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

Judgment delivered on: 13.04.2015

+ FAO(OS) 86/2014 & CM No. 2851/2014

E-PROCUREMENT TECHNOLOGIES PT LTD

.... Appellant

versus

M/S C-1, INDIA PVT LTD & ANR

... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Jayant K. Mehta & Ms Mahavi Khare,
Advocates.

For the Respondents: Mr Muneesh Malhotra & Mr Achin Mittal,
Advocates.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This is an appeal against the order dated 06.01.2014 passed by the learned Single Judge of this Court in IA No. 9821/2010 under Order 39 Rule 1 & 2 CPC. The learned Single Judge has confirmed the ex-parte ad interim injunction which was granted in favour of the respondent-plaintiff on 28.07.2010 in terms of prayers (a) to (d) of the said application and the appellant was restrained from using “the e-tendering/e-procurement software of the plaintiff company or representing the same to various public

sector undertakings as well as the world at large.”

2. The learned counsel for the appellant submitted that the whole dispute is centred on the e-tendering software. According to the appellant, the e-tendering software, which is utilised by the appellant, has not been copied from the e-tendering software of the respondent No. 1. In fact, it was pointed out by the learned counsel for the appellant that there is no similarity between the software of the appellant and that of the respondent No. 1. Furthermore, the software of the appellant is on the Java platform whereas that of the respondent No. 1 is on the Microsoft's .net platform and the two are entirely distinct. This is apart from the various other dissimilarities, which have been set out at pages 132 to 139 of the paper book.

3. It was also pointed out by the learned counsel for the appellant that interrogatories had been served upon the respondent No. 1-plaintiff. Interrogatory numbers 6, 7 & 8 are material and they are as under:-

“6. Whether or not any employee of the Plaintiff has compared the software "E procurement solution" with the software of the Defendant No.1 prior to filing of the present suit? If yes, who is that person? Whether such person has prepared any report? Whether such report has been filed in the present proceedings? If not, why? Whether such report finds any similarities between the two software, namely, "E procurement solution" and the software of the Defendant No.1?

7. Describe the similarities that were found between "E procurement solution" software and the software of the Defendant No.1 at the time of filing of the present suit.

8. What tools and information had been relied upon by the Plaintiff to compare "E procurement solution" software with the software of the Defendant No.1? Please list the same."

4. The reply submitted to these interrogatories by the respondent No. 1 were as under:-

Q. No. 6:- Whether or not any employee of the Plaintiff has compared the software "E procurement solution" with the software of the Defendant No. 1 prior to filing of the present suit? If yes, who is that person? Whether such person has prepared any report? Whether such report has been filed in the present proceedings? If not, why? Whether such report finds, any similarities between the two software, namely, "E procurement solution" and the software of the Defendant No. 1?

Ans.: - The basis of the suit filed by the plaintiff is that the defendant no. 2, is running the defendant no. 1 company as proxy i.e. through his wife, father in law and other relatives. The Defendant No. 2 approached the plaintiff in the year 2003 in respect. of the tender with the Government of Madhya Pradesh by public relations. The defendant no. 2 who was director of M/s Applitech Tendercity.Com (Pvt.) Ltd. approached the plaintiff company and after some negotiations formed an "Association Agreement" dated 20.01.2003 with the Plaintiff. In pursuance to the said agreement, the plaintiff herein was required to provide the technical support as well as the software to the defendant no 2 and so as to bid for the tender by the Govt. of Madhya Pradesh. It is admitted position that the defendant no. 2 did not have the software at any point of time and therefore, he found association with a plaintiff company and accordingly gained the technical knowhow of the plaintiff's software. It is a categorical stand of the plaintiff that the defendant no. 2, being the director / CEO of the M/s Applitech Tendercity.Com (Pvt.) Ltd. had taken possession of the software for the tender of the Govt. of Madhya Pradesh and did not return the said software and thus violated the intellectual right of the plaintiff company as stated in agreement dated 20.01.2003 (Refer to Paragraph 50 of the Plaint).

Since the defendant no. 2 did not return the software, and on the contrary using the same against the interest of the plaintiff company, the plaintiff filled a suit being CS(OS) no. 1675/2005 for permanent and perpetual injunction against the M/s Applitech Tenderscity.Com (Pvt.) Ltd. as well as the Defendant no. 2. The said suit was decreed in favour of the plaintiff and against the defendants on 18.12.2006. Not only this, an award has been passed in favour of the Plaintiff in the arbitration proceedings conducted by the arbitrator Rt. Justice Mr. R.C. Chopra for Rs. 5.03 cores against the defendant no. 2.

The said Mr. Ramesh Sinha defendant no. 2 had been using the software contrary to the undertaking and injunction granted against him and had appeared before this Court, whereby, tendered his unqualified apology and further gave undertaking that he will not use the software, and he is no longer in business of e-tendering as he is working with M/s Vardhaman Synthetics and Bulk Organics Pvt. Ltd. However, immediately thereafter the defendant No. 2, circumvent the decree and undertaking has formed the new company namely M/s E-procurement Technologies Pvt, Ltd.

It is submitted that the defendant has not placed any document in order to substantiate that his software is different than that of the plaintiff's software and accordingly there is no occasion for the, plaintiff to compare the same. However it is pertinent to mention herein that the software in relation to 'e-procurement solution would require- a minimum of research and development of. 5 to 7 years of highly skilled engineers, whereas, the defendant no. 2 on 26.11.2007 had made the statement that he has been working with M/s Vardhaman Synthetics and Bulk Organics Pvt. Ltd. and tendered his unqualified apology whereby admitting that he has been misusing the software of the plaintiff company. Whereas the defendant no. 2 has formed the Defendant No. 1 company through his proxies on 05.05.2007 which makes it clear that at the relevant point of time ie. on 26.11.2007 the defendant no. 2 did not have the software which itself is clear that the defendants did not, have the software at the time of the formation of the' company.

So, the software is being used which clearly establishes the fact that the defendant no. 2 did not have the software accordingly there is no occasion for any of the employee of the Plaintiff Company, to compare the software with the defendants software as this itself demonstrates the same against the defendant.

Q. No. 7:- Describe the similarities that were found between "E procurement solution" software and the software of the Defendant No. 1 at the time of filing of the present suit.

Q. No. 8:- What toots and information had been relied upon by the Plaintiff to compare "E procurement solution" software with the software of the Defendant No. 1? Please list the same.

Ans.7&8:- The reply to the Question No. 6 be read along with the present query. However let the defendant no. 1 submits the details including the passwords before the Hon'ble Court in order to establish that he is not using the software of the plaintiff company. Since the onus lies on the defendant to proof the negative as he has alleging contrary to the plaintiff averment.

(underling added)

5. It was further submitted by the learned counsel for the appellant that the suit filed by the respondent No. 1 was premised on there being a case of infringement of copyright of the e-tendering software belonging to the respondent No. 1-plaintiff. Yet, as the answers to the interrogatories would disclose, the respondent No. 1-plaintiff had not even compared the software and therefore, the respondent No. 1-plaintiff was not in any position to allege any kind of infringement of the purported copyright of the e-tendering software of the respondent No. 1-plaintiff.

6. The learned counsel for the appellant also pointed out that

in an earlier proceeding by a third party against the respondent No. 1/plaintiff with regard to infringement of that third party's copyright in the e-tendering software, the respondent No. 1-plaintiff had taken the stand that there can be no copyright in an idea and that the e-tendering software was much like an accounting software of a generic nature. Furthermore, the stand taken in that case was that the respondent No. 1-plaintiff's software was developed on the .net platform whereas the third party software had been developed on the Java platform and the that two were entirely different.

7. The learned counsel for the appellant, therefore, submitted that in this backdrop, the learned Single Judge has erred in granting the ad interim injunction in favour of the respondent No. 1 and against the appellant.

8. The learned counsel for the respondent No. 1-plaintiff submitted that there was a decree against one Mr Ramesh Sinha (defendant No. 2) with regard to the e-tendering software of the respondent No. 1-plaintiff. The said Mr Ramesh Sinha was prevented from using the e-tendering software of the respondent No. 1-plaintiff. He further submitted that the said Mr Ramesh Sinha's wife (Sangeeta Sinha) has 88% share holding in the appellant company. He submitted that, therefore, the said Mr Ramesh Sinha engaged in this subterfuge and through this devious method has utilised the e-tendering software of the respondent No. 1-plaintiff.

9. It is further stated that the father-in-law of Mr Ramesh

Sinha is also a shareholder in the appellant company and the said Mr Ramesh Sinha is also the CEO of the appellant company. The learned counsel for the respondent No. 1 submitted that the learned Single Judge after considering the totality of circumstances and the past conduct of Mr Ramesh Sinha and his alleged involvement in the appellant company had passed the impugned order and there was nothing wrong in the same.

10. After having heard the learned counsel for the parties, the primary question, which arises for consideration, is whether the e-tendering software of the respondent No. 1 is identical or similar to the e-tendering software of the appellant company. This question arises in the backdrop of the fact that the suit is styled as one for infringement of the copyright of the respondent No. 1-plaintiff. If one were to examine the prayers, each one of them pertain to the alleged copyright of the respondent No. 1-plaintiff. Before any person can claim infringement of a copyright, it must be shown that the defendant has material, which is identical or similar to the material of the plaintiff. As an example, we can take the case of infringement of copyright in a book. There may be differences in the cover pages of the original book and the alleged infringed copy but, if the contents are the same it could, prima facie, be established that there is a case of infringement. But, before such a prima facie conclusion could be arrived at, there would have to be a comparison of the original book and the offending book. The same principle would apply to software also. While there may be differences in the front end, there may be identity or similarity in the coding of the software.

But, this has to be shown and demonstrated by the plaintiff claiming infringement.

11. In the present case, what we find is that when specific interrogatories were raised by the appellant-defendant in the form of question Nos. 6, 7 & 8, which we have extracted above. The evasive answers were given by the respondent No. 1-plaintiff. In those answers and specifically to the query No. 6, it has been clearly admitted that the respondent No. 1-plaintiff has not compared the e-tendering software of the appellant with that of the respondent No. 1-plaintiff. Without any such comparison having been made by the respondent No. 1-plaintiff, it would be difficult to prima facie conclude that there has been an infringement of the alleged copyright of the respondent No. 1-plaintiff in the e-tendering software, which is employed by it. Unfortunately, the learned Single Judge has not examined this aspect of the matter. Although the point with regard to interrogatories and the replies was specifically raised by the learned counsel for the appellant, there seems to be no discussion in this aspect.

12. We also do not see as to how the learned Single Judge could have even come to a prima facie conclusion that the e-tendering software of the respondent No. 1-plaintiff was the same software, which was used and employed by the appellant-defendant No. 1 without any comparison having been made. This is so, particularly, because the appellant has raised the specific plea that the products were entirely different and were based on different platforms.

13. In view of the foregoing discussion, we do not see as to how a prima conclusion could have been arrived at that there was an infringement of the alleged copyright of the software of the respondent No. 1-plaintiff. That being the case, no ad interim injunction ought to have been granted consequently we set aside the order passed by the learned Single Judge on the said application under Order 39 Rule 1 & 2 CPC.

14. The appeal is allowed. The said application, being IA No. 9821/2010, stands dismissed.

15. As is usual, we make it clear that the observations made by us in this appeal arising from an interim order are only prima facie in nature and the matter with regard to infringement would have to be finally decided on the basis of pleadings and evidence in the trial of the suit.

16. There shall be no order as to costs.

BADAR DURREZ AHMED, J

APRIL 13, 2015
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SANJEEV SACHDEVA, J