiff Company and therefore, the damages in the present case can be presumed as a natural consequences. In support of his contention, the plaintiff's counsel relied on the following judgments:

- **Beiersdorg A.G. Vs. Ajay Sukhwani & Anr.** reported in **2008 SCC Online Del 1226**
- **M/s.Hilton Tobacco Private Ltd., Vs. M/s.Souza Cruz S.A. & Ors.** reported in **1994 SCC Online AP 209**
- **Macleods Pharmaceuticals Ltd., Vs. Procare Laboratories Pvt. Ltd.,** reported in **2013 (54) PTC 357 (Del)**
- **Microsoft Corporation Vs. Kiran & Anr.** reported in **2007 (35) PTC 748 (Del)**

8.5. The learned counsel for plaintiff also submitted that in **Microsoft Corporation Vs. Kiran & Anr.** reported in **2007 (35) PTC 748 (Del)**, the Delhi High Court held as follows:

"33. the claimant has a right to damages

regardless of the defendant's state of mind, and that is so regardless of whether the cause of action is infringement of a registered mark, or passing off."

9.1. In reply to the aforesaid submission, the learned counsel appearing for the defendants 1 to 4 submitted that the defendants never agreed to pay for any liquidated damages and they have not stated anything about the liquidated damages in the contract and that the plaintiff is not entitled to claim any liquidated damages. He therefore contended that the question of paying liquidated damages would arise only when the parties entered into a contract and agreed to the terms of the contract, in the event of breach, the party in default shall pay a stipulated amount to the other party and if this sum is a genuine pre-estimate of damages likely to flow from the breach, it is called liquidated damages. He further submitted that it is the case where primary obligation under a contract is secured by a secondary covenant to pay certain amount and nowhere in the agreement, it has been agreed that damages will be paid in case of non-achievement of target that gives the right to the plaintiff to claim Rs.25,00,000/- as liquidated damages for acts of infringement and passing off. Further, at the time of cross

examination, P.W.1 admitted the fact that in the Marketing Agreement entered between the parties, there is no Clause of liquidated damages to pay a sum of Rs.25,00,000/-.

9.2. The learned counsel for defendants 1 to 4 further submitted that the Marketing Agreement will be terminated only when the sales targets are not achieved. He also drew the attention of this Court to the paragraph No.15 of the plaint, wherein the plaintiff stated as follows:

"The plaintiff and the defendants have agreed for the sales target as per Clause 7 of the agreement. On that basis, the defendants ought to have achieved a sales target of 166 units till date. The defendants on the other hand have been negligent and have failed to achieve the same. The defendants have installed only 2 units so far at University of Madras and Anna University Chennai for Rs.81,000/- each. The plaintiff estimating the loss of revenue and projected profits is entitled to receive Rs.1,32,84,000/- (Rupees One Crore Thirty Two Lakhs Eighty Four Thousand only). The defendants were entitled to a fixed commission of 25% of the sale price. Deducting the said commission payable to the defendants, the plaintiff is entitled to receive Rs.99,62,000/- (Rupees Ninety Nine Lakhs Sixty Two

Thousand only) towards projected sales at sale price for the period of the contract. However, the plaintiff limits its claim to the tune of Rs.25 Lakhs as damages due to failure of performance of the contract."

however, in paragraph No.20 of the plaint, the plaintiff has stated that:

"The plaintiff values the relief of damages in the suit at Rs.25,00,000/- for infringement of copyright and pays the requisite court fee accordingly for the purpose of court fee and jurisdiction."

9.3. The learned counsel for defendants 1 to 4 contended that the plaintiff has contradicted its basis for the claim of damages for Rs.25,00,000/- by stating in one place that it is for non-achievement of sales target and in another place that it is for acts of infringement of copyright which makes it clear that the claim for damages is only a figment of plaintiff's imagination and made for the sole purpose of this case. He further submitted that the plaintiff is not entitled to any kind of damages whatsoever. He further drawn the attention of this Court to Section 73 of the Indian Contract Act, 1872 which reads as follows:

"When a contract has been broken, the party who

suffers by such breach is entitled to receive, from the party who has broken the contract, naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.

Explanation – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

9.4. He also pointed out that Clause 2 of the aforesaid Marketing Agreement reads as follows:

“AQEHE appoints VITS as non exclusive marketing service providers of the software U CAMPUS XL 1.0 in the territory of States of Tamil Nadu, Karnataka, Andhra Pradesh, Kerala and Union Territory of Pondicherry. This Agreement does not prevent AQEHE from marketing the software U CAMPUS XL 1.0 on its own to educational institutions and government/statutory bodies in the territory. AQEHE is at liberty to appoint other marketing agents for the territory for marketing the software U CAMPUS XL 1.0.”

9.5. The learned counsel would further contend that the terms of the Marketing Agreement makes it vividly clear that it is a non-exclusive agreement and the plaintiff can sell their product directly or through its agents. He also contended that it is not in dispute that the plaintiff did not sell a single unit of the Software besides the two units sold by the defendants which was also confirmed by P.W.1 in his deposition which is as extracted below and can be found in page 73 of the Compilation.

Q: Have you at any time during the subsistence of the agreement (Ex.P2) tried to market the software U CAMPUS XL 1.0 on your own as Ex.P2 is even according to you a non-exclusive agreement.

A: No"

9.6. The learned counsel submitted that it is pertinent to mention here that the Software could not be sold in the market despite best efforts since it is a replica and has contents from the free downloaded material from the NAAC website, which is also clear from the deposition of P.W.1 extracted below and can be found in Page 64 of the Compilation:

Q:Can you tell in what way is your software different or distinct from the freely available material in the NAAC website?

A: It is entirely different. Witness adds: My software was released by the head of NAAC at Osmania University. He has also given a recommendation letter to all the Principals of the Whole Country.

Q: According to you, is the quality of the software determined by the person who released it?

A: Yes, certainly.

9.7. He further added that even as per Section 73 of the Indian Contract Act, 1872, no damages is payable to the plaintiff for the reason that damages can be granted only for actual loss suffered and it cannot be based on "guess-estimates" as held by the Supreme Court in the case of **ONGC Limited Vs. Off-Shore Enterprises Inc.** reported in **(2011) 14 SCC 147**.

10. Heard the learned counsel for plaintiff and the learned counsel appearing for the defendants 1 to 4 and perused the materials on record. Insofar as 5th defendant is concerned, he has already been set ex parte by the learned Master vide order dated 20.03.2013.

11.1. Both the parties admittedly entered into a contract for the sale of the software of the plaintiff by the first defendant on 15.06.2004 and in the very same date, the defendants 1 to 3 and the plaintiff have also executed a Guarantee Agreement, in order to achieve the sale of software by the first defendant. It is pertinent to note that this is a non-exclusive agreement. Therefore, the plaintiff is at liberty to enter into a contract for the sale of the software with other persons also. This Agreement will come into effect from 01.07.2004 for a period of two years. In the event of failure to achieve the targets, the consequence will be the termination of the contract. In this connection it would be beneficial to refer the Clause 11 of the Marketing Agreement, which reads as follows:

"11. Termination:

11.1. This agreement may be terminated forthwith by AQEHE, if VITS is unable to achieve minimum target/s prescribed in Clause 7 above.

11.2. This agreement may be terminated forthwith by AQEHE, if there is any material breach of the terms and obligations set out in this agreement committed by VITS.

11.3. This agreement may be terminated by AQEHE, if the management of VITS is likely to come into the possession of a competitor of AQEHE.

11.4. This agreement may be terminated by either party if the other goes into liquidation whether compulsory or voluntary.

11.4. This agreement may be terminated forthwith, if the undertakings and/or property of the other party is taken over by the Government or Court receivers are appointed.”

As prescribed in Clause 7 of the agreement, the defendants are expected to achieve the minimum targets, however, the defendants failed to achieve the target, as a result of which the agreement will be terminated.

11.2. After perusing the Marketing Agreement entered between the plaintiff and the first defendant, this Court found that there was no Clause for determining the liquidated damages. Therefore, the plaintiff is not entitled to claim any liquidated damages by referring the said Marketing Agreement dated 15.06.2004. Further, the plaintiff's claimed that they have lost the projected profits due to the failure of the defendants to achieve the sales target and had they have achieved the same, then, the

plaintiff would have achieved the projected profits from the sale of the software U CAMPUS XL 1.0. and thereby, they would have achieved the sale revenue of Rs.1,75,84,000/- (Rupees One Crore Seventy Five Lakhs Eighty Four Thousand only).

11.3. Further, if the said sales target was achieved, the defendants 1 to 3 are entitled for a fixed commission of 25%. However, out of 166 units of the software U CAMPUS XL 1.0, the defendants have sold only 2 units. Therefore, they failed to achieve the sales target since they have not yet sold the 164 units. The price of 1 Unit is Rs.81,000/- (Rupees Eighty One Thousand only). The total sales target will go around Rs.1,32,84,000/-. After deducting the 25% commission, a total revenue loss to the plaintiff is sum of Rs.99,63,000/- (Rupees Ninety Nine Lakh Sixty Three Thousand only) However, they have restricted the damages only to the extent of Rs.25,00,000/- for breach of contract.

11.4. As per the terms of the said Marketing Agreement, if the sales targets is not achieved, the consequence will be the termination of the contract. As stated above, there is no Clause in

the Marketing Agreement for payment of liquidated damages. However, the plaintiff claims for the damages to the extent of Rs.25,00,000/-, for breach of agreement. In the absence of any Clause for the liquidated damages in the Marketing Agreement, the plaintiff cannot as a matter of right claim any compensation for the liquidated damages. Further, the said Marketing Agreement is only a non-exclusive agreement. Therefore, the plaintiff is not prevented from entering into any other agreement or to sell the software to outsiders. However, to substantiate the claim of the plaintiff, the plaintiff also rendered accounts before this Court, wherein it is seen that, so far the plaintiff sold only 2 softwares to the defendants Company. Apart from that, the plaintiff not at all sold any software and this would per se show that the defendants' product had not been sold in any market and therefore, the claim towards liquidated damages is not justifiable and baseless. As far as Issue No.5 is concerned, this Court has no hesitation to hold that the plaintiff is not entitled for any liquidated damages as they claimed in the suit.

12. In the result, Issue Nos. 1, 2, & 3 are answered in favour of the plaintiff and Issue No.5 is answered against the plaintiff.

KRISHNAN RAMASAMY, J.,

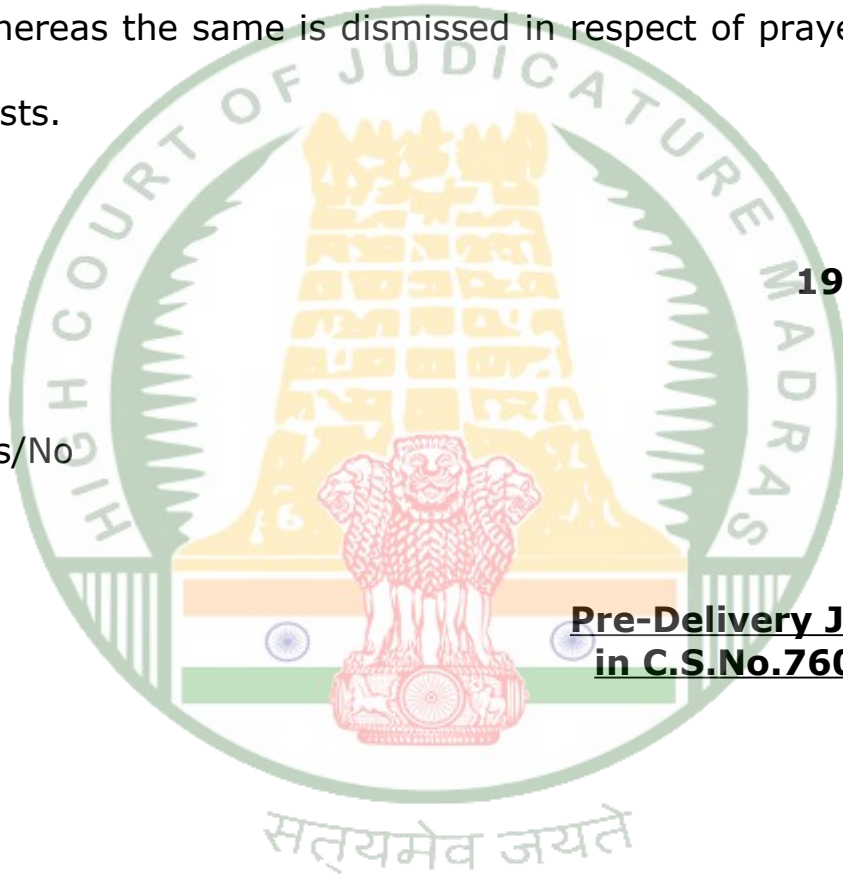
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Hence, in respect of prayer (a), (b) and (c), the present suit is partly decreed whereas the same is dismissed in respect of prayer (d) and (e). No costs.

19.08.2019

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Index : Yes/No



**Pre-Delivery Judgment
in C.S.No.760 of 2006**

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