

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

% Judgment pronounced on 27th July, 2015

+ **C.S. (OS) No. 433/2009**

SAP AKTIENGESELLSCHAFT & ANR. Plaintiffs
Through Mr. Anshul Mittal, proxy counsel.

versus

M/S APPSONE CONSULTING INDIA (P) LTD. AND ANR.
..... Defendants
Through Defendants are *ex-parte*.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiffs have filed the suit for permanent injunction restraining infringement of copyrights, damages, delivery up and rendition of accounts of profits against the defendants. Along with the suit, plaintiffs also filed an application being I.A.No. 3024/2009 under Order 39 Rule 1 and 2 CPC.

2. The suit along with said interim application was listed before Court on 13th March, 2009. After hearing, detailed *ex-parte* order was passed restraining the defendants and all others acting for and on their behalf from directly or indirectly reproducing/installing and/or using pirated/ unlicensed software programs of the plaintiff No.1.

3. The plaintiffs states that the present suit pertains to plaintiffs' proprietary rights pertaining to its various softwares and violation thereof by the defendants by infringing the plaintiffs' softwares as well

as by imparting training programme of the plaintiffs' softwares in an illegal and unauthorized manner.

4. The plaintiffs' claims that the plaintiffs' ERP software has assumed extreme importance with present worldwide emphasis across industries being drastic cost cutting and the most efficient utilization of available resources. The plaintiffs have developed the following modules of the ERP software-

- A. SAP-FICO (Finance and Control)
- B. SAP-PP (Production Planning)
- C. SAP-HR (Human Resource)
- D. SAP-MM (Material Management)
- E. SAP-SD (Sales and Distribution)
- F. SAP- (Net Weaver)
- G. SAP-ABAP

5. It is the case of the plaintiffs that the software products of the plaintiffs are not available off the shelf or through authorized resellers. Further, the SAP software products are not bundled with any computer hardware vendors as an Original Equipment Manufacturer (OEM) product.

6. The plaintiffs have purpose-specific versions of its software. The plaintiffs enters into license agreement with customers for specific use and the said license agreements expressly prohibits the software from being used in any other manner or for any other purpose. There is End User License Agreement's (EULA's) pertaining to the specific use of the plaintiffs' software programmes for internal business purpose by the clients of the plaintiffs.

7. The plaintiff No.1 is claimed to be the sole and whole owner of copyright in the software programs developed and marketed by it including SAP R/3 Release 4.6B. It is stated that the software programs are "Computer Programmes" within the meaning of Section 2 (ffc) of the Copyright Act, 1957 (hereinafter referred to as the 'Act') and are included in the definition of a "literary work" as per Section 2 (o) of the Act. The plaintiff No.1's computer programs are "works" that have been first published in Germany and have also been registered in Germany, apart from Copyright Registrations having been obtained from the United States Copyright Office. These programs have been created for the plaintiffs by their employees, in the course of their employment with plaintiffs for valuable considerations. Under the Indian Copyright Law, the copyright in a work created by an employee belongs to the employer under the 'Work made for Hire' doctrine. Both the computer program and the supplementary User Instructions and Manuals are 'original literary works' as contemplated under Section 2 (o) and Section 13 (1) (a) of the Act.

8. The plaintiffs have stated that in the month of September 2008, the plaintiffs came across the defendants' organization and they offering training on the plaintiffs' software programs. As the plaintiffs have Education partners with only 57 entities, in India and that the plaintiffs or any of their agents or representatives had not entered into any such agreement with the defendants with any such SAP training Program Agreement till date, the plaintiffs come across the unauthorized actions of the defendants in imparting the Training Program of the plaintiffs' software. The suspicion of plaintiffs was confirmed when such enquiries revealed that the defendants were

providing training upon the plaintiffs' software SAP ERP on several modules of the plaintiffs. The enquiries made by the plaintiffs further revealed that the defendants were conducting the aforesaid unauthorized training programs in batches of one hour with each batch consisting of around 15-20 students. It is further stated that the defendants charged a fees of Rs. 30,000-35,000/- per student per module as against the fees of around Rs. 1.5 lacs charged by the plaintiffs.

9. It is the case of the plaintiffs that the plaintiff No. 2 through its Agents EIPR India Limited, immediately on becoming aware of the defendants' activities lodged a criminal complaint with the Police in Navi Mumbai, on 1st October, 2008. The Police Team, accompanied by representatives of the plaintiff No. 2, carried out investigations at the Navi Mumbai premises of the defendant No. 1. During the search operations, the Police team was able to recover hard disks, servers, containing pirated software SAP R.3 Release 4.6B of the plaintiffs, SAP Brochures, SAP Study materials, record book of SAP certificates issued to the students, 12 nos. of SAP loaded CDs, which were being used for providing training on SAP software. The Police team thereafter seized these servers. Thereafter, FIR No. 119/08 dated 1st October, 2008 was registered in this regard for offences committed under the provisions of Sections 51, 52, and 63 of the Act and also under Section 420 IPC.

10. It is alleged that the defendants are not spending any amount for the research work of softwares and the defendants are merely doing illegal activity without any investment therefore the profit margin of the defendants is very high.

11. Despite the defendants being served by way of publication in newspaper dated 21st November, 2011, neither the defendants have entered the appearance nor have the written statement been filed and hence, the defendants were proceeded *ex-parte* vide order dated 27th April, 2012. By the same order the interim order dated 13th March, 2009 was made absolute and the interim application being I.A.No.3024/2009 was disposed of.

12. In *ex-parte* evidence, the plaintiffs have filed affidavit of Mr. Somanath Ballari, it is stated that the plaint was signed, verified and instituted by Ms. Madhu Kohli in her capacity as the Constituted Attorney of the plaintiffs. However, Ms. Madhu Kohli is no more associated with the plaintiffs and thus, he is now being a Constituted Attorney of the plaintiffs. The copy of the Power of Attorney dated 24th July, 2008 and 29th August, 2008 in favour of Ms. Madhu Kohli has been exhibited as Exhibit PW-1/1 and Exhibit PW-1/2 respectively. A copy of Power of Attorney dated 30th January, 2013 executed by plaintiff No. 1 and Power of Attorney dated 12th May, 2011 executed by plaintiff No. 2, in his favour has been exhibited as Exhibit PW-1/3 and Exhibit PW-1/4 respectively.

13. It is also deposed in the affidavit that the EULA's pertain to specific use of the plaintiffs' software programs, and does not grant license for third party training. A sample copy of an EULA has been exhibited as Exhibit PW-1/5 (colly). The plaintiffs have specific license agreements to govern comprehensive and continuing education/training programs essential to make effective and meaningful use of SAP software products. A copy of the

Education/Training License Agreement ("SAP Academy Program") has been exhibited as Exhibit PW-1/6.

14. The software of the plaintiffs requires specially trained software professions to load, execute, access, employ, utilize, store and display integrated end-to-end solutions derived from such software products. Only a formal Training Agreement with the plaintiffs renders a training license in respect of SAP software. The plaintiffs have entered into several specific arrangements with third party software specialists (known as 'Partners') the world over, for the provision of professional training on working of the plaintiffs' software programs. Unless specifically authorized through the said training agreements with the plaintiffs, no individual or entity would become eligible or authorised to act as partner. In India, for the purpose of providing education training services upon the plaintiffs' software, the plaintiffs have entered into partnership with specific entities. The list of Partners authorized to render training in India has been exhibited as Exhibit PW-1/7 (Colly).

15. It is deposed that plaintiff No. 1 is the sole owner of Copyright in the software programs developed and marketed by it. The software programs are "computer programs" within the meaning of Section 2 (ffc) of the Act and included in the definition of a literary work as per Section 2(o) of the Act. A copy of the copyright registration certificate issued by the United States Copyright Office has been exhibited as Exhibit PW-1/8 (Colly). The plaintiff No. 1 is the owner of copyright in the aforesaid 'literary work' within the meaning of Section 17 of the

Act and is thus, entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the Act *inter alia*:-

- (a) The right to reproduce the work in any material form, including storing it in any medium by electronic means,
- (b) The right to issue copies of the work,
- (c) The right to make an adaptation or translation of the work,
- (d) The additional right to, for a computer program, to sell or give on commercial rental, or offer for sale or commercial rental, any copy of the computer program,
- (e) The right to authorize the doing of any of the aforesaid acts.

16. The plaintiff No.1's computer programs are "works" that has been first published and registered in Germany. Further, Copyright Registrations have also been obtained from the United States Copyright Office. These programs have been created for the plaintiffs by their employees, in the course of their employment with plaintiffs. The computer programs and the supplementary user instruction Manuals supplied by the plaintiffs are 'original literary works' as contemplated under Section 2(o) and Section 13(1) of the Act. The plaintiff No.1's works are protected in India under Section 40 of the Act read in conjunction with the International Copyright Order 1999, by virtue of the fact that both India and Germany are signatories (hence members) to the Berne and Universal Copyright Convention, the said Conventions, on a reciprocal basis, recognize the copyright in a work created in any member country.

17. It is the admitted position in law that the Act prohibits and accordingly punishes the very use of unauthorized computer program, since the use of a computer program would necessarily involve *inter alia*, the making of an unauthorized reproduction of the same, at the time of installation of the computer program. During 'use', unauthorized temporary/ephemeral copies of the computer program are made on Random Access Memory (RAM) of the computer, thereby amounting to additional unauthorized reproduction. It has come on record that in September, 2008, the plaintiffs came to know about the defendants and they offering training on the plaintiffs' software programs. The plaintiffs in evidence has established that the plaintiffs conducted further enquiry in the business of the defendants and came to know that the defendants are providing training on SAP software and are charging a fee ranging from Rs.30,000 to Rs.35,000 for each SAP module from each student. The defendants offered to provide training to the plaintiffs' agent on SAP FICO module towards which the defendants took advance payment of Rs. 5,000 from the said Agent and provided a cash receipt. A copy of the said cash receipt has been exhibited as Exhibit PW-1/9. As per searching the record available with the plaintiffs, their database yielded not a single valid license in favour of the defendants and hence the defendants have illegally obtained, installed and are using pirated/infringing software products of the plaintiffs. The defendants were providing training on the plaintiffs' software establishes the fact that they have illegally obtained the plaintiffs' software titles and made an unauthorised reproduction of the same and therefore used the

infringing copies of the plaintiffs' software for rendering unauthorized training on the plaintiffs' Software Programs.

18. It is stated that upon verification of the defendants' infringing activities, the plaintiffs filed criminal complaint and an FIR bearing Nos. 119/08 dated 1st October, 2008 was lodged before Vashi Police Station, Navi Mumbai. On the basis of the said complaint, the Police conducted investigation at the defendants' premises and recovered hard discs containing the illegal and infringing copies of the plaintiffs' software and fee receipt books from the defendants. A copy of the FIR lodged at the Vashi Police Station, Navi Mumbai has been exhibited as Exhibit PW-1/10 (colly).

19. During the pendency of the suit, the plaintiff filed an application being I.A No. 15662/2014 for allowing the change of attorney/for substituting the new attorney i.e. Mr. Yogesh Goyal as the previous attorney left the plaintiff company. The same was allowed by order dated 22nd August, 2014.

20. In the affidavit of Mr. Yogesh Goyal, the plaintiffs have proved the authenticity of Ms.Madhu Kohli who has signed and verified the plaint and affirmed the evidence of Mr. Somanath Ballari's affidavit.

21. On the aspect of relief of damages, the plaintiffs have stated that they have suffered irreparable harm and injury and losses in terms of revenue and goodwill. An appropriate figure can be determined on the basis of the following criterions:-

- (a) The Investigating officer found one computer hard disc containing illegal and infringing copies of the plaintiffs'

software. Further, the officer found twelve compact discs loaded with infringing copies of SAP HELP program, which is a proprietary material of the plaintiffs and Twenty Four cash receipts issued to the students towards the payment of fee for the unauthorised training. The partnership fee for the plaintiffs education program costs Rs.12,00,000/-. Further, the plaintiffs charge certification fee for SAP ERP at Rs. 35,000/-, per student and assuming that minimum Twenty Four students were trained by the defendants, the plaintiffs would have lost about Rs.16,20,000/- towards the training program.

- (b) The Investigating officer further found seventy five advertising letters for illegal training on plaintiffs SAP R/3 software. The defendants considerably promoted their unauthorised training, which was not imparted by trained SAP professionals. The plaintiffs have no quality control over the illegal training provided by the defendants nor any means to ascertain the content of the training imparted thereof. The plaintiffs have also suffered a loss in terms of reputation which is quantified at Rs. 20,00,000/-.
- (c) The defendants enrolled at least Twenty Four students for training as per the cash receipt books which were recovered during the Police investigations. The plaintiffs charged a fee ranging from Rs. 30,000/- to Rs. 35,000/- for providing training on the plaintiffs' software. The plaintiffs suffered the damages of about Rs. 7 Lakh and

Rs.7,80,000/-, due to the wrongful gain of the defendants by providing unauthorised training to the said students.

Punitive damages

22. With regard to the relief of damages as claimed by the plaintiffs, this Court has previously granted both exemplary and punitive damages against the defendants in ex-parte matters of similar nature. 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, copyrights, 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.”

23. Further, this Court in ***Microsoft Corporation Vs. Rajendra Pawar & Anr.***, 2008 (36) PTC 697 (Del.) 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.”

24. Having gone through the evidence on the issue of damages, no doubt, some of the figures stated in the affidavit appears to be reasonable. However, the statements made in the affidavits are merely oral and these have not been proved by documentary evidence in accordance with law. However, I am of the view that the plaintiffs are entitled for punitive damages and costs of the suit along with the relief of permanent injunction. The suit is also accordingly decreed by allowing prayer (a) and (e) of para 28 of the plaint. The other reliefs are rejected.

25. In view of the facts of the present case, this Court is of the opinion that in the present case Rs.3 lac as punitive damages be granted in favour of the plaintiffs and against the defendants in terms of para 28(b) of the plaint. Ordered accordingly.

26. Decree be drawn accordingly.

(MANMOHAN SINGH)
JUDGE

JULY 27, 2015