

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 26, 2020

+ CS(COMM) 1324/2016, CCP(O) 134/2010 & IA 2667/2016

MICROSOFT CORPORATION & ORS Plaintiffs
Through: Mr.Aasish Somasi, Adv.

versus

SATVEER GAUR & ANRDefendants
Through: None

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present suit has been filed by the plaintiffs with the following prayers:

“a) An order of permanent injunction restraining the defendants, their principal officers, directors, agents, franchisees, servants, and all others acting for and on their behalf, from directly or indirectly using for any kind of computer related activities or otherwise in any other manner, any pirated/counterfeit/unlicensed software of the Plaintiffs, or reproducing and distributing any pirated/counterfeit/unlicensed software of the Plaintiffs in contravention of the terms of the End-User License Agreement (s), or infringing in any other manner or causing or enabling or assisting others to infringe the copyrights of the Plaintiffs in their respective computer programs and related manuals;

b) An order for delivery up of all the impugned products being pirated/counterfeit/unlicensed software programs contained in hard disks, compact disks, floppies

or other storage media and including any CD/DVD Writers/ Burners, or any other material infringing the copyrights of the Plaintiffs, such as counterfeit User Instruction Manuals etc., lying in the possession of the defendants and their principal officers, directors, agents and servants.

c) An order for rendition of accounts of profit illegally earned by the Defendants on account of the unlicensed use and reproduction of the Plaintiffs' software programs, including conversion damages which are presently indeterminate, and a decree for the amount so ascertained be passed in favour of the Plaintiffs and against the defendants;

d) An order for damages for Rs. 60, 00,000/- be passed in favour of the Plaintiffs and against the defendants;

e) An order for costs in the present proceedings be passed in favour of the Plaintiffs and against the Defendants.”

2. The plaintiff No.1 Microsoft Corporation ('Microsoft', in short) is a company organized and existing under the laws of State of Washington, USA, having its principal office in Redmond WA, USA. The plaintiff No.2 is Microsoft Corporation Pvt. Ltd. which is wholly owned marketing subsidiary of the plaintiff No.1, having its corporate office at Nehru Place, New Delhi. Plaintiff No. 3 is Adobe Systems incorporated, is a company organized and existing under the laws of the State of Washington, USA. The plaintiff No.4 is Quest Software Inc., is a company organized and existing under the laws of the State of California, USA.

3. It is the case of the plaintiffs that the plaintiff No.1 is the biggest software publisher for personal and business computing in the world. Microsoft engages in the development, manufacturing, licensing and support of a range of software products for various computing devices. Its software products includes operating systems for servers, personal computers and intelligent devices, server applications for distributed computing environments, information worker productivity applications and software development tools. Microsoft also sells video game consoles, video games and engages in online business through various network portals.

4. It is averred that Microsoft software products include the most widely used operating system software, Microsoft Windows and application software such as Microsoft Office and Visual Studio. These software products are today installed and used on millions of computers all over the world, including India. Other popular software products of Microsoft include Microsoft Windows Server System, Microsoft Publisher, Microsoft Vision, Microsoft Project and other stand-alone desktop applications. It is also the case of the plaintiffs' that Microsoft also manufactures a large range of computer peripherals.

5. In so far as, the plaintiff No.3 is concerned the Adobe software application includes Adobe Photoshop, Adobe Page Maker, Adobe illustrator, Adobe Premier, etc. They are today installed and used on millions of computers all over the world including India. The plaintiff No.3 completed its acquisition of

Macromedia, Inc. on December 03, 2005 resulting in one of the world's largest innovative and diversified software companies. It is stated that Macromedia is an extremely well-known software company engaged in the development of software products, which may be broadly divided into three market categories (i) Designer and Developers, (ii) the Business Users, (iii) Consumer Users. Similarly, plaintiff No.4 software includes TOAD a powerful tool that makes database and application development faster and easier and also simplifies and automates day to day database administration tasks, FOGLIGHT, a program to reduce service disruptions to unify IT and the business, QUEST SQL, OPTIMIZER for Oracle, a powerful program to improve DQL performance by identifying performance issues directly from running SQL statements and password manager, which enable end users to reset forgotten passwords securely using stronger password policies.

6. It is the case of the plaintiffs' that they are not only world famous in their respective sever development domains but are also the largest and biggest software companies in the world. The global presence of the plaintiff companies span across the continents and their research and development operations are continuously expanding to support the ever-growing domain for a new information technologies. The plaintiffs have also referred to their global revenues and including the money spend on advertising and promotion on their products. It the case of the plaintiffs that the software products/programs, developed and marketed by the plaintiffs, are computer programs within the

meaning of Copyright Act, 1957 ('Copyright Act' for short). These programs have been created by the respective employees of the plaintiffs, for the plaintiffs. The rights of the authors of member Countries of the Berne and Universal Copyright Conventions are protected under the Indian Copyright Law. The plaintiffs being the owners of the copyright are entitled to all the exclusive rights flowing from such ownerships. The plaintiff No.1's software products can be purchased by the consumers through retail purchase, with a new PC and Volume license. Under each of the above methods of purchasing products certain unique and distinct anti-piracy features have been provided. The anti-piracy features of plaintiff No.1's products have evolved over the years and are continuously changing to keep pace with the new technologies and the requirements to fight piracy and counterfeiting of the plaintiff No.1's products. According to the plaintiffs, the genuine software products of the plaintiff No.1 comprises of (i) certificate of authenticity, (ii) end-user license agreement, (iii) hologram media (CD) and (iv) documentation.

7. Similarly, plaintiff No.3's software products can be purchased in various ways and through different channels depending upon the personal and professional requirements and needs of the end-users including large corporate organizations, government agencies, small business and educational institutions. The aforesaid organizations usually purchase software of the plaintiff No.3 through Adobe's Open Options 4.5 Volume Software Licensing Program. The said license program has

various options, which includes (i) CLP program and (ii) TLP program, etc.

8. The purchasing of the genuine software program of plaintiff No.4 can be done through (a) retail purchase, (b) online purchase and (c) volume license.

9. It is also the case of the plaintiffs that the copyrights in the plaintiffs' software products are infringed *inter alia* in one of the following ways: (i) end-user piracy, (ii) counterfeiting, (iii) channel piracy and (iv) internet piracy.

10. It is averred in the plaint that the plaintiffs suffered incalculable damages to their intellectual property rights and business on account of various forms of copyright piracy in their software programs. A brief description of common methods of copyright infringement employed in relation to piracy, are (i) reproducing the plaintiffs' software and the packaging of that software so that purchasers are deliberately misled to believe that the product they are buying is genuine software, (ii) reproducing or burning the plaintiffs' software into a blank writable CD/DVD where no attempt is made to represent that the copy is genuine, (iii) reproducing a number of plaintiffs' programs on a single CD/DVD-ROM, known as a compilation CD/DVD and (iv) making more copies than permitted by the End-User License Agreement.

11. It is also averred that the corporate or end-user piracy is the most damaging form of the software piracy which occurs

when businesses, corporations, companies, institutions, schools, non-profit organizations, etc., make additional copies of plaintiffs' software without authorization. The reproduction of the plaintiffs' software without the plaintiffs' permission is an infringement of their copyright in their software programs.

12. It is stated that this kind of a piracy occurs (i) when number of software copies installed on the computers of an organization or a company exceed the number of copies permitted or authorized by End-User License Agreement held by that organization or the company or, (ii) when the number of copies of the software installed on computer systems within an organization or a company exceeds the number of licenses for the relevant software held by that organization or, (iii) When the softwares are installed and copied from pirated CD/DVD ROMs containing single or multiple pirated/unlicensed version of software programs onto the computers used by an organization or a company, or (iv) when academic or other restricted or non-retail software is acquired without the license and used for commercial purposes, or (v) when advantage of upgrade offers are taken without having a legal copy of the version to be upgraded.

13. With regard to the piracy of the plaintiff No.1's software the same happens (i) by reproducing the Microsoft Software and packaging of the software, so that purchasers are deliberately misled into believing that the product they are buying is genuine software, (ii) reproducing or burning plaintiff software onto a blank CD / DVD where no attempt is made to represent that the

copies are genuine, (iii) Reproducing a number of the plaintiffs' programs on a single CD-ROM, known as a compilation CD.

14. According to the plaintiffs, the defendant No.2 appears to be a company into the business of providing IT services and solutions to its clients. The defendant No.1 appears to be the system administrator of the defendant No.2 entity. It is the case of the plaintiffs' that they have received information on their Business Software Alliance (BSA) website reporting the usage of unlicensed / pirated software programs of the plaintiffs by the defendants on their computers. The BSA is a non-profit association of global software companies including the plaintiffs that is formed to fight software piracy regarding the large scale use of unlicensed / pirated software and thus strive to promote a safe and legal digital world. According to the plaintiffs' investigation, it was revealed that the defendants were involved in piracy of the plaintiffs' software programs and to determine the sphere of activities of the defendants, the number of computer systems in use, and the types of software programs being used by the defendants, an independent investigator, Dhruv Maingi, was engaged to carry out investigation into the activities of the defendants. During the course of the investigation it was confirmed that, defendant No.2, a company by the name 'Chetu' is in existence and located in Nehru Place, New Delhi. The investigator then conducted an online survey for Chetu on the website www.chetu.com which revealed the address of the centre to be located in Sector 63, Noida. It is also revealed that the company is using the software programs such as Microsoft

Active Directory, SQL server and Microsoft Windows for its functioning. Thereafter, the investigator conducted an online search on the website www.123eng.com which revealed certain job openings at Chetu looking for candidates who are proficient in the use of software programs such as Adobe Flash, Adobe Actionscript, Adobe Photoshop, Adobe Dreamweaver.

15. It is also averred in the plaint that the investigator conducted telephonic interview of the employees of the said Company posing as a consultant from a HR placement agency. The plaint also reveals that the investigator made a conversation with one Mukesh Bist, who was an employee in Chetu, the defendant No.2 Company. During his conversation, Mr.Bist has revealed that there are approximately 300 computer systems at Chetu, which are operating upon software programs such as Microsoft Office. It is also stated that there is no installation of Open Office on any of the computer systems. He also revealed that 40 to 50 employees at Chetu work on software programs such as Adobe Illustrator, Adobe Flash, Adobe Photoshop, Adobe CS3 and Adobe Reader. The plaint also reveals that the investigator had conversation with the defendant No.1, Satveer Gaur, who works as a system Administrator with Chetu. During the course of conversation, Mr.Gaur revealed that there are approximately 13 servers at Chetu which are operating upon a Microsoft Windows Platform. He also revealed that there are approximately 200 computer systems in use at Chetu and that all the computer systems operate upon Microsoft Windows Operating System and have software programs such as Microsoft

Office installed upon them. He also divulged the use of software programs such as Adobe reader 9.0, Adobe Photoshop, Adobe Reader and Adobe Flash by approximately 60 employees working on computer systems at Chetu.

16. The plaint also reveals that the investigator had also conversation with one Vikas Tyagi as well, who revealed that he works in a team consisting of seven members and him and other team members make use of software programs such as Quest TOAD for working on projects.

17. The plaint further reveals that another investigator, Anil Malhotra was also engaged to verify the number of computer systems located at the premises of the defendants and the softwares being used thereof. It also reveals that Mr. Malhotra had visited the premises at Chetu when he met Vicky Singh, claimed to be working as a software engineer at Chetu. During the course of investigation, Mr. Singh, informed him that approximately 160 to 200 computer systems have software programs such as Microsoft Office installed upon them and the e-mail server operates upon Microsoft Outlook. It is also revealed from the plaint that the said investigator had also spoken to two other employees, namely, Harshit Kapoor and Polak Yadav, who confirmed the usage of software programs such as Microsoft Office and Microsoft Outlook.

18. It is the case of the plaintiffs that in the month of September and October, 2010 it conducted a license check within their database which revealed that there were no substantial

licenses purchased in the name of the defendants. The information as received by the BSA; the investigations which revealed the usage of software programs belonging to the plaintiffs companies and subsequent license check of the defendants make it clearly evident that the defendants were using unlicensed / pirated version of the software programs of the plaintiffs which amounts to violating the copyrights as subsisting in the computer programs of the plaintiffs including the program aforementioned, by copying the same on to hard disk of computer system and using the same on a large-scale. Thereafter, by commission of the several acts of infringement identified above, the defendants have converted to their own use, infringing copies of the said copyright works as contemplated under the Copyright Act.

19. It is the case of the plaintiffs that by these acts, the defendants have caused lot of damage to the plaintiffs running into crores of rupees on account of loss of business and loss of reputation and goodwill in the market. The defendants are blatantly capitalizing on the strength of the international reputation enjoyed by the plaintiffs and their world famous software programs and thereby making unfair profits to the tune of crores of rupees.

20. It is in this background the suit has been filed. A written statement has been filed by the defendant No.1 and 2. Firstly, I intend to refer to the written statement as filed by the defendant No.2. It is stated that the defendant No.2 was incorporated in the

year 2004 and only functions as an Offshore Development Center for the parent company. The defendant No.2 does not offer any services to customers within the territory of India. It is averred that the defendant No.2, through its parent company, is a fully licensed Microsoft certified gold partner since 2003 and its use of Microsoft products is governed by the terms of the Microsoft Partner Network Agreement. Consequently, all the software used by the defendant No.2 belonging to the plaintiff No.1 was licensed at the time of filing of the suit and continues to be licensed as of the date of the filing of the written statement. According to defendant no.2, the plaintiff has deliberately concealed the facts and its allegations of infringement have no legal basis. According to the defendant No.2, the use of software of plaintiff No.3 was covered by the licenses granted as part of plaintiff No.3's Bronze Solution Partner Benefit Program. Hence, the defendant No.2 through its parent company has the requisite licenses required for using the software belonging to the plaintiff No.3.

21. In so far as the software belonging to the plaintiff No.4, it is stated that at no point did the defendant No.2 use any software of the plaintiff No.4 which requires a paid license. Any software of the said plaintiff that was found on the defendant No.2's systems is freeware and was downloaded by the defendant No.2's employees for personal use and the same was never used in connection with the business activity of the defendant No.2 or for that matter its parent company. It is also stated that at the time of seizure by the local commissioner, the only software of plaintiff

No.4 on the answering defendant system was Quest TOAD, which is Open Source and does not require paid license.

22. In substance, it is stated that the defendant No.2 has not violated any of the rights available with the plaintiffs under the Copyright Act and seeks dismissal of the suit. That apart, the defendant No.2 has also challenged the jurisdiction of this Court to try and adjudicate the suit. This submission of the defendant No.2 is on the basis of a stipulation mentioned in the License Agreement with the parent company, which reads as under:

“13(d)(1) Generally. Except as provided in Section 13(d)(2), the laws of the State of Washington govern this Agreement. If federal jurisdiction exists, the parties consent to exclusive jurisdiction and venue in the federal courts in King County, Washington. If not, the parties consent to exclusive jurisdiction and venue in the Superior Court of King County, Washington”

23. Similarly, a License Agreement entered into with the plaintiff No.3 stipulates the following:

“12.3 Forum. If Member is a resident of the United States, Canada or Mexico, all disputes arising under this Agreement will be brought in Superior Court of the State of California or the Federal District Court of San Jose in Santa Clara County, as permitted by law.”

24. In so far as, the written statement filed by the defendant No.1 is concerned, he in substance reiterated the stand taken by the defendant No.2 in its written statement. Replications to the Written Statements have been filed by the plaintiffs. On the basis of the pleadings, the following issues have been framed by this Court vide the order dated September 30, 2015:-

“1) Whether the court at Delhi is not vested with the territorial jurisdiction to try and entertain the suit ? (OPD)

2) Whether the suit is devoid of any cause of action against the defendants? (OPD)

3) Whether the plaintiffs are the owners of the copyright over the works claimed in the suit? (OPP)

4) Whether the defendants have infringed the copyright of the plaintiffs in the said works ? (OPP)

5) Whether the defendant No.2 has purchased the necessary licence from the plaintiff for usage of the softwares in question ? (OPD-2)

6) Whether the plaintiff is entitled to the relief of permanent injunction against the defendants, as prayed for in para 64 (a) of the plaint? (OPP)

7) Whether the plaintiff is entitled to the relief of delivery up of the impugned products against the defendants, as prayed for in para 64(b) of the plaint? (OPP)

8) Whether the plaintiff is entitled to rendition of accounts of the profits, as prayed for in para 64(c) of the plaint? (OPP)

9) Whether the plaintiff is entitled to damages for a sum of Rs.60.00 lacs or any lesser amount from the defendant, as prayed for in para 64(d) of the plaint? (OPP)

10) Relief.”

25. Suffice would it be to state that pursuant to the framing of issues, the plaintiffs have filed the evidence by way of an affidavit of one J. L. Sharma. J. L. Sharma was cross-examined by the learned counsel appearing for the defendants. The said

cross-examination remained inconclusive. As is seen from the record, failure on the part of the defendant to complete the cross-examination of PW-1, the same was closed and the PW-1 was discharged (see order dated February 29, 2019). It is also noted that the defendants have not filed evidence. When the matter was listed before the Joint Registrar on April 04, 2019 the learned Joint Registrar, finding that no one has appeared for the defendants, closed the defendants' evidence.

26. On January 20, 2020, Mr. Ashish Somasi, learned Advocate, appearing for the plaintiffs made his submissions when there was no appearance for the defendants. The plaintiffs have also filed written submissions. The plaintiff has proved / exhibited the following documents along with the examination in chief, PW1/A:-

- (1) Letter of Authority dated 13th February, 2012
Ex.PW1/1
- (2) Power of Authority dated 3rd May, 2012 Ex.PW1/2
- (3) Letter of Authority dated 16th April, 2014 Ex.PW1/3
- (4) Letter of Authority dated 17th September, 2008
Ex.PW1/4
- (5) Power of Attorney dated 2nd September 2008
Ex.PW1/5
- (6) Letter of Authority dated 7th October, 2008 Ex.PW1/6

- (7) List of Software Programs Ex.PW1/7
- (8) A detailed list of Software Programs Ex.PW1/8
- (9) Ex. PW1/9 to PW1/32 (As per Ex.PW1/A)

27. The cross examination of J.L. Sharma by the learned counsel for the defendants remained inconclusive and has no bearing on the merit of the dispute in the present suit. The learned counsel for the plaintiffs has reiterated the case, as set up by the plaintiffs in the pleadings / examination in chief and in his oral submissions as well.

28. At this stage, I may state here that this Court on two occasions i.e on October 29, 2010 and November 25, 2010 appointed Local Commissioner for carrying inspection of the computers at the defendants' premises to check whether they are using unlicensed software. Two reports have been filed by the Commissioner. First report reveals, despite the Commissioner asking the licenses of the software found on the computers inspected, the defendants could not produce the same. Similarly, the second report also reveals that with regard to some computers, licenses were produced but without invoices and in some cases, no licenses were produced.

29. Having perused the record and heard the learned counsel for the plaintiffs, my issue wise findings are as under:-

Issue No.1

30. This issue was framed in view of the objection taken by defendant No.2 in view of the License Agreement entered between the parent company of the defendant No.2 and the plaintiff No.1, which confers exclusive jurisdiction to Superior Court of King County, Washington. Similar objection has been taken qua plaintiff No.3 in terms of the License Agreement that it has with the parent company of the defendant No.2, which stipulates, all disputes between the said plaintiffs and the parent company of defendant No.2 shall be brought in Superior Court of the State of California or the Federal District Court of San Jose in Santa Clara County. Suffice would it be to state that in this suit, the dispute is between the plaintiffs and the defendants, the allegations being that the defendants are using unlicensed softwares on their computers. The dispute is not between the plaintiff No.1 and 3 with the parent company of defendant No.2 but between the plaintiffs and the defendants. Further, the unauthorized usage of the software of the plaintiffs is in India and the plaintiff No.2 is based within the territorial jurisdiction of this Court for the plaintiffs to file the present suit in this Court. In this regard, I may only refer to the judgment of the Supreme Court in the case of *Indian Performing Rites Society vs. Sanjay Dalia (2015) 10 SCC 161*, wherein the Supreme Court inter-alia held that a suit can be filed at a place where the plaintiff has a principal place of office and not subordinate office. The principal place of office of the plaintiff No.2 is in Delhi. Further, I find,

the registered Office of defendant No.2 is also in Delhi. The issue No.1 is decided accordingly.

Issue Nos.2 to 9

31. Insofar as these issues are concerned, the plaintiffs have relied upon Ex.PW1/7 to Ex.PW1/33 in support of their case. They have relied upon the reports of the Local Commissioner to establish that the defendant No.2 had no licenses of the plaintiff Nos.1 or 3's software in its own name. Para 27 of Ex.PW1/A refers to the Local Commissioner's reports, wherein it is mentioned that the Local Commissioner had sealed 51 computers containing the infringing software. The report also reveal that the defendants used unauthorized / unlicensed versions of the plaintiff Nos.1 and 3's software on 208 computer systems. The said conclusions drawn by the Local Commissioner have not been contested by the defendants by filing objections to the report or by cross examining the PW1, who had filed the affidavit Ex.PW1/A. In fact, the defence of the defendants in their written statements, which has already been reproduced above in paras 20 to 24 of this judgment could not be said to have been proved in the absence of cross examination of PW 1 / by filing affidavits / proving documents in accordance with law. So, the case as set up by the plaintiffs is established in terms of the reports of the Local Commissioner and it is clear that the defendants including the defendant No.2's employees have been using unauthorized / unlicensed versions of the plaintiff Nos.1 and 3's software by

installing them on their various computer systems and using in day to day business activities.

32. I may state here that when the matter was listed before the Court on October 16, 2019, one Rakesh Singh, representative of the defendant No.2 appeared along with his counsel and stated that the defendants are ready to suffer a decree, inasmuch as they shall not use the pirated / counterfeit / unlicensed software of the plaintiffs. Since, he did not have the necessary authorization, the counsel was directed to file the same. Regrettably, no authorization has been filed on record.

33. I have heard the matter on January 22, 2020 when there was no representation for the defendants. The issue Nos. 2 to 9 are decided in favour of the plaintiffs.

34. In view of my above discussion, the plaintiffs are entitled to the prayers as made at (a) and (b) of paragraph 64 of the plaint, inasmuch as, the defendants, their principal officers, directors, agents, franchisees, servants, and all others acting for and on their behalf are restrained from directly or indirectly using for any kind of computer related activities or otherwise in any other manner, any pirated/counterfeit/unlicensed softwares of the Plaintiffs, or reproducing and distributing any pirated/counterfeit/unlicensed softwares of the Plaintiffs in contravention of the terms of the End-User License Agreement (s), or infringing in any other manner or causing or enabling or assisting others to infringe the copyrights of the Plaintiffs. This would result in the seized goods released to the defendants on superdari, be handed over to the

plaintiffs for destruction and needful shall be done within two months from today.

35. The other aspect, which needs to be considered is the issue of damages. The learned counsel for the plaintiffs has drawn my attention to para 60 of the plaint, to show various orders passed by this Court in various suits, wherein damages were awarded. Having noted the said orders passed in the cases filed by the plaintiffs herein, this Court is of the view, in the absence of any defence of the defendants and the magnitude of the violation carried out by the defendants, the plaintiffs shall also be entitled to damages. Accordingly, this Court awards damages to the tune of Rs.30 lakhs in favour of the plaintiffs to be shared equally by all of them and this is, in view of the prayers at (c) and (d) of para 64 of the plaint.

36. The plaintiffs shall also be entitled to costs as per the certificate of costs filed by the learned counsel for the plaintiffs on January 31, 2020 vide filing No.119815. Decree sheet be drawn accordingly.

CCP(O) 134/2010

List this petition for consideration on July 6, 2020.

IA 2667/2016

Dismissed as infructuous.

V. KAMESWAR RAO, J

MAY 26, 2020/ak