N.C.No.2023: DHC:4141
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 08.06.2023

\+ **RFA 835/2016 & CM APPL. 14617/2020**

M/S IHT NETWORK LIMITED ..... Appellant
Through: Mr. Shivesh P. Singh, Advocate.

versus

SACHIN BHARDWAJ ..... Respondent
Through: Mr. Prashant Vaxish, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present appeal has been filed by M/s. IHT Network Limited (appellant-defendant) seeking to set aside the final order dated 09.03.2016. Vide the impugned final order dated 09.03.2016, the Ld. ADJ-04(NW), Rohini District Courts, Delhi (hereinafter referred to as the Ld. Trial Court) had decreed the suit for recovery filed by the Respondent-Plaintiff to the tune of Rs. 19,12,080/- along with interest (simple interest) @ 12% per annum from the date of filing of the suit till its realization along with cost of the suit. For the sake of convenience parties are also being referred to by their original names in the suit.

2. The instant suit was filed by the respondent-plaintiff for the recovery of Rs.19,12,080/- alleging as follows:-

a. The defendant was engaged in the business of providing Job Guaranteed Courses in the field of Computer Hardware Education and networking along with franchise services for consideration. The Plaintiff after gaining knowledge of the said franchise service being offered and being interested in setting up of such a franchise, contacted the defendant.

b. According to the averments made in the plaint, the plaintiff was earlier running an institute for English speaking courses named Achievers Point. Initially, the defendant did not have any objection to the same but later on, the defendant raised an objection to the running of the said institute after collecting the franchise fee/money. It is averred that due to such objections, the plaintiff had to close down the said institute and the sum of Rs. 75,000/- which was stated to be given as franchise fee for running the institute Achievers Point, has also been claimed in the suit.

c. The plaintiff in the plaint has further averred that the officials of the defendant after inspecting the premises of the plaintiff had assured him that approximately 70-80 students would be transferred by the defendant from their already running institute and that the plaintiff would earn about Rs.50,000/- to Rs.60,000/- as net profit from the fees of the said students. Finding the terms and conditions of the transaction mutually beneficial, a Memorandum of Understanding dated 01.10.2008 (hereinafter referred to the 'MoU') was executed between the parties. Incidentally, none of the parties have proved the MoU on record.

d. There is no dispute regarding the payment of two instalments of Rs. 1,68,540/- each, by the plaintiff towards franchise fee. The said amounts were paid by the plaintiff on 01.10.2008 and 01.10.2009. Besides the aforesaid amount, as per the averments made in the plaint, the plaintiff paid further sum of Rs. 2,50,000/- (Rupees two lakhs and fifty thousand only) to the defendant towards cost of various kinds of hardware, software, equipment/start up kit facility books etc. which were required for running the said centre. However, it has been stated that as against a payment of Rs. 2,50,000/- (Rupees Two Lakhs and Fifty Thousand only), the defendant supplied goods only worth Rs. 1,95,234/- (Rupees One Lakhs and Ninety Five Thousand and Two Hundred and Thirty Four only) and the balance amount of Rs. 54,766/- (Rupees Fifty Four Thousand and Seven Hundred and Sixty Six only) was not refunded by the defendant despite reminders.

e. It was further stated that the plaintiff also spent Rs. 5,60,000/- (Rupees Five Lakhs and Sixty Thousand Only) on the centre towards furniture / fixtures / infrastructure, computers, advertisements and brand publicity. A further sum of Rs. 80,000/- per month was spent by the plaintiff for running the said centre, which includes rent, salary of the staff, administration expenses etc.

f. It is stated that despite making all the aforesaid payments, the defendant failed to execute the franchise agreement and also provide the requisite number of students as undertaken by its officials. As per the plaintiff, only 43 students were transferred by the defendant in late November, however, the plaintiff could collect fee only from 16 students

as the defendant had already collected the fee from the remaining students.

g. It was further stated by the plaintiff that despite the aforesaid payments, the defendant vide its letter dated 22.05.2009 withdrew the job/placement guarantee offered by it and also unfairly deducted the royalty from the above said excess amount of Rs. 54,766/- paid towards equipment/start up kits etc.

h. The dispute between the parties also pertains to the defendant withdrawing its services and closing down the said centre of the plaintiff vide its letter dated 13.05.2009 (annexed as Annexure A-10 to the paperbook). The plaintiff also alleged that the officials of the defendant took away all the money receipts, files and records etc. pertaining to the centre on the pretext of audit/inspection. Thereafter, as per the version of the plaintiff, he visited the office of the defendant on 15.06.2009 as well as wrote an email dated 11.11.2010 demanding the appellant-defendant to refund the money paid by him.

i. In the aforesaid circumstances, the plaintiff claimed a sum of Rs. 19,12,080/- with interest @ 18% per annum from the date of receipt of the amount till date of actual payment. Further, a sum of Rs. 25,000/- was claimed on account of mental agony along with a sum of Rs, 25,000/- towards cost of litigation.

3. The appellant-defendant filed its written statement alleging that- (i) suit was barred by limitation as the franchisee agreement was revoked on 13.05.2009; whereas, the present suit was instituted on 14.05.2012 (ii) the

plaintiff had failed to sign the franchisee agreement after expiry of 90 days as mentioned in the MoU (iii) the plaintiff was in breach of the terms of the MoU and the defendant vide its various letters being letter dated 22.04.2009, letter dated 05.05.2009 and letter dated 13.05.2009 had requested the plaintiff to rectify the breaches mentioned therein. In so far as the terms of the MoU as stated in para 5 of the plaint are concerned, the defendant in corresponding para 5 of the written statement took a stand that the same are matter of record.

4. In view of the aforesaid, the learned Trial Court framed the following issues for adjudication:

i. *Whether the suit filed by the plaintiff is not maintainable as it is barred by period of limitation? OPD*

ii. *Whether the plaintiff is entitled for recovery alongwith interest as prayed for? OPP*

iii. *Any other relief.*

5. The plaintiff examined himself as PW-1 and one Sh. Aman Dwivedi, a student of plaintiff's centre/institute as PW-2. The defendant examined its Director Sh. Umesh Chaudhary as DW-1. On the assessment of documents brought on record, the learned Trial Court answered the issues in favour of the plaintiff and against the defendant and decreed the suit *vide* its judgment dated 09.03.2016, for a sum of Rs. 19,12,080/- along with simple interest @12% per annum from the date of filing of the suit till realization of decretal amount, along with costs.

Issue no.1

6. In respect of the first issue, the learned Trial Court found that the defendant had unreasonably withdrawn their services, as well as, closed the centre on 13.05.2009 on a false pretext and took away all the money receipts, records, etc. The learned Trial Court further found that the plaintiff had visited the offices of the premises of the appellant-respondent on 15.06.2009 and expressed his grievances regarding the closing down of the centre and requested the defendant to return the money paid by him. In this background, the learned Trial Court held that the period of limitation started from 15.06.2009 and the suit having being instituted on 14.05.2012, was within the period of limitation.

7. Mr. Shivesh P. Singh, the learned counsel for the appellant defendant submitted that in terms of para 16 of the plaint the cause of action arose on 13.05.2009 when the centre was closed by the defendant, therefore, the suit ought to have been filed on or before 12.05.2012. The suit having been filed on 14.05.2012 was barred by limitation. He further submits that the finding of the learned Trial Court that the cause of action started from 15.06.2009, when the respondent plaintiff visited the office of defendant company is perverse in as much as, the arrangement having been terminated and the centre being closed on 13.05.2009, the visit of the respondent plaintiff to the office of the defendant on 15.06.2009 would not extend the limitation.

8. On the other hand, Mr. Prashant Vaxish, the learned counsel for the respondent plaintiff submitted that 12.05.2012 and 13.05.2012, were second Saturday and Sunday, respectively, therefore, the suit filed by the respondent plaintiff on 14.05.2012 was not barred by limitation. When confronted with the above fact, the learned counsel for the defendant rightly conceded that the suit

was within the period of limitation. Accordingly, it is held that the cause of action for filing the suit arose on 13.05.2009, when the Centre was closed by the defendant, and the suit having been filed on 14.05.2012, (12.05.2012 and 13.05.2012 being second Saturday and Sunday), the suit filed was within the period of limitation.

Issue no.2

9. On issue no.2, Mr. Shivesh P. Singh, the learned counsel for the appellant-defendant submits that for maintaining the claim for damages and compensation, first the wrong committed by the defendant has to be proved by the plaintiff. After the wrong is proved, the plaintiff is obliged to prove quantum of such damages suffered by him with supporting documentary evidence. He submits that the respondent plaintiff completely failed to show any wrong committed by the appellant defendant. He further submits that the respondent plaintiff in terms of MoU dated 01.10.2008 failed to execute and enter into an agreement. He submits that the respondent plaintiff also failed to pay 15% of the total fee collection every month. He contends that the plaintiff admitted receiving of fee of at least 15-16 students out of 40 students who were transferred from Shakarpur Centre to the centre of the respondent plaintiff, therefore, the respondent plaintiff is not entitled to claim back his franchisee fee of Rs. 3 lacs plus applicable service tax. He submits the MoU does not confer any right on the franchisee. Next, it was argued that there was complete failure on part of the plaintiff on the issues stated in the revocation letter 13.05.2009, therefore, the defendant was constrained to revoke the franchise with immediate effect.

10. Inviting attention of the court to the affidavit of the plaintiff, Sachin Bhardwaj PW-1, the learned counsel for the defendant submits that exhibits PW-1/A to exhibit PW-1/E are actually the marks and not the exhibits, in as much as, the said documents have not been proved on record. He further submits that mark PW-1/F (email dated 25.04.2014) and mark PW-1/G (email) were also objected to by the counsel for the appellant defendant on the aspect of mode of proof in the absence of certificate under Section 65(B) of the Indian Evidence Act, 1872. To buttress his submission, he further referred to the statement dated 25.03.2015 of PW-1/Sachin Bhardwaj, the relevant part of which reads as under:-

> *"I tender my evidence by way of affidavit which is Ex. PW1/1 bearing my signatures at point A & B. I rely upon documents i.e. Mark PW1/A to Mark PW1/G. (Documents Mark PW1/F & PW1/G are objected to by counsel for the defendant subject to mode of proof). It is further stated that the documents which have been mentioned as Ex. PW1/A to Ex. PW1/E now have been marked as Mark PW1/A to Mark PW1/E and the same be read accordingly.*"

It was thus urged by the learned counsel for the appellant defendant that none of the documents relied upon by the plaintiff were proved.

11. Finally, it was argued by the learned counsel that none of the claims of the plaintiff are proved for want of documentary evidence.

12. Per contra, the learned counsel for the respondent plaintiff submits that since the appellant defendant has failed to deposit the decretal amount despite a direction of this court, therefore, the appellant-defendant cannot be permitted to make submissions and the right to plead of the appellant defendant needs to be struck off. He further submits that the intentions of the defendant were

malafide from the very inception and time and again he has defrauded the plaintiff after entering into the MoU. He submits that in the agreement, it was agreed that the defendant would provide students to the plaintiff, but the defendant failed to fulfil this obligation also.

13. Finally, the learned counsel for the respondent plaintiff submits that the plaintiff has suffered losses amounting to Rs.19,12,080/- due to unfair and irrational trade practice of the defendant. He submits that the agreement was revoked unilaterally by the appellant stating that the infrastructure and the furniture were not of good quality, whereas the infrastructure was inspected by the defendant's officials before granting the franchise. He submits that the computation was never questioned by the appellant when the said computation was put forth before the learned Trial Court. He submits that the calculation of the breakup of the total claim has been mentioned at page 141 and 142 of the appeal paperbook. He thus, prayed for the dismissal of the appeal.

14. In so far as the issue no.2 is concerned, the claim of the respondent plaintiff for financial losses/damages for the alleged acts and conduct of the defendant, which according to the plaintiff tantamount to deficiency in services and unfair trade practices, has been spelt out in para 14 of the plaint, which reads as under:-

> *(i) Franchise fees paid to defendant= Rs 3,37,080/-*
> *(ii) Rs 5,50,000/- paid towards cost equipment furniture / fixtures/ computer & other infrastructure related works etc.*
> *a) Cost of Equipment/ Books/ Start up Kit, |directly paid to defendant = Rs. 2,50,000/- :*
> *b) Other, Project Expenses done by the claimant:*
> *Furniture &Fixture = Rs. 1,50,000/-.*
> *Equipments / Computers / routers Rs.1,50,000/-.*

(iii) Amounts spent by the Plaintiff for running the said IHT centre (as detailed in para 7 of the present complaint rent, salary of staff, Admin expenses etc.) amounting. Rs 8,00,000/-
a)Rent Rs. 15000/- P.M
b) Salary (Teachers / counselors / Staff) Rs. 40,000/-PM.
c) Monthly local Advertisement Rs.10,000/- PM.
d) Administrative Expenses Rs. 10,000 PM.
e) Miscellaneous Expenses Rs. 5000 PM.
f) Expenses incurred on Launch /advertisement campaign/ Brand Publicity and Inauguration amounting Rs 1,50,000/-.
g) Franchisee fees for achievers point centre Rs.75,000/-(Rupees seventy five thousand only).

15. Clearly, the claim of the respondent-plaintiff under different heads is for financial loss/damages. It is a settled proposition of law that for grant of damages in terms of Section 73 of the Indian Contract Act, 1972, not only breach of contract but the losses/damages suffered are also required to be proved by an aggrieved person. Therefore, the question of refund of the franchise fee will depend on the question as to whether the defendant has committed the breach of contract entered into with the plaintiff and whether such breach has caused any loss or damage to the respondent plaintiff.

16. For ascertaining the aforesaid position, it is necessary to first ascertain the terms of the contract entered into between the parties. This exercise is necessary, as the parties admittedly, entered into an MoU but none of the parties have proved the said MoU on record. The terms of the MoU have been reproduced in sub-paras (a) to (g) of para 5 of the plaint. The stand of the appellant defendant in corresponding para 5 of the written statement is that the contents of sub-para (a) to (g) are matter of record. This being the position, the

terms contained in sub-para (a) to (g) of para 5 of the plaint, have to be read as the agreed terms of the contract between the parties, which read as under:

> *"a. The Plaintiff will pay a total sum of Rs. 3,37,080/- as franchise fees including service tax to the defendant in two equal installments of Rs. 1,68,540/- each to be paid on 1st October 2008 and 1st January, 2009 respectively, however both the parties shall execute a formal written franchise agreement for three years regarding the said IHT centre immediately after the payment of the above said first installment and the education centre at the above said premises will start operating from 10th of October 2008.*
>
> *b. As part of the franchise services, defendant will provide its brand name, technical support, project implementation guidance and national level image building support to the Plaintiff along with trained faculty and marketing staff and all the necessary training equipment, software, hardware etc., to be paid for by the Plaintiff. The defendants shall also provide day to day working support and guidance to the defendant for operation. Not only this, they will provide Job Guarantee to the students who will enroll for the job guaranteed courses.*
>
> *c. The Plaintiff shall pay 15% to the defendant as royalty on the fee collection.*
>
> *d. The defendant will provide the necessary ten days training each to the centre director/manager, academic counselor and marketing executive.*
>
> *e. All the students from the said IHT centre at Shakarpur will be transferred to the IHT centre at, Laxminagar by 15th October 2008.*
>
> *f. As the main course was the job Guarantee course, the defendant will provide placement to all the students passing out from the IHT centre operated by the Plaintiff and the Plaintiff will not be responsible for the same.*

g. The franchise fee is inclusive of the National Advertising Charges for the First year and hence, the defendant company will provide free Advertising and promotional services for running the IHT centre at the above said premises for 1st year."

17. Now coming to the question of breach of the agreed terms, a perusal of the plaint shows that it has been alleged by the plaintiff that – (i) the defendant did not transfer any student from its Shakarpur center to the Laxmi Nagar center of the respondent plaintiff nor any faculty was provided during the 1st month because of which the center could not function for one month. The defendant transferred only 43 students in late November, 2008 but the plaintiff was paid only for 15-16 students as the defendant had already received the full fee from the rest of the students [para 6]; (ii) the defendant arbitrarily and unreasonably withdrew the job/placement guarantee offered by them [para 9]; (iii) the defendant did not provide any day-to-day working support or guidance to the plaintiff for running the center. The plaintiff through an email demanded refund of all the payments made by him to the defendant regarding the franchise services along with interest but the defendant neither made the payment nor replied to the email [para 10]; (iv) the defendant cheated the plaintiff in the name of advertisement and diverted all students to the defendant company owned center at Azadpur and painted a shabby picture of other franchised centers in front of the students who came from outside Delhi mainly for job oriented courses, due to which the plaintiff did not get the students; and (v) despite receipt of the payments and huge financial contributions made by the plaintiff, the defendant failed to provide any services under the agreed terms and did not perform its obligation thereunder [para 13].

18. In the written statement, the defendant did not deny the aforesaid allegations as regard the breaches of the agreed terms, either specifically or by necessary implications, nor stated the same to be not admitted. A perusal of written statement shows that - (i) though it has been alleged that 43 students sent by the defendant in the plaintiff's center found that the center was not in proper condition and did not have the furniture fixtures and study equipment and the center was not running as per the standard of the defendant's norms, but this fact has not been proved by the defendant. No student was examined by the defendant in this regard. However, it is not denied that only 15-16 students paid the fee [para 6]; (ii) arbitrary and unreasonable withdrawal of job/placement guarantee offered defendant, is not denied [para 9]; (iii) in so far allegation of cheating in the name of advertisement and diversion of students to defendant's own center at Azadpur by painting shabby picture of other franchised centers is concerned, the defendant in the corresponding para 12 of the written statement has not specifically denied the allegation and has only stated that the plaintiff has made concocted and self made story which has no legs to stand in the eyes of law [para 12]; and (iv) as regard the non-providing of day to day working support and guidance and not providing other agreed services like advertising support etc., the defendant did not specifically deny the said allegation but only stated generally that the defendant company has provided all help to the plaintiff but the plaintiff did not utilize the same for the better future of the students, however, it has not been clarified or elaborated as to which services were provided by the defendant [para 10 & 13].

19. The Code of Civil Procedure expressly requires pleadings to be specific and also provides that the allegation of fact in the plaint which is not denied specifically or by necessary implication shall be taken to be admitted by the

defendant. Order VIII Rules 3, 4 and 5 provide that the defendant in his written statement must deal specifically with each allegation of fact of which he does not admit the truth, and where a defendant denies an allegation of the fact in the plaint, he must not do so evasively, but answer the point of substance. Further, every allegation of the fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. Order VIII Rules, 3, 4 and 5 are reproduced hereunder:-

ORDER VIII Written Statement, Set-Off and Counter-Claim

"3. ***Denial to be specific*** *- It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*

4. Evasion Denial *- Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.*

5. Specific denial - *[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:*

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

20. The scope of the above quoted provisions of Order VIII Rules, 3, 4 and 5 of the Code was considered by the Hon'ble Supreme in ***Badat & Co. v. East India Trading Co.: AIR 1964 SC 538***, and it was observed as under:-

> *"These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first para of Rule 5 is a reproduction of Order 19, Rule 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto. Under that proviso the court may, in its discreation, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably replying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in*

a locality, and the traditions and conventions of a court wherein such pleadings are filed."

21. From the above, it is clear that there being no specific denial in the written statement of the breaches alleged in the plaint, the said breaches shall be taken to be admitted.

22. The next logical question which arises for consideration is whether the plaintiff is entitled to the financial loss/damages as claimed. All financial losses or the damages allegedly suffered by the plaintiff on account of deficient services of, and the unfair trade practices adopted by, the plaintiff, have been detailed in paragraph 14 of the plaint and the response of the defendant in respect of such financial losses/damages suffered by the plaintiff, is in corresponding para 14 of the written statement. As the contents of para 14 of the plaint as well as the defendant's response thereto assumes relevance, therefore, the same are being juxtaposed as under for ready reference:-

14. That the above said acts and conduct of the defendants amounts to rendition of deficient services besides being a glaring example of unfair trade practices due to which the Plaintiff has suffered immense mental agony and financial losses/damages as mentioned below-: (i) Franchise fees paid to defendant= Rs. 3,37,080/- (ii) Rs 5,50,000/- paid towards cost equipment furniture / fixtures/ computer & other infrastructure related works etc. a) Cost of Equipment/ Books/ Start up Kit, directly paid to defendant = Rs. 2,50,000/- b) Other Project Expenses done by the claimant : Furniture & Fixture = Rs.	14. That the contents of the para 14 of the plaint are absolutely wrong and incorrect hence strongly denied further all sub para of the para 14 are absolutely wrong and incorrect hence strongly denied. It is submitted herein that the plaintiff has no right to claim the amount from the defendant.

1,50,000/-. Equipments / Computers / routers Rs. 1,50,000/-. (iii) Amounts spent by the Plaintiff for running the said IHT centre (as detailed in para 7 of the present complaint rent, salary of staff. Admin expenses etc.) amounting Rs 8,00,000/- a)Rent Rs. 15000/- P.M b) Salary (Teachers / counselors / Staff) Rs. 40,000/- PM. c) Monthly local Advertisement Rs. 10,000/- PM d) Administrative Expenses Rs. 10,000 PM. e) Miscellaneous Expenses Rs. 5000 PM f) Expenses incurred on Launch / advertisement campaign/ Brand Publicity and Inauguration amounting Rs.1,50,000/-. g) Franchisee fees for achievers point centre Rs.75,000/-(Rupees seventy five thousand only) The opposite party/defendant is liable to pay the total amount of Rs.19,12,080/- to the Plaintiff with interest @18% per annum from the date of receipt of the said amounts till the date of actual payment.	

23. A reading of para 14 of the plaint shows that the claim of the plaintiff is under different heads, therefore, each claim is being dealt with separately as under:

A. <u>Franchise fee of Rs.3,37,080/-</u>

(i) In paragraphs 6 and 7 of the plaint, it has been alleged by the respondent plaintiff that he paid two installments of Rs.1,68,540/- to the appellant-defendant towards franchise fee. This fact has not been denied either specifically or by necessary implication, therefore, the same has to be taken to be admitted. Further, the fact of payment of said two installments has also been stated by the plaintiff in his evidence filed by way of affidavit while appearing as PW-1. The cross examination of PW-1 also reveals that he has not been cross-examined on the aspect of said payment. Pleadings in the plaint and evidence led by the Plaintiff having gone unrebutted, have to be accepted as true and correct. Therefore, the payment of an amount of Rs.3,37,080/- (two installments of Rs.1,68,540/-) stands proved.

(ii) The plaintiff is claiming the refund of franchise fee on the ground that the terms of the contract were breached by the appellant defendant and the Center of the respondent plaintiff was closed by the appellant defendant without there being any fault on his part.

(iii) The stand of the appellant defendant in para 5, 6 and 9 of the written statement is that defendant's officials had visited on several occasions and found that the plaintiff is not adhering to the norms of the defendant company to build up infrastructure which includes setting up, lab, maintenance of services, and all other things, equipment, etc. for better future of the students; the 43 students who were transferred by the defendant to plaintiff's center also found that the center was not in proper condition as it did not have the necessary furniture, fixture and equipment; and on several occasion the defendant instructed the

plaintiff through various communications to follow up the required standard as asked in their earlier letters dated 22.04.2009 and 05.05.2009, therefore, the defendant company had no option but to close the center of the plaintiff through the letter dated 13.05.2009 for the reason that the respondent plaintiff was playing with the future of the students and deliberately harming the goodwill of the company.

(iv) The agreed terms and conditions between the parties as reproduced in para 5 of the plaint does not indicate that the respondent plaintiff was under any obligation of setting up of lab and other equipment etc., nor any norms with regard to the same have been proved by the defendant. Even the date of communication referred to in para 5 and para 9 of the written statement, which is alleged to have been written by the defendant, has not been mentioned nor the same has been placed and proved on record by the defendant. Not a single student was examined as witness to prove the fact that the students did not find the center of the plaintiff in proper condition or lacking in infrastructure. The letters dated 22.04.2009 and 05.05.2009 have not even been filed with the written statement, leave alone proving the same. Even the letter dated 13.05.2009 vide which closure of the center was ordered, has not been filed and proved on record by the defendant. Therefore, there is not an iota of evidence on record to justify the closure of plaintiff's center.

(v) Further stand of the defendant is that the plaintiff started the center after signing the MOU in October 2008 and after that the plaintiff did not comply with the condition to sign the agreement within 90 days of signing the MOU, therefore, the plaintiff breached the norms. On the

contrary, the plaintiff's case is that the defendant avoided entering into an agreement after receiving full amount of franchise fee. It is not in dispute that the plaintiff had paid full franchise fee and had invested in books/kits/equipment and other infrastructure and he had even closed his earlier institute by the name of 'Achievers Point', therefore, he would not stand to gain anything by not entering into the agreement, rather it stands proved that the defendant failed to provide backup support and other services as per the agreed terms. Therefore, the closure of the plaintiff's center by the defendant was not justified under any circumstance.

(vi) The franchise was for a period of three years commencing from October, 2008. The breach of agreed terms by the defendant and the closure of the center of the plaintiff by the defendant just after period of seven months without any tenable reason, has evidently caused loss of franchise fee to the plaintiff, and the defendant is liable to make good the said loss by refunding the amount of franchise fee of Rs. 3,37,080/- to the plaintiff.

B. <u>Cost of Equipment, Furniture/Fixtures/Computer & Other Infrastructure related work etc. Rs.5,50,000/-</u>

The claim under this head is further sub-divided into the following sub-heads:-

(I) Cost of equipment/books/start-up kit, directly paid to the defendant – Rs.2,50,000/-

(i) The respondent plaintiff has made a specific averment in para 8 of the plaint that the plaintiff has paid a sum of Rs.2,50,000/- to the

defendant on 01.10.2008 towards cost of various kind of hardware, software, equipment, start-up kit facility and books etc., which were required for running the center but the defendant had supplied the goods worth Rs.1,95,234/- and the balance amount of Rs.54,766/- was not refunded. It is further alleged in para 8 that the supplied items were also of very poor quality and were not replaced despite several requests. The only denial in para 8 is that *'the plaintiff had shown fiction money in the plaint without any documentary proof and even did not have right to claim the said amount as it is based on fiction'*. There is, however, no denial of the fact that an amount of Rs. 2,50,000/- was paid by the plaintiff to the defendant, against which goods worth Rs. 1,94,234/- were supplied by the defendant which were also of very poor quality and were not replaced despite several requests. There is also no denial of the fact that the balance amount of Rs. 54,766/- was not refunded by the defendant to the plaintiff. Therefore, these facts shall be deemed to have been admitted.

(ii) In para 14 of the plaint again it has been alleged by the plaintiff that cost of equipment/books/startup kit to the tune of Rs. 2,50,000/- was directly paid to the defendant. The receipt of this amount has not been specifically denied by the defendant in corresponding para 14 of the written statement. All that has been stated in para 14 of the written statement is that the plaintiff has no right to claim the amount mentioned in para 14 of the plaint from the defendant.

(iii) The plaintiff, who appeared as PW-1, reiterated the aforesaid averments of plaint in his Examination-in-Chief filed by way of an

affidavit, but was not cross-examined on these aspects. Therefore, it is proved on record that the goods/equipments/books etc. supplied were of poor quality and the defendant is liable to refund an amount of Rs 1,95,234/-. Further, the goods/equipments/books etc. were of no use for the plaintiff when the defendant closed the center of the plaintiff without any justified reasons.

(iv) There is no set-off or counter-claim filed by the defendant seeking adjustment of balance amount of Rs. 54,766/- against royalty etc., therefore, the defendant is liable to refund this amount also.

(II) Other project expenses done by the plaintiff/claimant:

- Furniture and Fixtures – Rs.1,50,000/-

- Equipments/Computers/Routers - Rs. 1,50,000/-

(i) It is not the case of the plaintiff that the amount invested in furniture & fixtures/equipment/computers/routers was directly paid by him to the defendant, therefore, the knowledge as to the extent of investment made by the defendant in furniture, fixture etc. cannot be attributed to the defendant. A perusal of para 8 and 9 of the written statement also shows that the defendant by implication has denied the investment made by the plaintiff in furniture / fixtures / equipment / computers / routers.

(ii) Further, in the cross examination of PW1, there is a specific suggestion put to him in response to which PW1 has stated that *'it is wrong to suggest that I had not spent any money for installing furniture and fixtures in my institute'*.

(iii) Therefore, the pleadings and the evidence on this claim, have not gone uncontroverted. This being the position, the plaintiff ought to have led documentary evidence to show investment made by him to the extent of Rs. 3 Lakhs on account of furniture / fixtures / equipments / computers / routers etc.

(iv) As there is no documentary evidence on record in the form of invoices etc. for the purchase of furniture / fixtures / equipments / computers / routers etc., the claim of the plaintiff on the said count is not proved and the same is, therefore, rejected.

C. <u>Amount spent by the Plaintiff for running the IHT Centre - Rs. 80,000/- per month *[detailed in para 5, 8 read with para 14 of the plaint]*</u>:-

(i) Break-up of the claim of losses/damages under this head is as under:

(a) Rent Rs. 15,000/- PM.
(b) Salary (Teachers / counselors / Staff Rs. 40,000/- PM.
(c) Monthly local Advertisement Rs. 10,000/- PM.
(d) Administrative Expenses Rs. 10,000/- PM.
(e) Miscellaneous Expenses Rs. 5,000/- PM.

(ii) It is not in dispute that the plaintiff's centre at Shakarpur started w.e.f. 15.10.2008 and the franchisee agreement was revoked by the defendant on 13.05.2009, therefore, effectively the centre was run by the plaintiff for a period of 07 months.

(iii) In so far as the spending of aforesaid amounts by the plaintiff which are specifically alleged in para 14 of the plaint, the only denial is that the contents of para 14 and all other sub paras thereof are absolutely wrong and strongly denied. It has been further alleged in the written statement that the plaintiff has no right to claim the alleged amount from the defendant. There is no specific denial as to the amount spent under different heads on monthly basis by the plaintiff. However, claim under each head is being dealt separately as follows.

(iv) **Payment of Rent @ Rs. 15,000/- p.m.**:- In para 5 of the plaint, it has been alleged that the plaintiff had taken the premises on a rent of Rs.15,000/- per month, which premises was inspected by the officials of the defendant and they found it to be the suitable in all respects for operation of the Center. This fact has not been denied by the appellant defendant in corresponding para 5 of the written statement. Further, the aforesaid fact was also reiterated by the Plaintiff as PW1 in his evidence filed by way of affidavit and he was not cross examined on this aspect. The pleadings and the evidence of plaintiff as regard payment of monthly rent Rs. 15,000/- having gone unrebutted, it can safely be concluded that the plaintiff spent an amount of Rs. 15,000/- per month for a period of 07 months i.e., total amount of Rs. 1,05,000/-

(v) **Salary (Teachers / counselors / Staff) - Rs. 40,000/- p.m.:-** PW1 in his cross examination, in response to a question put to him, has stated that there were 03 teachers in the institute for teaching, out of which 02 had been provided by the defendant, and their salary was Rs. 7,000/- each approximately, whereas marketing person was getting Rs.

10,000/- and incentives. There is no further cross-examination or question asked by the defendant to the plaintiff as regard the number of employees and the salary paid to them. Therefore, it has come on record that 03 teachers were being paid a salary of Rs. 21,000/- per month besides the salary of marketing person of Rs. 10,000/- per month. Thus, it is apparent that the plaintiff paid salary to the tune of Rs. 31,000/- to his employees each month during the period of 07 months for which the center remained open. Therefore, the expenditure incurred by the plaintiff on account of salary for a period of 07 months was Rs. 2,17,000/-.

(vi) **Monthly expenditure of Rs. 10,000/- on local advertisement; Rs. 10,000/- on administrative expenses; and Rs. 5,000/- on miscellaneous expenses:-** This amount spent by the plaintiff each month cannot be expected to be within the knowledge of the defendant, therefore, though there is no specific denial of this expenditure in para 14 of the written statement, but it cannot be allowed merely by invoking the Rule of 'non traverse', the claim being in the nature of damages. Incidentally, the expenditure incurred on these counts, was stated by the plaintiff in his testimony while appearing as PW1 and there being no cross examination on this aspect and the testimony in this regard having gone unrebutted, it has to be taken to true and correct. Therefore, the plaintiff is entitled to an amount of Rs.25,000/- per month for a period of seven months i.e., Rs.1,75,000/-.

D. <u>Expenses incurred on launch / advertisement campaign / brand publicity and inauguration amounting to Rs. 1,50,000/-</u>

(i) This claim has also not been specifically dealt with or denied by the defendant in the written statement but on the principle noted in the foregoing paragraph, the Rule of 'non traverse' will not be attracted, the claim being in the nature of damages. But again the expenditure incurred on these counts, was stated by the plaintiff in his testimony and there being no cross examination on this aspect, the testimony in this regard has to be taken to true and correct. Therefore, the plaintiff is also entitled to this amount of Rs.1,50,000/-.

E. <u>Franchise Fee for running Achiever Point Rs. 75,000/-</u>

(i) The plaintiff in para 4 of the plaint has alleged that prior to the starting of the defendant's centre, the plaintiff was running an institute of English Speaking Course by the name of 'Achiever Point' and the defendant company had assured the plaintiff that they had no objection if both the centers / institutes run simultaneously, but the defendant objected to the Achiever Point centre after collecting all the money from the plaintiff. Due to defendant's objection the plaintiff had to close the said centre on account of which the plaintiff suffered a loss of Rs. 75,000/- which the plaintiff had paid as franchise fee for the centre of Achiever Point. The defendant in corresponding para 4 in the written statement has not specifically denied the averments made but has only stated that *the contents of para 4 of the plaint are absolutely wrong and incorrect hence strongly denied.* However, defendants witness DW1 – Umesh Chaudhary in his cross examination has admitted that – *'it is correct that the defendant company objected to another centre in same premises of plaintiff namely Achiever point'*. The plaintiff has also filed

a bank statement showing payment of Rs. 75,000/- but the same could not be exhibited as the original was not produced and only mark PW-1/B was affixed on the bank statement. However, the fact of payment of Rs. 75,000/- was also stated by PW-1 in the evidence led by him by way of affidavit and the same has gone unrebutted, in as much as, there is no cross examination of PW-1 on the said aspect.

The plaintiff has also specifically alleged in para 10 of the plaint that the officials of the defendant had taken away all the money receipts, file and record etc. pertaining to the centre of the plaintiff on the false pretext of audit / inspection at the time of closing the centre on 13.05.2009, and the said records and documents were not returned by the defendant despite repeated requests and it became impossible for the plaintiff to resume the office of the centre. This part has also not been denied by the plaintiff in the written statement. In the cross examination of PW-1 also, his testimony as regard the documents having been taken by the defendant could not be demolished. This being the position, the plaintiff is entitled to an amount of Rs. 75,000/-.

24. In view of the above discussion the plaintiff is entitled to the following amounts:-

(i) Refund of franchise fee – Rs. 3,37,080/-

(ii) Refund of amount paid towards cost of equipment / books / startup kit – Rs. 2,50,000/-

(iii) Rent @ Rs. 15,000/- per month for 07 months – Rs. 1,05,000/-

(iv) Salary of 03 teachers @ Rs. 7,000/- each and salary of a marketing person @ Rs. 10,000/- per month for 07 months i.e. Rs. 2,17,000/-

(v) Monthly local advertisement (Rs. 10,000/- per month); administrative expenses (Rs. 10,000/- per month) and miscellaneous expenses (Rs. 5,000/- per month) for 07 months i.e. Rs. 1,75,000/-

(vi) Expenses incurred on launch / advertisement campaign / brand publicity and inauguration – Rs. 1,50,000/-

(vii) Franchise fee paid to Achiever point Rs. 75,000/-

25. Thus, the plaintiff is entitled to total amount of Rs. 13,09,080/-. In so far as interest is concerned, in the facts of the present case, the dispute arises out of a franchising agreement, a commercial transaction, and further since the defendant has taken advantage of the monies paid by the plaintiff and would have made profits thereon, the simple interest awarded by the learned Trial court @12% per annum as pendente lite and future interest is justified.

26. Accordingly, the suit of the plaintiff is decreed for an amount of Rs. 13,09,080/- along with simple interest @12% per annum from the date of filing of the suit till its realization along with cost of the suit. The appeal is thus, partly allowed and the decree is modified to the above extent.

27. Decree sheet be drawn, accordingly.

CM No.14617/2020

28. This is an application filed by the plaintiff-respondent under Section 340 CrPC alleging that the defendant-appellant has not only attempted to defraud the plaintiff by perjuring himself on various occasions and has also tried to mislead this Court. It has been alleged that perjury has been committed by the defendant-appellant before this Court- (i) by furnishing incorrect addresses of the registered office of the defendant company in its various applications which were supported by affidavits which were undated and not on oath and this fact

was also noted by this Court vide order dated 23.05.2018 and; (ii) the balance sheets furnished by the defendant company along with the affidavit had been tampered and the address of the registered office of the defendant company in all the balance sheets was concealed by using correction fluid.

29. In the backdrop of the aforesaid facts, it was prayed that perjury proceedings in terms of section 340 CrPC be initiated against the authorised officers of the defendant company.

30. I have perused the application and have heard the learned counsel for the parties.

31. The allegations in the application under Section 340 CrPC have to be considered in the context that the appeal had been preferred by the appellant-defendant against a money decree passed in favour of the respondent-plaintiff. A perusal of the orders passed in the present case shows that at no stage the operation of the money decree was stayed in the present appeal, therefore, the respondent-appellant had the remedy available to execute the decree by filing an execution petition and seeking assistance of the executing court in the manner prescribed under Rule 30 of Order 21 CPC viz., attachment and sale of defendant's/judgment debtor's property or by his detention in the civil prison, or by both. In case the details of the assets, or the address of the defendant company were not available with the plaintiff, it was for the plaintiff to make efforts at his own level to arrange for the same and furnish them to the executing court. It is not for the appellate court to provide any assistance to the plaintiff/decree holder to get the details of the assets or of the address of registered office of the defendant/judgment debtor.

32. Further, in case the appellant-defendant had withheld its address despite directions given in the present appeal, it does not make it a case for initiation of an inquiry under Section 340 CrPC. The acts alleged to have been committed by the appellant do not effect or impact the administration of justice especially when the appellant had not availed or obtained any relief from this Court based on the affidavit which allegedly contains the incorrect address of the registered office of the defendant company or on the basis of balance sheets which were allegedly tampered by concealing the address mentioned therein using correction fluid.

33. The Hon'ble Supreme Court in ***Iqbal Singh Marwah vs. Meenakshi Marwah****: (2005) 4 SCC 370*, articulated that where the effect of the forged document or evidence on administration of justice is minimal, it may not be expedient in the interest of justice to initiate an inquiry under Section 340 CrPC. The relevant part of the decision reads as under:-

> *"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the*

like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remediless. Any interpretation which leads to a situation where a victim of a crime is rendered remediless, has to be discarded."

34. In view of the above, there is no merit in the application and the same is dismissed.

VIKAS MAHAJAN, J.

JUNE 08, 2023/dss