

Dassault Systems S.A. and anr. Vs. Sphinx Worldbiz Lim.

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SooperKanoon Citation : sooperkanoon.com/711183

Court : Delhi

Decided On : Oct-06-2009

Reported in : 2009(41)PTC759(Del)

Judge : Manmohan Singh, J.

Acts : [Specific Relief Act, 1963](#) - Sections 41

Appeal No. : I.A. Nos. 15132/2008 and 6823 and 6824/2009 in C.S. [OS] No. 2569/2008

Appellant : Dassault Systems S.A. and anr.

Respondent : Sphinx Worldbiz Lim.

Advocate for Def. : V.P. Ghiraiya, Adv.

Advocate for Pet/Ap. : Sanjay Jain, Sr. Adv.; Prashant Gupta an; Priya Rao, Adv

Judgement :

Manmohan Singh, J.

1. By this order, I shall dispose of three applications bearing I.A. No. 15132/2008 filed by the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code?') and I.A. No. 6823/2009

and I.A. No. 6824/2009 filed by the defendant under Order XXXIX Rule 4 and Order IX Rule 2 of the Code for vacation of the ex parte ad interim order and for dismissal of the suit due to non-filing the process fee and registered A/D covers as per the directions of the court respectively.

2. The brief facts of the case are that the plaintiffs filed the present suit for permanent injunction to restrain copyright and trademark infringement, delivery up and rendition of accounts etc., inter alia, praying that a decree for permanent injunction be passed against the defendant, its principal officers, directors, agents, franchisees, servants and all others acting for and on its behalf from directly or indirectly cracking, copying, reproducing, storing, installing and/or using pirated CATIA software program of plaintiffs and its various versions without licence and/or providing educational, certification courses and/or engineering services in relation thereof, thereby amounting to infringement of copyright in plaintiff No. 1's computer programmes/software titles.

3. The suit and interim applications were listed before this Court on 10.12.2008 when in I.A. No. 15132/2008 (under Order XXXIX Rules 1 & 2 of the Code), the court passed an ex parte ad interim injunction against the defendant, its agents, representatives, servants and assigns restraining them from using the software of the plaintiffs with respect to CATIA software programme without obtaining a valid licence from the plaintiffs. One week's time was granted for compliance under Order XXXIX Rule 3 of the Code.

4. In another application filed under Order XXVI Rule 9 of the Code being I.A. No. 15133/2008, the court appointed a local commissioner to seize and seal the computers, CPUs, compact discs and other storage media, which were found to contain unlicensed/pirated versions of the plaintiff's softwares and release the same on Superdari to the defendant with a direction to produce the same before this Court as and when directed.

5. In compliance with the said order, the local commissioner visited the premises of the defendant on 15.12.2008 and filed his report stating therein that 'the software found in the server CPU and one of the hard discs was unlicensed and pirated and the server CPU and the hard discs also had cracks for the purpose of

installing the software of the plaintiff company without genuine licences. Two codec CDs of the software of the plaintiff company were also found and three CDs containing pirated software and cracks of the plaintiff company's software were seized from the premises of the defendant but the same went missing along with one of the external hard drive and one Pen drive as well.'

6. Thereafter the defendant filed two applications i.e. I.A. No. 6823/2009 under Order XXXIX Rule 4 of the Code for vacation of ex parte ad interim order mainly on the ground that the provision of Order XXXIX Rule 3 of the Code has not been complied by the plaintiff and second application filed under Order IX Rule 2 of the Code being I.A. No. 6824/2009 on the reason that the plaintiff did not file the process fee and registered AD cover as per order dated 10th December, 2008 and since the plaintiff is enjoying the ex parte ad interim injunction, therefore, the suit is liable to be dismissed.

7. In other application filed under Order IX Rule 2 of the Code of Civil Procedure being I.A. No. 6824/2009, the contention of the defendant is that on 06.03.2009 the defendant made the enquiries from the registry of this Court in order to find out about the filing of report of the local commissioner and the learned Counsel for the respondent has also filed Vakalatnama on 12.03.2009. The counsel has also inspected the court file on 23.03.2009 from where he noted that the plaintiffs did not file process fee and registered A/D covers for issuance of summons and notice in the main suit as well as in the interim application under the provisions of Order IX Rule 2 of the Code.

8. Both these applications have been contested by the plaintiff and replies have also been filed by the plaintiffs.

9. The defendant has also opposed the application filed under Order XXXIX Rules 1 and 2 of the Code filed by the plaintiff mainly on the ground that the plaintiffs have concealed various material facts from this Court by not disclosing the certificate of copyright. Further the plaintiffs are not entitled to an injunction under Section 41[h] of the [Specific Relief Act, 1963](#), and this Court has no territorial jurisdiction to try the present suit.

10. It is submitted that the defendant has taken the licences from Pacific Infratech Pvt. Ltd. for training and project execution as per defendant's agreement signed between Pacific and Sphinx dated 25.03.2008 enforced upto the end of December 2008, therefore, the defendant is authorised to resell the plaintiffs' software for supplying CATIA V5 R17 software to the defendant for its project work. It is averred that on 22.02.2008, the defendant's Managing Director, Mr. Narender Singh Surana had again initiated talks related to withdrawal of 4 licenses and 85 softwares, which ZIGMA had purchased for Rs. 96 lacs in 2001.

11. As regards, I.A. No. 6823/2009 filed under Order XXXIX Rule 4 is concerned, the contention of the learned Counsel for the plaintiffs is that the complete set of paper book was served to the defendant during the course of the proceeding conducted by the Local Commissioner on 15th December, 2008 to 17th December, 2008. Learned Counsel for the plaintiffs has shown the covering letter as well as the affidavit of compliance. It appears from the record that the affidavit of compliance of Order XXXIX Rule 3 was filed on 18th December, 2008 by an affidavit of Mr. Prashant Gupta, Adv. However, it also appears that by letter dated 16th December, 2008 the papers were served upon the defendant on 17th December, 2008. Since one week's time was granted to the plaintiffs to make compliance under the provision of Order XXXIX Rule 3 it appears that the complete set of papers have been supplied to the defendant personally on 17th December, 2008 under the signatures of the defendant, therefore, there is no force in the submission of the learned Counsel for the defendant. However, it appears from the record that the affidavit of the said compliance was filed on 18th December, 2008 which is delayed by one day only. The contention of the defendant cannot be accepted as the defendant did not make any grievance after the receipt of the letter on 17th December, 2009 that the letter did not contain the complete set of paper book.

12. No doubt, compliance of Order XXXIX Rule 3 of the Code is a mandatory provision. Order XXXIX Rule 3 reads as under:

3. Before granting injunction, Court to direct notice to opposite party.--The Court shall in all cases, except where it appears that the object of granting the injunction

would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

[Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant--

[a] to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with--

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

[b] to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.]

13. In the present matter, one cannot deny the fact that the defendant got the knowledge of the suit and interim order within five days of passing it. Further, the defendant itself signed the said letter, which was delivered to it personally on 17th December, 2008 and it did not raise any point at that time about the non receipt of the papers, nor did it ask the plaintiffs to supply the copies immediately. Mere reading of the proviso to Order XXXIX Rule 3 of the Code shows that there are two options when an ex parte ad interim order is passed : one is to deliver the relevant papers as mentioned in the said provisions and second is that the required papers be sent by registered post. In the present case, the papers were delivered at the defendant's place and under those circumstances, the plaintiffs have made the compliance of Order XXXIX Rule 3 of the Code, therefore, there is no merit in this argument of the defendant.

14. However, the affidavit in the present case has not been filed within the time granted by the court. There is a delay of one day in this regard. The provision of Order XXXIX Rule 3 of the Code is a mandatory provision. Delay in compliance is a serious matter and cannot be condoned unless there exist some special circumstances. In the present case, as I have held that the complete paper book has been handed over personally on 17th December, 2008 which is within time granted by the court and the affidavit was filed on 18th December, 2008, the delay of one day is condoned considering the over all circumstances of the matter, but subject to the cost of Rs. 10,000/-which shall be paid by the plaintiffs to defendant within 2 weeks from today. I.A. No. 6823/2009 is disposed of accordingly.

15. In the application filed under Order IX Rule 2 of the Code, the summons in the main suit and notice in the application were issued for 23rd April, 2009 i.e. the next date of hearing. It appears from the record that the plaintiffs did not file the process fee, however, as per record the defendant had filed the Vakalatnama on 13th March, 2009 before the next date of hearing. In fact the defendant was fully aware on 15th December, 2008 itself about the pendency of the suit. Further on acceptance of service on 17th December, 2008, the defendant did not make any complaint for non-receipt of any paper and infact filed the written statement and replied to the interim application and present two applications.

16. The objections raised by the defendant in the present application are too technical and without any substance. Probably, the plaintiff did not file the process fee because the service had been effected personally. I do not find any merit in this application and the same is dismissed. I.A. No. 6824/2009 is disposed of.

IA No. 15132/2008

17. As regards the injunction application filed under Order XXXIX Rule 1 and 2 of the Code, it appears from the report of the local commissioner that Mr. Surana, the defendant's Managing Director had agreed during the proceedings when the local commissioner visited the defendant's premises that software found in the server CPU and one of the hard discs was unlicensed and pirated and that the server CPU and the hard disc also had cracks for the purpose of installation of the software of the plaintiff company without genuine license.

18. This admission of the defendant itself shows that the defendant was using unlicensed software of the plaintiffs, which was found in the server CPU etc. of the defendant. This evidence as well as admission made by the defendant is good enough to confirm the ex parte ad interim injunction order granted by this Court on 10th December, 2008 in this application. There is no need to go into further contentions raised by the defendant as the same will be considered at the time of trial as the restraint orders are only against using the unlicensed software CATIA of the plaintiffs without obtaining a valid license from the plaintiffs and I find that the defendant has no defence under these circumstances. This application is, therefore, allowed and the ex parte ad interim injunction order granted by this Court on 10th December, 2008 to this extent is made absolute till the disposal of the suit.

19. As agreed by the learned Counsel for the parties I appoint Mr. Aditya Singla, Adv. (Mobile No. 9818601006 9818601006) to de-seal the computers/CPUs and create back up copies of the hard discs/storage media on new hard discs/storage media provided by the defendant. The unlicensed/pirated software as identified by the representative of the plaintiffs will then be deleted from the new hard discs. The defendants will be at liberty to use the new hard discs along with the seized computers/CPUs. The original hard discs would then be sealed and handed over to the defendants on superdari. The Local Commissioner shall also take one copy of the print of the storage media and file the same alongwith his report. The fee of the Local Commissioner is fixed at Rs. 20,000/- excluding actual expenses. The Local Commissioner shall file a report within four weeks from today.

20. The present application being IA No. 15132/2008 stands disposed of accordingly.

21. All these applications being IA No. 15132/2008, IA No. 6823/2009 and IA No. 6824/2009 are disposed of.

C.S. [OS] No. 2569 /2008

List the matter before the Joint Registrar on 1st December, 2009 for admission/denial of documents.

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