

Microsoft Corporation and anr Vs. Prithviraj and anr.

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Court : Delhi

Decided On : May-02-2014

Judge : G. S. Sistani

Appellant : Microsoft Corporation and anr

Respondent : Prithviraj and anr.

Advocate for Pet/Ap. : Mr. Aashish Somasi

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CS(OS) 1623/2010 %
Date of Decision :

02. 05.2014 MICROSOFT CORPORATION & ANR Plaintiffs Through: Mr. Aashish Somasi, Adv. VERSUS PRITHVIRAJ & ANR. Through: Defendants CORAM: HONBLE MR. JUSTICE G.S. SISTANI G.S. SISTANI, J.

(Oral) 1. The plaintiffs have filed the present suit for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts of profit, damages etc. Summons were issued in the suit on 13.08.2010 and on 24.05.2011. On an application for appointment of Local Commissioner filed by the plaintiffs, a Local Commissioner was appointed in the matter. None appeared on behalf of defendants despite service, hence defendants were proceeded ex parte on 24.10.2011.

2. The plaintiffs have filed affidavit by way of evidence of Constituted Attorney of Plaintiff No.1 and Plaintiff No.2 Col. J.

K. Sharma (Retd.) (PW1). Letter of Authority and Power of Attorney in favour of Col.J.K.Sharma (Retd.) has been exhibited as Ex. P-1 and Ex. P-2 respectively. PW1 has deposed that at the time of filing of the present suit, Mr.Achuthan Sreekumar was the Constituted Attorney and that he recognizes the signature of Mr.Achuthan Sreekumar, affixed in the plaint in his capacity as the constituted attorney of plaintiffs. A photo copy of the Power of attorney and the Letter of authority as executed by the Plaintiff No.1 and Plaintiff No.2 in favour of Mr. Achuthan Sreekumar have been exhibited as Ex P-3 and Ex P-4 3. PW1 has also deposed that the Plaintiff No.1, Microsoft Corporation is a company organized and existing under the laws of the State of Washington, USA, having their principal office at One Microsoft Way, Redmond, WA980526399, USA. He has further deposed that the Plaintiff No.2, Microsoft Corporation India Private Limited is the wholly owned marketing subsidiary of the Plaintiff No.1. Microsoft Corporation, having their office at Eros Corporate Towers, 5 th Floor, Nehru Place, New Delhi-110 019, and is an entity incorporated and registered under the Indian Companies Act, 1956. The Plaintiff No.2 was set up in the year 1989 to provide marketing, promotion, anti-piracy awareness campaigns and actions and channel development support to the Plaintiff No.1 and/or its affiliates. Additionally, the products of the Plaintiff No.1 are distributed in New Delhi through various authorized distributors.

4. PW1, has also deposed that the Plaintiff No.1 (Microsoft) was set up in the year 1975 and is the biggest software publisher for personal and business computing in the world. The Plaintiff No.1 engages in the development, manufacture, licensing, and support of a range of software products for various computing devices. Its software products include operating systems for servers, personal computers (PC), and intelligent devices; server applications for distributed computing environments; information worker productivity applications; and software developments tools. Plaintiff No.1 also sells video game console (Xbox), video games and engages in online business through various Internet portals (MSN etc.). The Plaintiffs popular software products include the most widely used

operating system software, MICROSOFT WINDOWS (various versions), and application software such as MICROSOFT OFFICE (various versions) and VISUAL STUDIO (various versions). These software are today installed and used on millions of computers all over the world, including India. He has also deposed that the software developed and marketed by the Plaintiffs is a computer programme within the meaning of Section 2 (ffc) of the Copyright Act, 1957 and included in the definition of a literary work as per Section 2 (o) of the Act.

5. He has further deposed that the Plaintiffs Company, apart from computer software, also manufactures a large range of computer peripherals (hardware). The Microsoft Hardware group established in 1982 has been an integral part of the Plaintiffs growth for 31 years. During this period, the Plaintiffs have built their reputation for technological expertise in hardware by developing and launching a series of successful devices including the ergonomically designed Mouse and Keyboard.

6. PW1 has also deposed that the Plaintiffs computer programmes are works that have been first published in the USA and are also registered in the USA. These programs have been created by the employees of the Plaintiff No.1, for the Plaintiff No.1. Under the US Copyright Law, US Code Title 17, Section 201(b), the copyright in a work created by an employee belongs to the employer under the Work made for Hire doctrine. Both the computer programme, as well as the supplementary User Instructions and Manuals, are original literary works as contemplated under Section 2 (o) and Section 13 (1) (a) of the Copyright Act, 1957. The Plaintiff No.1 is the owner of the said copyrights.

7. PW1, has further deposed that the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. India and the USA are signatories to both the Universal Copyright Convention as well as the Berne Convention. The Plaintiff No.1s works are created by authors of member countries and originate from and are first published in the said member countries. He has also deposed that the Plaintiffs No.1 works are, thus, protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999.

8. PW1 has also deposed that the Plaintiff No.1 being the owner of the copyright in the aforesaid literary works within the meaning of Section 17 of the Copyright Act, 1957 is entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the Copyright Act, inter alia, (a) the right to reproduce the work in any material form, including storing it in any medium by electronic means (b) to issue copies of the work. (c) to make an adaptation or translation of the work (d) for a computer programme, the additional right to sell or give on commercial rental, or offer for sale or commercial rental any copy of the computer programme. (e) 9. the right to authorise the doing of any of the aforesaid acts. He has also deposed that under S. 51 (a) (i) of the Copyright Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright, does anything, the exclusive rights of which are granted to the owner of copyright, such as the ones enumerated in paragraph above (the primary acts of infringement).

10. PW1 has further deposed that under S. 51 (b) of the Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright: (i) makes for sale or hire, or sells or lets for hire, or by way of trade, displays or offers for sale or hire any infringing copies of the work; or (ii) permits for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work; or (iii) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright, any infringing copies of the work; or (iv) by way of trade exhibits in public; or (v) imports into India, any infringing copies of the work. The aforesaid acts are also termed as secondary acts of infringement.

11. PW1 has also deposed that the Plaintiffs have developed, inter alia, the following computer programs that are applied and are used by various business establishments and home users, and includes, amongst others: a. Microsoft Windows 2000 Professional; b. Microsoft Office 2000 Professional; c. Microsoft Word 2000; d. Microsoft Windows 98; e. Microsoft Office 97 (Professional Edition); f. Microsoft Visual Studio 6.0, Enterprise Edition; g. Microsoft Visual Basic, Version 6.0 (Enterprise Edition); h. Microsoft Visual C++ 6.0 Enterprise Edition i. Microsoft Office XP Professional j. Microsoft Windows XP Professional k. Microsoft Office Professional Edition 2003 l. Microsoft Office Access 2007 m. Microsoft Office

Excel 2007 n. Microsoft Office Groove 2007 o. Microsoft Office OneNote 2007 p. Microsoft Office Outlook 2007 q. Microsoft Office PowerPoint 2007 r. Microsoft Office Project Professional 2007 s. Microsoft Office SharePoint Designer 2007 t. Microsoft Office Visio Professional 2007 u. Microsoft Office Word 2007 v. Windows Vista Ultimate The Court Certified Copies of the Original Copyright Registration Certificates for the software programs Microsoft Windows 2000 Professional, Microsoft Office 2000 Professional, Microsoft Word 2000, Microsoft Windows 98, Microsoft Office 97 (Professional Edition), Microsoft Visual Studio 6.0, Microsoft Visual Basic Version 6.0, Microsoft Visual C++ Version 6.0, Microsoft Office XP Professional, Microsoft Windows XP Professional, Microsoft Office Professional Edition 2003, Microsoft Office Access 2007, Microsoft Office Excel 2007, Microsoft Office Groove 2007, Microsoft Office OneNote 2007, Microsoft Office Outlook 2007, Microsoft Office PowerPoint 2007, Microsoft Office Project Professional 2007, Microsoft Office SharePoint Designer 2007, Microsoft Office Visio Professional 2007, Microsoft Office Word 2007, and Windows Vista Ultimate as owned by the Plaintiffs have been exhibited as Ex.P5, Ex.P6, Ex.P7, Ex. P8, Ex. P9, Ex. P10, Ex. P11. ,Ex. P12, Ex. P13, Ex. P14, Ex. P15, Ex. P16, Ex. P17, Ex.P18, Ex.P19, Ex.P20, Ex.P21, Ex.P22, Ex.P23, Ex.P24, Ex.P25 and Ex.P26.

12. PW1 has also deposed that the Plaintiffs suffer incalculable damage to their intellectual property rights and business on account of various forms of copyright piracy.

13. PW1 has also deposed that in the month of July 2010, the Plaintiffs received information that the Defendants were engaged in infringing Plaintiffs copyrights, trademarks and other intellectual property rights by carrying on the business of unauthorized Hard Disk Loading of the Plaintiffs software on the branded computer systems sold by the Defendant to his customers. The said unlicensed software, naturally, were not accompanied by any Original Media such as Original Software Installation CDs, Certificates of Authenticity (CoAs), End User License Agreements (EULA), User Instruction Manuals etc. that always accompany the sale of every genuine software of the Plaintiffs.

14. He has also deposed that in order to ascertain if the Defendants were indeed involved in such infringing activities, the Plaintiffs requisitioned the services of an independent investigator, Mr. Shubham Jain, who purchased a computer system from the Defendants on 29th July 2010, onto which pirated/unlicensed versions of the Plaintiffs software programs had been illegally loaded. Further, on 2nd August 2010, the computer system as purchased from the Defendants was examined by the Plaintiffs technical expert, Ms. Urmila Sahu. Detailed affidavit of the independent investigator and technical expert has been filed in the present proceedings.

15. On 2nd August 2010, plaintiffs technical expert, photographed the computer box and thereafter opened the said box and inspected the laptop computer system and took printouts (screen shots) of the directory of its hard disk. The printouts of the said directory clearly revealed the fact that following software programs of plaintiffs were present on the said laptop sold by defendants: Operating system: Microsoft Windows 7 Ultimate Registered to: Admin PC Registration No.:

00426. OEM-8992662-00400 Application Software: Microsoft Office 2007 (Access, Excel, Groove, Infopath, One Note, Outlook, Power Point, Publisher, Word) 16. Licensed to: Admin Product ID:

89388. 707-0441865-65343 The technical expert opined that the plaintiffs programs as contained on the hard disk of the Acer eMachines brand Laptop Computer System were unlicensed and/or pirated versions of the plaintiffs software programs.

17. PW1 has further deposed that since computer programs are as much an outcome of concentrated human skill, labor and ingenuity as any other copyrighted work, and since they are vital components of advanced information processing technology, it is imperative that the illegal trade activities of traders like the Defendant be strictly restrained and the dangerous growth of computer software piracy be stemmed. He has also deposed that the computer industry is a high investment industry - not only in terms of money but also in terms of the valuable time, skill and effort, which goes into the development of new and advanced computer programs and software. As such, the Plaintiffs like others engaged in

this industry, bank heavily upon the copyright protection afforded to their computer software in jurisdictions in which piracy and infringement of their works takes place.

18. PW1 has also deposed that the loss and damage incurred by the Plaintiffs on account of Defendants copying and illegally distributing copies of the Plaintiffs computer programs run into lakhs and lakhs of Rupees. Since it is difficult to quantify the exact monetary extent of losses, the Plaintiffs bases their claim of damages of Rs. 20 lakhs on one or more of the following factors: (i) Actual illegal profits earned by the Defendants from selling more computers loaded with pirated software programs of the Plaintiffs; and/or (ii) Actual revenue lost by the Plaintiffs due to loss of sales of original software arising out of the illegal/infringing activities of the Defendants. (iii) Damage to Plaintiffs enormous reputation and goodwill in the following manner: (a) The purchasing customers of the computers sold by the Defendants with pirated software of the Plaintiffs, will in all likelihood believe that such infringing practice of the Defendants is authorized by the Plaintiffs; (b) If the pirated copies of the Plaintiffs software programs ever fail or get corrupted or malfunction, the Defendants customers, in receipt of those programs, will accuse the Plaintiffs and their software products of being of poor quality. Pirated software is more prone to virus attacks and malfunctions for obvious reasons. (c) Such indiscriminate illegal duplication and distribution of Plaintiffs software programs by the Defendants would doubtlessly result in the tainting of the reputation and goodwill attached to the Plaintiffs famous trademark MICROSOFT and, consequently, in the erosion of the publics identification of this very strong mark with the Plaintiffs alone, thus diminishing its distinctiveness and prestigious connotations.

19. The plaintiffs have also filed affidavit of one Mr. B.K. Anand, PW-2, a Chartered Accountant with experience of over 4 decades. He has stated in his affidavit that he was approached by the plaintiffs attorneys to offer his advice on the computation of damages in the present case. After perusing the documents on record, the report of the investigators and other evidence in support of the defendants business activities, Mr. Anand has taken into consideration the facts which were put before him. He assessed the loss suffered by the plaintiffs in the

sum of Rs. 16,32,000/-, the basis whereof is contained in paragraph 8 and 9 of the affidavit.

20. The local commissioner has also filed his reports, wherein he has stated that on inspection conducted by him alongwith technical expert on laptop purchased by plaintiffs representative it was revealed that the laptop consisted of: (a) Window 7.0 Ultimate (b) Office 2007 Enterprise There was no certificate of authorization found in the computer system or any license thereof and further defendant No.1 was not able to show any license or certificate of authentication for said software. The second computer which was running at the shop of defendant comprised of following software: (a) Windows 98 (b) Office XP Pro (c) Visual Fox Pro There was no license nor there was any authenticity certificate found in said computer also.

21. Local commissioner sealed the newly purchased laptop by taping the box and after affixing his signature returned the same to defendants on Superdari. The computer already functioning was not seized although the inventory was prepared as the defendant expressed that it is the only available computer.

22. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record along with the affidavit by way of evidence which have been filed. Court Certified Copies of the Original Copyright Registration Certificates for the software programs as owned by the Plaintiffs have been exhibited as Ex.P5, Ex.P6, Ex.P7, Ex. P8, Ex. P9, Ex. P10, Ex. P11. ,Ex. P12, Ex. P13, Ex. P14, Ex. P15, Ex. P16, Ex. P17, Ex.P18, Ex.P19, Ex.P20, Ex.P21, Ex.P22, Ex.P23, Ex.P24, Ex.P25 and Ex.P26. The testimony of the witnesses has remained unchallenged and unrebutted. The plaintiff has been able to establish that the plaintiff is the owner of the copyright in its computer programme within the meaning of Section 2(ffc) of the Copyright Act, 1957 and is included in the definition of literary work as per Section 2(o) of the said Act. Section 17 of the Copyright Act, 1957 gives exclusive rights to the plaintiff to exploit all rights emanating from the ownership of its copyright, as set out in Section 14 of the Copyright Act.

23. On the basis of the documents placed on record plaintiffs have established that the defendants have violated the copyright of the plaintiff by carrying on

business of Hard Disk Loading i.e. pre-loading various software programs of the plaintiffs on to the computers sold by the defendants.

24. In view of the aforesaid, the plaintiffs are entitled to a decree of permanent injunction in terms of prayer a of paragraph 39 of the plaint.

25. The last aspect to be considered is the issue of damages on account of infringement of copyrights of the plaintiff and also for loss of sales and reputation. Defendants have deliberately stayed away from the present proceedings as a result of which an enquiry in the accounts of defendants for determination of charges could not take place. The affidavit of Mr. B.K. Anand, Chartered Accountant is accepted as evidence without challenge thereto. Based on the assumption of the sale by defendants of 48 computers in 1 year, the potential revenue that the defendants could have earned by distribution of licensed copies of the plaintiffs software, Mr. Anand has worked out damages amounting to Rs. 16,32,000/-.

26. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 13.08.2010 is confirmed and the suit is decreed in favour of the plaintiff and against the defendants. Plaintiff is also entitled to damages to the tune of Rs.16.0 lacs.

27. Decree sheet be drawn up accordingly. (G.S.SISTANI) JUDGE May 02, 2014
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