

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**226****RSA No.704 of 2015 (O&M)****Reserved on : 12.01.2024****Date of Decision: 23.01.2024**

M/s Semi Conductor Complex Limited

....Appellant

VERSUS

M/s Netica Solution Pvt. Ltd. and Another

....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. S.K. Sharma, Senior Panel Counsel and
Mr. Rajat Sharma, Advocate for the appellant.

Mr. Harjaap Singh Mann – respondent No.1 in person.

None for respondent No.2.

ALKA SARIN, J.

1. The present appeal has been preferred by the defendant-appellant challenging the judgment and decree dated 21.12.2012 passed by the Trial Court and judgment and decree dated 28.01.2015 passed by the First Appellate Court.

2. The brief facts relevant to the present *lis* are that the plaintiff-respondent No.1 instituted a suit against the defendant-appellant and defendant-respondent No.2 averring therein that the plaintiff-respondent No.1 and defendant-appellant had entered into a Memorandum of Understanding (hereinafter referred to as the 'MOU' for the sake of brevity) on 25.06.2002 to set up a center at Chandigarh/Mohali to promote a training program for Engineering and MCA final year students and graduates. As per

clause 4 of the MOU, the plaintiff-respondent No.1 was required to pay a licence fee of Rs.10,00,000/- to the defendant-appellant. 40% was to be paid initially on signing of the MOU. A bank guarantee for the balance amount was required to be submitted within 15 days. 40% of the fee was to be paid on the commencement of 3rd year operations and 20% on the commencement of 4th year operations. The defendant-appellant was to be given annual royalty of 25% per student if the collection would be upto Rs.20,00,000/-, 27% if the collection would be more than Rs.20,00,000/- or less than Rs.30,00,000/- and 32% if it was above Rs.30,00,000/-. The defendant-appellant in turn was to furnish the facility for the course at the center, prescribe standards, period of training, method of review of performance of students/trainees in different modules of training and classes. The first batch commenced in August 2002 and was completed in February 2003 as the period for training was six months. Before the commencement of each batch, permission was sought from the defendant-appellant for releasing the advertisement, notice etc. It was further averred that the defendant-appellant did not reimburse 40% share of the expenses incurred on the advertisement etc. by the plaintiff-respondent No.1. The courseware which was supposed to be provided by the defendant-appellant was infact developed by the plaintiff-respondent No.1 themselves. However, later the defendant-appellant complained of deficiency in the courseware. It was further the case set up that the application of plaintiff-respondent No.1 for fixing the test date was not entertained by the defendant-appellant and rather the defendant-appellant started raising objections and pointed out to the deficiency qua the courseware, faculty etc. The plaintiff-respondent No.1 also started negotiations with a U.S. based company for the software tools at

subsidized rate to provide high quality education but the defendant-appellant delayed the permission to commence the course. The inaction on the part of the defendant-appellant caused huge losses to the tune of Rs.30,00,000/-. Due to the delay the remaining seats could not be filled for batches in February and July 2004. On 28.06.2004 a letter was issued by the plaintiff-respondent No.1 seeking permission to release the advertisement, which was to be released by 01.07.2004, as the advertisement rates were going to be revised. Instead of approving the letter, a letter was received from the defendant-appellant on 13.08.2004 directing the plaintiff-respondent No.1 to pay Rs.4,00,000/- towards licence fee. In response the plaintiff-respondent No.1 informed the defendant-appellant that the course was already behind schedule and requested to defer the MOU clause for commencement of the 3rd year by 08 months and ensured to extend the bank guarantee. However, the defendant-appellant threatened to get the bank guarantee invoked. Hence, in September 2004 the present suit was filed for permanent injunction for restraining the defendants from encashing/invoking the bank guarantee given by the plaintiff-respondent No.1. The defendant-appellant filed written statement raising preliminary objections. On merits the averments made in the plaint were denied. It was averred that the plaintiff-respondent No.1 was under an obligation to develop the infrastructure but the plaintiff-respondent No.1 was not able to conduct the course as per requirements of MOU. It was alleged that plaintiff-respondent No.1 was only concerned with making money and that the accounts had not been settled by the plaintiff-respondent No.1 with the defendant-appellant regarding fees paid by students. Though the students were to pay fee in name of SCL by cash or cheque and then after deducting 25% of royalty the

payment was to be paid to the plaintiff-respondent No.1 but the plaintiff-respondent No.1, with malafide intention, made only those payments which had been paid through cheques and the money received in cash had been misappropriated by it. It was alleged that the plaintiff-respondent No.1 did not send the records of the students and due to defect in the service by plaintiff-respondent No.1 the strength had been reduced to only 7. It was also alleged that the plaintiff-respondent No.1 in the garb of a government department had tried to smuggle certain software which was neither a part of MOU nor the defendant-appellant had any knowledge. It was submitted that the bank guarantee already stood invoked by letter dated 06.09.2004 which was duly received by bank. Replication was filed by plaintiff-respondent No.1 to the written statement filed by the defendant-appellant.

3. From the pleadings of the parties the following issues were framed :

1. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for ? OPP
2. Whether the suit of the plaintiff is not maintainable ? OPD
3. Whether the plaintiff has not come to the court with clean hands ? OPD
4. Whether the suit of the plaintiff is barred for want of service of notice under Section 80 CPC ? OPD
5. Whether the suit is bad for mis-joinder and non-joinder of necessary parties ? OPD
6. Relief.

4. The Trial Court vide judgment and decree dated 21.11.2012 decreed the suit of the plaintiff-respondent No.1. Aggrieved by the said judgment and decree an appeal was preferred by the defendant-appellant, which was also dismissed vide judgment and decree dated 28.01.2015. Hence, the present regular second appeal.

5. Learned counsel for the defendant-appellant would contend that the suit itself was not maintainable as there was an arbitration clause No.19 in the MOU and hence the civil court had no jurisdiction. It is further the contention that on the commencement of the 3rd year operations 40% of the fee was to be paid, however, the said amount was not paid by the plaintiff-respondent No.1.

6. *Per contra* Mr. Harjaap Singh Mann has appeared in person on behalf of the plaintiff-respondent No.1. It has been contended by Mr. Mann that vide letter dated 28.06.2004 (Ex.PW1/10), the defendant-appellant was requested for the release of the advertisement for the next batch of students. However, instead of approving the advertisement a letter dated 13.08.2004 (Ex.PW1/11) was sent by the defendant-appellant requesting for payment of Rs.4,00,000/- which the defendant-appellant claimed was due. Vide letter dated 20.08.2004 (Ex.PW1/12) the plaintiff-respondent No.1 requested that the 3rd year operations be deferred by 08 months and assured to extend the bank guarantee on procedural and other grounds. Vide letter dated 30.08.2004 (Ex.PW1/13) the defendant-appellant informed the plaintiff-respondent No.1 that until valid concerns relating to adequate infrastructure, updated courseware, provisioning of software/hardware tools, quality faculty and establishing proper business practices are addressed, it would not be proper and viable business case to commence operations. It is the contention

of Mr. Mann that since the operation itself did not commence the question of payment of 40% of the amount as per the MOU did not arise.

7. I have heard learned counsel for the defendant-appellant and Mr. Mann appearing on behalf of the plaintiff-respondent No.1.

8. In the present case both the Courts below found that the defendant-appellant itself was at fault in not commencing operations for the 3rd year. The plea of arbitration was for the first time raised in the year 2009 i.e. after 05 years of institution of the suit. On a query by the Court as to whether any application was ever moved before the civil court for referring the matter to the arbitration, the response by the counsel for the defendant-appellant was in the negative. As found by the First Appellate Court, the terms of the bank guarantee indicate that it was conditional guarantee subject to loss suffered by the defendant-appellant due to non-fulfilment of contractual obligation by the plaintiff-respondent No.1 as per MOU. Learned counsel for the defendant-appellant has not been able to convince this Court that any loss was suffered by the defendant-appellant due to non-fulfillment of it's contractual obligations by the plaintiff-respondent No.1 as per the MOU. The letter written by the defendant-appellant themselves i.e. PW1/13 makes it amply clear that it was they who did not permit the commencement of operations. The defendant-appellant cannot take benefit of its own wrong as has also been held by the First Appellate Court. Once there was no loss suffered by the defendant-appellant due to the alleged inaction by the plaintiff-respondent No.1 the defendant-appellant was not entitled to invoke the bank guarantee. No other point was argued.

9. In view of the above, I do not find any merit in the present appeal. No question of law, much less any substantial question of law, arises

in the present case. The appeal is accordingly dismissed. Pending applications, if any, also stand disposed off.

23.01.2024
jk

(ALKA SARIN)
JUDGE

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO