

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

% **Date of decision: 29th March, 2019.**

+ **CS(OS) 482/2016 & IAs No.11735/2016 (u/O XXXIX R-1&2 CPC),
11736/2016 (u/O XXVI R-9 CPC), 7876/2017 (u/S 151 CPC),
17171/2018 (u/S 151 CPC) & 17172/2018 (u/O XIII-A CPC)**

CAMPUS EAI INDIA PVT. LTD.

.... Plaintiff

Through: Ms. Anuradha Salhotra, Ms. Achal
Shekhar and Mukul Kochar, Advs.

Versus

NEERAJ TIWARI & ORS

.....Defendants

Through: Mr. Ankit Relan, Ms. Ekta Sharma
and Mr. Vishesh Kumar, Advs. for
D-1.
Ms. Julien George, Ms. Anu Paarcha
and Mr. Arjun Gadhoke, Advs. for D-
2 to 5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff instituted this suit against defendants No.1 to 6 namely (i) Neeraj Tiwari; (ii) Girish Kumar; (iii) Shivendra Kaushik; (iv) Raoul Ghosh; (v) Orryworx Private Limited; and, (vi) Bigrock Solutions Limited, pleading (a) that the plaintiff is the exclusive subcontractor and successor in interest to CampusEAI Inc., a software information technology services and consulting company incorporated under the Laws of Ohio; (b) that the plaintiff has developed and markets a single sign-on solution for institutions of higher education in the United States and other countries; (c) that the plaintiff's single sign-on solution known as QuickLaunch SSO, is a cloud based, self-service, Identity-as-a-Service application integration platform

that helps schools, colleges and universities to integrate their applications irrespective of their integration protocol; (d) that the plaintiff has invested considerable money and resources in developing goodwill and has spent millions of dollars in formulating, developing, marketing/advertising and implementing its trade secret and copyright protected QuickLaunch SSO application; (e) that the defendant No.1, at the time of institution of the suit was still an employee of the plaintiff and the defendants No.2 to 4 are ex-employees of the plaintiff; (f) that the defendants No.1 to 4 have stolen the plaintiff's copyright, trade secret, technical proprietary, confidential information and Intellectual Property in respect to the aforesaid software from the plaintiff's computers, databases and development and repository sites; (g) that after extracting the information, the defendants packed it as their own under the name Loginology, to try and sell the same to the plaintiff's current and prospective customers/clients; (h) that the defendants No.2 to 4 are also promoters/directors of defendant No.5 incorporated on 28th June, 2016 and running the website www.loginology.com which offers an identical application to the plaintiff's QuickLaunch SSO application; (i) that the defendant No.6 is the Registrar of the domain name www.loginology.com; (j) that the defendants No.1 to 4, at the time of their employment with the plaintiff were working at a senior level under the confidentiality and employment agreements including the terms of the plaintiff's Employee Handbook and were directly and actively involved in development of the subject software for and on behalf of the plaintiff; (k) that the defendants, under their agreements with the plaintiff were not entitled to take any other employment while working with the plaintiff and the agreement also had a non-compete clause restraining the defendants from

taking up competing assignments for a period of two years, after leaving the employment of the plaintiff; (l) that in or around February, 2016, the defendant No.1 started taking unauthorised leaves and on account whereof disciplinary proceedings were initiated against the defendant No.1 and the salary of the defendant No.1 for the month of June, 2016 withheld; (m) that on account of defendant No.1 absconding from employment, the plaintiff took back the company issued laptop assigned to the defendant No.1 as part of his duties as a Software Developer; (n) that on reviewing the data on the said laptop, some applications recording nefarious activities of the defendants as herein below mentioned were found; (o) that it was discovered that the defendants No.1 to 4, while still in employment of the plaintiff started working on www.loginology.com and conspired to steal and subsequently stole the confidential data as well as the copyright protected and Intellectual Property of the plaintiff, to set up a rival and competing company; (p) that it was also discovered that after the defendants No.2 to 4 had left the employment of the plaintiff, the defendant No.1 while still in employment of the plaintiff passed on the sale strategy / operating method relating to QuickLaunch SSO to the defendants, to enable them to sell their competing products; (q) that the conduct aforesaid of the defendants No.1 to 4 is in breach of their agreements with the plaintiff and infringes the copyright of the plaintiff; (r) that a comparative analysis of the works of the plaintiff and the defendants shows that the defendants' work is a copy of the plaintiff's work; and, (s) that the defendants have used QuickLaunch SSO software and its source code developed by the plaintiff.

2. The plaintiff has thus sought the reliefs of, (I) permanent injunction restraining the defendants No.1 to 5 from divulging the confidential material

of the plaintiff's technology, trade secrets, methods and processes, market sales, list of clients, accounting methods and competitive data to third parties; (II) permanent injunction restraining the defendants No.1 to 5 from directly and indirectly approaching the plaintiff's current and prospective clients, employees and suppliers for soliciting business; (III) permanent injunction restraining the defendants No.1 to 5 from reproducing/printing, publishing, copying, storing/installing any pirated/unlicensed software of the plaintiff and its various versions and from infringing the copyright of the plaintiff in original literary work titled QuickLaunch SSO; (IV) mandatory injunction directing the defendants to produce the contents of their websites and hand over their source code to this Court; (V) mandatory injunction directing the defendant No.6 to pull down the website www.loginology.com or any other website controlled by defendants No.1 to 5; and, (VI) for ancillary reliefs.

3. The suit came up first before this Court on 22nd September, 2016, when summons of the suit and notice of the application for interim relief were ordered to be issued to the defendants for 29th September, 2019.

4. The defendants No.2 to 5, on 29th September, 2016 stated that they had not indulged in any of the acts of which they had been accused of and had no intention also to indulge therein for a period of two years from the date of cessation of their respective employments with the plaintiff and were ready to be bound by their said statement. They also stated that the software which had been developed by them was an entirely different software from the software of the plaintiff and they were willing to have the two softwares examined from an independent expert to whom the matter could be referred.

5. The defendant No.1 also on 29th September, 2016 stated that he had no objection to the decree for injunction as claimed being passed against him also, save qua the allegations of copyright infringement.

6. Accordingly, on 29th September, 2016, a decree was passed in favour of the plaintiff and, against the defendants No.2 to 5 in terms of prayer paragraph 40 (a) to (f) of the plaint; and against the defendant No.1 in terms of prayer paragraph 40 (a), (b), (e) and (f) of the plaint, with the clarification that the same shall operate for a period of two years only from the respective dates of cessation of employment of each of the defendants No.1 to 4 with the plaintiff.

7. On 29th September, 2016, with the consent of the counsels, it was further directed that the plaintiff as well as the defendants No.2 to 5 submit their respective source code in a sealed envelope to the Director, IIT, Delhi, as an independent expert, to evaluate the two softwares within one month of receipt of reference to report whether there is any similarity or infringement of copyright between the two softwares or whether the two are independent creation. The Director, IIT, Delhi was further requested to nominate an expert competent to do the needful and the representatives of both parties directed to meet with the Director, IIT, Delhi or the said expert for working out modalities, if any required in this regard. It was further agreed that the source code submitted to the expert would be as on 22nd September, 2016.

8. Accordingly, filing of the written statement by the defendants qua the remaining reliefs was deferred till receipt of report.

9. On further enquiry, the counsel for the defendants stated that the defendants had no objection to the reference to the expert being in terms of

Section 20 of the Indian Evidence Act, 1872. The counsel for the plaintiff, on similar query, stated that she will obtain instructions in this regard and inform the Court.

10. The expert report from IIT, Delhi was not received within the time envisaged and vide order dated 2nd November, 2017, it was directed that in the meanwhile the written statement qua the other reliefs claimed by the plaintiff be filed.

11. A report dated 19th September, 2018 under cover of letter dated 22nd September, 2018 has since been received from IIT, Delhi. The plaintiff has filed IA No.17171/2018 by way of objections to the said report and the defendants No.2 to 5 have filed IA No.17172/2018 under Order XIII-A of the Code of Civil Procedure, 1908 (CPC) seeking summary judgment of dismissal of suit on the basis of the said report.

12. The counsel for the plaintiff and the counsel for the defendants No.2 to 5 were heard on 28th March, 2019 and have further been heard today with reference to the said report, the objections of the plaintiff thereto and the possibility of a summary judgment in the light of the said report.

13. Though the report of the Three Members Committee constituted, in pursuance to the direction of this Court by the Director, IIT, Delhi, of two Professors and one Assistant Professor of Department of Computer Science and Engineering, IIT, Delhi comprises of 19 pages and the Annexure thereto comprises of 262 pages but for the purposes of the present order/judgment suffice it is to reproduce the following passages thereof:

“Abstract

We present our final comprehensive report from our analysis on Source-Code Plagiarism Dispute in terms of the order passed by the Hon'ble Delhi High Court, in the No.CS(OS) 482/2016 titled as M/s Campus EAI India Private Limited (Plaintiff) and Neeraj Tiwari & Ors (Defendant). Our studies indicate that there are no instances of plagiarism found in defendant's code. We have compared the softwares on the basis of structural and flow similarities therein while also accounting for programming logic and methodology for detecting plagiarism.

1. Introduction

Plagiarism in printed texts is a well understood phenomena and there are numerous computer-assisted tools and techniques which could be used to detect plagiarism in printed texts. However, plagiarism in software is relatively new and an active area of research. Software plagiarism is significantly different in nature from plagiarism of other literary/technical works. According to Parker and Hamblet [11], software plagiarism is defined to be an act through which a plagiarized program is produced from an original program by applying a number of routine program transformations. We, in this report, not only subscribe to the definition of software plagiarism from [11], but also refine it to cover similarity in semantic structure and information processing methodology between softwares. If the softwares were developed independently it is highly improbable for them to have the same structure and flow. In other words, changing the code structure and flow (code-refactoring) while maintaining the same functionality is a laborious and a difficult exercise (in terms of time and effort) requiring high degree of skill.

A central challenge in automated or manual detection of software plagiarism is that while it is fairly straightforward to detect simple modifications of software (such as variable renaming), it is difficult to detect plagiarism orchestrated through function reordering and refactoring. Plagiarism at

such deep levels can trip any trained eye or a naïve automated plagiarism detection tool.

The two disputing parties, M/s Campus EAI India Private Limited and Neeraj Tiwari & Ors, have both implemented their backend processing in Java and their frontend processing in CSS (Cascading Style Sheets) and Javascript. We have analyzed the source-codes as a pair-wise comparison between files from the two softwares.

.....While these tools can assist in highlighting similarities in the source codes, a similarity does not imply plagiarism and hence, these tools cannot completely automatically detect plagiarism. A further analysis and manual detailed examination is required to arrive at a decision whether or not plagiarism exists.

Our assessments reveals no plagiarism in the softwares. While the automated tools highlighted 577 instances of similarities between the two softwares, of varying number of lines-of-codes, all of these cases were assessed as false positives, as they were either open-source codes (see Section 3) or they showed structural similarity in segments that have a standard representation.

Detailed Results: The detailed analysis data and analysis results are provide in an annexure (262) pages.

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Most softwares' source codes are not publicly available and only the person, team or organization that created the source code has the legal right to modify or reuse them. Such softwares are called "proprietary" or "closed source" softwares. On the other hand "open-source" softwares are distributed along with their source codes. An open-source software can be borrowed, modified and redistributed. Many open-source software are released with their own licensing and copyrights with the sole purpose of further qualifying the borrowing, modification and re-distribution of open-source code under various settings (commercial, personal, or academic) pertaining to the use of it.

The right over a proprietary source code is held by the owner company. If a structural and intentional similarity is detected over the company's proprietary code segments, a case of plagiarism is recorded. However, in case the source code segments detected as similar are identified as open-source, the similarity would not imply plagiarism as none of the two companies hold the license or copyright over the code segment.

Our assessment for possible plagiarism takes into account the proprietary or open-source status of the source code segments, as discussed in detail in Section 6.2.

6. Comparison Method

To detect possible plagiarism we performed the following four steps:

1. Assessment of authenticity of the submitted source code,
2. Identification of open-source and proprietary code in software,
3. Similarity detection in proprietary code,
4. Examination of 'similar' code for plagiarism.

These steps have been described in the forthcoming subsections.

6.1 Step 1: Assessment of authenticity of the source code

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In our opinion the data did not suggest any anomaly in the software development pattern; this is because the commit frequency was fairly regular. Based on the above analysis, in our opinion, the source code version submitted to us is authentic.

6.2 Step 2: Identification of open-source and proprietary code in software

As discussed in Section 3, it is necessary to identify the open-source segments in the source code of the two companies as similarity detected over open-source code segments cannot be recorded as a case of plagiarism. The open-source segments in

the source codes of the two companies, thus, need to be excluded from our analysis process to avoid false results of plagiarism detection. A comprehensive study of the two software source codes was conducted that revealed use of various open-source source codes and dependence over various open-source libraries, listed in annexure Section 1 (annexure Page 1).

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6.4 Step 4: Examination of ‘similar’ code for plagiarism

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Certain code constructs have a standard structure that cannot vary even with distinct developers. Additionally, various programming notations have a standard format and style. Such cases can result in false positives from the similarity detection tool. We found cases of function calls and library imports which were classified as similar by the tools, but were false alarms. We also found cases of declarations and hierarchical tags (in case of CSS files) that have a standard structure and were thus detected as similar code segments.

.....

Another class of false positives in the similarity detection tool’s results come from similarity detected in open-source code segments. Based on the analysis discussed in Section 6.2, the source code segments detected as open-source and all source code segments belonging to open-source libraries that were detected as similar cannot be classified as instances of plagiarism. However, it is possible that the defendant may include proprietary code segments of plaintiff’s source code in a open-source licensed file. Our analysis ensured that we do not overlook the possibility of such cases.

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7. Results

We detected 158 instances of similarity in the backend source code and 419 instances of similarity in the frontend source code, i.e., a total of 577 instances of varying sizes of code

segments and varying percentage match (between 1% to 99%). However, none of the 577 instances can be recorded as a case of plagiarism as discussed further.

Out of the 577 instances, 433 instances were observed in code segments that were verified as open-source code segments carrying a license or a copyright where the license terms allow companies to import the code. The 433 instances can be put in 2 categories, as discussed in Section 6.4:

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..... The Loginology SSO source code java, css and js files have 99,374 lines-of-code and Quicklaunch SSO source code java, css and js files have 1,69,913 lines-of-code. These instances, thus, constitute a very small portion of the source code that is 0.27% of Loginology SSO's source code and 0.19% of Quicklaunch SSO's source code.

.....

All the code segments in Loginology SSO's source code that contained instance(s) of similarity have been examined and classified as un-plagiarized. The same can be seen in table 1 as the count of instances under column 'R' (Remaining) is zero.

Table 1: Similarity and plagiarism report of Loginology SSO source code files

	Similar Instances (S)	Open-source		Open-source (A+B) (O)	Imports Only (I)	False Positives (Structural Similarity) (F)	Remaining (S-(O+I+F)) (R)
		Category A (A)	Category B (B)				
Backend files (.java)	158	21	1	22	123	13	0
Frontend files (.css, .js)	419	371	40	411	0	8	0
Total files	577	392	41	433	123	21	0

8. **Conclusion**

- *IIT Delhi was given the task of detection of software plagiarism in the source codes of M/s Campus EAI India Private Limited (Plaintiff) that is, Quicklaunch SSO, and of Neeraj Tiwari & Ors (Defendant), that is, Loginology SSO.*
- *It was claimed that the source codes given to IIT Delhi for analysis have not been modified after 22 September 2016.*
- *We verified the claim that the source code of defendant has not been modified after 22 September 2016 and studied the development history for ensuring absence of unusual patterns in development process, as discussed in Section 6.1.*
- *The source codes were compared for structural similarity with the help of similarity detection tools SIM and MOSS, as discussed in Section 6.3.*
- *These automated tools reported 577 instances of structural similarity.*
- *Further analysis, as discussed in Section 5, revealed that, out of the 577 instances, 433 instances were recognized in open source code. All such similarity instances cannot be classified as instances of plagiarism, as discussed in Section 6.2.*
- *Further, 123 instances only matched on import statements. As the import statements have a standard structure and do not perform any processing they were ruled out.*
- *The 21 instances were manually analyzed for plagiarism, as discussed in Section 6.4.*
- *After manual analysis it was concluded that the 21 instances of proprietary code detected as structurally similar by the automated tools did not qualify as*

instances of plagiarism. The details of the same are discussed in Section 6.4 and 7.

Concluding Remark: *In our opinion there is no evidence of plagiarism between the two source codes. We also did not detect any meaningful case of unusual activity in the development pattern or any case of tampering with the development history. We can conclude with a high degree of confidence that the proprietary source codes from M/s Campus EAI India Private Limited that is, Quicklaunch SSO, and of Neeraj Tiwari & Ors, that is, Loginology SSO are not plagiarized.”*

(emphasis added)

14. The plaintiff has objected to the report pleading:

- “a. Firstly, assuming (but not admitting) to the fact that Open Source codes have been used in both the codes for the rival softwares, reliance needs to be placed on the number of instances in which Open Source codes have been used in both the softwares, in order to construe whether the rational order of the two rival codes is the same or not.
- b. Secondly, the Open Source codes used by both the parties need to be examined, as the Open Source codes used by the Plaintiff have been re-engineered and tailored to suit the needs of the Plaintiffs software and the same have eventually been bootstrapped by the Defendants.
- c. Thirdly, the order of the Import Structure of the two rival codes must also be examined in depth, to determine whether the structure of both the codes is similar, as the Import Structure of

the Plaintiffs code has been tailor made for the Plaintiff's software.

- d. Fourthly, all of the 433 instances of the Open Source codes and the import structure need to be made known and scrutinized to determine the similarities between the two rival codes."

15. On the contrary, the counsel for the defendants No.2 to 5 contends that once a team of experts from an esteemed institution like IIT, Delhi has concluded that there is no plagiarism by the defendants No.2 to 5 and no infringement of plaintiff's copyright in its asserted software, no other issue survives and there is no other compelling reason why the claim of the plaintiff should not be disposed of before recording of oral evidence.

16. The counsel for the plaintiff has argued that the report erred in excluding from analysis the open source code segments found in the source code of the plaintiff as well as the defendants. It is explained that open source software programs are programs which are available to all, without any licence or permission for use thereof being required to be taken. It is further explained that such open source code software programs are like a dictionary and just like no plagiarism can be attributed to use of words from a dictionary, no plagiarism can be attributed to use in the source code of open source code segments as rightly found by the experts also. It is however further contended that just like there is copyright in the chronology in which the words from the dictionary are arranged in framing a sentence or a passage, similarly there is copyright in the chronology in which the open source code segments are used in a source code. It is contended that the

report erred in not analyzing the chronology in which the open source code segments are used in the source code of the plaintiff and the defendants and which analysis, if had been carried out, would have demonstrated plagiarism. It is argued that trial is required in the suit, to grant an opportunity to the plaintiff to, by examining its experts, prove so.

17. It is further emphasised by the counsel for the plaintiff that besides the 433 open source segments, the report finds 21 other proprietary segments and a total of as many as 577 similarities.

18. I have enquired from the counsel for the plaintiff, whether the plaintiff represented to the experts aforesaid to carry out the analysis of chronology.

19. The counsel for the plaintiff draws attention to the letter dated 20th February, 2017 of IIT, Delhi to this Court, annexed to IA No.7876/2017 filed by the plaintiff seeking transfer of the task of conducting source code examination from IIT, Delhi to any other independent Government body/Institute such as National Institute of Technology (NIT) and Central Forensic Science Laboratory (CFSL), informing this Court that the progress in the matter had been stalled due to demand of the plaintiff that the expert committee must change its scope of work to include many additional analysis which the committee felt would be time consuming and not necessary in the initial phase and that such analysis could be ordered by the Court, if the initial code comparison analysis results are inconclusive. The counsel for the plaintiff contends that the plaintiff filed IA No.7876/2017 for directions of this Court in this respect but the said application was disposed of, without issuing any fresh direction.

20. However, a perusal of IA No.7876/2017 shows the plaintiff to have pleaded therein that the plaintiff, on enquiry from other Government institutes capable of conducting detailed source code examination, had been informed that the same would cost in the range of Rs.4 lacs to Rs.5 lacs only, while IIT, Delhi was charging Rs.11.88 lacs and seeking more for a detailed analysis. The plaintiff however, in the prayer paragraph of the said application is found to have stated “It is respectfully submitted that the Professional Cost and time indicated by the IIT Delhi is substantially higher to conduct the source code examination. It is accordingly prayed that the task of conducting the source code examination be transferred from the IIT Delhi to any other independent government body/institute such as National Institute of Technology, Delhi or CFSL (Central Forensic Science Laboratory)”.

21. I also find that on 22nd January, 2018, when the aforesaid IA No.7876/2017 came up before this Court, the same was disposed of vide the following order:

“It is agreed and recorded accordingly that the report which has to be given by IIT Delhi will be in terms of the order dated 29.9.2016.”

22. In view of the aforesaid contents of IA No.7876/2017 and the order thereon, I am unable to agree with the contention of the counsel for the plaintiff that the plaintiff had taken the objection as is being raised now, prior to or at the time of examination by the appointed expert and on the contrary find the plaintiff, in moving IA No.7876/2017 having been guided by the higher costs being charged by IIT, Delhi and to which also the

plaintiff agreed on 22nd January, 2018. It thus cannot be held that the objection raised now was raised during the agreed examination also.

23. The counsel for the defendants No.2 to 5 has argued that the parties had consented to examination by the expert to cut short the trial and the plaintiff cannot now be permitted to, notwithstanding such examination, still want the suit to go on. It is also argued that the only objection of the plaintiff was to the charges demanded by IIT, Delhi and which objection also the plaintiff gave up. Attention in this regard is invited to the email dated 20th January, 2017 of the plaintiff annexed by the defendants No.2 to 5 to their reply to IA No.7876/2018 aforesaid. It is contended that it is now not open to the plaintiff to reiterate the same.

24. The counsel for the defendants No.2 to 5 also draws attention to the replication of the plaintiff to the written statement of the defendants No.2 to 5 to contend that no such plea, as is being taken now by way of objections, is taken therein.

25. The counsel for the defendant No.1 has also contended that the plaintiff, in the plaint has not even disclosed the name of the author of the source code in which the plaintiff claims copyright and has not pleaded that its own source code contained open source code segments or that the infringement was in sequence / arrangement of open source code segments.

26. In ***Hirachand Kothari Vs. State of Rajasthan*** 1985 (Supp) SCC 17 it was the claim of the plaintiff/appellant that the State of Rajasthan, in relation to a dispute as to valuation of a piece of land, had agreed to appointment of the Town Planning Officer as the Assessor to assess the value of the land and submit his report. The Town Planning Officer valued the land at

Rs.35,826.50p. However the State of Rajasthan disputed the said valuation. The plaintiff/appellant instituted the suit for recovery of the amount at which the Town Planning Officer had assessed and determined the valuation of the land, pleading that the State of Rajasthan was bound thereby. The State of Rajasthan contested the said suit *inter alia* pleading that it had never agreed that the assessment or valuation made was to be final and binding on them and that there was an error in principle in the assessment done/valuation made. It was held:

“6. The main question raised is whether the report of the assessor (Ext. 5) was “information” within the meaning of Section 20 of the Evidence Act and therefore considered to be an admission of the parties as to appraisalment or valuation of the disputed land at Rs 35,826.50 p. and such an admission must operate as estoppel. Admissions may operate as estoppel and they do so where parties had agreed to abide by them. The word “information” occurring in Section 20 is not to be understood in the sense that the parties desired to know something which none of them had any knowledge of. Where there is a dispute as regards a certain question and the Court is in need of information regarding the truth on that point, any statement which the referee may make is nevertheless information within the purview of Section 20. The contention on behalf of the State Government on the word “information” occurring in this section is that the parties did not stand in need of obtaining any information from D.N. Gupta and that at any rate the State Government never agreed to abide by the valuation made by him and therefore they were not bound by the same inasmuch as the valuation made by him was not conclusive as to the value of the subject-matter as between the parties.

7. Section 20 of the Evidence Act reads as follows:

“20. Admissions by persons expressly referred to by party to suit.—Statements made by persons to whom a party to the suit

has expressly referred for information in reference to a matter in dispute are admissions.”

Section 20 is the second exception to the general rule laid down in Section 18. It deals with one class of vicarious admissions that demand of persons other than the parties. Where a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person referring. The reason is that when a party refers to another person for a statement of his views, the party approves of his utterance in anticipation and adopts that as his own. The principle is the same as that of reference to arbitration. The reference may be by express words or by conduct, but in any case there must be a clear admission to refer and such admissions are generally conclusive”.

However in the facts of the said case, it was found that the State of Rajasthan had not consented to the valuation.

27. Reference in the context of law on Section 20 of the Indian Evidence Act, 1872 may also be made to ***Akhil Bhartiya Mahajan Shiromani Sabha Vs. Dharamveer Mahajan*** (2008) 154 DLT 320, ***Anoop Madan Vs. Dena Bank*** (2013) SCC OnLine Del 2097 and ***Takamol Industries Pvt. Ltd. Vs. Kundan Rice Mills Ltd.*** 2017 SCC OnLine Del 6450.

28. Though the order dated 29th September, 2016 does not expressly contain the consent of the plaintiff to the offer of the defendants of examination of the two softwares by an independent expert but the tenor of the order is consensual and as the subsequent orders also confirm; in any case, on 22nd January, 2018 as aforesaid, it was agreed and recorded that the report which had to be given by IIT, Delhi will be in terms of order dated 29th September, 2016. There is thus no iota of doubt that the reference for

information to IIT, Delhi was with the consent of the plaintiff as well as the defendant.

29. The aforesaid was/is enough to bind the plaintiff as well as the defendant to the information submitted by the expert and to dispose of the suit in accordance therewith. However I had still on 29th September, 2016 expressly enquired from the counsels whether they were agreeable to the reference to the expert being in terms of Section 20 of the Indian Evidence Act. While the counsel for the defendants had readily agreed, the counsel for the plaintiff had sought time to obtain instructions.

30. I have enquired from the counsel for the plaintiff, whether the counsel for the plaintiff at any subsequent time so informed the Court.

31. The counsel for the plaintiff replies in the negative.

32. The counsel for the defendants No.2 to 5 contends that though undoubtedly in none of the subsequent orders/pleadings such consent of the counsel for the plaintiff is recorded but at the same time, though the counsel for the plaintiff had taken time to obtain instructions and inform the Court, the failure to inform the Court should be deemed as consent. It is stated that had the intention of the plaintiff been to be not bound by the report, the counsel for the plaintiff would have informed so and which she did not. It is argued that the plaintiff is also thus deemed to have agreed to the reference being in terms of Section 20 of the Evidence Act.

33. I tend to agree with the counsel for the defendants. The plaintiff in a commercial suit especially of the nature of infringement of copyright in the source code of a software program, and adjudication whereof is of a highly

technical nature, cannot be permitted to be a fence-sitter. The plaintiff in such a suit cannot be permitted to, after receipt of opinion of the expert, if in favour, claim the same to be binding and if against, claim the same to be not binding.

34. It cannot be lost sight of, that the defendants in this suit on the very first date of appearance before this Court agreed to suffer a decree for permanent injunction as sought and further offered to the examination of the source code of the software program of the plaintiff and of the defendants to be examined by an independent expert and also had no hesitation to make a statement to be bound by the said report, even if against them and to suffer the consequences of becoming liable for damages etc. therefor. It is not as if the plaintiff was not agreeable to the aforesaid offer of the defendants. The plaintiff also readily agreed thereto, being aware that the adjudication of the dispute in any case would be ultimately falling in the domain of experts with this Court also forming an opinion on the basis of such expert opinion. Though the counsel for the plaintiff on 29th September, 2016 did not consent to the reference to the expert being under Section 20 of the Evidence Act as readily consented to by the counsel for the defendants, but it is not as if the counsel for the plaintiff expressed any aversion thereto. All that transpired was that though the defendants were present in the Court for their counsels to readily take instructions, the plaintiff was not. Rather, the counsel for the plaintiff expressly stated that she will inform. She did not inform to the contrary. Therefrom, it is well-nigh possible that the defendants proceeded with the evaluation by the expert, costs whereof even the plaintiff, claiming itself to be established in the field, was finding to be exorbitant, on the premise of the said finding of the expert putting an end to the litigation one

way or the other, without requiring the parties to incur expenditure on trial. A litigant cannot be permitted to create such a situation. If the counsel for the plaintiff had informed that the plaintiff was not agreeable to be bound by the report, the defendants could have very well also reneged from their consent to Section 20 of the Evidence Act or even to spending money on expert opinion, even before filing their pleadings.

35. The counsel for the plaintiff has also drawn attention to pages 148 to 150 of Part III file, being the chat *inter se* the defendants, to contend that the same shows a high probability of the defendants having stolen the source code of the software program of the plaintiff and other confidential data of the plaintiff.

36. The defendants, in the said chat are found to be indulging in casual banter about the fact of their leaving the employment of the plaintiff. I have enquired from the counsel for the plaintiff, whether not such banter is common also to advocates in large law firms, who often talk about the impact of their leaving on the firm.

37. The counsel for the plaintiff could not disagree, but contends that the matter requires further investigation and opportunity of trial needs to be granted. It is further contended that all objections of the plaintiff are within the four corners of order of reference; that the experts have not used the proof of innovation test; the experts have done library-wise instead of product-wise comparison.

38. I have further enquired from the counsel for the plaintiff, whether there are any other application / software programs serving the same purpose as the subject software program of the plaintiff.

39. The counsel for the plaintiff admits that there are others also, explaining that SSO is an abbreviation for “Single Sign-On” and that Google also has the same application, but contends that the subject software program of the plaintiff is standard for universities in United States. On further enquiry, it is admitted that there are other competitors of the plaintiff in the United States. The counsel for the plaintiff, in response to the contention of the counsel for the defendant No.1 has also stated that the plaintiff, in paragraphs 3 & 4 of the plaint itself has pleaded that the defendants are authors of the source code of the plaintiff. It is however stated that whatever was authored by the defendants as employees of the plaintiff, belongs to the plaintiff.

40. The counsel for the defendants No.2 to 5 has drawn attention to the replication of the plaintiff to the written statements of the defendants No.2 to 5 to show the plea of the plaintiff that the plaintiff’s first version of the software QuickLaunch SSO was launched in the year 2011 and contends that the defendants No.3&4 joined employment of plaintiff thereafter. It is further contended that the plaintiff nowhere pleaded that segments of its source code are from open source software programs and what is being alleged now is contrary to what is pleaded. It is further argued that the plaintiff, in the complaint of criminal offence filed against the defendants, did not say that the defendants are the authors of the plaintiff’s source code and it is further informed that the said complaint has been closed.

41. The counsel for the plaintiff has placed reliance on ***R.G. Anand Vs. Delux Films*** (1978) 4 SCC 118, in turn relying on ***Bobbs-Merrill Company Vs. Isidor Straus and Nathan Straus*** 210 U.S. 339, holding “the question is

not whether the alleged infringer could have obtained the same information by going to the same source used by the plaintiff in his work, but whether he did in fact go to the same source and do his own independent research. In other words, the test is whether one charged with the infringement made an independent production, or made a substantial and unfair use of the plaintiff's work."

42. The counsel for the defendants No.2 to 5 has drawn attention to ***L. Ram Narain Vs. Santosh Kumar*** 1952 SCC Online P&H 64 holding the reference in that case to be under Section 20 of Evidence Act.

43. I have enquired from the counsel for the plaintiff, whether in the facts and circumstances aforesaid, the plaintiff is willing to give an undertaking to pay the actual costs of litigation as disclosed by the defendants to the plaintiff, in the event of the plaintiff, even after trial sought, failing to make out a case. The names of the Directors of the plaintiff have also been enquired, upon being informed that the plaintiff company has no assets of its own from which the costs, if any decreed against the plaintiff can be recovered.

44. It is informed that Arun Chopra and Shringi Chopra are the only Directors of the plaintiff and are of old age. The counsel for the plaintiff further states that the said Directors are not willing to give an undertaking to the Court to, in the event of the costs decreed being not recovered from the plaintiff, being recovered from them personally. It is stated that an undertaking can be given for maximum costs of Rs.15 lacs.

45. The counsel for the defendants states that the defendants have already incurred 50% of the costs of over Rs.12.5 lacs paid to IIT, Delhi and have

incurred considerable costs in this litigation for the last over two and a half years and of which certificate along with proof can be furnished. It is stated that trial of the suit will entail examination and cross-examination of experts and all of which will again invite incurring of heavy expenditure, with the defendants requiring the presence of their expert, even for the cross-examination of the expert now intended to be examined by the plaintiff. The counsel for the defendants thus states that the defendants are not willing to accept the undertaking by the plaintiff and its Directors of maximum costs of Rs.15 lacs and the plaintiff, in spite of the report of the IIT, Delhi still wants to proceed with the litigation, must agree to reimburse the defendants with full costs thereof, in the event of failing.

46. Having considered the controversy, I am of the opinion that the defendants are entitled to summary judgment of dismissal of the suit. My reasons therefor are recorded below:

(A) What is now contended by the counsel for the plaintiff including in objections is indeed contrary to the stand of the plaintiff taken in replication filed to the written statement of defendants No.2 to 5 prior to the report. The plaintiff therein, in response to paragraphs No.28 & 29 of the written statement of the defendants No.2 to 5 as under:

“28. It is further submitted that when the answering Defendants conducted the comparison between the source codes of the “QuickLaunch SSO” and “Loginology”, from the very same website that the Plaintiff had used, i.e. www.diffnow.com, the answering Defendants found that with respect to comparisons represented in screenshots II-IV of the Plaint, the website clearly mentions the name of the author of the source codes, to be one Mr.

Abdullah A Almsaeed. It is evident that the Plaintiff, with the intention of misleading and defrauding the Hon'ble Court has malafidely removed the portion of the screenshots, which mentioned Mr. Almsaeed's name as the author. Thus, despite being aware that Mr. Almsaeed is the actual author of the source code, who has provided the open source libraries in public domain, the Plaintiff has wrongly claimed copyright over such source codes and filed the instant suit. Further, it is evident from the printouts of the source codes that the source code represented in Screenshot I was published in public domain on 25th May, 2013 and the source code represented in Screenshots II-IV was published in public domain on 4th January, 2014.

29. *It is submitted that such acts of the Plaintiff not only amount to concealment and suppression of material fact, but is also contemptuous and fraudulent deserving to be penalized with exemplary costs by this Hon'ble Court. Printouts of the abovementioned screenshots, the entire abovementioned source codes from open source libraries and information about Mr. Almasaeed have been filed in the present proceeding for the kind consideration of the Hon'ble Court. The answering Defendants reserve its right to initiate appropriate legal action against the Plaintiff, for such malicious prosecution and rendering false evidence."*

pleaded as under:

- "8. *The contents of Paragraphs 28 and 29 are wrong and denied. It is submitted that as per the admission of the Defendant's screen shot 1 was first in public domain on May 25, 2013 and a*

source code represented in screen shot 2 to 4 was first published in public domain on January 4, 2014. It is further submitted that the Plaintiffs' first version of the software Quicklaunch SSO was launched in the year 2011 and therefore it cannot be said that the Plaintiff copied the portions of the source codes which are available in open source libraries. It is therefore clear that the Plaintiffs' source code is an original work and the Defendants have copied the work of the Plaintiff to develop their own software Loginology. Moreover, it is rather surprising to note that the Plaintiff took almost 3 years to develop their software and the Defendants took only 6 months to develop their software Loginology which is based on same functioning of the code, same architecture and same resources. It is the Defendants who have been suppressing material facts from the Court and not the Plaintiff. The said fact is apparent from the fact that the Defendants have claimed that they have obtained source codes from open source libraries to develop their software Loginology whereas when compared with the open source library, it has been found by the Plaintiff that there are difference on as many as 249 lines, 4 in-line differences and 78 lines have been deleted by the Defendants which proves that Loginology code is not an open source code. It is therefore respectfully submitted that the Defendant Nos.2 to 4 should be permanently enjoined from using the infringing source code and the Defendants deserve to be penalized with exemplary cost by this Hon'ble Court."

(B) Such inconsistencies in a suit of the present nature adjudication whereof, as aforesaid, is largely dependent on expert opinion and appreciation thereof, are indeed fatal to the claim of the plaintiff.

(C) The plaintiff, nowhere in its pleadings is found to have pleaded that though segments of the source code of the plaintiff as well as the defendants have been sourced from open source code software programs but the copyright of the plaintiff is in arrangement or sequencing of the said open source code.

(D) I have in *Vifor (International) Ltd. Vs. Suven Life Sciences Ltd.* 2019 SCC OnLine Del 7514, in the context of commercial suits, held that litigants thereto are required to make sharp to the point pleadings culling out the disputes for adjudication and cannot be permitted to take general pleas and cannot understand their own case during the course of trial. Such pleas make litigation endless, with applications after applications for amendment of pleadings and for filing of documents and leading of evidence beyond the permitted stage being filed and all of which are not envisaged in the timelines for disposal provided for with respect to the commercial suits in the Commercial Courts Act, 2015. A litigant to a commercial suit, particularly a plaintiff, who defaults has to suffer the consequences. There is a mode to move away from what the Britishers labelled as ‘mofussil pleadings’ at least in relation to commercial suits.

(E) The conduct of the defendants of, on the very first date, even before filing their written statement, agreeing to suffer a decree for permanent injunction as sought and also offering to have the software of both compared by an expert to put the matter at rest at the earliest, also speaks volumes in favour of the defendants. Not only so, the defendants also immediately consented to being bound by the report of

the expert meaning that if it were to be against them, the consequences against the defendants would have followed.

(F) The conduct of the plaintiff, of though not having instructions on 29th September, 2016 for consent to being bound by the report of the expert and undertaking to inform the Court of the same, not informing the Court that the plaintiff was not willing therefor is indicative of the plaintiff thereby leading the defendants to believe that the plaintiff was also agreeable thereto and the report of the expert would indeed be final.

(G) In this context I may mention that since the date of the decree dated 29th September, 2016, the period of two years for which it was passed has also expired.

(H) The plaintiff allowed the experts to proceed with the examination as deemed appropriate by them, by expressly consenting thereto on 22nd January, 2018. The plaintiff is now estopped from contending that the examination should have been on different parameters. Though the plaintiff claims to have filed IA No.7876/2017 in this respect but did not press the same. The plaintiff cannot be permitted to blow hot and cold during the course of proceeding.

(I) No *mala fides* are attributed to the expert, as indeed cannot be considering the stature of the institution to which the experts belong.

(J) The expert has given cogent reasons for not finding the defendants to have plagiarized the software program of the plaintiff

and no material at least for the present suit has been shown to the contrary.

(K) As far as the reliance by the counsel for the plaintiff on ***R.G. Anand*** supra is concerned, it is the argument of the counsel for the plaintiff herself, though the plea is to the contrary, that the defendants are the authors of the source code of the software program of the plaintiff also. Once the defendants are claimed by the plaintiff to be the author, in my opinion, in the facts of the present case, the test as enunciated therein, will not apply.

(L) The reluctance of the plaintiff to even now bear the actual costs of litigation of the defendants in the event of failing in the suit, is akin to the fence-sitting indulged in by the plaintiff till now. The plaintiff, under the Commercial Courts Act itself is liable for actual costs of the defendants, in the event of failing in the suit. It was only because the plaintiff, though not entitled in the facts to claim trial, was claiming trial, then an offer was made to the plaintiff to assure reimbursement of costs. The defendants cannot be compelled to incur expenditure for a fishing expedition which the plaintiff appears to be indulging in, without the plaintiff, if called upon, bearing the expenditure therefor. The same again shows the roving nature of the enquiry which the plaintiff desires.

(M) The reference to IIT, Delhi, is found to be within the meaning of Section 20 of the Evidence Act and the plaintiff, in accordance therewith is bound by the report and estopped from contending otherwise.

47. The suit is thus dismissed. I am for the time being confining costs incurred by the defendants in the litigation to the amount paid by defendants No.2 to 5 to IIT, Delhi, being 50% of about Rs.12 lacs i.e. Rs.6 lacs only but with the clarification that in the event of the plaintiff preferring an appeal, the defendants shall be entitled to press for costs of the suit till now also, if the occasion so arises before the Appellate Court. The plaintiff to pay costs of Rs.6 lacs to defendants No.2 to 5 within four weeks.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 29, 2019

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(corrected and released on 19th April, 2019)

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