

Symantec Software Solutions Pvt Ltd & Ors vs.ms. R. Modi & Ors

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Court : Delhi

Decided On : Oct-17-2016

Appellant : Symantec Software Solutions Pvt Ltd & Ors

Respondent : Ms. R. Modi & Ors

Advocate for Def. : Mr. C.M. Lall, Ms. Nancy Roy, Ms. Adya Khanna

Advocate for Pet/Ap. : Mr. Pravin Anand, Ms. Krutika Vijay, Mr. Aashish Somasi, Mr. Ravin Galgotia

Judgement :

% + *IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

17. h October, 2016. CS(OS) No.1842/2008 SYMANTEC SOFTWARE SOLUTIONS PVT. LTD. & ORS Plaintiffs Through: Mr. Pravin Anand, Ms. Krutika Vijay, Mr. Aashish Somasi and Mr. Ravin Galgotia, Advs. Versus Ms. R. MODI & ORS. Defendants Through: Mr. C.M. Lall, Ms. Nancy Roy and Ms. Adya Khanna, Advs. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW IA No.10065/2016 (of plaintiffs u/O XIV R-5 CPC) & IA No.10917/2016 (of defendants u/O XVI R-1&2 CPC and Chapter XI Rule 1 of Delhi High Court (Original Side) Rules, 1967) IA No.10065/2016 first came up before this Court on 19th August, 1. 2016, when the counsel for the defendants appeared on advance notice and the following order was passed: 1. The plaintiffs/applicants seek shifting of onus of the following issue:-

"Whether the present suit has been instituted by a competent and/or a duly authorised person?. OPD from that placed on the defendants to that on the plaintiffs. CS(OS) No.1842/2008 Page 1 of 26 2. The counsel for the defendants appearing on advance notice states that the application is a guise to get over production of Mr. Achuthan Sreekumar of the plaintiffs summoned as a witness by the defendants and which order was challenged by the plaintiffs by way of FAO(OS) No.171/2015 and which was dismissed on 1st August, 2016. The counsel for the plaintiffs/applicants on enquiry 3. whether the plaintiffs/applicants, in the event of this application being allowed, seek cancellation of the summons already issued for appearance of Mr. Achuthan Sreekumar states that the plaintiffs/applicants may do so. It is further contended that the defendants in their application for summoning of Mr. Achuthan Sreekumar had stated only the reason of onus of the aforesaid issue being on the defendants and since Mr. Achuthan Sreekumar is the signatory of the plaint. The counsel for the defendants contends that the 4. defendants had applied for summoning of as many as seven officials of the plaintiffs as witnesses to prove the aforesaid issue and to prove the following issues:-

"(i) Whether the plaintiffs are guilty of entrapment. OPD (ii) Whether the suit is motivated in as much as it has been filed with malicious intent to discredit the defendants?. OPD and of which the defendants were permitted to summon only three; though the defendants in their application for summoning had given only the reason to prove the issue about valid institution of the suit against the name of Mr. Achuthan Sreekumar but now that the defendants have been permitted to summon only three witnesses, if Mr. Achuthan Sreekumar also does not appear, the defendants would be prejudiced. As per my understanding of law, the defendants having 5. summoned Mr. Achuthan Sreekumar of the plaintiffs as a witness for specific purpose of examining him to prove that he was not authorised to institute the suit or to sign and verify the CS(OS) No.1842/2008 Page 2 of 26 plaint, would not be entitled to examine him on any other aspect. The defendants, if now desire to examine Mr. Achuthan Sreekumar on any other aspect, will have to apply therefor. The counsel for the defendants states that the application 6. in that regard will be filed within a week. It is deemed appropriate to consider both applications 7. together.

8. List on 1st September, 2016. 2. Thereafter, the defendants filed IA No.10917/2016 and opportunity sought to file replies to both the applications was granted and arguments on both the applications heard on 22nd September, 2016 (IA No.10065/2016 erroneously remained to be mentioned in the said order) and orders reserved.

3. As would be obvious from the aforesaid, the defendants have no objection to IA No.10065/2016 of the plaintiffs, seeking to have the onus changed of the issue framed in the suit of valid institution thereof from that as placed on the defendants to that on the plaintiffs. The only objection of the defendants thereto was on the ground of the plaintiffs by seeking so inter alia dispensing with the production of the official of the plaintiffs summoned by the defendants as a witness and in which regard the defendants have already filed the other application; thus IA No.10065/2016 of the plaintiffs is entitled to be allowed, keeping open the opposition by the defendants thereto for consideration while deciding the other application. CS(OS) No.1842/2008 Page 3 of 26 4. I may in this regard also notice that the onus of an issue as to the valid institution of the suit and signing and verification of the plaint by a duly authorized person ordinarily has to be on the plaintiff only, inasmuch as it is only the plaintiff who can lead affirmative evidence of the valid institution of the suit and signing and verification of the plaint by a duly authorized person on behalf of the plaintiff or of ratification of the action of institution of the suit and signing and verification of the plaint even if without authority at the time of institution and the defendant can only lead evidence in the negative in this regard. The order dated 26th October, 2009 of framing of issues in the suit does not give any reasons for placing the onus of the said issue on the defendants. The language of the issue framed in this regard also suggests that the placing of onus thereof on the defendants is a typographical mistake. If the onus of the issue had been intended to be on the defendants, the language of the issue would have been whether the suit has not been instituted by a competent and/or duly authorised person?. However, I may notice that where the Court finds that the objection by the defendant/s as to the valid institution of the suit and signing and verification of the plaint is vexatious and mala fide, the Court may either place the onus of the issue on the defendant/s or frame the said issue with onus thereof on the plaintiff/s but CS(OS) No.1842/2008 Page 4 of 26 specifying the costs which

the defendant/s will have to pay to the plaintiff/s, in the event of the said issue being decided in favour of the plaintiff/s.

5. Thus, IA No.10065/2016 of the plaintiffs under Order XIV Rule 5 of Code of Civil Procedure, 1908 (CPC) is allowed on above terms and the onus of Issue No.4 framed on 26th October, 2009, which is as under: 4. Whether the present suit has been instituted by a competent and/or a duly authorized person?. OPD is shifted from that on the defendants to that on the plaintiffs.

6. The counsel for the plaintiffs on enquiry stated that the plaintiffs, as a result thereof, do not want to examine any additional witness.

7. The defendants in their IA No.10917/2016 have inter alia stated: (i) that the plaintiffs evidence before the Commissioner appointed for recording evidence in this suit was concluded on 5th April, 2011; (ii) that the defendants filed their list of witnesses on 3rd November, 2011 and applied for summoning of the seven officials of the plaintiffs; (iii) that on receipt of summons by the said witnesses, the plaintiffs filed an application before this Court seeking cancellation of the CS(OS) No.1842/2008 Page 5 of 26 summons issued to the said witnesses and this Court vide order dated 27th January, 2015 partially allowed the said application of the plaintiffs, permitting summoning of only three of the said seven witnesses; (iv) that the plaintiffs preferred FAO(OS) No.171/2015 thereagainst which was dismissed vide order dated 1st August, 2016; (v) that though vide order dated 27th January, 2015 supra, the defendants had been permitted to summon only three of the seven officials of the plaintiffs whom the defendants originally intended to summon but the defendants did not impugn the said order dated 27th January, 2015 in the hope that they would be able to extract the relevant information from Mr. Achuthan Sreekumar during his cross- examination, as the said Mr. Achuthan Sreekumar had instituted the suit and signed and verified the pleadings in the plaint on the basis of his knowledge; (vi) however the plaintiffs filed IA No.10065/2016 supra to wriggle out of the order dated 1st August, 2016 supra of the Division Bench; (vii) that the defendants in their application for summoning of aforesaid seven witnesses, against the name of Mr. Achuthan CS(OS) No.1842/2008 Page 6 of 26 Sreekumar gave the reason of seeking to examine him only on the issue qua valid

institution of the suit and signing and verification of the plaint in the hope that the defendants would be able to prove their defence from the other witnesses sought to be summoned but which witnesses have now been denied; (viii) that none of the witnesses produced by the plaintiffs have been able to answer questions regarding, who instructed investigations to be conducted into the activities of the defendants, who permitted / authorised Mr. Anil Nayar, the investigator to record the telephonic conversation with the defendant No.1 Ms. Rupali Modi, who instructed Mr. Anil Nayar to misrepresent to the defendant No.1 Ms. Rupali Modi that he was a consultant and representative of an overseas company; (ix) that the business model of the plaintiffs and Business Software Alliance (BSA) is that by filing suits as the present one and insisting on huge damages and costs and forced sale of software, BSA as an organization makes huge profits which are then shared with the plaintiffs; CS(OS) No.1842/2008 Page 7 of 26 (x) that it is only with the intention of hiding the dubious activities of the plaintiffs and BSA, that the plaintiffs are not wanting to produce Mr. Achuthan Sreekumar as a witness; (xi) that BSA is a profit making entity which runs its operations by filing litigations such as the present suit and the profits made from such litigations are shared by the companies like the plaintiffs herein; (xii) that out of the seven officials of the plaintiffs sought to be examined by the defendants, only three were vide order dated 27th January, 2015 permitted to be examined and now the plaintiffs out of those three also want to evade production of Mr. Achuthan Sreekumar for examination / cross-examination; (xiii) that since the defendants have been denied summoning of other witnesses, the defendants be permitted to examine / cross-examine Mr. Achuthan Sreekumar on the issues framed vide order dated 4th October, 2010 as well as Issue No.4 framed vide order dated 9th October, 2009 (sic for 26th October, 2009); (xiv) that the defendants in the alternative want summoning of Mr. Keshav S. Dhakad, Mr. Tarun Sawhney, Ms. Karishma Gandhi and Mr. Inzamuni of the plaintiffs for examination / cross-examination. CS(OS) No.1842/2008 Page 8 of 26 8. It is necessary to give the basic structure of the pleadings to appreciate the aforesaid pleas in the application aforesaid of the defendants.

9. The five plaintiffs namely Symantec Software Solutions Private Ltd., Symantec Corporation, Autodesk India Pvt. Ltd., Autodesk Inc. and Adobe Systems

Incorporated have instituted this suit against Ms. R. Modi, Ms. K. Modi and Mr. Nirav Modi carrying on business as Directors of elogic Solutions India Pvt. Ltd. (impleaded as defendant No.4) for permanent injunction to restrain the said defendants from infringing the software of the plaintiffs and/or from using the pirated / counterfeit / unlicensed software of the five plaintiffs and for ancillary reliefs inter alia pleading (a) that all the five plaintiffs have joined in this action because the right to relief arises out of the same act or transaction of the defendants and if separate suits were instituted against the defendants, common questions of law and fact would arise; (b) that the suit on behalf of the plaintiff No.1 Symantec Software Solutions Private Ltd., New Delhi was instituted and plaint signed and verified by Mr. Achuthan Sreekumar and the suit on behalf of the other plaintiffs was instituted and the plaint signed and verified by Mr. Anand Banerjee; (c) that the defendant No.4 elogic Solutions India Pvt. Ltd. appears to be connected with a United States based entity named elogicTech CS(OS) No.1842/2008 Page 9 of 26 Solutions Inc. and claimed to provide services in the field of 2D / 3D Animation and Computer Aided Designs in addition to drafting solutions to the global architecture, engineering and construction industry; (d) that in July, 2008, the plaintiffs received information through BSA of usage of huge unlicensed / pirated software programs of the plaintiffs by the defendants on their computer systems; (e) that BSA is a non-profit association of global software companies including the plaintiffs formed to fight software piracy; (f) that the plaintiffs engaged the services of an independent investigator Mr. Anil Nayar to carry out an investigation of the activities of the defendants; (g) that on 6th August, 2008, the investigator made a phone call to the office of the defendant No.4 elogic Solutions India Pvt. Ltd. and spoke to the defendant No.1 Ms. Rupali Modi and informed her that he represented an overseas client who had commissioned him to source out an Indian Company which could develop and provide architectural drawings; (h) that the defendant No.1 Ms. Rupali Modi informed the investigator that elogic Solutions India Pvt. Ltd. could provide the desired services and a visit by the investigator to the office of elogic Solutions India Pvt. Ltd. was arranged; (i) that on 7th August, 2008, the investigator visited the office of elogic Solutions India Pvt. Ltd. and Ms. Rupali Modi, to satisfy him of being CS(OS) No.1842/2008 Page 10 of 26 possessed of sufficient infrastructure to handle the nature of the work

involved, informed the investigator about the number of computer systems and the type of software programs that elogic Solutions India Pvt. Ltd. was using; (j) that the said discussions confirmed use by the defendants of pirated / unlicensed versions of the software programs of the plaintiffs.

10. The suit was entertained and vide ex-parte ad-interim order dated 3rd September, 2008, the defendants restrained from using in any computer related activities or otherwise in any other manner any pirated software programs of the plaintiffs or any software programs of the plaintiffs, without licence and Commissioners appointed to visit the premises of the defendants and to collect information of infringement.

11. The defendants have contested the suit by filing a written statement inter alia pleading: F The defendants reserve their right to institute a separate tortuous action against the so called investigator and the plaintiffs in their personal capacity for tortuous liability for infringing the privacy of the defendants by adopting illegal means and to entice the defendants for the purposes of entrapment. The defendant is also advised that the credentials of the investigator, Mr. Anil Nayar are extremely doubtful to say the least. According to reports Mr. Nayar was found giving away key national secrets to CS(OS) No.1842/2008 Page 11 of 26 foreign security firms during his tenure with the Indian Army special forces. The defendants have reliably learnt that Mr. Nayar was thereafter removed from his last employment as he had committed forgery. The defendants are further advised that in all his previous employments, the said investigator has been removed in disgrace. Certain select documents are being filed in these proceedings. It is, therefore, not at all surprising that the plaintiffs used the services of Mr. Nayar to entrap the defendants and implicating them in the present action before this Honble Court. It is also noteworthy that, in the transcripts of the conversation as annexed by the plaintiffs, the investigator called his alleged, and fabricated, client to be exact replica of Fluor Daniel It is paramount to mention that the said Fluor Daniel company is an engineering and construction corporation. By falsely terming his company to be a replica of Fluor and repeatedly using other means to entrap the defendants, the plaintiffs are trying to make out a case on those copies of the software programmes which the defendants have made genuinely for their back

up purposes. G. It is humbly submitted that the present suit is not only an abuse of process but also a prime example of suppression and concealment before this Honble Court for seeking an ex-parte injunction by using the following means:-

"(a) Harassing the defendants by subjecting them to the proceedings in Delhi whereas the entire, though alleged, CS(OS) No.1842/2008 Page 12 of 26 cause of action has arisen in Hyderabad and plaintiff No.3 has an authorised dealer in Hyderabad. It is also pertinent to mention that the other plaintiffs, except, allegedly, plaintiff No.1, do not even have office in India. (b) The plaint, on behalf of plaintiff Nos.2 to 5, has been signed by verified by a lawyer who, as per the information received by the defendants, is a partner of the law firm representing the plaintiffs. (c) The owner of the copyright in the programmes has not been made a party and the suit is liable to be dismissed since it is a statutory requirement that the copyright owner alone can bring a civil action. (d) The person acting on behalf of the plaintiffs as the investigator not only used means to entrap the defendants, upon the information received by the defendants, they shall be instituting a civil action against him and the plaintiffs and all of their directors in personal capacity for infringing the privacy of the defendants and subjecting them to frivolous prosecution. (e) The suit is grossly undervalued. The plaintiffs by filing the present suit have played fraud with this Honble Court by alleging that the series of transaction is same. It was so alleged by the plaintiff to save the court fees for each plaintiff had they instituted a separate suit, if there was any cause of action, against the defendants. Similarly, the law CS(OS) No.1842/2008 Page 13 of 26 is well settled that the court fee is to be ad valorem to the relief claimed. As per plaint, the alleged loss suffered is Crores of rupees. It is perverse and totally arbitrary to value the present suit as Rs.2 million though claiming the loss suffered to be ten times than that. The plaint is liable to be rejected on this ground alone.

12. In the issues first framed on 26th October, 2009, no issue on the aforesaid pleas of the defendants in the written statement was framed. The defendants applied under Order XIV Rule 5 CPC and vide order dated 4th October, 2010, the following additional issues were framed: (a) Whether the plaintiffs are guilty of entrapment?. OPD (b) Whether the suit is motivated in as much as it has been filed with malicious intent to discredit the defendants?. OPD 13. The defendants sought to summon seven officials of the plaintiffs as witness in their defence

evidence and to which objection was taken, as aforesaid, by the plaintiffs. Of the said seven witnesses, the plaintiffs did not object to the production of Mr. Anil Nayar aforesaid. Vide order dated 27th January, 2015 (i) Mr. Achuthan Sreekumar was permitted to be examined observing that his testimony was necessary to decide the institution of the suit by a duly authorised person since issue in that regard had been framed CS(OS) No.1842/2008 Page 14 of 26 and onus thereof was on the defendants and the plaintiffs had chosen not to produce him; (ii) Ms. Rohini Boez was permitted to be examined observing that the plaintiffs also in their list of witnesses though had cited her but not examined her and PW-2 Gaurav Shankar examined by the plaintiffs had deposed that the said Ms. Rohini Boez had received information regarding the alleged use of unlicensed pirated software of the plaintiffs by the defendants and in these circumstances she is a relevant witness; (iii) Mr. Inzamuni sought to be examined on the ground that PW-1 Ashwin Mehta had named him was not permitted to be summoned by the defendants finding that no specific role had been attributed to him by PW-1 Ashwin Mehta; (iv) Mr. Keshav S. Dhakad and Mr. Tarun Sawhney sought to be examined by the defendants again, on the ground of their names having found mention in the testimony of PW-4 Vinish Mehra, were not permitted to be summoned, as the defendants had failed to disclose as to how their examination was relevant to the controversy in the suit; (v) Ms. Karishma Gandhi sought to be examined by the defendants on the ground of having been named by PW-3 Ms. Tanu Arora was also not permitted to be summoned again because the defendants were unable to satisfy the relevance thereof. CS(OS) No.1842/2008 Page 15 of 26 14. As aforesaid, the plaintiffs appealed against examination permitted of Mr. Achuthan Sreekumar and Ms. Rohini Boez and which appeal was dismissed inter alia holding: 12. Now, if Achuthan Sreekumar has instituted the plaint and verified the pleadings for and on behalf of plaintiff No.1, notwithstanding Tanu Arora having been examined by the plaintiffs, who gave the authorization to Achuthan Sreekumar, he would be a relevant witness keeping in view the onus of the issue being cast upon the defendants, thereby permitting the defendants to summon him as the witness. He has not only signed the plaint but has even verified the same and the basis of the verification is the knowledge of Achuthan Sreekumar to the contents of paras 1 to 49 of the plaint. It is trite that a knowledge of a person lies in

the brain and the veracity of the knowledge can be established by examining the said person alone and no one else.

13. As regards Rohini Boez, notwithstanding the testimony of Gaurav Shankar and his cross-examination, we find that she had been cited as a witness by the plaintiffs and thus this would be a good reason for the defendants not to include her name in the original lists of witnesses filed. Upon the plaintiffs giving her up as a witness, the defendants became entitled to summon her as an additional witness. The justification to examine her has been given by the learned Single Judge, and we adopt the same. 15. The counsel for the defendants argued (a) that all the witnesses examined by the plaintiffs shied away from taking the responsibility of taking the decision for the institution of the suit; (b) that Mr. Achuthan Sreekumar has signed the replication also as constituted attorney of all the CS(OS) No.1842/2008 Page 16 of 26 plaintiffs; (c) that Ms. Tanu Arora examined by the plaintiffs also in reply to Question No.1 in her cross-examination held on 4th January, 2011 deposed that Mr. Achuthan Sreekumar had been briefed in the matter and had in reply to Questions No.23 & 24 deposed that there is complete transparency between BSA and its members and all members have access through all the information whenever required.

16. Per contra, the counsel for the plaintiffs (A) referred to para 18(a) of Man Kaur Vs. Hartar Singh Sangha (2010) 10 SCC512 to contend that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction and where the entire transaction has been handled by an attorney- holder, necessarily the attorney-holder alone can give evidence in regard to the transaction; (B) contended that DW-1 Ms. R. Modi in reply to Question No.51 during her cross-examination on 21st May, 2014 evaded to reply about multiple software on each computer having been found by the Court Commissioner appointed and in reply to Question No.33 could not show any licence and thereby admitted to piracy; (C) stated that the Court Commissioners appointed in the suit have sealed 79 computer systems and each of such computer systems was found to have multiple pirated software. CS(OS) No.1842/2008 Page 17 of 26 17. The counsel for the defendants in rejoinder pointed out to the verification of the plaint and the

replication of Mr. Achuthan Sreekumar based on his knowledge.

18. I however enquired from the counsel for the defendants, as to what was the plea of the defendants of entrapment on which the defendants are intending to examine the officials aforesaid of the plaintiffs. In my view, a plea of entrapment which can constitute a defence in an action for infringement can be, where the plaintiff has created circumstances for the defendant, either to make an admission of being in possession of infringing software or to, at the time of surprise inspection by the Commissioners appointed by the Court, being in possession of infringing software, say by providing to the defendant infringing software for carrying out some work or by deleting parts of conversation / correspondence preceding or succeeding the admission of being possessed of infringing software or in some other such manner and in which facts the defendant can defend the suit by pleading that they would not have made the admission of piracy of software or would not have been found to be possessed of the pirated software but for such entrapment by the plaintiffs. However, that is not the plea here. The plea of the defendants is that the investigator Mr. Anil Nayar engaged by the CS(OS) No.1842/2008 Page 18 of 26 plaintiffs approached the defendants pretending to act on behalf of some client which was exact replica of Fluor Daniel and on the said pretext visited the offices of the defendants and thereby became privy to the affairs of the defendants.

19. I do not see any wrong therein and do not find the same to constitute a plea of entrapment on which a suit for infringement of copyright in software programs can be defended. Use of pirated / infringement of, software programs is generally shrouded in secrecy with those indulging therein being highly qualified and literate being well aware of the illegality thereof taking all precautions and measures to avoid detection thereof. Without those claiming copyright in the software programs being infringed resorting to means as adopted by the plaintiffs and their investigators to assure themselves, before initiating legal action, of piracy/infringement, it would be virtually impossible for them to impregnate the offices and places and affairs of infringers. The infringers will never, on straight questioning, give straight answers. At the same time the owners / holders of copyright in software programs, if rush to the Courts without fully satisfying

themselves of the defendant indeed indulging in infringement and without collecting proof thereof to establish infringement in Court, may be accused of and become CS(OS) No.1842/2008 Page 19 of 26 liable for malicious prosecution or frivolous litigation and costs and consequences thereof. The Division Bench of this Court in Autodesk Inc. Vs. A.V.T. Shankardass AIR2008 Delhi 167, concerned with propriety of ex parte appointment of Court Commissioner in cases of software piracy held that in such cases an element of surprise is of critical importance and necessary and issuance of notice would result in effacement of entire incriminating evidence. It was further held that where the Court is satisfied that the party is not able to produce the desired evidence for reasonable circumstances, it may assist a party by appointing a Court Commissioner to get the evidence. It was further held that service of notice in such cases could result in , the movement of the computer system or infringing software to unknown destination leaving no surviving evidence, thereby causing grave prejudice to the plaintiff. In fact the Division Bench, while laying guidelines on the subject observed that it may not be always possible for a plaintiff to obtain any admission by employing decoy customers and gaining access to defendants premises and that any such attempt also inheres in it the possibility of disappearance of the pirated software/incriminating evidence in case the decoy customer is exposed and thus visit by a decoy customer or investigator is not to be insisted upon as pre-condition, thereby legalizing to CS(OS) No.1842/2008 Page 20 of 26 what objection is being taken by the defendants in the present case. The said view was followed by another Division Bench in Rajeev Kumar Vs. Microsoft Corporation MANU/DE/1213/2014.

20. The counsel for the defendants then contended that the plaintiffs and BSA indulged in a policy of picking and choosing the person/s against whom the suit/s are to be filed and thereby coerce the person/s who are selected and targeted for action to purchase software at much higher price than prevalent.

21. BSA is not a party to the present suit. Thus, no allegation against BSA in its absence can be entertained.

22. As far as such allegations against the plaintiffs are concerned, even if it were to be believed that the plaintiffs have chosen not to litigate with others, also indulging in piracy / infringement of plaintiffs software, the same does not constitute a defence for the defendants, if guilty thereof. No negative equality, as is the settled principle, can be claimed. Even otherwise, if the volume of piracy / infringement of copyright in software is on a mammoth scale, as is suggested by the counsel for the defendants, nothing wrong can be found in the plaintiffs finding themselves unable to initiate litigations against each and every infringer and initiating litigations against CS(OS) No.1842/2008 Page 21 of 26 only such of the infringers, action whereagainst would send a message to the infringers in general and/or yield substantial benefit to the plaintiffs.

23. No justification for either of the aforesaid queries having been given by the counsel for the defendants, Mr. Achuthan Sreekumar or any of the other official of the plaintiffs cannot be permitted to be examined by the defendants to prove the additional issues framed on 4th October, 2010. Significantly, the defendants have not made any counter claim for damages against the plaintiffs. If the plaintiffs fail to prove the cause of action with which suit has been instituted, the suit will be dismissed and the question of costs if any to be awarded to defendants against plaintiffs shall be adjudicated. Conversely, if the plaintiffs establish the cause of action, the question of the suit being motivated or having been filed with malicious intend to discredit the defendants would not arise.

24. A party to a litigation is not entitled to summon or examine a witness without satisfying the Court of the relevance of the witnesss testimony to the lis for adjudication. The defendants here appear to have gone about the exercise without this thought process. The court is not to allow its machinery to be put into motion and to allow summoning of witnesses without applying its mind to the relevancy of the testimony. Litigants cannot expect the Court CS(OS) No.1842/2008 Page 22 of 26 to apply its mind only at the final stage of decision making and be a silent spectator before that. By that time, damage to the other party and to person unnecessarily summoned and examined as witness may already be done and which cannot always be compensated with costs. Moreover, if the same were permitted, the Court will not be able to decide the lis within reasonable time or

within the time stipulated under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and to which genre this suit belongs. This Court, in *Amitabha Sen Vs. Sports World International Ltd* 2008(101) DRJ528 also held that a party who seeks for a prayer to the Court to issue summons to a witness, must reveal to the Court the purpose for which the witness is proposed to be summoned. Similarly in *Union of India Vs. Orient Engineering & Commercial Co. Ltd.* (1978) 1 SCC10 also it was held that it is not right that everyone who is included in the witnesses list is automatically summoned.

25. I had in fact also enquired from the counsel for the defendants, as to what purpose summoning by the defendants of the officials of the plaintiffs would serve and whether the defendants had been permitted to cross-examine the said witnesses. Else, a defendant summoning the plaintiff as his CS(OS) No.1842/2008 Page 23 of 26 witness cannot, in law, be permitted to cross-examine him, without the permission of the Court.

26. Both counsels appeared to have not considered the said aspect and it appears that the defendants, though summoning the officials of the plaintiffs as their own witnesses, had before the Commissioner proceeded to cross-examine them without any objection.

27. The counsel for the defendants of course in response thereto cited the judgment of the Division Bench of the High Court of Patna in *Sri Awadh Kishore Singh Vs. Sri Brij Bihari Singh* AIR1993 Pat. 122 holding that no provision had been brought to the notice of the Court in that case of any of the party being debarred from examining its adversary as a witness on its behalf. Attention was also invited to the judgment of the Gujarat High Court in *Vashram Daya Harijan Vs. Bijal Deva Harijan* (1971) 12 GLR40 though noticing the condemnation by the Courts of the practice of calling the opponent as own witness allowing the same in the facts of that case.

28. This Court, in *Amitabha Sen supra*, after examining a host of case law including *Sri Awadh Kishore Singh supra* held that though there is no bar to a party seeking the summoning of another party to the same suit as his witness, it is

also clear that such an act is unusual and that it should only be CS(OS) No.1842/2008 Page 24 of 26 permitted if the application for summoning the opposite party is bona fide and is not vexatious or an abuse of the process of the Court and in exceptional circumstance. Finding the summoning of the sole shareholder of the defendant in that case to be with the object of putting some pressure on him and not in the interest of justice, the application for summoning was rejected. Else, right since Mahunt Shatrugan Das Vs. Bawa Sham Dass AIR 1938 PC59 the practice of calling the defendant as a witness to give evidence on behalf of the plaintiff has been condemned.

29. Supreme Court, in Sat Paul Vs. Delhi Administration (1976) 1 SCC727 and Division Bench of this Court in State Vs. Ramesh Chand ILR (1974) 1 Del 129 held that though it is not necessary that before a party calling a witness can cross-examine him, the witness should be first declared hostile and that the Court has unfettered discretion to allow a counsel to put questions in the nature of cross-examination to his own witness during examination-in-chief but before putting such questions leave of Court should be asked for and obtained.

30. In the facts of the present case, I find no reason to allow the defendants to examine Mr. Achuthan Sreekumar of the plaintiffs for deposing on behalf of the defendants on the issue/s on which he is sought to CS(OS) No.1842/2008 Page 25 of 26 be examined. Needless to state that if the defendants on their own evidence have made out any case as pleaded by them and in opposition to which evidence led by the defendants, it is found that it was essential for Mr. Achuthan Sreekumar of the plaintiffs to appear as a witness, adverse inference shall be drawn against the plaintiffs, not only for having not produced the said Mr. Achuthan Sreekumar but also for having opposed his production by the defendants.

31. Thus, IA No.10917/2016 of the defendants is dismissed.

32. Resultantly, Mr. Achuthan Sreekumar of the plaintiffs summoned by the defendants to not appear as a witness.

33. The observations hereinabove contained are only for the purpose of the decision of the applications aforesaid and not to have any bearing at the time of final hearing of the suit. No costs. RAJIV SAHAI ENDLAW, J.

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