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

+ **CS(OS) 2243/2009**

MICROSOFT CORPORATION AND ANR. Plaintiffs
Through **Ms. Safia Said, Advocate**

versus

MR. GANESH WAKODE AND ORS. Defendants
Through **None**

% **Date of Decision: 20th February, 2013.**

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J

1. Present suit has been filed for permanent injunction restraining infringement of copyrights, delivery of profits, rendition of accounts, damages and delivery of all plaintiffs' unlicensed pirated software. The prayer clause of the present suit is reproduced hereinbelow:-

"I. A Decree of Permanent Injunction restraining the Defendants, their principal officers, directors, agents, franchisees, servants and all others acting for and on their behalf, from directly or indirectly reproducing/storing/ installing and/or using pirated/unlicensed software programs of the Plaintiff No. 1, thereby Infringing Copyright in the Plaintiffs' computer programs/software titles;

II. A Decree of Delivery up of all the impugned products being unlicensed/pirated software contained in hard disks, compact disks, floppy disks or other storage media and including any CD Writers/Burners, or any other material infringing or aiding in the

infringement of the Copyright of the Plaintiffs, such as infringing copies of user Instruction Manuals of the abovementioned software titles, lying in the possession of the Defendants and their principal officers, directors, agents, franchisees, servants etc;

III.A Decree for payment Rs.20,00,200 towards Rendition of Accounts of profits illegally earned by the Defendants by reason of infringement of the Plaintiff No.1's Copyright as aforesaid;

IV.A Decree of damages be passed in favour of the Plaintiffs and against the Defendants as determined by the Hon'ble Court having regard to the extent of use of the Plaintiff's software, pursuant to the present proceedings;

V. A Decree of costs in the present proceedings be passed in favour of the Plaintiff Companies and against the Defendants; and

Any other and further orders, as this Hon'ble Court deems fit, proper and just in the facts and circumstances of the present case, may be passed in favour of the Plaintiff Companies and against the Defendants."

2. In the plaint, it has been stated that the plaintiff no. 1, Microsoft Corporation is a company organized and existing under the laws of State of Washington, USA. Plaintiff no. 1 is the largest software publisher in the world and its computer software including various operating systems such as Microsoft Windows XP Professional, Win Server 2003 Ent., Win Server 2000, Microsoft Professional 2003, MS Office XP Professional 2002, Office XP Professional with front page, Office XP Small Business, Office Enterprise 2007, Office 2000 Premiere Enterprise 2007, Office 2000 Premiere, Office 2000 Professional etc. Plaintiffs' software programmes are popular, famous and renowned throughout the world.

3. Plaintiff no. 2 is stated to be a wholly owned marketing subsidiary of plaintiff no. 1 which has been incorporated and registered under Indian Companies Act, 1956. Plaintiff no. 2 has been set up in 1989 to promote anti-piracy awareness campaigns and to support plaintiff no. 1 or its affiliates. The products of plaintiff no. 1 are distributed in India through various authorised distributors.

4. The relevant facts of the present case are that the plaintiffs in November 2009, upon receiving information of the defendants' infringing activities regarding unlicensed use of the plaintiffs' software programme, immediately initiated an investigation. The plaintiffs also conducted a search within its database called 'Microsoft Sales' and found that the defendants have registered in their names only the following licenses:-

- a. 1 license of SQL Server 2008.
- b. 1 license of Windows Server 2008.
- c. 20 Client Access License (CAL).

5. For the aforesaid purpose, an independent investigator, Mr. Jatin Batra was engaged. The investigator on 18th November, 2009 through telephonic conversation gathered information regarding the plaintiffs' software usage at the defendants' premises as a marketing executive of Anti-virus software solution. During the course of the conversation, the investigator was informed that there were about 200 computer systems housed by the defendants at their offices located in Mumbai, Noida and Kolkata. Mr. Batra was further informed that most of the computer systems housed by the company have installed on them plaintiffs' software

programmes, which includes, Microsoft Windows and its various versions, Microsoft Office and their various versions etc.

6. The plaintiffs in the past had continuously written to the defendants requesting them to conduct a SAM Review Programme at their office, with a view to determine the extent of software programmes used by the defendants and the number of licenses held by it with respect to the plaintiff No.1's software programmes. However, despite repeated follow ups made by the plaintiffs, the defendants made no efforts towards conducting the SAM Review or towards legalization and instead chose to ignore the said requests made by the plaintiffs.

7. On 27th November, 2009, this Court by an ex parte order restrained the defendants, its employees, agents, servants etc. from using the plaintiffs' unlicensed software till the next date of hearing. On the said date of hearing, three Local Commissioners were also appointed to visit the three offices of the defendants.

8. On 10th December, 2009, when the Local Commissioners visited the respective offices of the defendants, they found a total number of 77 computer systems installed with around 161 unlicensed/pirated software titles of the plaintiffs.

9. The defendants had been served on 18th June, 2010. Since, no one appeared on their behalf, the right of the defendants to file written statement was closed and this Court on 20th May, 2011 set down the defendants ex parte.

10. Plaintiffs in their ex parte evidence examined Mr. Vishal Ahuja, who filed his evidence by way of affidavit as Ex.PW1/A and proved the

notarized copy of the Power of Attorney in his favour by the plaintiffs as well as Court's certified copies of the original copyright certificate for the software programmes such as Microsoft Windows XP Professional and Microsoft Office Professional Edition 2003. The detail of the unlicensed software installations found in the two locations during the execution proceedings as mentioned in the evidence of Mr. Vishal Ahuja is reproduced hereinbelow:-

Sr. No.	Name of the Software program	Number of Installations
1.	Microsoft Office Premium 2000	13
2.	Microsoft Office 2002	2
3.	Microsoft Office 2003	1
4.	Microsoft Office Professional 2003	33
5.	Microsoft Office Project Professional 2003	3
6.	Microsoft Office Enterprises 2007	7
7.	Microsoft SQL Server 2000	3
8.	Microsoft SQL Server 2005	2
9.	Microsoft SQL Server Enterprises 2.0	1
10.	Microsoft Visual Studio 2003	2
11.	Microsoft Visual Studio Professional 2005	6
12.	Microsoft Visual Studio Professional 2008	2

11. Learned counsel for the plaintiffs has relied on *Mathias Vs. Accor Economy Lodging Inc.*, 347 F. 3d 672 (7th Cir. 2003) where the factors underlying grant of punitive damages were discussed. It was observed that “the award of punitive damages in this case thus serves the additional

purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." She also pointed out that in ***Time Incorporated Vs. Lokesh Srivastava & Anr., 2005 (30) PTC 3 (Del.)*** this Court has held that *punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement.*

12. The plaintiffs have also relied upon ***Adobe Systems Inc. & Anr. Vs. Mr. P. Bhominathan & Anr., 2009 (39) PTC 658 (Del.)*** where the court in a similar software piracy matter has passed a decree of Rs. 5,00,000/- by way of compensatory damages as well as a sum of Rs. 5,00,000/- on account of punitive/exemplary damages in favour of the plaintiff and against the defendant. The court also granted costs to the plaintiff in the said case.

13. Having heard learned counsel for the plaintiffs and perused the ex parte evidence as well as document placed on record, this Court is of the opinion that plaintiffs have in fact proved the facts stated in the plaint and have also exhibited the relevant documents in support of their case. Since the plaintiffs' evidence has gone unrebutted, said evidence is accepted as true and correct.

14. Moreover, the software programmes as developed and marketed by the plaintiffs are a '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' work are also 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.

15. Consequently, this Court is of the view that plaintiffs are entitled to a decree of permanent injunction.

16. This Court in ***Disney Enterprises, Inc. Vs. Mr. Rajesh Bharti & Ors.***, CS (OS) 1878/2009 decided on 13th February, 2013 has held as under:-

*“16. Further, this Court in **Microsoft Corporation Vs. Rajendra Pawar & Anr.**, CS(OS) 530/2003 decided on 27th July, 2007 has held “Perhaps it has now become a trend of sorts, especially in matters pertaining to passing off, for the defending party to evade court proceedings in a systematic attempt to jettison the relief sought by the plaintiff. Such flagrancy of the defendant’s conduct is strictly deprecatory, and those who recklessly indulge in such shenanigans must do so at their peril, for it is now an inherited wisdom that evasion of court proceedings does not de facto tantamount to escape from liability. Judicial process has its own way of bringing to tasks such erring parties whilst at the same time ensuring that the aggrieved party who has knocked the doors of the court in anticipation of justice is afforded with adequate relief, both in law and in equity. It is here that the concept of awarding punitive damages comes into perspective.”*

*17. This Court is also of the view that before award of damages it is not necessary that the plaintiff must show some particular benefit has accrued to the defendant or that the plaintiff must satisfy the Court by leading evidence that it has suffered actual loss. In **Microsoft Corporation Vs. Ms. K. Mayuri & Ors.**, 2007 (35) PTC 415 Del., this Court has held “The practice of grant of exemplary damages needs to be strengthened particularly in those cases where flagrant infringement is found. Such an exercise of power is not to be fettered by any requirement that the plaintiff must show some particular benefit*

which has accrued to the defendant or that the plaintiff must satisfy the court by leading evidence that he has suffered actual loss. In a case where the plaintiff proves such actual loss, he would be entitled to the same. However, even without such a proof, in case of flagrant infringement, the court has the complete discretion to make such award of damages as may seem appropriate to the circumstances, so that it acts as deterrent. In some cases, it is not possible to prove the actual damages, namely, that there is a normal rate of profit or that there is a normal or establish licensed royalty. Yet, clearly, the damages have to be assessed.”

18. In *Disney Enterprises Inc. & Anr. Vs. Harakchand Keniya & Ors.*, CS (OS) 1254/2007 decided on 24th October, 2011 wherein the defendants were engaged in selling the counterfeit party hats and other party decoration products bearing the DISNEY characters, this Court while stating that the plaintiffs are the proprietor of the trademark in question and the said trademarks have been infringed by the defendants, awarded damages to the tune of Rs. 2,00,000/- against the defendants.

19. In fact, punitive damages have the effect of deterring not only the defendant from repeating the offence, but also deterring others from committing the same, preserving peace, inducing private law enforcement; compensating victims for otherwise uncompensable loss and payment of the plaintiff's counsel fees. In *Time Incorporated Vs. Lokesh Srivastava & Anr.*, 2005 (30) PTC 3 (Del.) while awarding punitive damages of Rs. 5 lakhs in addition to compensatory damages also of Rs. 5 lakhs, Justice R.C. Chopra observed that “time has come when the Courts dealing in actions for infringement of trademarks, copy rights, patents etc., should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law breakers who indulge in violation with impunity out of lust for money, so that they realise 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.” In the said case the court held that the defendants' magazine which used the Hindi translation of the word 'Time' with the distinctive red border,

was a slavish imitation of the plaintiff's trademark and held the defendants are liable for infringement."

17. Consequently, present suit is decreed and plaintiffs are held entitled to compensatory damages of Rs. 5,00,000/- and punitive damages of Rs. 2,00,000/-. Further, defendants, their principal officers, directors, agents, franchisees, servants and all other acting for and on their behalf are restrained by permanent injunction from directly or indirectly reproducing/storing/installing and/or using pirated/unlicensed software programmes of the plaintiff no. 1. Plaintiffs are also held entitled to the costs of the suit which is assessed at Rs. 1,50,000/-. Registry is directed to prepare a decree sheet accordingly.

18. With the aforesaid observations, present suit stands disposed of.

MANMOHAN, J

FEBRUARY 20, 2013

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