

\$~

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

+ CS(OS) 325/2013

SAP SE & ORS

..... Plaintiffs

Through: Ms. Astha Joshi, Advocate

versus

TRANSWEAVE SOLUTIONS PVT LTD & ANR

..... Defendants

Through: None

%

Date of Decision: 12th October, 2017

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (ORAL):

1. Present suit has been filed for permanent injunction restraining infringement of copyright, trademark, passing off, rendition of accounts of profit, damages and delivery up etc. The prayer clause in the suit is reproduced hereinbelow:-

“(a) An order of Permanent injunction restraining the Defendants, their principal officers, directors, agents, franchisees, servants and all other acting for and on their belief, from directly or indirectly reproducing/installing, providing training on software programs of the plaintiffs, including but not limited to SAP IS – Retail module, SAP R/3, SAP ERP 2005, including the use of all training

manuals published by the plaintiffs or copies thereof, amounting to infringement of the plaintiffs' copyright in its said computer programs.;

- (b) An Order for Delivery up of all unlicensed/pirated plaintiffs' software contained in hard discs, compact discs, floppy discs and/or other storage media, including any CD/DVD/Writers/Burners, or any other material infringing the plaintiffs' copyright in its computer programs including plaintiffs' User Instruction Manuals/training manuals and or any other material infringing the rights of the plaintiffs, lying in the possession of the defendants and their principal officers, directors, agents, franchisees, servants etc.*
- (c) An order for the Rendition of Accounts of profits illegally earned by the Defendants on account of their infringing activities and a Decree for the amount ascertained by this Hon'ble Court be passed against the Defendants and in favour of the plaintiffs and or an order of damages in lieu of rendition of accounts.*
- (d) An order for Costs in the present proceedings be passed in favour of the plaintiffs and against the defendants.*
- (e) Any other and further orders, as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case as well as in the interests of justice, be passed in favour of the plaintiffs against the defendants."*

2. At the outset, learned counsel for plaintiffs gives up prayers (b) (c) of the prayer clause to the suit. The statement made by learned counsel for plaintiffs is accepted by this Court and plaintiffs are held bound by the same.

3. It is pertinent to mention that the corporate name of the plaintiff no.1 was changed from SAP AG to SAP SE vide order dated 19th August, 2015.

4. It has been averred in the plaint that plaintiff no.1 is a German company and the owner of the copyright in the software programmes and products which are developed and marketed by it, including SAP ERP 2005, SAP IS-Retail, SAP ERP 6.0, etc. The aforesaid software programmes are computer programmes within the meaning of Section 2(ffc) of the Copyright Act 1957 and are included in the definition of a 'literary work' as per Section 2(o) of the Copyright Act, 1957. It has been further averred that the plaintiff no.1 has a wholly owned Indian subsidiary, i.e. plaintiff no.2, which is responsible for the sales of SAP solutions, implementation, post-implementation support, training and certification of its customers and partners in India.

5. It has been stated in the plaint that plaintiff no.1 coined, adopted and commenced the use of trademark SAP in the year 1972 and it forms an integral part of the plaintiffs' trade and business and acts as a source identifier of the plaintiffs' products. The plaintiffs' own the domain name www.sap.com and their mark SAP is registered under Classes 9, 16, 14 and 41 under the Trademark Act, 1999.

6. Learned counsel for the plaintiffs states that the plaintiffs provide various business solutions to its customers which are collectively called as SAP Business Suite. She states that the software products of the plaintiffs are customised solutions tailored to the specific needs of each client and are not available off-the-shelf. She

further states that due to the high levels of customisation of the plaintiffs' software products or SAP software products, the plaintiffs have purpose-specific versions of its software license agreements. She also states that license given by the plaintiffs for a particular purpose cannot be used for any other purpose i.e. a EULA (End User License Agreement) license does not permit the licensee to provide training to any third party except as specifically provided. She points out that for training purposes, the plaintiffs enters into an Education/Training License agreement with the Licensee.

7. Learned counsel for the plaintiffs states that in 2007, the plaintiffs and defendant no.2, CEO of the defendant no. 1 company, executed an agreement titled: Partner Cooperation Agreement: SAP Education Programs (SAP E-Learning Course), in terms of which the defendant no.1 company was appointed as a non-exclusive Education partner for a period of one year. The tenure of the said agreement was extended vide two addendums executed between the parties, dated 8th July, 2009 and 1st January, 2010. Subsequently, due to non performance the Education Partner agreement was not extended and the same expired on 30th June, 2010 and from 1st July, 2010, the defendants ceased to be the education partner of the plaintiffs.

8. Learned counsel for the plaintiffs states that in August 2011, it came to plaintiffs' knowledge that the defendants, even after the expiry of the Education Partner Agreement, continued to represent themselves as SAP Global Education Partner and were offering certification course for SAP IS Retail Course. She states that on 23rd

January, 2013, an investigation conducted at the defendants' premises revealed that the defendants, despite being served with a legal notice dated 12th December, 2011 and subsequent assurances given by them vide email dated 5th June, 2012, continued to offer SAP IS Retail course and use the SAP trademark and logo, without any authorization/license from the plaintiffs.

9. Learned counsel for the plaintiffs states that the defendants have been using plaintiffs' trademark SAP and the SAP logo, to create an impression that the defendants are connected/affiliated with the plaintiffs. She further states that the defendant no.1 is using the plaintiffs' registered trademark SAP as keywords and metatags for its domain name www.transweave.com, in an attempt to cause confusion among unwary customers and diverting them to their said website.

10. Vide order dated 19th February, 2013 this Court granted an ex-parte ad interim injunction in favour of the plaintiffs and against the defendants. This court further appointed a Local Commissioner to visit the premises of the defendant no.1. The relevant portion of the ex-parte injunction order is reproduced hereinbelow:-

"So, issue notice application also to the defendants for 22nd March, 2013 and it is also ordered that the defendants shall not start any fresh programs/courses by using SAP IS-Retail module, SAP R/3, SAP ERP 2005 programmes of the plaintiff."

11. Thereafter, the defendants filed their written statement and on 2nd July, 2014 the following 10 issues were framed by this court.

"(1) Whether the defendants have infringed the plaintiffs'

copyright in the computer programs, SAP IS Retail, SAP ERP 6.0 and SAP R/3 and their various versions/modules (including the use of all training manuals published by the plaintiffs or copies thereof)? *OPP*

(2) *Whether the defendants are entitled to continue providing third party training on plaintiffs Software, without authorization from the plaintiffs, even after termination of the Education Partner Agreement dated 17.12.2017?* *OPD*

(3) *Whether the defendants are entitled to 'all rights', not limited to 'marketing and distributing', in respect of the software made available to the defendants for delivering to end users under the Channel Partner Agreement ?* *OPD*

(4) *Whether the defendants were entitled to offer third party training or any training under the Channel Partner Agreement?* *OPD*

(5) *Whether the defendants have misrepresented themselves as plaintiffs' authorized Education Partner, even after termination of Education Partner Agreement dated 17.12.2017?* *OPP*

(6) *Whether the defendants have violated their undertaking as recorded in their e-mail to the plaintiffs dated 5.6.2012?* *OPP*

(7) *Whether the plaintiffs are entitled to delivery up of all unlicensed / pirated software, user instruction/training manuals and copies thereof, in possession of the defendants?* *OPP*

(8) *Whether the defendants are liable to render accounts to the plaintiffs? If yes, from when?* *OPP*

(9) *Whether the plaintiffs are entitled to damages on account of the infringing activities of the defendants, if yes, amount to which the plaintiff is entitled to? OPP*

(10) *Relief.*

12. Since the defendants stopped appearing and instructing their counsel, they were proceeded ex parte vide order dated 21st July, 2017.

13. Out of the ten aforementioned issues framed by this Court, issues No. (1) and (5) to (9) were the issues for which the onus to prove was on the plaintiffs. The plaintiffs have filed their evidence by way of an affidavit of Mr. Rahul Sethi (PW1).

14. The plaintiffs' witness has proved the aforesaid averments as well as the copies of the Copyright Certificates issued in favour of the plaintiff no.1 as Ex.PW1/4. The plaintiffs' witness has also proved the cease and desist letter dated 12th December, 2011 sent to the defendants and the email dated 05th June, 2011 sent by the defendant no.2 to the plaintiffs as Ex.PW1/8 and Ex.PW1/9 respectively. The PW1 has further proved the printouts from the defendants website www.transweave.com, offering SAP IS Retail training and which also uses the SAP logo as Ex.PW1/10. The PW1 has also proved the email dated 23rd January, 2010 sent by the defendant no.1 to the investigator as Ex.PW1/13.

15. Having heard learned counsel for plaintiffs as well as having perused the papers, this Court is of the view that due to extensive worldwide use over substantial period of time, the plaintiffs' SAP

mark and SAP logo have acquired reputation and goodwill in the marks globally as well as in India.

16. Further, as the plaintiffs' evidence has gone un rebutted, said evidence is accepted as true and correct. The Supreme Court in ***Ramesh Chand Ardawatiya Vs. Anil Panjwani, AIR 2003 SC 2508*** has held as under:-

"33.In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."

17. From the evidence on record, it is apparent that despite expiry, by efflux of time, of the Education Partner Agreement, the defendants had been blatantly installing/using pirated software to train the students amounting to unauthorised reproduction of the plaintiffs' copyrighted software.

18. Consequently, the allegation that the trademark, logo, label and

software pertaining to SAP used by defendants amounts to infringement of plaintiffs' copyright, is accepted. The use of illegal trade activities by the defendants is bound to cause incalculable losses, harm and injury to the plaintiffs and immense public harm.

19. Accordingly, present suit is decreed in accordance with the paragraph 38(a) of the plaint along with the actual costs. The cost shall amongst others include the lawyers' fees, local commissioner's fee as well as the amounts spent on purchasing the court fees. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

OCTOBER 12, 2017

rs