

Adobe Systems, Inc & Anr. vs Mr. P. Bhominathan & Anr. on 5 March, 2009

Author: Manmohan Singh

Bench: Manmohan Singh

* HIGH COURT OF DELHI : NEW DELHI

+ CS (OS) No.2065/2003

Judgment reserved on: 20th January, 2009
% Judgment decided on : 5th March , 2009

Adobe Systems, Inc & Anr.Plaintiffs
Through: Mr. Pravin Anand, Adv. with Mr. Nishant
Bora and Ms. Jaya Negi, Advs.

Versus

Mr. P. Bhominathan & Anr.Defendants
Through: None

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported
in the Digest? Yes

MANMOHAN SINGH, J.

1. The present suit has been filed by two independent companies i.e. Adobe Systems Inc, USA, plaintiff No.1 and M/s. Microsoft Corporation, USA, Plaintiff No.2.for permanent injunction restraining the infringement of copyrights, trademarks, passing off, delivery up, rendition of accounts, damages etc. and the same is pending before this Court. Mr. Anand Banerjee is the Constituted Attorney of the plaintiffs by virtue of a Letter of Authority in his favour and a copy of the same is exhibited as Ex. P-1 and Ex. P-2 of the Evidence Affidavit.

2. It is averred in the plaint that the Plaintiff No.1, Adobe Systems Incorporated (hereinafter referred to as „Abode) and Plaintiff No.2, Microsoft Corporation (hereinafter referred to as „Microsoft) are the companies organized and existing under the laws of the State of Washington, USA having its principal office at 345 San Jose, Park Avenue, CA 95110-2704, USA and One

Microsoft Way, Redmond, WA 98052-6399, USA respectively.

3. It is contended that the software programs as developed and marked by the Plaintiffs are „computer programme within the meaning of Section 2(ffc) of the Copyright Act, 1957 and also included in the definition of a literary work as per Section 2(o) of the Copyright Act, 1957. The Plaintiffs works are protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999 as 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.

4. The plaintiffs have filed original and Court Certified Copies of Original Copyright registration certificates for the software programs as owned by the Plaintiffs exhibited from Ex.P3 to Ex.P5 from page no.26 to 31 and from Ex.P-8 to Ex.P-13 of page 36 to 47 of the Evidence Affidavit respectively.

5. Also, trademark registration certificates for the use in legal proceedings as owned by the Plaintiffs have been exhibited from Ex.P6 to Ex.P7 from page No.32 to 35 of the Evidence Affidavit and from P- 14 to P-15 of page 48 to 51 of the Evidence Affidavit respectively.

6. It is stated in the plaint that the Plaintiffs, upon receiving information of the Defendants infringing activities in April, 2003 on BSA/NASSCOM anti piracy hotline, immediately initiated an investigation to ascertain if the Defendants were infringing the copyrights/trademarks of the Plaintiffs by using pirated software programs of the Plaintiffs on the computer system used at their premises for their day to day business activities. And later on, after coming to know the activities of the defendants, the present suit has been filed by the plaintiffs as the defendants were infringing the legal rights of both the companies.

7. The suit along with the interim application were listed before this court for the first time on 2 nd December, 2003 when the summons were issued in the main suit and in I.A. No.11295/03, an ex parte ad interim order was passed restraining the defendants, their representatives, agents and all other persons acting for and on their behalf from using the pirated/unlicensed software of the plaintiffs. In I.A. No.11296/03, this court had appointed Mr. Amit Pal, advocate as a Local commissioner with a direction to visit the premises of the defendants or any other premises belonging to the defendants to find the infringing software of both the plaintiffs.

8. As per the report of the Local Commissioner filed in this court on 3rd January, 2004 it is recorded that from defendant No.2, 18 hard drives have been seized from its premises which contained infringing software of plaintiff No.2 i.e. Microsoft Corporation as identified in the presence of the officer of the defendant company. However, no infringing software of the plaintiff No.1 i.e. Adobe Systems Inc. was found.

9. By order dated 4th March, 2004 the defendants were proceeded ex parte and time was granted to the plaintiffs to lead the evidence by way of affidavit. Thereafter the defendants filed an application being I.A. No.5905/04 under Order 9 Rule 13 to set aside this order which was later on amended by filing of another application being I.A. No.3667/05 converting the application from Order 9 Rule 13

CPC to Order 9 Rule 7 CPC. The said application was allowed and four weeks time for filing the written statement was granted to the defendants vide order dated 17th August, 2005.

10. The defendants did not file the written statement as directed by the court and learned counsel for the defendants filed an application being I.A. No.9944/05 seeking permission to discharge from the matter which was allowed by order dated 1st February, 2006. The defendants were again proceeded ex parte on 16th January, 2007 and time for filing the ex-parte evidence by way of affidavit was granted. Thereafter the matter was adjourned from time to time for filing the evidence by way of affidavits.

11. The plaintiffs filed the evidence by way of affidavit of Sh. Anand Banerjee along with documents and exhibited documents Ex.PW-1 to Ex.PW-15. The plaintiffs also filed another affidavit of Sh. Sanjiv Sharma showing the computation of damages. In the said affidavit, a statement has been made that approximate average market price of licensed Microsoft product which was pirated/unlicensed and used illegally by the defendants on the computer system for use at their premises in the year 2003 was as follows:-

"a. Microsoft Server SQL 7.0 Rs.25,000/- per license b. Microsoft Windows 2000 Server Rs.35,000/- per license c. Microsoft Windows 2000 PRO Rs.9,500/- per license d. Microsoft Developer Network Subscription Rs.1,00,000/- per license e. Microsoft Office XP Rs.15,000/- per license"

12. In Para No.8 of the affidavit, the details of conservative assumption and estimates have been made which are as follows:-

"(a) That the defendants are engaged in the business of software development and providing IT enabled services aimed specifically at educational institutions. They have extensive use of plaintiffs' software program and much of their business activities are dependant on such usage.

Despite making profits in the business, the defendants have not invested any money in purchase of genuine software, even though use of such software is integral to their business activities.

(b) That the plaintiffs caught the defendants violating their copyrights by indulging in blatant end user piracy of their software programs in the year 2003. The Hon'ble Court has granted an ex parte ad interim injunction against the defendants on 2nd December, 2003, restraining them from infringing the copyrights of the plaintiffs by using pirated/unlicensed software of the Plaintiffs and infringing the plaintiffs' registered trademarks Adobe, Adobe Illustrator, Microsoft etc.

(c) That as per the Local Commissioner's report, the defendants had a total of 19 Desktop Computers installed in their premises along with one Server, most of which were loaded with infringing copies of the plaintiffs' software. An inventory of the Server and 19 Desktop Computers disks containing pirated/unlicensed versions of the plaintiffs' software was made during the local commission proceedings. Upon perusing the said License Summary sheet, I was able to identify the

number unlicensed versions of the plaintiffs genuine software programs that were found at the defendants premises. The report of the Local Commissioner along with the License Summary has been filed in the present proceedings and may kindly be referred to."

13. In Para No.9 of the affidavit, it is stated that the potential revenue that the plaintiffs could have earned if genuine software had been purchased by the defendants is computed as follows:-

Name of software	Approx. Cost licensed software	of No. of Computers having pirated versions	Approx. revenue plaintiffs	to
Microsoft Windows 2000 PRO	Rs.9,500/- per license	19	Rs.1,80,500	
Microsoft Windows Office XP	Rs.15000/- per license	18	Rs.2,70,500	
Microsoft Windows Developer Network Subscription (MSDN)	Rs.1,00,000/- per license	18	Rs.18,00,000	
Microsoft Windows 2000 Server	Rs.35,000/- per license	14	Rs.4,90,000/-	
Microsoft SQL 2000 Server	Rs.25,000/- per license	19	Rs.4,75,000/-	
Total			Rs.32,15,500/-	

14. In the evidence produced by the plaintiffs, it is claimed that on a fair and conservative basis, the defendants would have deprived the plaintiffs potential revenue of Rs. 32,15,500/-. This figure includes profits that would have been legitimately due to the plaintiffs.

15. As regards the infringement part is concerned, it is an undisputed fact that the learned Local commissioner has recovered the infringing software of the plaintiff No.2 from the premises of the defendants. The defendants on the other hand have not rebutted the statements made in the plaint nor filed any objection to the report of the Local commissioner. The claims of the plaintiffs in the pleadings and evidence produced by them have gone un-rebutted and in view of material available on record, it is clear that the defendants are guilty of counterfeiting the products of the plaintiffs. Both the plaintiffs are, therefore, entitled for a decree of permanent injunction as prayed for in Para 31(a) to (c) and (e) of the plaint.

16. As regards the relief claimed in sub para (d) is concerned, the same has been made by the plaintiffs seeking an order for damages to the tune of Rs. 20 lakhs. I shall not deal with this prayer.

17. I have heard learned counsel for the plaintiffs.

18. On the basis of pleadings, documents, evidence produced by the plaintiffs and report of the local commissioner, it is apparent that the plaintiffs has the statutory rights in respect of the software for which copyright exist with the plaintiffs. The use of the counterfeited and duplicate software by the defendants is clearly illegal and in violation of legal rights of the plaintiffs. It causes financial damages not only to the plaintiffs but also causes deception to the public at large. At the same time, government is also losing huge revenue because of such illegal activities as it is known fact in this trade that the counterfeiters do not maintain any account books nor pay any taxes and in case damages are not granted in counterfeiting cases, they will be encouraged. For this reason, most of the time, it has been noticed that counterfeiters do not appear before Court nor raises their defence after interim orders and seizure of goods. Therefore, aspect of damages is a vital issue involved in such type of matters. Learned counsel for the plaintiffs has referred catena of judgments given by this court wherein the damages have been granted in various cases.

19. In General Tire Vs. Firestone, (1975) 1 WLR 819, it was observed that the general rule is that the measure of the damages is, as far as possible, that sum of money, which will put the injured party in the same position, as he would have been if he had not suffered the wrong. Extent of loss suffered or, the advantage gained by the defendant by his wrongful act at the cost of the plaintiffs.

20. In Meters Ltd. v. Metropolitan Gas Meters Ltd., (1911) 28 RPC 157 (UK), it was held that in the case of an infringement of patent, damages were computed as follows :

"(no. of infringing articles) x (the sum that would have had to be paid in order to make the manufacture of that article lawful)

- Where the defendants were acutely aware of the implications of their act and committed them willfully and intentionally in flagrant violation of the plaintiff's copyright and trademark, substantial additional damages are awarded."

21. In Microsoft Corporation Vs. Kamal Vahi & Ors., CS (OS) No.817 of 2004 it was observed that compensatory damages are awarded based on a calculation of a percentage of revenue that would have been earned if the defendants had not indulged in the infringing activity.

22. In Microsoft Corporation Vs. Deepak Raval, MIPR2007(1)72 in CS (OS) No.529 of 2003, it was observed that where the defendants fails to respond and are recklessly indifferent as to whether or not the goods they are selling counterfeit, dishonest intention may be inferred and the defendants can be said not to be "honest traders" 23. In Amarnath Sehgal Vs. Union of India, 2005 (30) PTC 253 (Del) it was observed that compensatory damages may be paid where the acts and commissions of the defendants violate the established rights of the plaintiffs.

24. In Microsoft Corporation Vs. Goodview Electronics Pty Ltd., [2001] FCS 1852 factors to be taken into account in awarding additional damages were laid down :

- Flagrancy of the infringement.

- Any benefit shown to have accrued to the defendant by using of the infringement.

Similar view has been laid down in the case of Microsoft Corporation v. Glostar Pty Ltd, [2003] FSR 210.

25. In Microsoft Corporation v. Kiran, 2007 (35) PTC 748 (Del) it has been held that „wilfully, intentionally and flagrantly violating the copyrights and trademark is deliberate and calculated infringement.

26. There is recent trend, which is heading towards American concept of punitive damages and their assessment is worth discussing and needs a special mention.

27. India followed the traditional concept of damages that is to compensate a claimant for loss and damage. Such damages are also referred to as compensatory damages which are awarded to compensate the plaintiffs for damages which he has suffered or is expected to suffer and to replace something that the plaintiffs has lost or is expected to lose because of the wrongful act of the defendant. The primary purpose of the damages is to restore those losses to the plaintiffs. However as tort litigation has evolved, I find that the concept of damages is not limited to compensation for loss and damages alone. Three kinds of damages are being awarded by courts, which include nominal damages, exemplary damages and compensatory damages.

28. Punitive damages, also commonly called in English exemplary damages, are designed to punish, not to compensate. In general, punitive damages are awarded for socially deplorable conduct, such as fraud or malicious, reckless, or abusive action. Since the early 1900s, punitive damages have been available only for tort but not for contract. Punitive damages are discretionary and are never given as a matter of right.

29. There is little dispute that punitive damages are designed to punish, not to compensate. By punishing, punitive damages are said to have a deterring effect within society itself. According to that theory, the deterring effect depends, in part, on a broadcasting effect, so that punitive damages serve as a lesson to others in a similar situation.

30. The concept of punitive damages made its entry in Indian legal system in the year 1999 with apex court decision with regard to allotment of petrol pumps, which was obviously not relating to Intellectual property. In Common Cause v. UOI, AIR 1999 SC 2979. The Hon ble Supreme Court of India recorded the finding that the conduct of the petitioner is oppressive and that he had made allotments of the petrol pumps in favour of various persons for extraneous consideration. The Supreme Court awarded an amount of Rs. 50 Lakhs as Punitive Damages.

31. In IP matters, the drive of granting punitive damages started with Delhi High Court s decision of Time Incorporated v. Lokesh Srivastava, 2005 (30) PTC 3 (Del) wherein the Court has expressly recognized third type of damages as punitive damages apart from compensatory and nominal damages. The Court has made some relevant observations discussing the aspect of punitive damages. The court held that :

"The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities..."

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them."

The court justified the grant of punitive damages on the basis of flagrancy of infringement which is the doctrine derived from US law.

32. Within Copyright, in infringement matter in the case of Amar Nath Sehgal 's case (supra) wherein this Court considered the author 's special right against distortion, mutilation and modulation of the work. Consequently, the court granted Rs. 5 Lakhs as a damages on the basis of loss of reputation, honour and injury. This was perhaps one of the few cases, which was not decided exparte.

33. The judgment of Times 's case (supra) was followed by Hero Honda Motors Ltd. v. Shree Assuramji Scooters, 125 (2005) DLT 504 : where the Court took the view that damages in such a case should be awarded against defendants who chose to stay away from proceedings of the Court and they should not be permitted to enjoy the benefits of evasion of Court proceedings. The rationale for the same is that while defendants who appear in Court may be burdened with damages while defendants who chose to stay away from the Court would escape such damages.

34. In Himalaya Drug Company v. Sumit, 2006 (32) PTC 112 (Del.) which was a case relating to infringement of copyright in a database/ compilation made on web, this Court has created a peculiar rule of assessing the actual damages in Ex parte cases and granted both compensatory as well as punitive damages of the same amount.. According to the said chart expenditure on the said project has been split under three categories: (1) manpower (2) website cost (3) average overhead cost. The total cost as indicated in the chart qua the creation, compilation and hosting of the said database on the plaintiff's website comes to Rs.7,94,227/-. Considering the evidence on record, this court passed the decree of Rs.7,94,227/- by way of compensatory damages as well as a decree in the sum of Rs.7,94,227/- on account of punitive/exemplary damages in plaintiff's favour and against the defendants.

35. In the case of Intel Corp. Vs. Dena Karan Nair CS (OS) No.1333/2005 it was held by this Court on 24 th April, 2006 when the defendant failed to appear and relying upon Hero Hond 's case (supra) and Time Inc. 's case (supra) awarded damages of Rs.3 lacs as opposed to the amount of Rs.20 lacs which had been prayed for by the plaintiffs.

36. In the present case as already pointed out the local commissioner was also appointed to visit the premises of the defendants to locate the pirated/unlicensed software. The local commissioner as per the order of the court has visited the premises of the defendants and in his report, it has been found that the defendants had pirated software of plaintiff no. 2 at the premises of the defendants.

37. The defendants at the same time had neither filed the written statement nor had shown any interest at the initial stage to resolve the dispute with the plaintiffs.

38. The claim of the plaintiffs is that it is entitled to a sum of Rs.32,15,500/- and it has gone unrebutted which includes loss of business, reputation and goodwill in the market. Since the above claimed amount is based on the assessments by the plaintiffs, I am of the view that a sum of Rs.5 lacs can be reasonably awarded to the plaintiff No.2 as compensatory damages and a sum of Rs.5 lacs as punitive/exemplary damages as well as damages on account of loss of reputation and damage to the goodwill.

39. The suit of the plaintiffs is also decreed in terms of the prayer made at para 31 (A) to (C) and (E) of the plaint. The plaintiffs shall also be entitled to costs.

MANMOHAN SINGH, J March 05, 2009 sa