

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 09.03.2011

+ **CS(OS) No. 1755/2003**

Autodesk, Inc. & Another

.....Plaintiffs

- versus -

Mr. Prashant Deshmukh & Others

.....Defendants

Advocates who appeared in this case:

For the Plaintiff: Mr. Pravin Anand and Ms. Jaya Negi

For the Defendant: None.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J. (ORAL)

1. This is a suit for permanent injunction, damages and delivery up of the infringing material.
2. Both the plaintiffs are companies registered in U.S.A. Plaintiff No.1 is a leading design software and digital content company having presence in more than 160 countries and providing design software to professionals, to help them in making, managing and marketing their

designs for hotels, motorways, office buildings and lifts etc. and its products are stated to be installed on millions of computers all over the world, including India. Plaintiff No.2 owns softwares such as Microsoft Windows and Microsoft Office and also manufactures a large range of computer peripherals. Plaintiff No.1 has a large number of authorized resellers in India whereas plaintiff no.2 has a subsidiary company in India having office in New Delhi. It is claimed that the software developed and marketed by the plaintiffs are computer programmes within the meaning of Section 2(ffc) of the Copyright Act, 1957 and also covered under the definition of a literary work as per Section 2(o) of the Copyright Act. It is further claimed that the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian Copyright laws since both India as well as U.S.A. are signatory to both these conventions. Plaintiff No.1 also claims to be owner of various trademarks in India, including AUTODESK and AutoCAD. AUTODESK is stated to have been registered in India in Class 9 vide registration No.462772. Plaintiff No.2 claims ownership of the trademarks MICORSOFT and WINDOWS. Plaintiff No.2 is

the registered proprietor of trademarks in India in Clause 9 and 16 vide registration No.430449B and 430450B.

3. It is alleged that in May, 2003, the plaintiff received information from Mr. Devesh Tiwari, a Service Engineer for the computers of the defendants, about large scale use of unlicensed/pirated software by the defendants. The plaintiffs have accordingly sought an injunction restraining the defendants from infringing their copyright and their registered trademarks. The plaintiff have also claimed damages amounting to Rs.20 lakhs besides rendition of accounts and delivery up of the unlicensed/pirated softwares contained in hard disks, compact disks, floppies etc.

4. The right of the defendant to file the written statement was closed by this Court vide Order dated 25th February, 2005 and the plaintiffs were directed to produce evidence by way of affidavit.

5. The plaintiffs have filed four affidavits by of affidavits. In her affidavit by way of evidence, Ms. Rohini Boaz, who is working with Autodesk India Pvt. Ltd., a subsidiary of plaintiff No.1, has stated that the Autodesk India Pvt. Ltd. has access to the license database of plaintiff

No.1 which lists out all licensed software users in India in order to keep track of authorized licensees at any given point of time. The data base contains the information of authorized licensees, particulars of software licenses they own in India and serial numbers of those software programmes. She has further stated that license check dated 19th October, 2004 revealed that defendants 1 and 2 were not holding any license from plaintiff No.1 whereas defendant No.3 M/s Space Designers Syndicate was holding a license in respect of AutoCAD LT 2005, which was at serial No.342-08419184 registered on 19th September, 2004.

6. In his affidavit by way of evidence, Mr. Devesh J. Tiwari has stated that he was working with M and S Consultancy Services since January, 2003 as a computer service engineer. His responsibility was to maintain the computer software and hardware of his company's clients. He has further stated that he was deputed to maintain the computer system of Associated Space Designers Syndicate Pvt. Ltd. When he first visited the premises of this company, he met one Ms. Poornima Bhide, an employee of the aforesaid company, who was looking after the

administration and maintenance of their computer systems. He noticed that the company had around 40 computers at the time of his visit and came to know that they were not using genuine/legal software. He claims that the company did not possess any legal licenced software. He noticed that all the computers were installed with various softwares including Microsoft Windows 95/98, Microsoft Office 97/2000 and AutoCAD Versions 12, 14 and 2000. He further stated that when he discussed this issue with Ms. Bhide, she stated that they had been using pirated software for a long time and that she cannot take any decision in this regard. When he approached Mr. Prakash Deshmukh, a director of the aforesaid company for purchase of genuine licensed software, he told him that they had been using unlicensed/pirated software for many years and assured him that nothing had happened to them. He claimed that in the course of service operations, he personally saw the pirated compact disks that were being used to install the pirated software. Those disks were unbranded and were kept in the custody of Ms. Bhide. He further stated that he never saw any genuine software discs, manuals, end-user licences etc. in the premises of the aforesaid company till he

last attended their service call on 18th August, 2003.

7. In his affidavit by way of affidavit Mr. Achuthan Sreekumar, constituted attorney of the plaintiffs has stated that the plaintiff No.1 is the world's leading design software and digital content company, helping over 5 million design professionals in over 160 countries in making, managing and marketing their designs for hotels, motorways, office buildings and lifts and AutoCAD is flagship product of plaintiff No.1 company and is extremely popular among design professionals such as engineers and architects, He has further stated that plaintiff No.2 company has developed various computer programmes including Microsoft Windows 98, Microsoft Windows 2000, Microsoft Office 97 and Microsoft Office 2000. He has also stated that word Microsoft has been continuously and extensively used by plaintiff No.2 since 1975 and has come to be identified and recognized exclusively with plaintiff No.2 company.

8. Exhibit P-20 is the copy of legal proceedings certificate issued by the Trade Marks Registry, which shows that plaintiff No.2 Microsoft Corporation is the registered proprietor of the word Mark MICROSOFT in respect of computer programmes prerecorded on tapes, disks,

diskettes, cartridges, cassettes and within ready only memories, computer programmes and related user manuals and instructional guides sold as a unit. Exhibit P-21 is the legal proceedings certificate issued by the Trade Marks Registry, which shows that plaintiff No.2 Microsoft Corporation's Word Mark MICROSOFT is registered under Class 16 in respect of Computer Hardware, Software Manuals, Computer Documentation:- Reference, User, Instructional & General Utilities Manuals & Data Sheets for computer hardware and software manufacturers.

9. Exhibit P-7 is the certificate of registration in respect of the work AutoCAD 2002 and user's guide granted to Autodesk Inc. Exhibit P-8 is the copy of certificate of registration in respect of the work AutoCAD 2004 and user's guide granted to the plaintiff No.1. Exhibit P-9 is the copy of certificate of registration in the work Microsoft Windows 2000 Professional granted to the plaintiff no. 2 Microsoft Corporation in USA. Exhibit P-10 is the copy of certificate of registration granted to the plaintiff no. 2 in respect of the work Microsoft Office 2000 Professional. Exhibit P-11 is the copy of copyright registration granted to the plaintiff no. 2 in respect of the work Microsoft Word 2000. Exhibit P-12 is

the copy of copyright registration obtained by plaintiff no. 2 in respect of Microsoft Windows 98 whereas Exhibit P-13 is the copy of copyright registration in respect of Microsoft Office 97 (Professional Edition). Several other copyright registrations have been obtained by plaintiff no. 2 with respect to various software programmes.

10. I see no reason to disbelieve the deposition of Mr. Devesh J. Tiwari particularly when the defendants have chosen not to contest the suit by filing written statement and their right to file written statement was closed by the Court vide order dated 25th February, 2005. The deposition of Mr. Tiwari shows that during the course of servicing the hardware installed in the premises of Associated Space Designers Pvt. Ltd. He found pirated softwares including the Microsoft Windows 95/98 Operating System; Microsoft Office 97/2000; AutoCAD Versions 12, 14 and 2000 installed on their computers. He also noticed pirated CDs being used to install pirated softwares. Annexure 'A' to his affidavit shows that he found AutoCAD 12 on all computers except 1 or 2, AutoCAD 14 on all computers except 1 or 2, AutoCAD 2000 on 10 computers, Windows 95 on 20-25 computers, Windows 98 on 20 computers, Office 97

(Professional Edition) on all computers except 1 or 2, Office 2000 on one computer, Adobe Photoshop on one computer and 3D studio on one computer.

Learned counsel for the plaintiff states that AutoCAD 12, 14 and 2000 are the older versions of AutoCAD 2002 and 2004 and in fact, all the software under the series AutoCAD belong to plaintiff no. 1 company.

11. The plaintiffs have today filed an affidavit of Mr. Subroto Panda, Head of the IT Department of the Legal Representatives of the Plaintiff companies, who claims to be administering various software programmes used at the premises of the plaintiffs' representatives, including purchasing software on their behalf and installing and maintaining those softwares. In his affidavit, Mr. Panda has stated that in his 14 years of experience, he had purchased various software programmes and had come across a number of purchase agreements along with End User License Agreements (EULA) of various software companies, including the plaintiffs in this suit. He has affirmed that once a software programme of the plaintiffs is purchased by the End User, there is seldom a change that the term of the license would not be in perpetuity. He has further stated

that on visiting the website of the plaintiffs, he had downloaded one DULA for one of the products of the plaintiff No.1 company and a webpage showing the details of subscription for Microsoft products and both the documents indicate that mostly all licenses used by commercial entities can be used in perpetuity. He has further stated that a software programme purchased by an entity at any given point of time in the past should currently reflect in the data base of the product purchase summary maintained by the plaintiff companies. He has also stated that the conditions stipulated in Section 65B of the Indian Evidence Act, 1872 have been complied with in respect to the documents downloaded by him.

The affidavit of Mrs. Ms. Rohini Boaz when read with the affidavit of Mr. Panda indicates that had any license been purchased by defendant No.2 company in respect of various softwares, which Mr. Devesh J. Tiwari claims to be pirated softwares, the information in this regard would have been available in the data base maintained by the plaintiff companies. As stated by Ms. Rohini Boaz the data base revealed that defendant No.2 was not holding any license from plaintiff No.1, when the data

base was searched by her on 19th October, 2004. The plaintiffs have, therefore, been able to prove that the softwares found installed in the computers of defendant No.2 were not licensed by the plaintiff companies.

12. The documents filed by the plaintiff companies, thus, show that plaintiff no. 2 holds copyright registration in respect of software being Windows 98, Office 97 (Professional Edition) and Office 2000 whereas plaintiff No.1 company holds copyright in respect of software of AutoCAD series.

13. Section 40 of the Copyright Act, 1957, to the extent it is relevant, provides that the Central Government may, by order published in the Official Gazette, direct that all or any provisions of the Act shall apply to work first published in any territory outside India to which the order relates in like manner as if they were first published within India.

14. Para 3 of International Copyright Order 1999 issued vide S.O. 228(E) dated 24th March, 1999 published in the Gazette of India, Extra Part II would show that vide aforesaid order, all the provisions of the Copyright Act, 1957 except those in Chapter VIII and those other provisions which apply exclusively to Indian works have been extended

to any work first made or published in a country mentioned in Part I, II, III, IV or VI of the Schedule in like manner as if it was first published in India. USA is included as one of the countries mentioned in Part I of the Schedule and its name appears at number 131 of the list. Paragraph 2 of the aforesaid order provides that “Berne Convention Country” means a country which is a member of the Berne Copyright Union and includes a country mentioned either in Part I or in Part II of the Schedule. Therefore, USA is a member of the Berne Copyright Union and all the provisions of the Copyright Act, 1957 except those contained in Chapter VIII, and those other provisions which apply exclusively to Indian works are applicable to the copyrights in respect of any work which has been published first in USA.

15. Clause (d) of Section 3 of the International Copyright Order, 1999, to the extent it is relevant, provides that the aforesaid provisions shall apply to any work first made or published by a body corporate incorporated under any law of a country mentioned in Part I, II, III, IV or Part VI of the Schedule, in like manner, as if it was incorporated under a law in force in India.

16. The provisions of para 3 however have been made

applicable subject to the provisions contained in para 4 to 6 of the order. Paragraph 4 of the International Copyright Order, 1999 does not apply in this case. Section 32 of the Copyright Act, 1957 to which paras 5 and 6 of the aforesaid order pertains relates to licences in public translations and therefore, does not apply to facts of the case before this Court.

17. Thus, in view of the provisions contained in Section 40 of the Copyright Act read with International Copyright Order, 1999, the provisions of Chapter XI of the Copyright Act including Section 51 which deals with infringement of copyright would apply to the copyright registrations obtained by the plaintiffs in respect of the software found to be installed in the computers of defendant no. 2.

18. Section 51 of the Copyright Act, to the extent relevant, provides that copyright in a work shall be deemed to be infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyrights under the Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under the Act does anything, the

exclusive right to do which is by the Act is conferred upon the owner of the copyright.

Section 14 of the Copyright Act, to the extent relevant, provides that copyright means the exclusive rights subject to the provisions of the Act, to do or authorize the doing of specified acts in respect of a work or any substantial part thereof, which in the case of a computer programme would include to reproduce the work in any material form including the storing of it in any medium by electronic means. Therefore, by using pirated versions of the softwares, copyright of which vest in the plaintiff companies, the defendant no. 2 infringed their copyrights in those softwares.

19. As noted earlier, the plaintiff no. 2 holds trademark registrations in the word/mark Microsoft in class 9 and class 16. By using the software which according to the learned counsel for the plaintiff bears the registered trademark 'MICROSOFT' of plaintiff no. 2, the defendant no. 2 infringed the registered trademark which plaintiff no. 2 company holds in India in respect of the word/trademark 'MICROSOFT'.

20. Learned counsel for the plaintiff states that he is confining his prayers to grant of permanent injunction and punitive damages. Regarding punitive damages in the case of ***Time Incorporated v. Lokesh Srivastava & Anr.***, 2005 (30) PTC 3 (Del), this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of ***Hero Honda Motors Ltd. v. Shree Assuramji Scooters***, 2006 (32) PTC 117 (Del), this Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

In ***Microsoft Corporation v. Deepak Raval*** MIPR 2007 (1) 72, this Court observed that in our country the

Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In ***Larsen and Toubro Limited v. Chagan Bhai Patel*** MIPR 2009 (1) 194, this Court observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a

trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use the pirated software thereby depriving the copyright owner of the revenue to which he is entitled by sale of licence to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using the infringing mark/pirated software for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

21. It is difficult to dispute that the use of pirated softwares of reputed companies such as Microsoft and AutoCAD is widely prevalent in our country and in fact, use of pirated software may be far exceeding the use of licenced software. The companies which invest heavily in

development of such highly useful software, will be discouraged from making further investments in designing new softwares and improving the existing ones, if they are deprived of licence fee which they get on sale of licences, since it is only from that money that they can develop new softwares by making substantial investments in research and development. Also, use of pirated software by a commercial enterprise needs to be dealt with more strictly than use by an individual for his personal purposes.

Since defendant no. 2 has been found using the pirated software of the plaintiff's company for its commercial purposes, there is likelihood of the defendant company persisting with the use of these pirated softwares. Hence, the defendant no. 2 is hereby restrained from using any pirated/unlicensed software of the plaintiff's company.

In the fact and circumstances of the case, particularly considering that defendant no. 2 was found using the pirated software for its commercial benefit, I also award punitive damages amounting to Rs. 1 lakh to the plaintiffs and against it. The suit qua other defendant(s) is dismissed.

The decree sheet be drawn up accordingly.

CCP (O) 141/2003

Dismissed as not pressed.

**(V.K. JAIN)
JUDGE**

**MARCH 09, 2011
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