

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS (OS) No.782/2002**

Judgment reserved on: 2nd July, 2009

% Judgment decided on : 7th July, 2009

Adobe Systems, Inc & Anr. Plaintiffs
Through: Mr. Praveen Anand, Adv. with
Mr. Shantanu Sahay, Adv.

Versus

Mr. Mahindra Saxena & Anr. Defendants
Through: None

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. The present suit has been filed by two independent companies i.e. Adobe Systems Inc, USA, plaintiff No.1 and M/s. Microsoft Corporation, USA, Plaintiff No.2 for permanent injunction against the defendants restraining them from infringement of copyrights, trademarks, passing off, delivery up, rendition of accounts, damages etc. and the same is pending before this Court. Mr. Bharatvir Singh is the Constituted Attorney of the plaintiffs by virtue of a Letter of Authority in his favour.

2. It is averred in the plaint that the Plaintiff No.1, Adobe

Systems Incorporated (hereinafter referred to as 'Abode') and Plaintiff No.2, Microsoft Corporation (hereinafter referred to as 'Microsoft') are the companies organized and existing under the laws of the State of Washington, USA having its principal office at 345 San Jose, Park Avenue, CA 95110-2704, USA and One Microsoft Way, Redmond, WA 98052-6399, USA respectively.

3. It is contended that the software programs as developed and marked by the Plaintiffs are 'computer programme' within the meaning of Section 2(ffc) of the Copyright Act, 1957 and also included in the definition of a literary work as per Section 2(o) of the Copyright Act, 1957. The Plaintiffs' works are protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999 as the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian Copyright law. India and the USA are signatories to both the universal Copyright Convention as well as the Berne Convention.

4. The plaintiffs have filed original and Court Certified Copies of Original Copyright registration certificates and trademark registration certificates for the software programs as owned by the Plaintiffs exhibited from Ex.P3 to Ex.P6 and Ex.P-7 to Ex.P-14 of the evidence affidavit respectively.

5. It is stated in the plaint that the Plaintiffs, upon receiving information of the Defendants' infringing activities in February, 2002 on BSA/NASSCOM anti piracy hotline, immediately initiated an investigation to ascertain if the Defendants were infringing the

copyrights/trademarks of the Plaintiffs by using pirated software programs of the Plaintiffs on the computer system used at their premises for their day to day business activities. Later on, after coming to know the activities of the defendants, the present suit has been filed by the plaintiffs as the defendants were infringing the legal rights of both the companies.

6. The suit along with the interim application were listed before this court for the first time on 9th April, 2002 when the summons were issued in the main suit and in I.A. No. 3334/2002, an ex parte ad interim order was passed restraining the defendants, their representatives, agents and all other persons acting for and on their behalf from using the pirated/unlicensed software of the plaintiffs. In I.A. No. 3335/02, this court had appointed Mr. R.K. Vats, Advocate as a Local commissioner with a direction to visit the premises of the defendants or any other premises belonging to the defendants to find the infringing software of both the plaintiffs.

7. As per the report of the Local Commissioner filed in this court on 24th April, 2002 it is recorded that 16 computer disks containing counterfeit and unlicensed software of the plaintiffs were found at the premises. A blue CD carry case containing 17 computer disks having infringing software of plaintiff No.2 i.e. Microsoft Corporation was also found at the premises.

8. No written statement was filed by the defendant no. 1 till 13th January, 2004 and his right to file written statement was closed on that date. On the same date, written statement was filed on behalf of

defendant no. 2, however, only adjournments were sought after that by the counsel for the defendant. Thus, on his non-appearance, by an order dated 30th March, 2006 the defendants were proceeded ex parte and time was granted to the plaintiffs to lead evidence by way of affidavit.

9. The plaintiffs filed evidence by way of affidavit of Sh. Anand Banerjee on the basis of copy of letter of authority in his favour by plaintiff nos. 1 and 2 exhibited as Ex.P-1 and Ex.P-2 of the evidence affidavit. The plaintiffs also filed another affidavit of Sh. Sanjiv Sharma showing the computation of damages. In the said affidavit, a statement has been made that approximate average market price of licensed Microsoft product and Adobe products which were pirated/unlicensed and used illegally by the defendants on the computer system for use at their premises respectively were as follows:-

(A) **MICROSOFT**

a. Microsoft Office 97	Rs. 15,000 per unit
b. Microsoft Windows 98	Rs. 6,000 per unit
c. Microsoft Server SQL 7.0	Rs. 35,000 per unit
d. Microsoft Project (various versions)	Rs. 16,000 per unit
e. Microsoft Windows 2000 server	Rs. 27,000 per unit
f. Microsoft Visio 2000	Rs. 20,000 per unit
g. Microsoft Windows 2000 PRO	Rs. 7,000 per unit
h. Microsoft Exchange Server (various versions)	Rs. 36,000 per unit
i. Microsoft Visual Studio 6.0	Rs. 50,000 per unit
j. Microsoft Windows NT server	Rs. 36,000 per unit

(B) **ADOBE**

a. Adobe Photoshop	Rs. 25,000 per unit
b. Adobe Pagemaker	Rs. 25,000 per unit
c. Adobe Acrobat	Rs. 15,000 per unit
d. Macromedia Dreamweaver	Rs. 50,000 per unit
e. Macromedia Flash	Rs. 50,000 per unit
f. Macromedia Fireworks	Rs. 60,000 per unit

10. In Para No.8 of the affidavit, the details of conservative

assumption and estimates have been made which are as follows:-

“(a) that the defendants are engaged in the business of providing consultancy services to companies desirous of setting up call centre business. They have extensive use of plaintiff’s software program and much of their business activities are dependent on such usage. Despite making huge profits in the business, the defendants have not invested any money in purchase of genuine software, even though use of such software is integral to their business activities.

(b) that the plaintiffs caught the defendants violating their copyrights by indulging in blatant end user piracy of their software programs in the year 2002. The Hon’ble Court has granted an ex parte ad interim injunction against the defendants on 9th April, 2002, restraining them from infringing the copyrights of the plaintiffs by using pirated/unlicensed software of the plaintiffs and infringing the plaintiffs’ registered trademarks Adobe, Adobe Illustrator, Microsoft etc. Keeping the Defendants’ conduct in view, it will be fair and justified to conservatively assume that the defendants were indulging in piracy of plaintiff’s software programs on a large scale.

(c)that as per the Local Commissioner’s report, the defendants had a total of 23 computers installed in their premises, all of which were loaded with infringing copies of the plaintiffs’ software. Apart from these computers, other disks were also recovered from the defendants’ premises. An inventory of 16 computers disks containing pirated/unlicensed versions of the plaintiffs’ software was made during the local commission proceedings. The report of the Local Commissioner has been filed in the present proceedings and may kindly be referred to.”

11. In Para No.9 of the affidavit, it is stated that the potential revenue that the plaintiffs could have earned if genuine software had been purchased by the defendants is computed as follows:-

Name of software	Approx.	Cost	of	No.	of	Approx.
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	licensed software	Computers having pirated versions	revenue to plaintiffs
Microsoft Windows 98 (Standard)	Rs.6000/- per license	15	Rs.90,000
Microsoft Windows Office (Standard)	Rs.15000/- per unit	21	Rs.3,15,000
Microsoft Server SQL 7.0	Rs.35,000/- per unit	2	Rs.70,000
Microsoft Project (various versions)	Rs.16,000/- per unit	4	Rs.64,000
Microsoft Windows 2000 Server	Rs.27,000/- per unit	5	Rs.1,35,000/-
Microsoft Visio 2000	Rs.20,000/- per unit	1	Rs.20,000/-
Microsoft Windows 2000 PRO	Rs.7,000/- per unit	3	Rs.21,000/-
Microsoft Exchange Server (various versions)	Rs.36,000/- per unit	1	Rs.36,000/-
Microsoft Visual Studio 6.0	Rs.50,000/- per unit	3	Rs.1,50,000/-
Microsoft Windows NT 4.0 Server	Rs.36,000/- per unit	1	Rs.36,000/-
Adobe Acrobat (various versions)	Rs.15,000/- per unit	3	Rs.45,000/-
Adobe PageMaker (various versions)	Rs.25,000/- per unit	3	Rs.75,000/-
Adobe Photoshop (various versions)	Rs.25,000/- per unit	6	Rs.1,50,000/-
Macromedia Dreamweaver	Rs.50,000/- per unit	3	Rs.1,50,000/-
Macromedia Fireworks 3.0	Rs.60,000/- per unit	2	Rs.1,20,000/-
Macromedia Flash	Rs.50,000/- per unit	2	Rs.1,00,000
Total			Rs.15,77,000

12. In the evidence produced by the plaintiffs, it is claimed that on a fair and conservative basis, the defendants would have deprived the plaintiffs a potential revenue of Rs. 15,77,000/-. This figure includes profits that would have been legitimately due to the plaintiffs.

13. As regards the infringement part is concerned, it is an undisputed fact that the learned Local commissioner has recovered the infringing software of the plaintiffs from the premises of the defendants. In view of material available on record, it is clear that the defendants are guilty of counterfeiting the products of the plaintiffs. Both the plaintiffs are, therefore, entitled for a decree of permanent injunction as prayed for in Para 36(A) to (C) of the plaint.

14. On the basis of pleadings, documents, evidence produced by the plaintiffs and report of the local commissioner, it is apparent that the plaintiffs have statutory rights in respect of the software for which copyright exists with them. The use of counterfeited and duplicate software by the defendants is clearly illegal and in violation of legal rights of the plaintiffs. It causes financial damage not only to the plaintiffs but also amounts to deception to the public at large. At the same time, the government is also losing huge revenue because of such illegal activities as it is a known fact in this trade that the counterfeiters do not maintain any account books nor pay any taxes and in case damages are not granted in counterfeiting cases, they will be encouraged.

15. In **Microsoft Corporation v. Kiran, 2007 (35) PTC 748 (Del)** it has been held that ‘wilfully, intentionally and flagrantly violating the copyrights and trademark’ is deliberate and calculated infringement.

16. In **Microsoft Corporation Vs. Kamal Vahi & Ors., CS (OS) No.817 of 2004** it was observed that compensatory damages are

awarded based on a calculation of a percentage of revenue that would have been earned if the defendants had not indulged in the infringing activity.

17. In **Amarnath Sehgal Vs. Union of India, 2005 (30) PTC 253 (Del)** it was observed that compensatory damages may be paid where the acts and commissions of the defendants violate the established rights of the plaintiffs.

18. In **Microsoft Corporation Vs. Deepak Raval, MIPR2007(1)72** in CS (OS) No.529 of 2003, it was observed that where the defendants fails to respond and are recklessly indifferent as to whether or not the goods they are selling counterfeit, dishonest intention may be inferred and the defendants can be said not to be “honest traders”.

19. The primary purpose of the damages is to restore losses to the plaintiffs. However as tort litigation has evolved, I find that the concept of damages is not limited to compensation for loss and damages alone. Three kinds of damages are being awarded by courts, which include nominal damages, exemplary damages and compensatory damages.

20. Punitive damages, also commonly referred to in English as *exemplary damages*, are designed to punish and not to compensate. In general, punitive damages are awarded for socially deplorable conduct, such as fraud or malicious, reckless, or abusive action. Since the early 1900s, punitive damages have been available only for tort but not for contract. Punitive damages are discretionary and are never given as a

matter of right.

21. The concept of punitive damages made its entry in the Indian legal system in the year 1999 with the decision of the Apex Court with regard to allotment of petrol pumps, which was obviously not relating to Intellectual property. In ***Common Cause v. UOI***, AIR **1999 SC 2979**, the Hon'ble Supreme Court of India recorded a finding that the conduct of the petitioner is oppressive and that he had made allotments of the petrol pumps in favour of various persons for extraneous consideration. The Supreme Court awarded an amount of Rs. 50 Lakhs as Punitive Damages.

22. In the case of ***Time Incorporated v. Lokesh Srivastava***, **2005 (30) PTC 3 (Del)**, the Court has expressly recognized third type of damages as punitive damages apart from compensatory and nominal damages. The Court has made some relevant observations discussing the aspect of punitive damages. The court held that :

“The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities...”

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them."

The court justified the grant of punitive damages on the

basis of flagrancy of infringement which is the doctrine derived from US law.

23. The judgment of Times's case (supra) was followed by ***Hero Honda Motors Ltd. v. Shree Assuramji Scooters, 125 (2005) DLT 504*** where the Court took the view that damages in such a case should be awarded against defendants who chose to stay away from proceedings of the Court and they should not be permitted to enjoy the benefits of evasion of Court proceedings. The rationale for the same is that while defendants who appear in Court may be burdened with damages while those who choose to stay away from the Court escape such damages.

24. In the case of **Intel Corp. Vs. Dena Karan Nair CS (OS) No.1333/2005** it was held by this Court on 24th April, 2006 when the defendant failed to appear and relying upon Hero Honda's case (supra) and Time Inc.'s case (supra) awarded damages of Rs.3 lacs as opposed to the amount of Rs.20 lacs which had been prayed for by the plaintiffs.

25. In the present case as already pointed out, the local commissioner was appointed to visit the premises of the defendants to locate the pirated/unlicensed software. The local commissioner as per the order of the court has visited the premises of the defendants and in his report, it has been found that the defendants had pirated software of the plaintiffs at the premises of the defendants.

26. The suit is decreed in terms of prayers (A), (B), (C), and (E) as contained in paragraph 36 of the plaint. In lieu of the prayers of rendition of accounts as contained in prayer (F), the plaintiff is entitled

to a decree of Rs.5 lac by way of compensatory damages as well as a decree in the sum of Rs.5 lac on account of punitive/exemplary damages in the plaintiffs favour and against the defendants. The plaintiff is also entitled to costs. The suit stands decreed accordingly.

MANMOHAN SINGH, J.

JULY 07, 2009
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