

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

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Date of decision: 7th May, 2019

+ **CS(COMM) NO. 271/2016 & IA No. 12596/2016 (u/O VII R-11 CPC)**

SOFTWARE ONE INDIA PVT. LTD. PLsAINTIFF

Through: Mr. Manoj Kumar Sahu, Adv.

Versus

C&S ELECTRIC LTD. ...DEFENDANT

Through: Mr. Chander M. Lall, Sr. Adv. with
Ms. Nancy Roy & Mr. Rupin Bahl,
Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has sued the defendant for recovery of Rs.1,18,55,172/- pleading that:

- (i) the plaintiff is a software licensing company;
- (ii) the defendant placed a purchase order dated 27th June, 2011 on the plaintiff seeking delivery of various software licenses of Microsoft from the plaintiff, for a period of three years, on year 1, year 2 and year 3 basis;
- (iii) under the said purchase order, the defendant was liable to pay license fee of Rs.52,75,531/- for each of the three years and the plaintiff was to deliver to the defendant software licenses of Microsoft on yearly basis for a consecutive period of three years;
- (iv) an Enterprise Enrollment Agreement dated 28th June, 2011 was entered between the plaintiff, Microsoft and the defendant, for

a term of 36 months, on year 1, year 2 and year 3 basis; as per the said agreement all the products were to be imported directly from the principal publisher Microsoft to the defendant and the plaintiff was appointed as the re-seller to meet the terms of pricing and delivery of licenses and payment of billing etc. to the defendant;

- (v) the aforesaid Enterprise Enrollment Agreement could only be terminated or renewed as per the termination clause thereof; in view of the termination clause, it was clear that the defendant had no right to terminate the already existing enrollment under the agreement and the defendant had a right only to terminate the ability to enter into new enrollments under the agreement, by giving 60 days notice;
- (vi) in compliance with the agreed terms of the purchase order, the software licenses were duly delivered to the defendant for year 1 and the defendant in turn had also paid outstanding dues for the year 1 invoice as raised by the plaintiff on the defendant; Microsoft in turn raised an invoice on the plaintiff for year 1 and the plaintiff duly made payment against the said invoice as raised by Microsoft;
- (vii) the plaintiff, for due compliance of year 2 of the purchase order had delivered the software licenses to the defendant and raised an invoice dated 7th July, 2012 on the defendant and the defendant was liable to pay Rs.59,27,586/- including taxes to the plaintiff within a month of the date of the invoice;

Microsoft raised a corresponding invoice dated 28th June, 2012 for year 2 for a sum of Rs.52,72,532.79 on the plaintiff and the plaintiff made payment thereof to Microsoft;

- (viii) however, the defendant failed and refused to make the payment against the invoice dated 7th July, 2012 in spite of repeated requests and reminders of the plaintiff; the plaintiff got served a legal notice dated 8th April, 2013 on the defendant;
- (ix) the defendant, in response dated 22nd April, 2013 to the legal notice of the plaintiff, took a stand that the defendant had consulted and communicated to Microsoft vide letter dated 27th April, 2012 that the defendant did not wish to renew the Enterprise Agreement; however the said stand of the defendant was incorrect as the Enterprise Agreement was perpetual in nature for an agreed term of 36 months and could not be terminated mid-term;
- (x) the plaintiff also received a letter dated 30th May, 2013 from Microsoft informing the plaintiff that Microsoft had communicated to the defendant that the Enterprise Agreement was perpetual and could not be terminated mid-term; and,
- (xi) Microsoft raised an invoice dated 28th June, 2013 for year 3 on the plaintiff and the plaintiff has made payment thereof as well. The plaintiff raised a corresponding invoice dated 15th July, 2013 on the defendant for a sum of Rs.59,27,586/- but which also has not been paid by the defendant.

Hence, the suit for recovery of Rs.1,18,55,172/- with *pendente lite* and future interest.

2. The suit was filed as a summary suit under Order XXXVII of the CPC and came up first before the Court on 2nd December, 2013 when summons for appearance were issued and upon the defendant entering appearance, summons for judgment were issued and the defendant filed leave to defend.

3. Vide order dated 21st March, 2016, the suit was ordered to be re-numbered as a commercial suit.

4. Vide order dated 12th July, 2016, unconditional leave to defend was granted to the defendant reasoning that (a) it was not the case of the plaintiff that the defendant had used the software in question after the termination of the Enterprise Enrollment Agreement on 27th April, 2013; (b) the principal controversy that was thus required to be addressed was, whether the defendant would be liable to pay the license fee for the period it had not used the software; and, (c) it was also the plea of the defendant that the defendant had purchase Microsoft Operating Software for which it had paid separately.

5. The defendant has filed a written statement pleading that, (i) the suit based on a contract is bad for non-joinder of Microsoft Operations Pte Ltd., also a party thereto; (ii) the plaintiff is only a reseller of software of which Microsoft holds copyright; (iii) the plaintiff is neither the rights holder of the software nor a signatory to the Enterprise Enrollment Agreement of which compliance is sought; (iv) the defendant neither has privity with the plaintiff nor owes any money to the plaintiff; (v) prior to year 2 invoice

dated 7th July, 2012 raised by the plaintiff on the defendant, the defendant on 27th April, 2012 informed Microsoft that the defendant did not find any fruitful benefits of the Enterprise Agreement and was exiting therefrom; (vi) the Enterprise Agreement was entered into by the defendant upon a misrepresentation by Microsoft that the issues which the defendant was earlier having qua Microsoft Operating System would be cured; however the said issues remained even under the Enterprise Agreement, making the defendant realize that there was no fruitful benefit of the Enterprise Agreement; (vii) Microsoft, vide its letter dated 10th August, 2012 for the first time took a stand that the Enterprise Agreement could not be terminated and had to run its course of 36 months and which was controverted by the defendant; and, (viii) no software, price whereof is being demanded in this suit, was supplied under the Enterprise Agreement to the defendant for year 2 and year 3.

6. The plaintiff failed to file replication to the written statement aforesaid inspite of opportunity therefor and vide order dated 19th December, 2016, the right of the plaintiff to file replication was closed.

7. The defendant, besides filing the written statement has also filed IA No.12596/2016 under Order VII Rule 11 of the CPC for rejection of plaint on the ground of (A) there being no privity of contract between the plaintiff and the defendant and the agreement on the basis of which suit is filed being between defendant and Microsoft Operations Pte Ltd.; (B) the agreement on the basis of which the suit has been filed having been terminated by the defendant on 27th April, 2012; (C) the plea that Enterprise Agreement could not be terminated is contrary to the terms thereof; and,

(D) though it was denied but even if it was assumed that the plaintiff had made payment for year 2 and year 3 to Microsoft, the remedy of the plaintiff was not to recover the same from the defendant but to seek refund thereof from Microsoft.

8. The plaintiff has filed a reply to the IA No.12596/2018 under Order VII Rule 11 of the CPC but which contains nothing but denial of the averments in the application and reiteration of the averments in the plaint.

9. This Court on 11th July, 2017 *prima facie* found that the suit could not be proceeded with without impleading Microsoft and on such observation, the counsel for the plaintiff sought adjournment to take instructions. On 2nd November, 2017, the counsel for the plaintiff stated that he had instructions not to implead Microsoft.

10. Vide order dated 17th August, 2018, the plaintiff was directed to place on record its internal arrangement with Microsoft. The counsel for the plaintiff on 22nd November, 2018 informed that the plaintiff had no other internal arrangement with Microsoft than what was already on record.

11. The counsel for the plaintiff and the senior counsel for the defendant have been heard on IA No.12596/2016 under Order VII Rule 11 of the CPC and / or vis-à-vis the maintainability of the suit.

12. The senior counsel for the defendant has argued that, (i) the plaintiff is suing the defendant for infringement of copyright without adding the owner of the copyright in software; (ii) the plaintiff is suing the defendant on the basis of a contract to which the plaintiff is not a party; (iii) the agreement was to be renewed from year to year for a period of three years

and the defendant having not renewed the agreement for the second year is not liable for license fee for year 2 or for year 3; (iv) on the contrary, the defendant chose to purchase the software from the Microsoft; (v) the plaintiff, under the Enterprise Agreement was only a collecting agent; (vi) the orders aforesaid show this Court to have expressed doubts as to the maintainability of the suit; (vii) the plaintiff in spite of directions has not produced the internal arrangement with Microsoft; and, (viii) attention is drawn to Section 61 of the Copyright Act, 1957 to contend that Microsoft as owner of the copyright is a necessary party.

13. The senior counsel for the defendant however agrees that for non-joinder of necessary party, the plaint cannot be rejected and at best Microsoft is to be impleaded as a defendant in the suit.

14. The counsel for the plaintiff has only argued what is stated in the plaint and which is recorded hereinabove and additionally only drawn attention to a copy of the letter dated 7th August, 2012 of Microsoft Corporation (India) Pvt. Ltd. to the defendant in response to the defendant's letter dated 27th April, 2012 terminating the Enterprise Agreement and stating that (a) Microsoft Operations Singapore is the contracting entity for the plaintiff's Microsoft license; (b) the defendant appeared to have a misunderstanding as to how enterprise agreements operate; (c) the Enterprise Agreement is a perpetual agreement enabling customers to place orders with Microsoft under specific volume licensing programmes; (d) the 'enrollment' under the Enrollment Agreement is the specific purchase which the defendant made and Microsoft allows customers to pay for such purchase over a three year period – it is not a year to year subscription

agreement that can be terminated mid-term; (e) thus the defendant's enrollment obligations continued and Microsoft could not accept the purported termination by the defendant; (f) the defendant's enrollment was covering plaintiff's renewal for 475 Desktops Computers with 125 Desktops being added at signing and shall continue to run for the term of enrollment which ended on 30th June, 2014; (g) the plaintiff will thus need to fulfill all obligations as part of enrollment; (h) Microsoft had not received any "True Up Orders" from the defendant; and, (i) advising the defendant to work with its partner and Microsoft Account Manager in relation to outstanding licence compliance.

15. Before I proceed to deal with the respective arguments, it is deemed expedient to discuss the documents filed by the plaintiff, though the defendant in its affidavit of admission / denial of documents has denied all the said documents on the ground of being photocopies. The order dated 19th December, 2016 also records that the plaintiff had not produced any documents i.e. original documents for admission / denial. However, from the pleadings, it emerges that there is no dispute about the form and content of documents which I proceed to discuss herein for the purpose of the present stage of the suit.

16. The purchase order dated 24th June, 2011 placed by the defendant on the plaintiff contains the product description, unit price, quantity and total price for each of the years 1,2 and 3, though same for all the years, with the plaintiff also providing (i) one day session on share point software; (ii) two days training session on Microsoft Excel; (iii) support on VLSC site; (iv) hand on access to "SA benefit under EA programme by specialized

software one EA Experts”; and, (v) training against SA vouchers by specialized partner and providing “1st year payment along with purchase order; 2nd year payment from the date of invoice. 3rd year payment also from the date of invoice”.

17. The Enterprise Enrollment (Indirect):

- (i) describes itself as between the entities identified in the signature form; the entities described in the signature form are the defendant under the column ‘Customer’ and Microsoft Operations Pte Ltd. in the column “Microsoft Affiliate”;
- (ii) provides that the enrollment consists of the Enterprise Enrollment (Indirect) and the Enterprise Agreement
- (iii) provides that the effective date thereof is the date the enrollment is accepted by Microsoft;
- (iv) provides that the enrollment thereunder will expire 36 full calendar months from the effective date and that “it could be terminated earlier or renewed as provided in the Microsoft Enterprise Agreement. Microsoft will advise Customer of the renewal options before it expires”;
- (v) against the column “Product Order” provides, that the reseller will provide the customer with customer’s Product pricing and order; pricing and billing terms for all products ordered will be determined by agreement between customer and the reseller and the reseller will provide Microsoft with the order separately from this enrollment;

- (vi) against the column “Reseller Information” mentions the name of the plaintiff as re-seller company and contains the signature on behalf of the plaintiff in confirmation of the information furnished of its address, telephone numbers, e-mail ID and contact person;
- (vii) against the column “Changing a Re-seller” provides that if Microsoft or the plaintiff as re-seller chooses to discontinue doing business with each other, the defendant as customer must choose a replacement; and, if the defendant as customer intends to change the re-seller, it must notify Microsoft and the plaintiff as former re-seller in writing at least 90 days prior to the date on which the change is to take effect;
- (viii) in the “Definitions” section of the Enterprise Agreement defines “Reseller” as a large account reseller authorized by Microsoft to re-sell licenses in an Enrolled Affiliate’s Defined Region under the programme or, where applicable, an entity that purchases licenses from a distributor for resale in an Enrolled Affiliates Defined Region under this programme. (Therefrom it appears that reseller thereunder can either be an entity having authorization from Microsoft to resell licenses or an entity which purchases licenses from a distributor of Microsoft for resale in its defined region. The plaintiff nowhere in the plaint has pleaded in which category it falls i.e. whether it is only an authorized reseller or purchases licenses from distributor of Microsoft for resale. While in the case of

former, the relationship of the plaintiff with Microsoft would be as between agent and principal, in the case of latter it would be on a principal to principal basis);

- (ix) In the “How the Enterprise program works” section of the Enrollment Agreement, under “When acquiring Licenses through a Reseller” provides that orders under an indirect enrollment will be made out to and submitted to the Enrolled Affiliate’s reseller; Microsoft will invoice that reseller or that reseller’s distributor, as applicable, according to the terms in the applicable enrollment; the reseller and the Enrolled Affiliate will determine the Enrolled Affiliate’s actual price and payment terms (since the Enterprise Enrollment between the defendant and Microsoft has the words “indirect” in bracket, it appears that the arrangement which the defendant entered into with Microsoft falls in the category of “Indirect Enrollment” within the meaning of the said clause);
- (x) In the “Licence grant” section of the Enterprise Agreement, under “Special rule for Enterprise Products” provides that so long as the Enrolled Affiliate places annual true-up orders, the Enrolled Affiliate may use the latest version (or any prior version) of each Enterprise Product on each of its Qualified Desktops as permitted in the Product Use Rights; in addition, for CALs, each Qualified Desktop (or, for CALs that are User-based Licenses, each Qualified User) covered by the Enrollment may access and use the associated server software;

(xi) In the “Licence grant” section of the Enterprise Agreement under “When Licenses become perpetual” *inter alia* provides in the case of early termination of an enrollment as provided in the subsection entitled “Early Termination”, if an Enrolled Affiliate chooses only to pay amounts due and payable as of the termination date, then the Enrolled Affiliate will instead have perpetual licenses for the number of licenses specified in the subsection entitled “Early termination”;

(xii) The “Term and termination” section of the Enterprise Agreement provides as under:

“This agreement stays in place until terminated. The term of each Enrollment is stated in the Enrollment. “Renewal” means the renewal of an Enrollment. Either party can terminate the agreement on notice – that will not affect any existing Enrollments. Generally, existing Enrollments may be terminated if either party breaches the agreement and does not cure the breach in the time allotted. Generally, upon termination or expiration, Enrolled Affiliate must order Licenses for copies of Products it has been using but has not yet placed orders for, and pay for all Licenses in full.

*a. **Term.** This agreement will remain in effect unless it is terminated by either party as described below. Each Enrollment or order will have the term provided in that Enrollment or order.*

- b. **Termination without cause.** Either party may terminate this agreement, without cause, upon 60 days written notice. Such termination will merely terminate either party's and its Affiliates' ability to enter into new Enrollments under this agreement. Such termination will not affect any Enrollment or order not otherwise terminated, and any terms of this agreement applicable to any Enrollment or order not otherwise terminated will continue in effect with respect to that Enrollment or order.*
- c. **Termination for breach.** Either party to an Enrollment may terminate it if the other party materially breaches its obligations under this agreement, including any obligation to submit orders or pay amounts owed. Except where the breach is by its nature not curable within 30 days, the terminating party must give the other party 30 days notice and opportunity to cure. If Microsoft gives such notice to an Enrolled Affiliate, Microsoft will give Customer a copy of that notice as well and Customer agrees to assist in attempting to resolve the breach. If the breach also affects other Enrollments and cannot be resolved between Microsoft and Customer within a reasonable period of time, Microsoft may also terminate this agreement and all other Enrollments under it. If an Enrolled Affiliate ceases to be Customer's Affiliate, Customer must promptly notify Microsoft, and Microsoft may terminate its Enrollment.*

*d. **Early termination.** If an Enrolled Affiliate terminates its Enrollment as a result of a breach by Microsoft, or if Microsoft terminates an Enrollment because the Enrolled Affiliate has ceased to be an Affiliate of Customer, then the Enrolled Affiliate will have the following options:*

(i) It may immediately pay the total remaining amount due, including all installments, in which case, the Enrolled Affiliate will have perpetual rights for all Licenses it has ordered; or

(ii) It may pay only amounts due as of the termination date, in which case the Enrolled Affiliate will have perpetual Licenses for (1) all copies of Products for which payment has been made in full, and (2) the number of copies of Products it has ordered (including the latest version of Products ordered under Software Assurance coverage in an initial or renewal term) for which payment has been made in installments that is proportional to the total of payments made versus total amounts due if the early termination had not occurred.

*e. **Effect of termination or expiration.** When an Enrollment expires or is terminated,*

(i) Enrolled Affiliate must order Licenses for all copies of Products it has run for which it has not previously submitted an order. Any and all unpaid payments or any order of any kind, including subscription services,

remain due and payable. Except as provided in the subsection titled “Early termination,” all unpaid payments for Licenses immediately become due and payable.

(ii) Enrolled Affiliate’s right to Software Assurance benefits under this agreement ends if it does not renew Software Assurance.

To the extent necessary to implement the termination provisions of this agreement, each party waives any right it has or obligation that the other party may have, now or in the future under any applicable law or regulation, to request or obtain the approval, order, decision, or judgment of any court to terminate this agreement.”

18. The defendant, vide its letter dated 27th April, 2012 to Microsoft Operations Pte Ltd. intimated its decision not to renew the Enterprise Agreement and to instead buy the licenses. The plaintiff, at page 47 of Part-III A file has also filed a photocopy of an invoice raised by the plaintiff on the defendant on 15th July, 2013 purporting to dispatch to the defendant the licenses for that year and containing a declaration that the licenses detailed to have been dispatched were genuine and imported by the plaintiff from the principal publisher i.e. Microsoft Singapore.

19. The plaintiff though has also filed at pages 49 and 50 the invoices dated 28th June, 2012 and 28th June, 2013 raised by Microsoft on the

plaintiff but has not furnished any proof of payment thereof, though in the plaint has pleaded to have paid the value thereof to Microsoft.

20. A reading of all the documents filed by the plaintiff itself does not show the arrangement to be of sale of licenses valid for three years with only the price thereof having been agreed to be paid in three installments and in which case the plaintiff was entitled in law, having completed the sale by delivery of licenses valid for three years, to sue for the balance price thereof. On the contrary, the purchase order placed by the defendant on the plaintiff shows the amount type and price of the licenses separately for each of the three years. Had the licenses not been meant to be delivered successively, the licenses to be delivered and sold would not have been separately mentioned with price thereof. Similarly, the invoices show that the plaintiff for each year was to supply the licenses to the defendant and with respect to each of which licenses the plaintiff in terms of the purchase order assured the defendant that the licenses were genuine and had been sourced from Microsoft.

21. Once the arrangement between the parties is found to be so, de hors the contentions qua the interpretation of the termination clause, the termination by the defendant of the arrangement, after the period of first year only and / or refusal by the defendant to take delivery of and to pay for licenses for the second and third years for which also the defendant had placed an order on the plaintiff and agreed to pay to the plaintiff, would only amount to breach of contract by the defendant and would entitle the plaintiff in law only to the remedy of seeking compensation for breach of contract. On the contrary what the plaintiff is seeking to do by filing this

suit for recovery of the agreed price for year 2 and year 3, is to seek specific performance of the agreement of sale of licenses, without pleading the necessary ingredients of the claim for specific performance.

22. Supreme Court in ***Kisan Sahkari Chini Mills Ltd. Vs. Vardan Linkers*** (2008) 12 SCC 500 held that ordinarily the remedy available for a party complaining of breach of contract lies for seeking damages and the entitlement to the relief of specific performance is available only if the contract is capable of being specifically enforced in law. Similarly, in ***Fortune Infrastructure Vs. Trevor D' Lima*** (2018) 5 SCC 442 it was noted that in common law, claim for damages is the rule and specific performance is an exception. In ***Noble Resources Ltd. Vs. State of Orissa*** (2006) 10 SCC 236, it was held that ordinarily specific performance of a contract would not be enforced particularly when damages may be an adequate remedy for breach of contract.

23. Otherwise also, the agreement of sale of computer software licenses is not specifically enforceable under the Specific Relief Act, 1963. It is nowhere pleaded that the software licenses to be granted were specially written / got written for the defendant or had no use to anyone else. The plaintiff, while seeking the relief in the nature of specific performance has not even pleaded what it did with the licenses for the year 2 and year 3 which the defendant refused to take and pay for and whether the plaintiff sold the said license to anyone else and / or otherwise how the plaintiff mitigated its damages on account of breach of agreement by the defendant. So much so that the plaintiff failed to file replication even to the written statement and forfeited its right therefor.

24. Even otherwise, the agreement between the plaintiff and the defendant is not specifically enforceable as a reading of the 'Changing a Reseller' clause of the Enterprise Enrollment (Indirect) between Microsoft and the defendant shows that the defendant was, at any point of time during the contract, entitled to change the Reseller by giving a notice to Microsoft and the Reseller intended to be replaced, 90 days prior to the date on which the change is to take place. A conjoint reading of Section 14(d) of the Specific Relief Act which provides that contracts which are by nature determinable are not specifically enforceable, along with Section 41(e) which provides that injunctions cannot be granted to prevent the breach of a contract performance of which cannot be specifically enforced, shows that the Courts are not to grant specific performance of an agreement which is terminable at will by either of the parties. Reference in this regard may be made to *Divyanshi Saxena Vs. Shri Ram School* 2006 SCC OnLine Del 375, *Jindal Steel and Power Ltd. Vs. SAP India Pvt. Ltd.* (2015) 221 DLT 708 and *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service* (1991) 1 SC 533.

25. I may however note that the Specific Relief Act has been amended through the Specific Relief (Amendment) Act, 2018 and which amendment has been in force since 1st October, 2018. Though the said amendment has removed "contract for the non-performance of which compensation in money is an adequate relief" as one of the type of contracts which cannot be specifically enforced under Section 14, as aforesaid, the contract as per the amended Section 14 also is still unenforceable.

26. Thus de hors the argument of the senior counsel for the defendant, of their being no privity of contract between the plaintiff and the defendant, the suit as instituted and in the form filed does not lie and is a deadwood with no reasonable possibility of the plaintiff succeeding therein and should not continue to waste the time of the Court.

27. No merit is found in the contention of the senior counsel for the defendant relying on Section 61 of the Copyright Act, of the plaintiff being not entitled to institute the suit for infringement of copyright without impleading the owner of the copyright and Microsoft being a necessary party to the suit for the said reason, because the present suit is not a suit for infringement of copyright.

28. I must however state that the documents as described hereinabove do not show the plaintiff to be having any rights whatsoever under an Enrollment Agreement, to which it was not even a party. What appears to have transpired is that pursuant to the defendant placing the purchase order on the plaintiff for Microsoft Enterprise, the defendant was made to enter into an Enrollment Agreement directly with Microsoft and though under which Enrollment Agreement, the purchase order placed by the defendant on the plaintiff was to be executed by the plaintiff but the fact remains that the plaintiff being not a party to the Enrollment Agreement is not entitled to exercise any rights thereunder. All that the plaintiff is entitled to is to exercise its rights under the purchase order and which as aforesaid is of sale of licenses and payment of price thereof separately for the three years and on refusal of defendant to take delivery of and pay price for year 2 and year

3 whereof, the remedy of the plaintiff as aforesaid is only of suing the defendant for breach of contract and not of recovery of price.

29. Having held so, the need to interpret the clauses aforesaid of the Enterprise Agreement does not arise.

30. The suit is thus found to be not maintainable in law and is dismissed.

31. The plaintiff to pay costs of the suit to the defendant, with professional fee assessed at Rs.2.5 lacs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 07, 2019

‘gsr’

(Corrected & released on 6th June, 2019)

