

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

% Order delivered on: 23rd September, 2015

+ **CS (OS) No.2435/2009**

MICROSOFT CORPORATION & ANR. Plaintiffs
Through Ms. Safia Said, Adv.

versus

SUSHEEL KUMAR & ORS. Defendants
Through Defendants are *ex-parte*.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

1. The plaintiffs have filed the present suit for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts of profits, damages etc. against the defendants.
2. The suit along with interim application was listed before Court on 18th December, 2009. After hearing, detailed *ex-parte ad interim* injunction order was passed thereby restraining them, their principal officers, directors, agents, franchisees, servants and all others acting for and on behalf of the defendants from directly or indirectly reproducing/storing/installing and/or using pirated/unlicensed software programs of the plaintiff No.1.
3. Despite service, no one appeared on behalf of the defendants and consequently, the defendants were proceeded *ex parte* vide

order dated 1st December, 2010. By the same order, interim order dated 18th December, 2009 was made absolute.

4. Brief facts of the case as per plaint are that the plaintiff No. 1, Microsoft Corporation is a Company organized and existing under the laws of the State of Washington, USA, having its principal office at One Microsoft Way, Redmond, WA 98052-6399, USA. Plaintiff No. 2, Microsoft Corporation India Private Ltd. is a wholly owned marketing subsidiary of the plaintiff No. 1 and was set up in the year 1989 to provide marketing, promotion, anti-piracy awareness campaigns and actions and channel development support to the plaintiff No.1.

5. Plaintiff No.1 was set up in the year 1975 and is the biggest software publisher for personal and business computing in the world. It is engaged in the development, manufacture, licensing and support of a range of software products for various computing devices. The software products of plaintiff No.1 include operating systems for servers, personal computers (PC) and intelligent devices; server applications for distributed computing environments; information worker productivity applications; and software developments tools. Plaintiff No.1 also develops software for mobile products/devices, PC games, video game console (Xbox), video games and engages in online business through various internet portals (MSN etc.)

6. Some of the plaintiff No.1's popular software products include the most widely used operating system software, Microsoft Windows Operating Systems (various versions), and application software such as Microsoft Office (various versions) and development tools like Visual Studio, Visual C++ (various versions). These software are

today installed and used on millions of computers all over the world, including India. Other popular software products of plaintiff No.1 include Microsoft Windows Server System, Microsoft Publisher, Microsoft Visio, Microsoft Fox Pro and other stand-alone desktop applications.

7. It is averred in the plaint that the software programs developed and marketed by the plaintiff No.1 are “computer programs” within the meaning of Section 2 (ffc) of the Copyright Act, 1957 and are included in the definition of “literary work” as per Section 2 (o) of the Act. The plaintiff No.1’s computer programs are “works” that were first published in the USA and are also registered in the USA. The said programs have been created for the plaintiff No.1 by its employees, in course of their employment with the plaintiff No.1. 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. It is stated by the plaintiffs that both the computer program, as well as the supplementary User Instructions and Manuals, are ‘original literary works’ as contemplated under Section 2 (o) and Section 13 (1) (a) of the Act and plaintiff No.1 is the owner of the said copyright.

8. It stated in the plaint that the rights of the authors of member countries of the Berne Convention, Universal Copyright Conventions and the World Trade Organization (WTO) are protected under Indian Copyright Law and India and USA are signatories to the Berne Convention, Universal Copyright Convention and the WTO Agreement. As the plaintiffs’ works are created by authors of the member countries and originate from and are first published in the said member countries therefore, in India, the works of plaintiffs are

protected under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999. The plaintiff No.1 being the owner of the copyright in the aforesaid literary works within the meaning of the proviso to Section 17 of the Copyright Act, 1957 is entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the said Act and therefore, is entitled to all exclusive rights flowing from such ownership as set out in Section 14 of the Copyright Act, 1957.

9. It is further stated that the plaintiffs have been vigilant in protecting their proprietary and common law rights before this Court and from time to time got several infringing parties prosecuted in India, the details have been mentioned in para 30 of the plaint.

The case of the plaintiffs against the defendants

10. Defendant No.1 is the IT Head of the Karle Group of Companies who has been carrying out unauthorized installation/reproduction of the plaintiffs' software programs. Defendant Nos. 2 to 8 are the members of Karle Group of Companies, having business interest in textiles, garment, real estates, software, biotechnology, pharmaceuticals etc.

11. It is averred in the plaint that in the month of November, 2009, the plaintiffs came to know that the defendants were using large volumes of software programs, including Microsoft Windows, Microsoft Office, Windows Server etc. belonging to the plaintiff No.1 for their business and other commercial purposes at its offices. Thereafter, the plaintiff immediately commenced making enquiries by conducting a search within its large and extensive database called "Microsoft Sales" with a view to determine the details of software

licenses in respect of the plaintiffs' software titles, registered by the defendants. The database result revealed that the defendants had made volume purchases for the following:-

- a. 45 licenses for Microsoft Office Standard;
- b. 1 license of Visio Professional;
- c. 6 licenses of Windows Server with CALs

12. In order to ascertain the fact, the plaintiffs deputed one Mr. Santhosh Kumar to make enquiries about the defendants' use of plaintiff No.1's software programs who was informed during his telephonic conversation with the IT Manager of the defendants that the defendants had about 250 computer systems spread across three locations in Bangalore and they used Windows XP as the operating systems and Microsoft Office application was installed on most of the computer systems. The information gathered by Mr. Kumar when compared with the plaintiffs' database search highlighted the unlicensed usage by the defendants of the plaintiffs' software titles.

13. In September, 2008 the plaintiffs had conducted a SAM Review audit as part of their SAM review program at the Head Office of the defendants, with a view to determine the extent of software programs used by the defendants and the number of licenses held by it in respect of the plaintiff No.1's software programs. Pursuant to the audit, large volumes of unlicensed software usage by the defendants came to the notice. Despite repeated requests by the plaintiffs, the defendants did not made efforts to close the unlicensed gap identified during the software audit, therefore the plaintiffs were left with no option, but to file the present suit.

14. In ex-parte evidence, the plaintiff filed affidavit dated 21st October, 2011 of Mr. Vishal Ahuja, Constituted Attorney of the plaintiff Companies as Ex. PW1/X reiterating the contents of the plaint and also exhibited certain documents exhibited as Ex.PW1/1 to Ex. PW 1/6 in support of its case. The same are as follows :

- Copies of the Power of Attorneys have been exhibited as Ex.PW1/1;
- Certified copies of the Copyright Registration Certificates of the plaintiff No.1's software programs have been exhibited as Ex.PW1/2(colly);
- Copy of the End User License Agreements pertaining to the specific use of the plaintiff No.1's software programs has been exhibited as Ex.PW1/3;
- Web-printouts of the Registrar of Companies website located at www.mca.gov.in reflecting the common registered address/email ID shared by the defendants' entities have been exhibited as Ex.PW1/4;
- The correspondence sent by the representatives of the plaintiffs and the defendants has been exhibited as Ex.PW1/5;
- Copy of the Local Commissioner's report has been exhibited as Ex.PW1/6.

15. The plaintiffs' ex-parte evidence was closed on 20th January, 2012.

16. PW-1 filed additional evidence by way of affidavit and also exhibited certain documents exhibited as Ex.PW1/7 and Ex. PW 1/8 in support of its case. The same are as follows :

- Affidavit under Section 65B of the Indian Evidence Act, 1872 of Mr. Sandeep Gupta has been exhibited as Ex.PW1/7;
- E-mail indicating the price lists of the unlicensed/pirated software program has been exhibited as Ex.PW1/8.

17. The plaintiffs' ex-parte evidence was again closed on 5th November, 2014.

18. The evidence filed by the plaintiffs has gone unrebutted as no cross-examination of the plaintiffs' witness was carried out, therefore, the statements made by the plaintiffs are accepted as correct deposition.

19. Learned counsel for the plaintiffs submits that on 18th September, 2009 three Local Commissioner visited the offices of the defendants and found around 269 computer systems installed with plaintiffs' software programs. After taking into account the licenses registered in the name of the defendants, a total of around 214 software programs were found unlicensed. Apart from the plaintiffs' unlicensed software programs being used, about 55 software programs had been deleted by the defendants during the course of inspection. The reports of the Local Commissioner detailing the unlicensed usage on about 269 computer systems at the premises of the defendants have been exhibited as Ex.PW1/6.

20. Counsel for the plaintiffs submits that for the purposes of computation of damages, the plaintiffs have filed emails indicating the price lists of the software programs found during the execution and the same have been exhibited as Ex.PW1/8. It is the plaintiffs' case that the unlicensed/ pirated software programs found installed at the

defendants' premises and the damages suffered in consequence to the same have been amounted to a total sum of Rs.17,10,841/-.

21. Counsel has placed reliance on the following judgments :-

(i) In ***Time Incorporated v. Lokesh Srivastava and Anr.*** 116 (2005) DLT 599 it was held that "punitive damages should really be punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement".

(ii) In ***Hero Honda Motors Ltd. v. Shree Assuramji Scooters*** 125 (2005) DLT 504 it was observed that "damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of Court proceedings. A party who chooses to not participate in Court proceedings and stay away must, thus, suffer the consequences of damages as stated by the plaintiff.

(iii) In ***Microsoft Corporation v. Kiran & Anr.*** 2007 (35) PTC 748 (Del) this Court observed that "Software piracy is a menace and needs to be put down with a heavy hand".

(iv) In ***Adobe Systems Inc. & Anr. v. P.Bhoominathan & Anr.*** 2009(39) PTC 658 (Del) Court granted both compensatory and punitive damages to the plaintiff.

22. In view of the above, a decree for permanent injunction is passed in terms of para 35(I) of the plaint in favour of the plaintiffs and against the defendants restraining them, 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.

Punitive damages

23. With regard to the relief of damages as claimed by the plaintiff in para 35 (IV) of the plaint, 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.***, (supra) 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.”

24. 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.”

25. In view of the facts of the present case, this Court is of the opinion that in the present case Rs.5 lac as punitive damages be granted in favour of the plaintiffs and against the defendants in terms of para 35(IV) of the plaint. Ordered accordingly.

26. Decree for cost of the proceedings is also passed against the defendants as claimed in prayer clause 35 (V) of the plaint. The other reliefs are not pressed by the plaintiffs. The same are accordingly rejected.

27. Decree be drawn accordingly.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 23, 2015