

(2019) 11 DEL CK 0250

In the Delhi High Court

Case No : Civil Suits (COMM) No. 1249 Of 2016, Miscellaneous Application No. 2487 Of 2019

Novi Digital Entertainment Pvt Ltd & Anr

APPELLANT

Vs

Five Desi & Ors

RESPONDENT

Date of Decision : 07-11-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 1 Rule 10
Copyright Act, 1957 — Section 51, 51(1)(c)
Information Technology Act, 2000 — Section 79

Citation : (2019) 80 PTC 435

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Sidharth Chopra, Yatinder Garg, Disha Sharma, Pragalb Bhardwaj, Gaurav Rohilla

Final Decision : Disposed Of

Judgement

Prateek Jalan, J

1. The plaintiffs have filed the present suit against 25 named defendants and various unidentified defendants arrayed as "Ashok Kumar" (defendant nos. 26 to 40). Plaintiff no. 1 owns a digital platform "HOTSTAR" through which it offers online streaming services to the public by way of mobile applications and web browsers. It offers general entertainment content and also produces original content for offer through its platform. Plaintiff no. 1 is a wholly owned subsidiary of plaintiff no. 2, which is an entertainment and media company. The claims of the plaintiffs are premised on an allegation of illegal and unauthorised distribution, broadcast, re-broadcast, transmission and streaming of the plaintiffs' content by the defendant nos. 1 to 7 (hereinafter referred to as the "defendant-websites") to the public.

2. The plaintiffs claim that, as a result of the unauthorised transmission of their content, the defendant-websites infringe their copyright in the original works

produced by them, which is protected under the provisions of the Copyright Act, 1957 (hereinafter referred to as "the Act").

3. Other than the defendant-websites, the plaintiffs have impleaded various Internet Service Providers as defendant nos. 8 to 23 (hereinafter referred to as "defendant-ISPs") and the concerned departments of the Government of India as defendant nos. 24 and 25 (hereinafter referred to as "the Government"). Defendant nos. 8 to 25 have been impleaded to ensure compliance with the orders of Court and no substantive relief has been sought against them.

4. The plaintiffs allege that the defendant-websites are "rogue websites" owned and managed by an organisation called "Desi Five" (defendant no. 1). The plaintiffs conducted an investigation through two independent investigators, which revealed that the defendant-websites are part of a network registered by the same registrant with a common physical and/or email address, and that these websites are primarily engaged in hosting, streaming, broadcasting, re-transmitting and communicating infringing content to the public. According to the plaintiffs, the anonymous nature of the websites makes it impossible to identify them effectively. The notices issued by the plaintiffs to the defendant-websites have not elicited any response.

5. On the basis of the aforementioned allegations, the plaintiffs have sought the following reliefs:-

"(i) Pass an order and decree of permanent injunction restraining the Defendant No.1 to 7 (and such other websites/ entities which are discovered during the course of the proceedings to have been engaging in infringing the Plaintiff's exclusive rights), its owners, partners, proprietors, officers, servants, employees, and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under it, from, in any manner hosting, streaming, making available for viewing and downloading, providing access to and / or communicating to the public, displaying, uploading, modifying, publishing, updating and/or sharing (including to its subscribers and users), on their websites, through the internet in any manner whatsoever, any cinematography work/ content/ programme/ show in relation to which Plaintiffs' have copyright.

(ii) Pass an order and decree of permanent injunction restraining the Defendant 1 to 7 (and such other websites/ entities which are discovered during the course of the proceedings to have been engaging in infringing the Plaintiff's exclusive rights), their owners, partners,

Proprietors, officers, servants, employees, and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under it, from in any manner broadcasting, rebroadcasting, retransmitting, making available for viewing and downloading, providing access to and/ or communicating to the public, displaying, uploading, modifying, publishing, updating, sharing (including to its subscribers and users), on their websites,

through the internet in any manner whatsoever, the broadcast of the content aired on the Star Channels, to which the Plaintiff No.2 has exclusive broadcast reproduction rights;

(iii) Pass an order and decree directing the Defendant No. 8 to 23, their directors, partners, proprietors, officers, affiliates, servants, employees, and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under it, to block access to the various Rogue Defendant Websites identified by the Plaintiffs in the instant suit at page 6 of the Documents;

(iv) Pass an order and decree directing the Defendant Nos. 24 and 25, to issue a modification calling upon the various internet and telecom service providers registered under it to block access to the various Rogue Defendant Websites identified by the Plaintiffs in the instant suit at page 6 of the Documents;

(v) An order for damages of Rs. 2,00,02,000/- to be paid by the Defendant No. 1 to 7 (and such other websites/ entities which are discovered during the course of the proceedings to have been engaging in infringing the Plaintiff's exclusive rights) to the Plaintiffs on account of their illegal and infringing activities and a decree for the said amount be passed in favour of the Plaintiffs (the Plaintiff reserves its right to claim additional damages and amend the pleadings accordingly once the magnitude of the Rogue Defendant Websites' illegal/ infringing activities and the revenues earned in pursuance to such illegal / infringing activities is ascertained upon discovery in the instant action;

(vi) An order for delivery up of all the apparatus and/or material that the Defendant No. 1 to 7 (and such other websites / entities which are discovered during the course of the proceedings to have been engaging in infringing the Plaintiffs' exclusive rights) use or may be using to infringe the Plaintiffs' copyrights and broadcast reproduction rights, to the authorized representatives of the Plaintiffs for the purpose of destruction;

(vii) An order for rendition of accounts of profits illegally earned by the Defendant Nos. 1 to 7 (and such other websites / entities which are discovered during the course of the proceedings to have been engaging in infringing the Plaintiff's exclusive rights) on account of their illegal hosting, streaming, publishing, exhibiting, making available and/or communicating to the public of the content/ programme / show to which the Plaintiffs' own exclusive copyrights, and the broadcast of the content aired on the STAR Channels and/or on hotstar.com to which the Plaintiff No. 2's own exclusive broadcast reproduction rights;

(viii) An order for costs in the present proceedings in favour of the Plaintiffs;

Any other Order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be passed in favour of the Plaintiffs."

6. This Court passed an ex-parte ad-interim order of injunction on 09.09.2016 in

following terms:-

"12. Accordingly, till further orders, the defendants No. 1 to 7 and 26 to 40, their owners, partners, proprietors, officers, agents, representatives, etc., are restrained from hosting, streaming, making available for viewing and downloading, providing access to and/or communicating to the public, displaying, uploading, modifying, publishing, updating and/or sharing on their websites, through the internet in any manner whatsoever, any cinematograph work/content/programme/show in relation to which the plaintiffs have a copyright, including the content aired on the Star Channels, on which the plaintiff No.2 has exclusive broadcast reproduction rights and HOTSTAR in respect whereof the plaintiff No.1 has the exclusive broadcast rights. Further, defendants No. 8 to 23 shall ensure compliance of this order by blocking the websites of the defendants No.1 to 7 and the access to the rogue websites identified in paras 23 and 25 of the plaint."

7. By a further order dated 19.09.2016, defendant nos. 24 and 25 were directed to issue notifications directing the defendant-ISPs and other ISPs to block the websites of defendant nos. 1 to 7.

8. Service of the suit was recorded as having been completed by the order of the Joint Registrar dated 02.11.2018, defendant nos. 1 to 7 having been served through email. Although some of the defendant-ISPs filed affidavits of compliance and/or written statements in the suit, the defendant-websites did not enter appearance and their right to file written statements was closed by the order of the Joint Registrar dated 13.02.2019.

9. The plaintiffs thereafter filed IA no. 2487 of 2019 for summary judgment in the suit in terms of prayers (i) to (v) of the plaint. Service of the application was ordered and an affidavit of service was filed by the plaintiffs demonstrating service of the application on all the defendants.

10. In support of the present application, Mr. Sidharth Chopra, learned counsel for the plaintiffs has taken me through the allegations contained in the plaint and the documents placed on record by the plaintiffs. He presses the reliefs sought in prayers (i) to (iv) and an order of costs. All other reliefs are expressly given up by Mr. Chopra. He relies upon the judgment of a coordinate bench in UTV Software Communication Ltd. And Ors. vs. 1337X.to and Ors. 2019 (78) PTC 375 (Del.) [(CS (COMM) 724/2017) and connected matters, decided on 10.04.2019] which deals with the determination of rogue websites and the proper orders to be passed in such cases extensively.

11. In UTV Software (supra), the Court heard arguments on behalf of the plaintiffs therein and also appointed an amicus curiae. As in the present case, neither the ISPs impleaded therein nor the Government of India advanced any submission on merits. In circumstances virtually identical with the present case, the Court came to the conclusion that the concerned websites were liable for copyright infringement under Section 51 of the Act and were not entitled to

exemptions under 51 (1)(c) of the Act or Section 79 of Information Technology Act, 2000. As far as rogue websites are concerned, the Court identified the following illustrative factors to be considered in determining whether a particular website falls within that class:-

"59. In the opinion of this Court, some of the factors to be considered for determining whether the website complained of is a FIOL/Rogue Website are:-

- a. whether the primary purpose of the website is to commit or facilitate copyright infringement;
- b. the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement;
- c. Whether the detail of the registrant is masked and no personal or traceable detail is available either of the Registrant or of the user.
- d. Whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement.
- e. Whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- f. Whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- g. Whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- h. whether the website contains guides or instructions to circumvent measures, or any order of any court, that disables access to the website on the ground of or related to copyright infringement; and
- i. the volume of traffic at or frequency of access to the website;
- j. Any other relevant matter."

12. The evidence placed on record by the plaintiffs in support of the claims in the suit include affidavits of Ms. Silky Gandhi dated 29.08.2016 and Ms. Preethi Mahtani dated 29.08.2016, who conducted the investigation into the defendant-websites at the instance of the plaintiffs. The affidavit of Ms. Silky Gandhi states that she monitored the websites between December 2015 and January 2016. She has referred to notices issued to the defendant-websites and also placed on record screenshots of content playing on those websites. She has averred that the registrants of the websites are unidentifiable due to domain privacy services. Ms. Preethi Mahtani inter alia has stated that she has monitored the defendant-websites between December 2015, March 2016 and reviewed in August 2016. She has also referred to the notices issued to the defendant-websites and to the domain privacy services as a result of which their true ownership is masked.

13. In support of his contention that the defendant-websites are liable to be treated as "rogue websites", Mr. Chopra has drawn my attention to the following documentary evidence in respect of each of them:-

Defendant No. 1:

S.No.

Document

Court Record Reference

1.

Desi-tashan.com WHOIS

Pg. 1294-1296, Vol.VIII, Folder IV

2.

Desi-tashan.com evidence

Pg. 1297-1823, Vol.VIII-X, Folder IV

3.

Notice to Desi-tashan.com dated 09.12.2015 along with Screenshots

Pg. 1299-1328, Vol. VIII Folder IV

4.

Notice to Desi-tashan.com dated 12.12.2015 along with Screenshots

Pg. 1366-1392, Vol. VIII, Folder IV

5.

Notice to Desi-tashan.com dated 15.12.2015 along with Screenshots

Pg. 366-371, Vol. III, Folder IV

6.

Notice to Desi-tashan.com dated 21.12.2015 along with Screenshots

Pg. 1469-1487, Vol. VIII-IX, Folder IV

7.

Notice to Desi-tashan.com dated 31.12.2015 along with Screenshots

Pg. 1603-1629, Vol. IX, Folder IV

8.

Screenshots of Desitashan.com in March 2016

Pg. 1630-1680, Vol. IX, Folder IV

9.

Notice to Desi-tashan.com dated 11.08.2016 along with Screenshots

Pg. 1681-1823, Vol. IX-X, Folder IV

Defendant No. 2:

S. No.

Document

Court Record Reference

1.

Desifive.com WHOIS

Pg. 1824-1828, Vol. X, Folder IV

2.

Desifive.com evidence

Pg. 1827-2251, Vol. X-XII, Folder IV

3.

Notice to Desifive.com dated 01.12.2015 along with Screenshots

Pg. 1829-1840, Vol. X, Folder IV

4.

Notice to Desifive.com dated 08.12.2015 along with Screenshots

Pg. 1898-1914, Vol. XI, Folder IV

5.

Notice to Desifive.com dated 14.12.2015 along with Screenshots

Pg. 1940-1952, Vol. XI, Folder IV

6.

Notice to Desifive.com dated 21.12.2015 along with Screenshots

Pg. 1992-2006, Vol. XI, Folder IV

7.

Screenshots of Desifive.com in March 2016

Pg. 2021-2115, Vol. XI-XII, Folder IV

8.

Notice to Desifive.com dated 11.08.2016 along with Screenshots

Pg. 2116-2251, Vol. XII, Folder IV

Defendant No.3:

S. No.

Document

Court Record Reference

1.

Desi-tashan.com WHOIS

Pg. 2252-2255, Vol. XII, Folder IV

2.

Desi-tashan.co evidence

Pg. 2256-2693, Vol. XII-XIV, Folder IV

3.

Notice to desi-tashan.co dated 12.08.2016 along with Screenshots

Pg. 2266-2269, Vol. XIV, Folder IV

4.

Screenshot of desitashan.com in August 2016

Pg. 2281-2693, Vol. XII-XIV, Folder IV

Defendant No.4:

S. No.

Document

Court Record Reference

1.

Embed.pk WHOIS

Pg. 2694-2696, Vol. XV, Folder IV

2.

Embed.pk evidence

Pg. 2697-2779, Vol. XV, Folder IV

3.

Notice to embed.pk dated 07.12.2015 along with Screenshots

Pg. 2697-2705, Vol. XV, Folder IV

4.

Screenshot of embed.pk in December 2015

Pg. 2704-2705, Vol. XV, Folder IV

5.

Screenshot of embed.pk in March 2016

Pg. 2706-2755, Vol. XV, Folder IV

6.

Notice to embed.pk dated 11.08.2016

Pg. 2756-2760, Vol. XV, Folder IV

7.

Screenshot of embed.pk in August 2016

Pg. 2761-2779, Vol. XV, Folder IV

Defendant No.5:

S. No.

Document

Court Record Reference

1.

Vidforu.pk WHOIS

Pg. 2780-2782, Vol. XV, Folder IV

2.

Vidforu.pk evidence

Pg. 2783-2903, Vol. XV, Folder IV

3.

Notice to Vidforu.pk dated 03.12.2015 along with screenshots

Pg. 2783-2790, Vol. XV, Folder IV

4.

Notice to Vidforu.pk dated 08.12.2015 along with screenshots

Pg. 2850-2855, Vol. XV, Folder IV

5.

Screenshot of Vidforu.pk in March 2016

Pg. 2856-2900, Vol. XV, Folder IV

6.

Notice to Vidforu.pk dated 11.08.2016

Pg. 2901-2903, Vol. XV, Folder IV

Defendant No.6:

S. No.

Document

Court Record Reference

1.

Desituber.com WHOIS

Pg. 2904-2907, Vol. XVI, Folder IV

2.

Desituber.com evidence

Pg. 2908-2916, Vol. XVI, Folder IV

3.

Notice to Desituber.com dated 12.08.2016 along with screenshots

Pg. 2908-2912, Vol. XVI, Folder IV

4.

Screenshot of Desituber.com in August 2016

Pg. 2913-2916, Vol. XVI, Folder IV

Defendant No.7:

S. No.

Document

Court Record Reference

1.

Tashanplayer.com WHOI

Pg. 2917-2920, Vol. XVI, Folder IV

2.

Tashanplayer.com evidence

Pg. 2921-3117, Vol. XVI, Folder IV

3.

Notice to tashanplayer.com dated 01.12.2015 along with screenshots

Pg. 2921-2954, Vol. XVI, Folder IV

4.

Notice to tashanplayer.com dated 08.12.2015 along with screenshots

Pg. 3050-3063, Vol. XVI, Folder IV

5.

Notice to tashanplayer.com dated 10.12.2015 along with screenshots

Pg. 3064-3073, Vol. XVI, Folder IV

6.

Notice to tashanplayer.com dated 16.12.2015 along with screenshots

Pg. 3094-3101, Vol. XVI, Folder IV

7.

Notice to tashanplayer.com dated 18.12.2015 along with screenshots

Pg. 3110-3117, Vol. XVI, Folder IV

8.

Screenshot of tashanplayer.com in December 2015

Pg. 1262-1282, Vol. VII, Folder IV

14. On the basis of the evidence placed on record, and keeping in mind the factors identified by this Court in UTV Software (*supra*), I find that there is sufficient evidence to hold that the defendant-websites are "rogue websites":-

a. From affidavits of Ms. Silky Gandhi (paragraph 12) and Ms. Preethi Mahani (paragraph 13), it appears that the primary purpose of the defendant-websites is to provide unauthorised and infringing content to the public.

b. The details of the registrants of each of the websites are masked and no personal or traceable details are available either of the registrant or the user.

c. Despite receipt of legal notices, the defendant-websites have not complied with the requests to take down the infringing content.

d. The defendant-websites contain directories or indexes to facilitate infringement of copyright.

e. Sample evidence of infringement has been filed before this Court. An

illustrative list of the content in respect of which infringement is demonstrated has also been filed.

15. In view of the above, I am of the view that the defendants have no real prospect of success in the suit and the plaintiffs are entitled to a decree under Order XIII-A of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC").

16. Following the judgment in UTV Software (*supra*), the defendant websites having been identified as rogue websites, the plaintiffs are entitled to the injunctions sought in prayer clauses (i) and (ii) of the plaint. The defendant-ISPs and the Government are also liable to be directed to block access to the defendant-websites and to issue notifications in that regard.

17. In UTV Software (*supra*), the Court also examined the issue of grant of dynamic injunctions and permitted subsequent impleadment of mirror/redirect/alphanumeric websites which provide access to the defendant websites, by filing an application under Order I Rule 10 of the CPC before the Joint Registrar alongwith an affidavit with supporting evidence, confirming that the proposed website is mirror/redirect/alphanumeric website of the injuncted defendant-websites. At Mr. Chopra's request, the same directions are liable to be made in this case also.

18. The suit is therefore decreed in terms of prayer clauses (i), (ii), (iii) and (iv) of the plaint, extracted above. The plaintiffs are also permitted to implead any mirror/redirect/alphanumeric websites which provide access to the defendant-websites by filing applications under Order I Rule 10 of the CPC supported by affidavits and evidence as directed above. Any websites impleaded as a result of such application will be subject to the same decree. The plaintiffs are entitled to actual costs of litigation including lawyers' fees and court fees. They will file an affidavit of their actual costs within two weeks.

19. Decree sheets be prepared accordingly.

20. The suit and pending applications stand disposed of.