

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.7783 of 2018

Date of Decision: 15. 01.2019

Microsoft Corporation Pvt. Ltd.

...Petitioner

versus

Rajesh Duseja and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Akshay Bhan, Senior Advocate, with
Mr. Chandandeep Singh, Advocate,
for the petitioner.

Respondent no.1 in person.

Amol Rattan Singh, J.

By this petition, the petitioner company challenges the order of the learned trial court (Additional District Judge, Amritsar), dated 24.05.2018 (Annexure P-1), by which its application under Order 1 Rule 10 CPC, seeking that it be deleted from the array of parties, has been dismissed.

The petitioner has been impleaded as defendant no.2 in the suit filed by respondent no.1 herein (the plaintiff), seeking a decree of permanent injunction restraining all the 8 defendants therein from using the plaintiffs' literary work, as also from using "keywords of books, title name, Author name as Rajesh Duseja, seller name as Rajesh Duseja, ISBN Numbers, book id, Images, Create space name as publisher, ASIN numbers URLs, webpages, publishing date, Item number, book pages, book size, book format, book weight advertisement, sharing".

In the suit, the plaintiff also seeks a rendition of accounts by all

the defendants as regards the profits earned by them from the books stated to have been published by the plaintiff, still further seeking damages / compensation to him, for illegally and unauthorizedly using the material.

2. In its application under Order 1 Rule 10 CPC (copy Annexure P-4), the petitioner contended that the grievance of the respondent-plaintiff as regards the allegation concerning defendants no.1 and 2, actually only concerns defendant no.1, i.e. Microsoft Corporation, Redmond, Washington, USA and that the petitioner, i.e. Microsoft Corporation Pvt. Ltd., Gurugram, has only been impleaded on “a mistaken basis” as it has no role to play in the operation of the search engine, 'Bing', because the allegation with regard to infringement of copyright is directed against the said search engine, which is owned and operated wholly by defendant no.1 (respondent no.2 in this petition).

It is further contended in the application that the only relationship between the petitioner and respondent no.2 herein, is that the petitioner is a subsidiary of respondent no.2 which is its parent company, but with the petitioner being a separate legal entity, not involved at all in the “alleged infringing activity”.

Yet further, it is contended in paragraph 5 of the application as follows:-

“It is submitted that there is nothing on record to show that the Defendant No.2 is controlling the platform 'Bing'. It is submitted that the Defendant No.2 is making a categorical assertion that it does not own or operate 'Bing' and has no control over the same. It is submitted that the mere fact that Defendant No.2 happens to be the subsidiary of Defendant No.1, does not automatically make it a necessary or proper party to the present suit. The defendant No.1 & 2 are separate legal

entities and has been impleaded separately as such.”

On the aforesaid contentions, the application was sought to be allowed, with the petitioner sought to be deleted from the array of defendants.

3. A reply was filed by the respondent-plaintiff to the aforesaid application, a copy of which has been annexed as Annexure P-6 with the present petition.

A perusal thereof shows that a preliminary objection has been taken by him that true and material facts had been concealed from the trial court by the applicant, including the fact that in a suit before the Delhi High Court (Blueberry Books and others v. Google India Pvt. Ltd. and others), the applicant had “agreed itself a party” and consequently, the application before the trial court at Amritsar (in the present *lis*), was only to mislead the court.

It was next contended, also by way of a preliminary objection, that in the matter of infringement of literary works of the plaintiff, he had moved Complaint no.3939/COP dated 22.11.2014 to the Commissioner of Police, Amritsar, and the petitioner had been summoned by the police many times, which also was a fact kept concealed by it from the trial court.

4. On the merits of the application, the plaintiff has submitted that as the URL does not appear automatically “on the Bing search result” and in fact comes through 'Bing Adwords' run by both, the petitioner and its parent company in the US, i.e. defendants no.1 and 2 in the suit, the contention of the petitioner that it has nothing to do with “Bing” and any alleged infringement of copyrights, is a false averment.

Thereafter, other than denying all contentions made in the application, the respondent-plaintiff has also reiterated with regard to the

case of *Blueberry Books* before the Delhi High Court and further has stated that in that case, even an application filed by Google India, which is stated to be a subsidiary of Google Incorporated USA, was rejected by a Division Bench, with the Supreme Court also having adjudicated upon that issue in SLP no.22081 of 2016. Thus, he submitted that Google India Private Limited was held to be a necessary party in that *lis*.

As per the plaintiff, the petitioner is fully aware that it has the same role to play qua 'Bing' and Microsoft Incorporated USA, as Google India has qua Google Incorporated USA.

5. Having considered the pleading of both parties, the learned trial court, vide the impugned order, first observed that a necessary party is one without whom an order cannot be effectively made, and a proper party is one in whose absence though an effective order can be passed, but whose presence is still necessary for the court to adjudicate completely and finally on the proceedings before it.

It was further held that a perusal of the plaint showed that the petitioner-applicant-defendant no.2 is the “Indian Arm” of the first defendant, i.e. Microsoft Inc. USA, and it was the specific pleading of the plaintiff that his literary work is still available “on the site of the defendant being misused by defendants”.

The contention of the plaintiff that the URL is not automatically submitted on the 'Bing search result' and in fact comes through Bing Adwords run by both, defendants no.1 and 2, with the second defendant being the 'carrier and right arm' of the first defendant, and the said 'Adwords' programme being run from India, was also noticed by the trial court in the impugned order.

6. Thereafter, in the light of the aforesaid pleadings noticed by it, the application of the petitioner was dismissed (though the last part of the impugned order refers to the petitioner as defendant no.4 instead of defendant no.2).

7. Notice having been issued in this petition, respondent no.1 (the plaintiff) appeared in person and submitted that both, Microsoft USA and Microsoft India, are co-plaintiffs in a suit filed in the Delhi High Court, wherein the petitioner has also admitted to being a subsidiary of the company incorporated in the USA, with common interests.

He further submitted that 'Bing Adverts' also appears on the search engine, 'Bing', owned by Microsoft, with the 'Adverts' reproducing books uploaded by the plaintiff, onto a website known by the 'brand name' of "CreateSpace Publication Incorporated", which is actually owned/operated by Amazon Incorporated (or its subsidiary).

His contention therefore is that the aforesaid search engine and the services it provides through 'Bing Adverts' infringes upon his (plaintiffs') intellectual copyrights, as it publishes his books, or a part thereof, which anybody can access and download from the internet, therefore depriving the plaintiff, i.e. the author of the material, of his rightful dues.

(It is to be simply noticed here that in the impugned order the word used is 'Adwords', whereas the respondent, before this court, submitted that actually it is "Bing Adverts".)

8. He next relied upon an order of a co-ordinate Bench of this Court in Google India Private Limited v. M/s Shree Krishana International and others (CR no.7034 of 2012), passed on 26.11.2012, to submit that even in that case, Google India was held to be a necessary party

alongwith Google Incorporated USA, and therefore the same rationale would apply to the present case also.

9. In response to the aforesaid contentions, Mr. Akshay Bhan, learned Senior Counsel appearing for the petitioner had, in rebuttal, submitted that as regards the suits instituted in the Delhi High Court by the petitioner alongwith its parent company in the USA, i.e. Microsoft Corporation, they were related to infringement of copyrights owned by Microsoft, in the USA and in India, which is wholly a different situation to the present one, because the search engine 'Bing' is not licensed to Microsoft India and remains wholly in the ownership of Microsoft Incorporated, USA.

Mr. Bhan further submitted that in the entire plaint before the trial court in the present *lis*, the plaintiff has not pleaded anywhere that the petitioner company has any specific role in infringement of any kind of rights of the petitioner, though allegations may have been made against the parent company in the US, i.e. defendant no.1 in the suit, with that company already having filed its written statement and it not seeking to be deleted from the array of the parties.

10. The articles of association as also the memorandum of the petitioner company have also been placed on record, to submit that Microsoft India, even while being a subsidiary of Microsoft Incorporated USA, is not in any manner concerned with the search engine 'Bing', and therefore has nothing to do with the allegations made by the petitioner, which are essentially in the domain of the company incorporated in the US.

11. Having considered the pleadings before this Court as also the learned trial court as have been annexed with this petition, and also having considered the arguments made on behalf of the petitioner and made by the

first respondent-plaintiff himself, what this court first needs to notice is that in paragraphs 3 and 4 of the plaint it has been averred as follows, (amongst other things):-

“3. That the defendant no.1 develops, manufactures, licenses, supports and sells personal computers and services. He has his own search engine namely “Bing”. The company also produces a wide range of other software for desktops and servers, and is active in areas including internet search with Bing, Bing adwords, Defendant number 2 is also using his services and technical departments in India.

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4. That defendant are multinational companies whose headquarters are in U.S.A. The publisher's headquarter is also in U.S.A. Defendant no.1 & 2 provided the channels with one click services charges. The search engine of the Microsoft Company gets advertisement from the online companies. Defendant no.1 is getting profit of each click either book sold or not. Defendant no.3, 4, 5 & 6 both are sharing sites and provide sharing with free and also provide paid up account to other channels for using their users. The online companies use Face book and twitter users for increasing their sales. Defendants took profit of each click and sharing either the book is sold or not. The police complaint no-3939/cop has been also filed against defendant no.1 on 22/11/2014 at Sadar Police Station, Amritsar. After removal of books many online companies posted plaintiff literary work as “currently unavailable”, add to wish list, booked now, sharing with face book, twitter and other social networking sites. Plaintiff work was on American President 'Abraham Lincoln', 'Andrew Johnson', 'John Kennedy' and American's political African's leader 'Martin Luther King'. Plaintiff is residence of Amritsar, Punjab where book was not in demand; the demand of plaintiff's book is at U.S.A, U.K, Australia, New Zealand, South Africa, and Europe. All online sellers posted their contact detail with plaintiff's literary work.”

(Emphasis applied only in this judgment)

12. Thus, it is obvious that (correctly or erroneously), against the petitioner, i.e. Microsoft Corporation Pvt. Ltd.- defendant no.2 in the suit, a specific allegation has been made that alongwith the parent company in the USA, as also Bing Adword/Adverts, the petitioner also, allegedly, 'provides channels' "with one click service charges".

Whether or not the petitioner-defendant no.2 actually provides any such services, or is any part of such services by which, allegedly, the respondent-plaintiffs' copyrights etc. are being infringed, would need to be proved by way of evidence before the trial court.

As it stands an allegation has been made by the plaintiff against the petitioner-defendant no.2 also, whether right or wrong.

Whether the respondent-plaintiff has simply arrayed the petitioner as a defendant so that, in case a decree is issued in his favour it becomes easier to execute it, or whether the petitioner company is seeking deletion of its name from the array of parties also only for the reason, that in case of a decree issued in favour of the petitioner, it is not as easy to execute it against the parent Corporation in the USA, are two opposing possibilities being observed by this court, with nothing further stated thereon, as the case of the parties is to be appraised by the trial court wholly on the merits of the evidence before it.

13. It is also to be noticed (though of course the facts of the cases may otherwise be not the same), that in *Blueberry Books* (supra) a co-ordinate Bench of the Delhi High Court (exercising original civil jurisdiction in the suit filed before it), had allowed the applications filed by Google India Private Limited and Amazon, with the Division Bench of that court having

thereafter reversed that decision (reported as *Blueberry Books and others v. Google India Pvt. Ltd. and others* 2016 (230) DLT 615).

However, even without going into the details of that case, to repeat, allegations having been made correctly or incorrectly by the respondent-plaintiff also against the petitioner-defendant no.2, in his plaint, in my opinion, the trial court did not err in dismissing the application filed by the petitioner seeking deletion of its name, with the correctness or otherwise of the allegations made to be gone into at the time of adjudication on the basis of evidence led by the court before it.

Thus, whether or not any violation of the petitioners' copyrights /trademark etc. has been committed by any of the defendants or all of them, or none of them, is a matter to be gone into by the trial court after appraising the evidence led by both parties before it.

Naturally, upon doing so, if that court comes to the conclusion that the allegations made against the present petitioner are wholly unsubstantiated, it would adjudicate accordingly (or otherwise), as per its findings at that stage. Nothing stated by this court in this order or previous ones passed in this petition shall be taken to be an observation on the merits of the case of either of the parties before the trial court, which would be adjudicated upon by that court wholly on the basis of evidence led before it.

14. Presently, I see no reason to continue to entertain this petition, because the fact remains that allegations have been made, (correctly or incorrectly), in the plaint, against the petitioner company also; hence, in my opinion, the learned trial court has not erred in dismissing the petitioners' application filed under Order 1 Rule 10 CPC, seeking deletion of its name from the array of defendants.

Consequently, finding no merit in this petition, it is dismissed,
with no order as to costs at this stage.

January 15, 2019
dinesh

(AMOL RATTAN SINGH)
JUDGE

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |