IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11TH DAY OF JULY 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

O.A. Nos.510 to 514 of 2018
in
C.S. No.334 of 2018

Netsweeper Inc.,
a company having its registered office at
Suite 4, 156 Columbia Street W.,
Waterloo, Ontario, Canada, N2L 3L3,
rep. by its Authorised Signatory
Mr.N.Krishnan ... Applicant/Plaintiff
(in all the applications)

-Versus-

1. Netsweeper Technologies Private Limited,
CIN: U72900TN2005PTC057943,
having Registered office at No.5-11-1,
Arihant Majestic Towers, J N Road,
100 feet Road, Koyambedu,
Chennai-600 107.

2. Mr.C.Gajapathy,
Director and Shareholder,

3. Mrs.Haritha Gajapathy,
Director and Shareholder,
2 & 3 are at
Netsweeper Technologies Private Limited,
having office at No.5-1-1,
Arihant Majestic Towers, J N Road,
100 feet Road, Koyambedu,
Chennai-600 107.

4. Netsweeper Technologies India Private Limited,
CIN: U72900TN2017PTC117540,

5. Mr.Jagdeesh Sengodappa,
Director and Shareholder,
Netsweeper Technologies India Private Limited,

6. Mr.Senthamaraikannan Pradeepkannan,
Director and Shareholder,
Netsweeper Technologies India Private Limited,

4 to 6 are having office at
No.4B, Soundarya Apartments,
Mel Ayanambakkam Main Road,
Mel Ayanambakkam,
Chennai-600 095. ... Respondents/Defendants
(in all the applications)

<u>O.A. No.510 of 2018</u>:-

Original Application praying that this Hon'ble Court be pleased to grant an interim injunction restraining the respondents/defendants themselves, its/their men, servants, agents, successors in business, retailers, directors, legal representatives, assigns, distributors, advertisers, or any other person claiming through or under them, from in any manner, whatsoever, using or otherwise dealing with, or in any manner passing off or enabling others to commit acts amounting to passing off of the trademark/tradename NETSWEEPER owned by the applicant/plaintiff by use of identical and/or deceptively similar trademark/tradename/ corporate name/domain name to that of NETSWEEPER in any other manner whatsoever till the final disposal of the suit.

<u>O.A. No.511 of 2018</u>:-

Original Application praying that this Hon'ble Court be pleased to grant an interim injunction restraining the respondents/defendants or their men, servants, agents, successors in business, retailers, legal representatives, assigns or any other person claiming through or under them etc. from operating any bank account whether in the nature of current account, fixed deposit account, investment account, demat account, mutual fund account, over draft account, loan account maintained by the 1st and 4th defendant including the bank account bearing no.01362560002747 of the 1st defendant, with the Ashok Nagar Branch of H.D.F.C. Bank Ltd., till the final disposal of the suit.

O.A. No.512 of 2018:-

Original Application praying that this Hon'ble Court be pleased to grant an interim injunction restraining the defendants their men, servants, agents, successors in business, retailers, legal representatives, assigns or any other person claiming through or under them, from providing any services to the existing customers of the plaintiff's product NETSWEEPER, till the final disposal of the suit.

O.A. No.513 of 2018:-

Original Application praying that this Hon'ble Court be pleased to grant an interim injunction restraining the respondents/defendants its men, servants, agents, successors in business, retailers, employees or officers, legal representatives, assigns or any other person claiming through or under them, whomsoever authorized jointly or severally from payment of any dividends or any other payments from the revenues of the 1st and 4th respondents/ defendants and consequently depositing the same into the account of the Registry of High Court, Madras.

O.A. No.514 of 2018:-

Original Application praying that this Hon'ble Court be pleased to pass an order of interim injunction restraining the respondents/defendants from utilizing or accessing the funds of the 1st respondent/defendant and 4th respondent/defendant in any manner whatsoever, including for the purpose of the instant litigation in any manner.

These original applications coming on this day before this court for hearing the court made the following order:-

These applications have been filed by the plaintiff in the suit.

2. The suit had been filed by Netsweeper Inc., a company having its registered office at Suite 4, 156 Columbia Street W., Waterloo Ontario, Canada, N2L 3L3, represented by its authorised signatory Mr.N.Krishnan against (1) Netsweeper Technologies Private Limited, CIN: U72900TN2005PTC057943, having registered office at No.5-11-1, Arihant Majestic Towers, J N Road, 100 Feet Road, Koyambedu, Chennai - 600 107; (2) Mr.C.Gajapathy, Director and Shareholder, Netsweeper Technologies Private Limited, having office at No.5-1-1, Arihant Majestic Towers, J N Road, 100 Feet Road, Koyambedu, Chennai - 600 107; (3) Mrs. Haritha Gajapathy, Director and Shareholder, Netsweeper Technologies Private Limited, having office at No.5-1-1, Arihant Majestic Towers, J N Road, 100 Feet Road, Koyambedu, Chennai - 600 107; (4) Netsweeper Technologies India Private Limited, CIN: U72900TN2017PTC 117540, having registered office at No.4B, Soundarya Apartments, Mel Ayanambakkam Main Road, Mel Ayanambakkam, Chennai - 600 095; (5) Mr.Jagdeesh Sengodappa, Director and Shareholder, Netsweeper Technologies India Private Limited, having office at No.4B, Soundarya Apartments, Mel Ayanambakkam Main Road, Mel Ayanambakkam, Chennai - 600 095; and (6) Mr.Senthamaraikannan Pradeepkannan, Director and Shareholder, Netsweeper Technologies India Private Limited, having office at No.4B, Soundarya Apartments, Mel Ayanambakkam Main Road, Mel Ayanambakkam, Chennai - 600 095, seeking for a Judgment and Decree for payment of a sum of

Rs. 1,00,00,000/- (Rupees One Crore only) as damages for passing off products or software or services and for injunction restraining the defendants from using the Trade Mark / Trade name Netsweeper and consequential reliefs.

3. The plaintiff is a Company based in Canada. It is engaged in the business of Internet content filtering and web threat management solutions and services. According to the plaintiff, they serve telecommunication companies, schools, corporations, government agencies and other organizations. The plaintiff had developed a software to manage Internet access. The plaintiff claimed to be the first Internet content filtering Company to develop Artificial Intelligence technology. They use the Trade Mark 'NETSWEEPER' and this has been registered in the United States of America and in Canada.

4. The plaintiff claims to own exclusive rights to use the Trade Mark. The plaintiff also offered services to Indian customers directly from Canada and through other subsidiary companies. The second and third defendants, namely, Mr.C.Gajapathy and Mrs. Haritha Gajapathy approached the plaintiff for an arrangement.

5. According to the plaint, the first defendant was incorporated to offer for sale the software developed by the plaintiff under the Trade Mark Netsweeper. The first defendant did not have any independent clients. They conducted the business generated by the plaintiff. The plaintiff paid salaries to the second and third defendants. The first defendant was incorporated on 03.11.2005. The second and third defendants became its Directors. Earlier, the second and third defendants were employed since 2005 and 2009 respectively. For the software subscription license provided by the plaintiff to the first defendant, the first defendant was to pay license fee in Canadian Dollars to the plaintiff. The second and third defendants were handling the operations of the first defendant for the customers of the plaintiff.

6. It has been claimed by the plaintiff that the first defendant held back the software subscription fees payable by it to the plaintiff for the period April 2015 to March 2016 and April 2016 to March 2017. The reason given was necessity to discharge service tax liability of the first defendant. However, the plaintiff claimed that the first defendant was remitting subscription fees only after deducting service tax amount. It was further stated that as on June 28th 2017, a sum of Rs.43,48,631/- was due to be remitted by the first defendant to the Government of India. The plaintiff instructed the second and third defendants to pay the unpaid service tax along with penalty and interest. The plaintiff also claimed that they have been requesting the first defendant to use the amounts lying in HDFC Bank account bearing No. 01362560002747 to pay the unpaid service tax to the Government. The amount in the bank account was the money paid by the customers along with service tax amounts. When the plaintiff attempted to check the bank statement, it was shocked to know that online access had been blocked by the second and third defendants. The second and third defendants avoided phone calls and messages from the plaintiff. The plaintiff therefore on 26.03.2018 wrote to the Ministry of Finance, Government of India, pointing out the service tax liabilities of the first defendant.

7. The plaintiff had already notified its customers regarding termination of license provided to the first defendant. However, there are four invoices payable by the first defendant to the plaintiff. When the plaintiff conducted an inspection on the portal of the Ministry of Corporate Affairs, they found that another Company, namely, the fourth defendant had been incorporated under the Trade name 'Net Sweeper'. It had been stated that the second and third defendants had shifted the business of the first defendant to the fourth defendant and are using the software of the plaintiff without the authority of the plaintiff. It had been stated that the defendants cannot be permitted to use the Trade name 'Net Sweeper'. It is under these circumstances that the suit had been filed seeking the reliefs as stated above.

8. Along with the suit, the plaintiff had also filed O.A.No. 510 of 2018 seeking an order of interim injunction restraining the defendants from passing off the Trade mark 'Net Sweeper'; O.A.No. 511 of 2018 for an interim injunction restraining the respondents/defendants from operating the bank account in HDFC Bank bearing No. 01362560002747; O.A.No. 512 of 2018 for an interim injunction restraining the defendants from providing any services to the existing customers of the plaintiff's product 'Net Sweeper'; O.A.No. 513 of 2018 for an interim injunction from paying any dividends from the revenues of the first and fourth defendants to deposit the same into Court; and O.A.No. 514 of 2018 for an interim injunction restraining the defendants from utilising statement of all Bank accounts of the first to fourth defendants.

9. In the affidavit filed in support of the above applications, the very same facts as stated in the plaint had been reiterated and it had been stated that if the plaintiff is not granted protection, they would be put to much loss and hardship. The first, second and third defendants alone were represented by counsel. Though notice have been served on the fourth, fifth and sixth defendants, they did not choose to appear before the Court.

10. A counter had been filed on behalf of the second respondent. This was filed on behalf of the third defendant also. It was stated that the first defendant was registered and incorporated on 03.11.2005 with four directors which included the second and third defendants and also Mr.Perry Roach and Mr.Lajos Erdelyi, who are the President and founder director of the plaintiff Company. The second defendant was offered employment in the plaintiff Company in October 2005. The first defendant was incorporated to support the business of the plaintiff. The first defendant had been supporting the plaintiff in testing its software product, 'Net Sweeper'. The first customer was Bank of Rajastan in August 2006. Between the years 2007 to 2017, the first defendant had been selling the software product to Indian Companies. The first defendant did not have any other sales apart from this product. The sales of this product was effected only after obtaining approval from the plaintiff. Whenever a sale is effected, the customer would pay license fee on an yearly basis. The price would be fixed by the plaintiff. The end user would get a 'Software Serial Key' directly from the plaintiff for using the software product 'Netsweeper' on a demonstration basis for a period of one month. If the customer confirms sale, then he becomes a licensee of the plaintiff to use the software.

11. It is the claim of the second and third defendant that the talks relating to transfer of shares from the first defendant to the plaintiff did not go according to expectation. The plaintiff offered Rs.5/- lakhs for transfer of 100% of the shares of the first defendant held by the second and third defendants. This price was not agreed by the second and third defendants. The plaintiff raised invoices against the first defendant for the money lying in its bank account. The second defendant also transferred the money against the invoices. It had been stated that the plaintiff does not have any Trade mark in India for the Trade name 'Net Sweeper'. The first defendant is the prior user of the said Trade Mark 'Net Sweeper'. With respect to blocking the access to the bank account, it had been stated that the plaintiff did not seek new password from the Bank. It was denied that the first defendant was trying to misappropriate the money. The first defendant was functioning only with the consent of the plaintiff.

12. It had been further reiterated that the Trade Mark 'Net Sweeper' had accrued to the first defendant in view of prior usage. Consequently, the reputation and goodwill of the Trade Mark belongs to the first defendant. It had been stated that the first defendant has no production of its own to sell to anyone. It had been stated that the applications must be dismissed.

13. Heard the arguments advanced by Mr. Arun C. Mohan for M/s. Fox Mandal & Associates for the plaintiff and Mr.S.Jayachandran, learned counsel for the defendant Nos. 1 to 3. Though notice had been served on defendant Nos. 4 to

6, they did not participated in the proceedings.

14. The plaintiff is a Company incorporated in Canada and its main business is promoting the software called 'Net Sweeper', which fundamentally is an Internet production software. They have registered the mark 'Net Sweeper' in Canada and in USA. They have built substantial reputation for their products and services. The second defendant was an employee of the plaintiff. An employment contract had been entered by the second defendant on 10.10.2005 and this was the beginning of the relationship between the plaintiff and the second defendant.

15. Similarly, the third defendant had also entered into an employment contract with the plaintiff on 01.04.2009. The first defendant Company was incorporated on 03.11.2005. The certificate of incorporation had been filed along with the plaint. The Master Data of the first defendant taken from the website of the Ministry of Corporate Affairs show that the second and third defendants are the Directors.

16. It is the case of the learned counsel for the first, second and third defendants that at the time of incorporation, the President and founder Director of the plaintiff were also directors of the first defendant Company. The Memorandum of Articles of Association of the first defendant reveals that the company was engaged in the business of software consultancy, providing software solutions and connected services.

17. The subscribers of the Company at the time of incorporation were the second and third defendants alone. It had been very specifically stated by the second defendant in the counter affidavit that the first defendant does not have any other business apart from the customers of the plaintiff. It had also been very specifically stated that whenever sale is effected by selling the software of the plaintiff, the customer would pay license fee for using the software at an early basis. The prizing of the software would be fixed only by the plaintiff Company. The customer would get a 'Software Serial Key' directly from the plaintiff for using the product 'Net Sweeper'. This would be for a period of one month on demonstration basis. If the customer is satisfied then he would have to pay the license fees and he becomes a licensee and use the product 'Net Sweeper'. He would become a customer and get the 'Software Serial Key' directly from the plaintiff. The arrangements between the plaintiff and the second and third defendants progressed smoothly till disputes arose particularly with respect to payment of service tax.

18. It had been stated by the plaintiff that the software subscription fees were not paid by the first defendant for the period from April 2015 to March 2016 and again from April 2016 to March 2017. It was stated that the first defendant earmarked service tax for each sale and was remitting only the remainder amount to the plaintiff as subscription fees. When this was pointed out by the plaintiff, the defendants did not give a proper answer.

19. It is seen from the averment of the plaint that, as on 28.06.2017, a sum of Rs.43,48,631/- was due and payable to the Government of India as service tax. It is also seen from the pleadings that the plaintiff had been requesting the second defendant to use the amount lying in HDFC Bank Account bearing No. 01362560002747 to pay the unpaid service tax to the Government of India. However, when the plaintiff attempted to check the balance, it was found that access had been blocked. The reason given by the second and third defendants is that the plaintiff did not seek a new password from the Bank.

20. Be that as it may, it is clear that the first defendant had been incorporated only because the plaintiff's Company wanted to expand its business in India. The second and third defendants had initially joined the plaintiff's Company under an employment contract and consequently, they had a fiduciary relationship and obligation to the plaintiff's company. The first, second and third defendants would not have had any existence, but for the fact that they have been given the privilege of being the agents of the plaintiff's company.

21. The plaintiff has come with a specific case that the fourth defendant had been incorporated only under the instances the first, second and third defendants. This was so because the plaintiff had informed the customers that the agency with the first defendant had been terminated. However, the incorporation of the fourth defendant's Company under the name 'Netsweeper Technologies India Private Limited, ' shows that the only intention is to ride on the reputation of the plaintiff Company, who has a registered Trade Mark 'Net Sweeper' in Canada and USA. Incorporation of the fourth defendant would certainly lead to confusion in the minds of the general public. Customers would naturally be misled by the name of the fourth defendant and believe it is a group company of the plaintiff.

22. It is claimed that the plaintiff had terminated the agency of the first defendant and it is for that reason, the second and third defendants had surreptitiously incorporated the fourth defendant with the existence of the fifth and sixth defendants. This cannot be permitted. The agency with the first defendant was terminated. The second and third defendants as Directors of the first defendant would have to settle the accounts directly with the plaintiff. On the other hand, if they were to divert business by forming a Company, with the same name as that of the plaintiff by utilising the Trade Mark of the plaintiff, naturally, this was an attempt to induce customers to believe that the fourth defendant is a unit of the plaintiff's Company. It is therefore clear that the defendants have attempted to pass off the Trade Mark and Trade name 'Net Sweeper' to their advantage and to the disadvantage of the plaintiff.

23. The balance of convenience is in favour of the plaintiff, who had appointed the second and third defendants as their employees placing implicit trust. The plaintiff has made out a *prima facie* case for grant of injunction as prayed.

24. It is evident that the plaintiff has to be protected. It is the categorical finding of the second and third defendants that they are not doing any other business apart from the business of the plaintiff. Consequently, they would not be put to any loss or damage if an order of injunction is granted since they are no longer agents of the plaintiff. There would be an order of injunction, consequently against the first, second and third defendants as prayed for in the Applications.

25. On the other hand, the fourth, fifth and sixth defendants have not participated in the judicial proceedings. The name of the fourth defendant is exactly that of the first defendant except for the word 'India'. This does not convey any difference. As a matter of fact a cursory glance of the cause title would not reveal the difference between the names of the first and fourth defendants. Consequently, there will also be an order of injunction specifically against the fourth, fifth and sixth defendants as prayed for in the Applications.

26. In view of all these, O.A.Nos. 510 to 514 of 2018 are allowed. No costs.

Sd/-C.V.K.J

11/07/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 04.10.2018 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.