

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(OS) 989/2005

Decided on March 31, 2008

MICROSOFT CORPORATION Plaintiff
Through Mr. Praveen Anand, Advocate.
versus

KRISHAN KUMAR GUPTA Defendant
Through

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Mr. Justice S. Ravindra Bhat: (Open Court)

1. The plaintiff files the present suit seeking an order of permanent injunction restraining the defendant from infringing its trademark and also seeks an order for rendition of accounts, delivery up of goods and for damages.
2. The plaintiff is a corporation based in the United States, having its Indian office in New Delhi. It has, over the years established a high reputation in

the business of development of software programmes and also select computer hardware including mouse, keyboard, joystick, etc. The mouse is a small hand held device, which is moved over a flat surface to produce a corresponding movement of a cursor or arrow on a computer monitor. The plaintiff manufactures mice under the label "Microsoft OEM Serial Mouse 2.OA" and is marketed with authentic microsoft software to install drivers. The plaintiff has obtained trademark registration in class 16 in 1984 for the mark 'MICROSOFT', bearing no: 430450. The plaintiff also has submitted figures relating to its sales and publicity. It has further averred as to the unique packing and contents of its boxes, in which its mice are marketed.

3. The avers that in January, 1998 it was informed that the defendants were manufacturing and selling counterfeit mice bearing the mark 'MICROSOFT'. One such mouse was purchased and sent for examination, upon which it was found that it was counterfeit. The technical consultant, Mr. Gurjot Singh gave a detailed report along with photographs. The report pointed out the following distinctions. Firstly, the absence of a Microsoft OEM Agreement, second, the absence of a Certificate of Authenticity accompanying the counterfeit product. Moreover, the absence of shrink wrap packing and hologram in the counterfeit piece and district micro switches and similar hardware components.

4. This act of the defendants, the plaintiff alleges, is a dishonest manner of not only infringing the plaintiff's registered trademark but also that it amounts to passing off, by adopting a mark that would cause deception and confusion in the

minds of the public. Therefore, the plaintiff urges this court to issue a permanent injunction protect its goodwill and proprietary rights.

5 . This court by order dated 28th January, 1998 issued an ad interim injunction restraining the defendants from manufacturing the counterfeit goods. The defendants later filed their written statement in which among others, they had taken the defence that they were only stockists of mice and other computers including PCL Ltd had stocked their old imported mice in its premises. It stated that the plaintiffs goods themselves varied in colour, texture, packaging etc, and the present set of mice recovered were infact old original products. It also objected to the report of the technical assistant.

6 . Therefore, on 19.2.2004, this court transferred the matter to the District Court in view of the valuation being less than Rs.20 lakhs. The court at the plaintiff's request allowed an amendment pertaining enhancement of the suit valuation. The case was consequently, transferred back to the High Court and renumbered. This court permitted the plaintiffs to cause substituted service to the defendnats through publication in the newspaper, duly made on 13th January, 2006 in the issue of the "Statesman". On 10th February, 2006 the defendants were set down ex-parte and on the 4th of May, 2006, the evidence by way of affidavit was taken on record.

7 . Mr. Anand Banerjee PW 1 gave evidence by way of affidavit Ex. PW 1/A. He as the constituted attorney of the plaintiff, stated that the plaintiffs owned proprietary rights over the trademark 'MICROSOFT' which was used on the mice

they manufactured. He also stated that the defendants were dishonestly using the aforesaid trademark on their goods, which were counterfeit inferior quality ones. He further stated that the value and quality of the defendants' goods were verified by the technical expert, who submitted a detailed report in relation to the same. He further stated that the customers would be deceived by the goods of the defendant and would associate them with the plaintiff's brand; since, the plaintiffs mark is a highly distinctive well known mark, enjoying good reputation around the globe.

8. As documentary evidence the plaintiffs produce the letter of authority in favour of Mr. Banerjee (Ex. P1), the trademark certificate issued in relation the mark 'MICROSOFT' in relation to software goods (Ex. P.2) and a similar certificate in relation to hardware products (Ex. P3). Apart from these, the report of the local Commissioner recording the stocking of infringing goods in the defendants premises is also on record along with report of the technical assistant and relevant photographs of the infringing goods.

9. The relevant part of the Local Commissioners report is as follows:-

“On inspection of the shop 28 pieces of Mouse bearing trade mark “MICROSOFT” were found in a box which were identified to me by an expert Mr. Gurjot Singh as counterfeit products of MICROSOFT.

It is also pertinent to note that the feet of the MOUSE i.e. the lower paid bore the names “VIJAY” and the signatures of various other persons.

On further inspection of the invoice book the local Commissioner found that on invoice no.331 dated 24.1.1998 which reflected sale of a mouse bearing the trademark

MICROSOFT for Rs.520/-.”

10. The expert evidence is as follows:-

“The Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial #. 08644912 was sold as a retail product whereas under the Microsoft OEM Agreement any OEM product has to accompany the sale of a Computer Hardware.

The Microsoft OEM Serial Mouse Hardware Ver 2.0A Part # 50674 bearing the Serial #. 08644912 does not have a Certificate of Authenticity, which is mandatory with all genuine Microsoft products.

All genuine Microsoft retail products are enclosed in a box packaging, which is shrink-wrapped, whereas the Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial #. 08644912 was sold as a loose piece and without a packaging.

The Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial #. 08644912 has a body/casing which differs from the specifications of a Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #. 506774 (Exhibits C-1, C-2, C-3, C-4).

The PCB circuit and components populating the PCB of the Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial #. 08644912 are a design modified form the specification of a Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #.50674. (Exhibit C-5).

The Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial #. 08644912 has momentary micro switches manufactured by and marked “1C”, whereas genuine Microsoft mouse never use momentary micro switches manufactured by and marked “IC” (Exhibit C-6).

The above reasons lead me to conclude that the Microsoft OEM Serial Mouse Hardware Ver 2.0A Part #50674 bearing the Serial

#.08644912 is not a genuine Microsoft product and in my opinion it is a counterfeit Microsoft product.”

11 . Mr. Anand, learned counsel for the plaintiff states that he has instructions to give up reliefs claimed in para 33 (c) to (f). Considering the materials placed on record, this court is of the opinion that the plaintiff is entitled to the relief it claims.

In view of the above, the suit is decreed in terms of prayers in para 33 (a) and (b). No costs.

S. RAVINDRA BHAT,J

MARCH 31, 2008

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