

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1168/2005

%15.01.2009

Date of decision:15.01.2009

MICROSOFT CORPORATION

.... Plaintiff

Through: Mr Pravin Anand, Mr Shantanu Sahay
and Mr Nishant Bora, Advocates.

Versus

MR. G.V. RAO & ANOTHER

.... Defendants

Through: Ex parte.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. The plaintiff a company incorporated in accordance with the laws of the State of Washington (USA) and carrying on business within the jurisdiction of this court also, has instituted this suit for restraining the defendants from copying, selling, offering for sale etc the counterfeit /unlicensed version of the plaintiff's software, amounting to infringement of the plaintiff's copyright in the said computer programmes and for further restraining the defendants from loading and offering for sale and distributing the plaintiff's software and/or any other product to which the plaintiff's trademark or any deceptive variants thereof have been applied without the license of the plaintiff and also amounting to infringement of plaintiff's trademark. The plaintiff has also claimed the ancillary reliefs of delivery, damages, rendition of accounts and costs.

2. Vide ex parte order dated 25th August, 2005, the defendants were restrained from copying, reproducing, hard-disk loading, offering for sale, distributing, issuing to public, counterfeit/unlicensed versions of the plaintiff's software and infringing the copyright of the plaintiff.

3. The defendant No.1 in the name and style of the defendant No.2 and as a sole proprietor of the defendant No.2 is averred to be carrying on business in Hyderabad of marketing and selling computer hardware including branded and/or assembled desk-top computers and peripherals. The defendants, on being served with summons of the suit, appeared before this court and filed a written statement, inter alia, disputing the territorial jurisdiction of this court and also denying that they were marketing or dealing in software. It was pleaded that they were engaged in marketing and selling computer hardware including branded desktop computers and computer peripherals. The plaintiff filed replication reiterating its stand in the plaint and on the pleadings of the parties, on 12th January, 2006 the following issues were framed:

- "1. Whether this court has no territorial jurisdiction to entertain and decide the suit? OPD
2. Whether the plaint is signed and verified by a duly authorized person? OPP
3. Whether the plaintiff owns the copyrights and trademarks which are subject matter of the suit?
4. Whether the defendants have infringed the copyright of the plaintiff as subsisting in its software programs?
5. Whether the defendants have infringed the registered trademarks of the plaintiff?
6. Whether the defendants have passed off counterfeit/pirated and unlicensed versions of the plaintiff's software as genuine goods of the plaintiff as alleged in the plaint?

7. Relief.”

4. The defendants on 27th April, 2006 also gave their no objection to the ex parte ad interim order being confirmed during the pendency of the suit and it was so confirmed.

5. The suit was adjourned for few dates thereafter on the plea of the counsel for the parties that the parties were attempting an amicable settlement. However, thereafter, the counsel earlier appearing for the defendants stated that the defendants had stopped instructing the counsel. The counsels for the defendants were discharged on 9th January, 2007 and the defendants ordered to be served again. However, the defendants could not be served, apparently because they had ceased to be at the address given in the plaint. The defendants were ordered to be served by affixation at their last known address and were so served and upon their failure to appear, were vide order dated 11th December, 2007 ordered to be proceeded against ex parte and remain ex parte.

6. The plaintiff has led ex parte evidence of its constituted attorney Mr Anand Banerjee and of a Chartered Accountant Mr Sanjiv Sharma. The said evidence remains unrebutted. Since the defendants are ex parte, need is not felt to render findings issue-wise. However, Mr Anand Banerjee witness of the plaintiff has deposed that he has instituted the suit and signed and verified the plaint on behalf of the plaintiff; that he has been duly authorized in this regard and the authorization in his favour has been proved as Exhibit P1. The said authorization is by one Mr Rakesh Bakshi who has claimed a power of attorney from the plaintiff in his favour and

with authority to delegate further. The document proved as Exhibit P1 also contains a photocopy of a notarized certificate of an Assistant Secretary (original of which was produced before the court) to the effect that a power of attorney in favour of the said Mr Anand Banerjee had been executed but the original of which was untraceable and ratifying the institution of all suits by the said Mr Anand Banerjee on behalf of the plaintiff pre or post 1st November, 2004; the present suit would be so covered. It is now the settled legal position that the institution of a suit even if unauthorized on the date of institution can be subsequently ratified. I, thus, find the suit to have been instituted and the plaint signed and verified by a duly authorized person on behalf of the plaintiff.

7. As far as the plea taken of the defendant challenging the territorial jurisdiction of this court is concerned, it is again the unchallenged evidence of the plaintiff that the plaintiff is carrying on business within the jurisdiction of this court. Even though the defendants are situated outside the jurisdiction of the court and the cause of action constituting their activities has also accrued outside the jurisdiction of this court but the legislature has intentionally, in relation to the suits for infringement of copyright, as the present suit is, under Section 62(2) given the court, where the plaintiff is carrying on business, also jurisdiction to entertain the suit. The said change in legislative policy has to be given full effect to and notwithstanding the said special change in relation to the actions under the Copyright Act and the Trademark Act, reliance cannot be placed on the general provisions of CPC relating to territorial jurisdiction. Thus this plea of the defendants is also found to be misconceived.

8. As far as the copyright of the plaintiff is concerned, Mr Anand Banerjee witness of the plaintiff has deposed and proved as Exhibit P2 to Exhibit P8 the copyright registration of the plaintiff and as Exhibit P9 and P10 the trademarks certificates of the plaintiff relating to the mark Microsoft. The defendants chose not to rebut the said evidence. That leaves only the question as to whether the defendants were infringing the copyright and trademark of the plaintiff. Though the defendants in their written statement claimed to be dealing in computer hardware and peripherals only and denied dealing in software, not only is it the unrebutted evidence but it is also common knowledge that such vendors of computer hardware are known to be attracting buyers/customers by loading un-licensed and pirated versions of the software to the hardware and without which software the hardware is useless. The witness of the plaintiff has also deposed that upon receiving information in June 2005 that the defendants were indulging in such activities, the plaintiff deputed an independent investigator Mr R Satheesh Kumar who, on behalf of the plaintiff, executed the purchase of an assembled computer system from the defendants on 24th June, 2005, on to which pirated version of the plaintiff's software programme had been illegally loaded. The plaintiff has not examined the said Mr R Satheesh before this court but even without his testimony, the version of the witness of the plaintiff in the circumstances aforesaid is believable. It is further in evidence that on technical examination, the aforesaid software was found to be unlicensed and pirated version of the plaintiff's software.

9. The witness of the plaintiff has deposed that even prior to the institution of the suit talks took place with the defendant No.1 but upon the refusal of the defendant No.1 to relent, the suit was filed. After the institution of the suit also when the counsel for the defendants was appearing, adjournments were taken from this court again on the ground of settlement. However, it appears that the defendants were not interested in the settlement and that is why stopped instructing their advocates and also decided against contesting this suit. In fact, it appears that the defendants during the pendency of the suit closed their business from the address at which the same was being carried on and shifted to some other place. That is why the defendants, after their advocate had stopped appearing could not be served at their address available with the plaintiff.

10. The plaintiff has thus made out a case for grant of the relief of injunction claimed. No purpose would be served in ordering delivery since the defendants, the record discloses, have ceased to be at the address available with the plaintiff. For the same reason there is no point in granting the relief of accounts also to the plaintiff. This court in **Microsoft Corporation v Yogesh Papat** 2005(30) PTC 245 has held that the plaintiff would be entitled to damages for the reason that it would be futile to direct the defendants to render accounts for the reason of the defendants carrying on business surreptitiously. Similarly in **Times Incorporated v Lokesh Srivastava** 2005 (30) PTC 3 (Del) also it was held that where infringement is found, punitive damages should follow to discourage such law breakers. The chartered accountant examined by the plaintiff has deposed that from the tax invoice issued by the

defendants for sale to the independent investigator aforesaid, it appears that the defendants have been carrying on business at least since 2003-2004. It has further been deposed that the average market price of licenced Microsoft products of plaintiff, which the defendants were illegally distributing pirated copies, were of the value of Rs 7500/- or Rs 15000/- per licence. This court has in the judgments (supra) taken judicial notice of the sales usually made by such vendors of the software, in the Nehru Place market at New Delhi. The witness of the plaintiff has deposed that the sales in the present case were of ten computers a month and has deposed that the plaintiff would be entitled to minimum damages of Rs 6 lacs. I do not find any reason not to agree with the said ex parte evidence of the plaintiff. The plaintiff is thus found entitled to a decree for damages in the sum of Rs 6 lacs against the defendants. The suit of the plaintiff is thus decreed against the defendants jointly and severally for the reliefs of permanent injunction in terms of prayer paragraph 39 (a) (b) and (c) and for recovery of damages in the sum of Rs 6 lacs. The plaintiff shall also be entitled to costs of the suit from the defendants. If the amounts are not recovered within 90 days of the decree, the plaintiff shall be entitled to future interest on the damages at 15% per annum till the date of payment.

The decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 15, 2009
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