

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

% **Date of decision: 20th May, 2014.**

+ **FAO(OS) 233/2014, CM No.8270/2014 (for stay) and CM No.8271/2014 (for condonation of 116 days delay in filing the appeal)**

RAJEEV KUMAR & ANR

..... Appellants

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. N. Mahabir, Mr. Rajneesh Kumar
Singh & Mr. Govind Chaturvedi,
Adv.

Versus

MICROSOFT CORPORATION & ANR

..... Respondents

Through: Mr. Saikrishna Rajgopala & Ms. Safia
Said, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the order dated 1st May, 2014 of the learned Single Judge of this Court (exercising ordinary original civil jurisdiction) of dismissal of I.A. No.6928/2014 filed by the appellants/defendants in CS(OS) No.2471/2013 filed by the respondents/plaintiffs.

2. The respondents/plaintiffs filed the suit from which this appeal arises for the relief of permanent injunction restraining the appellants/defendants from reproducing, storing, installing and/or using pirated/unlicensed

software of the respondents/plaintiffs thereby infringing the copyright of the respondents/plaintiffs in the computer programs/software titles and for the ancillary relief of rendition of accounts and damages.

3. The learned Single Judge while issuing summons of the suit and notice of the application for interim relief, vide *ex-parte* ad-interim order dated 11th December, 2013 restrained the appellants/defendants from directly or indirectly reproducing, storing, installing and/or using pirated/unlicensed software of the respondents/plaintiffs and also allowed the application of the respondents/plaintiffs for appointment of a Court Commissioner and appointed a Court Commissioner to visit the premises of the appellants/defendants and to make an inventory of the software programs belonging to the respondents/plaintiffs, contained in computer systems, laptops, CPUs, Hard Disks, CDs, DVDs and/or any other storage media found therein and to take into custody/seize all CPUs, CDs, DVDs and any other storage media containing illegal, unlicensed/pirated versions of the respondents/plaintiffs software and to seal the same so as to preserve the evidence.

4. The Court Commissioner submitted a report before the learned Single Judge and as per which unlicensed/pirated software of the

respondents/plaintiffs as per the details given in the report were found in the computers systems etc. of the appellants/defendants. The Court Commissioner further reported that the appellants/defendants had created obstruction in seizing and sealing the said articles.

5. The appellants/defendants having come to know of the suit, appeared therein and filed I.A. No.6928/2014 supra for modification of the order dated 11th December, 2013 on the application of the respondents/plaintiffs for appointment of the Court Commissioner to the extent that the CPUs, CDs, DVDs and other storage media be not sealed or taken into custody.

6. The learned Single Judge vide impugned order dismissed the said application of the appellants/defendants and directed the Court Commissioner to revisit the premises of the appellants/defendants and to carry out the order dated 11th December, 2013.

7. It was the contention of the senior counsel for the appellants/defendants before us on 12th May, 2014 that the sealing of the computer systems of the appellants/defendants by the Court Commissioner would stall the entire working of the appellants/defendants and the purpose of the appointment of the Court Commissioner could be served by directing the Court Commissioner to prepare/have prepared the mirror images of the

contents of the computer systems.

8. Per contra, the counsel for the respondents/plaintiffs appearing on advance notice contended that the appellants/defendants having obstructed in the execution of the commission issued by this Court, are not entitled to be heard at all. It was further contended that the purpose of issuance of the commission would not be served by making the mirror images as suggested by the appellants/defendants as the appellants/defendants could subsequently always challenge the same. It was yet further argued that the appellants/defendants having been found to be in use of unlicensed/pirated software of the respondents/plaintiffs, ought to be directed to deposit some amount in the Court. Reliance in this regard was placed on the order dated 11th January, 2012 of the Division Bench of this Court in FAO(OS) No.23/2012 titled ***Econix Hi-Tech Components Pvt. Ltd. Vs. Microsoft Corporation India Pvt. Ltd.***, where on the basis of the report of the Commissioner of a large number of pirated/unlicensed software being found in the computer systems of the defendant, the computer systems of the defendants were permitted to be de-sealed subject to deposit by the defendants a sum of Rs.22 lakhs in the Court.

9. We may mention that the Division Bench of this Court in ***Autodesk***

Inc. Vs. A.V.T. Shankardass AIR 2008 Delhi 167, in view of the earlier divergent view of the Single Benches of this Court on the request for appointment of Court Commissioners in cases of infringement of copyright in a computer software and of piracy, laid down the guidelines for exercise of discretion in such matters as under:

“(i) The object of appointment of a Local Commissioner in software piracy matters is not, as much to collect evidence but to preserve and protect the infringing evidence. The pirated software or incriminating evidence can only be obtained from the premises of the opposite party alone and in the absence of an ex parte appointment of a Local Commissioner there is likelihood that such evidence may be lost, removed or destroyed;

(ii) Request for ex parte appointment of a Local Commissioner in such matters is usual and in fact is intended to sub serve the ends of justice as it is imperative to have an element of surprise so that the actual position is not altered;

(iii) The test of reasonable and credible information regarding the existence of pirated software or incriminating evidence should not be subjected to strict proof or the requirement to demonstrate or produce part of the pirated software/incriminating evidence at the initial stage itself. It has to be tested on the touchstone of pragmatism and the natural and normal course of conduct and practice in trade;

(iv) It may not always be possible for a plaintiff to obtain any admission by employing decoy customers and gaining access to the defendant's premises. Any such attempt also inheres in it the possibility of dis-appearance of the pirated software/incriminating evidence in case the decoy customers is exposed. Accordingly, visit by decoy customer or investigator is not to be insisted upon as pre condition. A report of private Investigator need not be dis-regarded or rejected simply

because of his engagement by the plaintiff. The information provided by the private Investigator should receive objective evaluation;

(v) In cases where certain and definite information with regard to the existence of pirated software or incriminating evidence is not available or where the Court may nurture some element of doubt, it may consider asking the plaintiff to deposit cost in Court so that in case pirated software or incriminating evidence is not found then the defendant can be suitably compensated for the obtrusion in his work or privacy.”

It was however also clarified that the aforesaid guidelines are not exhaustive and are only illustrative. The argument of the counsel for the defendant in that case also, of there being no need of seizure of the computer system and CPUs which may be found or suspected to be involved in use of infringing software and of only ghost copies of the same including the software being directed to be made for the purpose of use as evidence in Court was also noted along with the opposition of the counsel for the plaintiff therein of the same being not feasible and being fraught with possibility of manipulation therein and objection being raised to the admissibility in evidence thereof but were left open for decision in appropriate case. We are today in the present case faced with that question.

10. We thus on 12th May, 2014 enquired from the senior counsel for the appellants/defendants that how the evidence which can otherwise be

collected in terms of the guidelines aforesaid by seizure of computer systems can be secured, if the computer systems are not seized and only mirror images are made. We further enquired from the senior counsel for the appellants/defendants as to what was there to prevent the appellants/defendants from objecting to the admission into evidence of the mirror images, if so directed to be made and authenticity thereof. It was yet further enquired, whether the appellants/defendants are accepting or disputing the report of the Court Commissioner of the unlicensed/pirated software found.

11. The senior counsel for the appellants/defendants sought time to consider and file an affidavit.

12. In pursuance to the aforesaid, the appellants/defendants during the hearing on 15th May, 2014, handed over an affidavit of Mr. Arun Kumar Mathur, Group CIO of the appellant No.2 M/s. Supertech Group Limited to the effect that the appellants/defendants had not deleted any software, inventory of which had been prepared and detailed in the report of the Court Commissioner and that the appellants/defendants do not dispute the inventory of the software stated in para 11 of the report of the Court Commissioner and proposing that the mirror images of contents of the hard

disk of the computer system by a new hard disk be prepared; that the unlicensed/pirated software may be deleted and the appellants/defendants be permitted to install new hard disks in the computer systems and the old hard disks be preserved.

13. The counsel for the respondents/plaintiffs again during the hearing on 15th May, 2014 contended that the pirated/unlicensed software reported by the Court Commissioner is of a very high value and the appellants/defendants be directed to deposit the market value thereof in the Court.

14. The senior counsel for the appellants/defendants responded by stating that though the appellants/defendants owing to the element of surprise visit by the Court Commissioner could not show all the licenses/authorization with them but are in position/custody of the documents to show that the entire said software reported by the Court Commissioner is not unlicensed/pirated.

15. In view of the aforesaid development i.e. of the appellants/defendants admitting the report of the Court Commissioner, we on 15th May, 2014 enquired from the counsels, whether not the suit insofar as for the relief of permanent injunction was entitled to be decreed and only the question of

damages survived.

16. The senior counsel for the appellants/defendants concurred.

17. We further enquired, whether not the said damages can also be computed on the basis of the market value of the unlicensed/pirated software found by the Court Commissioner, less that of which licenses/authorization are produced by the appellants/defendants.

18. There appeared to be a controversy on the aforesaid aspect and thus we reserved order. However, both the counsels agreed that in view of the admission by the appellants/defendants of the report of the Court Commissioner as aforesaid, the need for the commissioner to revisit the premises of the appellants/defendants also does not survive save for the purpose of determining, whether the appellants/defendants has removed/deleted all the unlicensed/pirated software and for finding out, whether the appellants/defendants are in violation of the order of the interim injunction.

19. We are of the opinion that in view of the aforesaid developments, nothing further remains to be ordered in this appeal. This appeal is not concerned with the question of deletion of the unlicensed/pirated software or the question of the appellants/defendants being in violation of the interim

order in force. The suit as aforesaid for injunction can be decreed and it is for the Suit Court to go into the aspect of computation of damages.

20. Resultantly, we dispose of the appeal directing the appellants/defendants to till further orders not delete any software, inventory of which has been prepared in detail in the report of the Court Commissioner and directing the parties to appear before the learned Single Judge on 23rd May, 2014 for further orders qua commission if any to be issued and for computation of damages. The appellants/defendants to also pay costs of this appeal to the counsel for the respondents/defendants of Rs.25,000/-.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

MAY 20, 2014
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