

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 2nd August 2011

+ CS(OS) 789/2004

MICROSOFT CORPORATION

..... Plaintiff

Through: Mr. Pravin Anand and Ms. Jaya
Negi, Advs.

versus

VIJAY KAUSHIK & ANR.

..... Defendant

Through: None.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

- | | |
|---|----|
| 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 Digest? | No |

V.K. JAIN, J (ORAL)

1. The plaintiff Microsoft Corporation is a company registered in USA and has setup a marketing subsidiary in India known as Microsoft Corporation India Private Limited. The plaintiff company provides a number of software products such as Microsoft Windows, Microsoft Office, etc., which are being installed and used on large number of

computers all over the world including India. It is claimed that the software developed and marketed by the plaintiff is a 'computer program' within the meaning of Section 2(ffc) of the Copyright Act, 1957 and is also included in the definition of literary work as per Section 2(o) of the Act. It is alleged that the computer program of the plaintiff company have been created by its employees for the company and the copyright in those works belongs to the plaintiff company.

2. The plaintiff also claims to be the owner of the trademark Microsoft, which it adopted in the year 1970 and which it has since then been using continuously and extensively not only as a trademark but also as a key and essential component of its corporate name. It is also claimed that the trademark Microsoft is a well-known mark and no other person is entitled to use the aforesaid mark in relation to any goods or business. The trademark Microsoft has also been registered in favour of the plaintiff company in India in Classes 9 and 16 vide registration No.430449B and 430450B, respectively.

3. In May 2004, on receiving information that the defendants have been infringing the copyright and

trademarks of the plaintiff, by preloading software on the hard disk forming part of the computer being assembled and sold by them, the plaintiff engaged an Investigator to verify the complaints received by it. The Investigator Mr. Manoj Kumar visited the premises of defendant No.2 M/s Supreme Peripherals Pvt. Ltd. on 8th June 2004 and placed order for a computer system. On 9th June 2004, he was given delivery of the computer by defendant No.1 Mr. Anil Kumar, an employee of defendant No.2. That computer was loaded with unlicensed software of the plaintiff company. Mr. Manoj Kumar delivered that computer in sealed boxes to the office of M/s Anand & Anand at New Delhi. The sealed boxes were got photographed by plaintiff's technical expert Mr. Gurjot Singh on the next day. He then opened the boxes, inspected the computer purchased from the defendants and took printouts of the directories of its hard disk. The inspection revealed that the operating system Microsoft Windows XP Professional Version 2002 and software Microsoft Office 2000 and Microsoft Visual Basic 6.0 had been loaded in the computer without any authorization. It was opined by the expert that the hard disk contained unlicensed and/or pirated version of the

plaintiff's software. The software program was not accompanied by the original Media, i.e. Compact Disc/Floppy Disks, Certificate of Authenticity, End User Licence Agreement, User Instruction Manuals, Registration Cards, etc. which are normally accompanying the genuine software of the plaintiff company. The defendants are thus alleged to have infringed the trademark and copyright of the plaintiff company by selling the computer containing hard disk loaded with the aforesaid pirated computer program. The plaintiffs have sought injunction restraining the defendants from keeping, selling, offering for sale, distributing or issuing to the public any counterfeit/unlicenced version of its software or any deceptive version thereof. The plaintiff has also sought delivery up of all the counterfeit/unlicenced copies of the plaintiff's software besides rendition of accounts.

4. The defendants were proceeded ex parte on March 23, 2005.

5. The plaintiff has filed affidavits of Mr. Manoj Kumar, who was the Investigator appointed by it, Mr. Sanjeev Sharma, who is a Chartered Accountant, Mr.

Achuthan Shreekumar, Constituted Attorney of plaintiff company, Mr. Bhagwati Prasad, Advocate, who is working with Mr. Anand & Anand Advocates and its technical expert Mr Gurjot Singh.

6. In his affidavit by way of evidence Mr. Manoj Kumar has stated that on instructions from the plaintiff company, he visited the premises of M/s. Supreme Peripherals Pvt. Ltd. located at 205 Meghdoot Building, 94, Nehru Place, New Delhi on 8th June 2004 and met its employee Mr. Anil Kumar, who handed over the visiting card of Mr. Vishal Kaushik, Director of defendant No.2 company to him. He has further stated that he sought quotation for a Pentium IV desktop computer with a particular configuration. Mr. Anil Kumar then handed over a quotation invoice to him on the letterhead of defendant No.2 company, which is Annexure III to his affidavit. Mr. Kumar also said that he would be able to provide any software free of charge when he indicated that he would like to have Microsoft Windows XP, Microsoft Office, Microsoft Visual Studio, Norton Antivirus, Games, etc. The witness also made advance payment of Rs.5,000/- for which the receipt,

which is Annexure III to the affidavit, was handed over to him and he was asked to take delivery of the machine on the next day. He again visited the premises of defendant No.2 on 9th June 2004 and delivery of the machine was given to him after loading the software. On checking the machine he found Microsoft Windows XP Professional, Microsoft Office and Microsoft Visual Basic, installed in the machine along with other software. The computer was thereafter packed and sealed in the boxes in his presence and a receipt which is Annexure IV to the affidavit was given to him after taking the balance amount from him. He took delivery of the computer at about 5:30 PM and placed his name seal on the computer boxes, indicating date and time as well. He then delivered the machine in the office of M/s. Anand & Anand, B-41, Nizamuddin East, New Delhi at about 6:00 PM. He has further stated that no amount was charged from him for the software installed in the computer and no literature pertaining to licences or any original CDs/Floppy Disks or operating CD for the software was given to him. In his affidavit by way of evidence Mr. Gurjot Singh, who is a qualified Microsoft Certified Systems Engineer and a Microsoft Certified Professional, has stated

that on 10th June 2004, he was asked by the representatives of the plaintiff company to examine the contents of a computer purchased from defendant No.2 company, which was kept at the office of the plaintiff's representatives at B-41, Nizamuddin East, New Delhi. He was handed over sealed boxes which M/s. Anand & Anand received on 9th June 2004. The boxes handed over to him were in a sealed condition. He took digital pictures of all the three boxes and computer printout of those pictures is Annexure A to his affidavit. He then opened the boxes and took out the monitor, CPU, keyboard, etc. After switching on the computer, he took out a printout of the contents of the hard disk, which revealed Microsoft Windows XP Professional Version 2002, Microsoft Office 2000 and Microsoft Visual Basic 6.0 loaded into it. He took coloured printout of the screenshots of all the printouts as well as printout of the directory which are Annexure B to his affidavit. The printout indicated the time and date when the software were loaded in the machines. On examining the software contained in the hard disk, he concluded that they were pirated softwares for the following reasons:-

- (a) Unlike in the case of original software, the computer loaded with the aforesaid software was not accompanied by Media (CDs/floppies), Instructional Manuals, End User Licence Agreement, Certificates of Authenticity and Registration Cards.
- (b) In the case of original software, each of the software accompanying the sale of a computer would necessarily be packaged and sold along with Media (CDs/floppies), Instructional Manuals, End User Licence Agreements, Certificates of Authenticity and Registration Cards.
- (c) The product keys of the software loaded in the computer inspected by me were “installation break codes” as an original product key of a plaintiff’s software does not contain nos. such as “00000” or “1111111111”. “Break codes” are product keys codes which can bypass the requirement of providing authentic installation codes during software installation.

7. Mr. Achuthan Sreekumar, Constituted Attorney of the plaintiff company has supported on oath the case setup

in the plaint and has deposed about the trademark and copyright of the plaintiff company.

8. In his affidavit Mr. Bhagwati Prasad, Advocate has stated that he has been working with Anand & Anand Advocates since 1983 and on 9th June 2004 one box containing monitor, one box containing CPU and two boxes containing the accessories were delivered in their office by the investigator Mr. Manoj Kumar in a sealed condition. He further stated that on 10th June 2004 contents of the computer system purchased by the investigator from the defendants were examined by Mr. Gurjot Singh in their office. He further stated that computer system examined by Mr. Gurjot Singh was the same which was purchased by Mr. Manoj Kumar from defendants on 9th June 2004.

9. Ex. P-8 is the Certificate of Registration of the word mark Microsoft in the name of Microsoft Corporation in respect of computer programmes prerecorded on tapes, disks, diskette cartridges, cassettes, and within ready only memories, computer programs and related user manuals and instructional guides sold as a unit, whereas Ex.P-9 is the Copy of registration in Class 16 in respect of computer

documents relating to computer hardware, software manuals, computer documentation, reference, user, instructional and general utilities manuals and data sheets for computer hardware and software manufacturers, producers and users. It would thus be seen that plaintiff is the proprietor of the trademark Microsoft in India in respect of the computer programme recorded on tapes, disks, CDs, etc. as also all the accompanying users, manuals, instruction guide, etc.

10. Ex.P-4 is the Certificate of copyright registration in respect of Microsoft Office 2000 Professional. Ex.P-6 is the copyright registration in respect of Microsoft Visual Basic Version 6.0, Ex.P-9 is the Certificate of Registration in respect of the work Microsoft Visual Basic 6.0 and Ex.P-7 is the Certificate of Registration of the work Microsoft Visual C++ 6.0 Enterprise Edition. Ex. P-4 to P-6 are US registrations.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. The deposition of Mr. Manoj Kumar, who was the

investigator appointed by the plaintiff company shows that he had purchased a computer system from defendant No.2 on 8th/9th June 2004, had got it sealed in boxes and later delivered those boxes in the office of M/s. Anand & Anand at B-41, Nizamuddin East, New Delhi. His deposition also shows that he had informed the representatives of defendant No.2 that he would like to have Microsoft Office XP, Microsoft Office, Microsoft Visual Studio, Norton Antivirus, Games amongst other softwares to be loaded in the computer and on checking the machines, he found Microsoft Windows XP Professional, Microsoft Office and Microsoft Visual Basic, etc. installed therein. The deposition of Sh. Bhagwati Prasad, Advocate shows that the sealed boxes which Mr. Manoj Kumar had deposited in their office on 9th June 2004 were inspected by Mr. Gurjot Singh on 10th June 2004. The affidavit of Mr. Gurjot Singh shows that Microsoft Windows XP Professional Version 2002, Microsoft Office 2000 and Microsoft Visual Basic 6.0 were found installed in the computers which Mr. Manoj Kumar had purchased from defendant No.2 and which he had delivered at the office of M/s. Anand & Anand Advocates on 9th June 2004. Mr. Gurjot Singh has, in his

affidavit, given grounds on the basis of which he came to the conclusion that the software found loaded in the computer inspected by him were pirated softwares. The deposition of Mr. Gurjot Singh as well Mr. Manoj Kumar also shows that the computer sold by defendant No.2 to Mr. Manoj Kumar was not accompanied by any media such as CDs/floppies, Instructional Manuals, End User Licence Agreements, Certificates of Authenticity and Registration Cards. Had the software loaded with the computer been genuine software purchased from plaintiff company, not only the CD/floppy, but the instructional manual and certificate of authenticity, etc. would have been supplied by defendant No.2 to Mr. Manoj Kumar along with the computer. In particular the affidavit of Mr. Gurjot Singh shows that the product keys of the software loaded in the computer inspected by him were “installation break codes” since the original product key of plaintiff’s genuine software does not contain numbers such as “0000” or “1111111111”. According to him break codes are products key codes which can bypass the requirement of providing authentic installation codes during software installation. In view of the inspection report of Mr. Gurjot Singh coupled with the

deposition of Mr. Manoj Kumar, I have no hesitation in holding that defendant No.2 had sold computer system having a hard disk loaded with pirated software Microsoft Windows XP Professional Version 2002, Microsoft Office 2000 and Microsoft Visual Basic 6.0. By selling computer system which contained a hard disk loaded with the pirated software in which copyright is held by the plaintiff company, defendant No.2 infringed the copyright of the plaintiff in the aforesaid computer program. The contention of the learned counsel for the plaintiff is that use of the pirated software also involves use of the trademark Microsoft of the plaintiff company without any licence from the plaintiff company and, therefore, defendant no.2 has also infringed the registered trademark of the plaintiff company which is otherwise a well-known mark in India.

19. The learned counsel for the plaintiff states that he is confining his prayer to grant of perpetual injunction and damages. In **Autodesk, Inc. vs. Mr. Prakash Deshmukh**, Suit No. 1755/2003 decided on 9th March 2011, in which Microsoft Corporation was plaintiff No.2 before this Court, this Court inter alia observed as under:-

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.

20. Defendant No.2 has been found using the pirated software of the plaintiff company for making gains in its business. There is a strong likelihood of defendant No.2 persisting with sale of computer system having hard disk loaded with pirated software unless adequate punitive damages are awarded against it. In fact use of pirated software by a commercial entity such as defendant No.2 needs to be dealt with more strictly than use of software by an individual for his personal purpose. Defendant No. 2 has not come forward to contest the suit. Had it contested the suit, it would have been possible for the Court to scrutinize its account books to ascertain the profit it has been making

from sale of computers loaded with pirated software. The defendant No. 2 is a company, carrying business in Nehru Place, a prime locality, which is the main market for sale of such products. It can, therefore, be safely assumed that it must be making handsome profits by selling computers loaded with pirated software and that is why it has taken the risk of carrying business of this nature and has chose not to come forward to contest the suit. The punitive damages to be awarded against defendant No. 2, therefore, need to be adequate, exemplary and deterrent enough.

21. For the reasons given in the preceding paragraphs, a decree with costs is passed against defendant No.2 restraining it from selling, offering for sale, storing, distributing of any computer systems or any other computer hardware loaded with the software Microsoft Windows XP Professional Version 2002, Microsoft Office 2000 and Microsoft Visual Basic 6.0 or any other software in which the plaintiff company hold copyright and/or trademark registration, except under a licence from the plaintiff company. Defendant No.2 is also directed to pay Rs.5 Lacs as punitive damages to the plaintiff company. As far as

defendant No.1 is concerned, he being a Director of the plaintiff company, no decree needs to be passed against him. The suit against defendant No.1 is dismissed without any order as to costs.

(V.K. JAIN)
JUDGE

AUGUST 02, 2011

Ag