

(2011) 05 DEL CK 0473
In the Delhi High Court
Case No : CS (OS) No. 255 of 2005

Sap Aktiengesellschaft and Another	APPELLANT
Vs	
Mr. Sadiq Pasha Proprietor, Neologik India	RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Copyright Act, 1957 — Section 13(1), 14, 2, 3, 40

Citation : (2011) 179 DLT 709 : (2011) 46 PTC 335 : (2011) 6 RCR(Civil) 698

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Rahul Beruar and Subhash Bhutoria, for the Appellant; None, for the Respondent

Judgement

V.K. Jain, J.—This is a suit seeking permanent injunction restraining infringement of copyright of the Plaintiffs, delivery up of infringing material and rendition of accounts of profits, etc. Plaintiff No. 1 is a company incorporated in Germany, whereas Plaintiff No. 2 is its Indian subsidiary, responsible for sales of SAP solutions, implementation, post-implementation support, training and certification of its customers and partners in India. Plaintiff No. 1 claims to be global leader in developing application software products for real time business developing process and also claim to be world's largest inter-enterprise software company and world's third largest overall independent supplier. It employs nearly 30,000 people in 50 countries including India. It is alleged that in early 70s Plaintiff No. 1 developed RF System, an automatic accounting and transaction-processing programme that featured standard software and real-time computing and later came to be referred as R/1. It is alleged that the software title solutions developed by the Plaintiffs, enables organizations to document, plan and deploy the resources available to them, in the most efficient manner, so as to achieve the maximum productivity. Plaintiff No. 1 also claims that it developed SAP R/2 in the year 1979 and SAP R/3 in the year 1992. SAP R/3 is a new architectural paradigm by combining three-tier client-server architecture with the business concept of enhanced process integration. It is claimed by the

Plaintiffs that their products are not available off the shelf or through e-stores or resellers nor are they bundled with any computer hardware's as an OEM product. Due to high levels of customization of Plaintiffs' software products they have purpose-specific versions of their software license agreements which are licensed for particular stream of use and cannot be used in any manner or for any other purpose. Besides End User License Agreements (ELU As), the Plaintiffs also claim to have specific license agreements to govern comprehensive and continuing education/training programmes required for effective and meaningful use of its products. This is also the case of the Plaintiff that their software title requires specially trained software professionals to load, execute, access, employ, utilize, store and display integrated end-to-end solutions derived from such software products and towards this purpose the Plaintiffs have entered into several specific arrangements with third party software specialists all over the world, known as "Partners", for provision and execution of the aforesaid functions. In India, the Plaintiffs have such partnerships with only two companies Siemens Information Systems Ltd. and Genovate Solutions (I) Pvt. Ltd. and those partners have only six training centers which are located in major cities of commercial importance.

2. This is also the case of the Plaintiff that the software programme developed and marketed by them are "computer programmes" within the meaning of Section 2(ffc) of the Indian Copyright Act, 1957 and are also included in the definition of a "literary work" as per Section 2(o) of the Copyright Act. It is also alleged that both India and Germany are signatories of the Berne Convention, Universal Copyright Convention and WTO Agreement and, therefore, rights of the Plaintiff companies are protected in India under Copyright Act. Defendant Sadiq Pasha is stated to be the proprietor of M/s. Neologik India and is stated to be engaged in the business of providing ERP/eCRM training services to its clients and also providing training programme in ERP software at Bangalore. It was found by the Plaintiffs that on its website www.neologikindia.com the Defendant was making offer for providing various training programmes in relation to Plaintiffs' software products and had also been regularly advertising the training programmes offered by it with respect to the software programmes of the Plaintiffs, especially on SAP R/3 and ABAP/4. It is also alleged that only a formal training agreement with the Plaintiffs renders training license in respect of SAP software products and training packages are prohibited from being implemented as commercial industry solutions. It is claimed that there is not a single valid license granted by the Plaintiffs to the Defendant and, therefore, he has illegally obtained/installed and is using pirated/infringing software products belonging to the Plaintiffs. It is further claimed that during the search operation on 19th October 2004 the police was able to recover two servers containing pirated software SAP R/3 Version 4.7 IDES which were being used for providing training on SAP software. Thereafter an e-mail was sent by the Defendant to the Plaintiff wherein he not only acknowledged use of Plaintiffs' unlicensed software programmes but also admitted that despite raid by police he continue to conduct

unauthorized training programme in SAP software. The Plaintiffs have accordingly sought an injunction restraining the Defendant from reproducing/installing and/or using pirated/unlicensed software programmes of Plaintiff No. 1, including SAP R/3 and ABAP/4 for the purpose of training or otherwise. They have also sought delivery up of the infringing material besides seeking rendition of accounts.

3. The Defendant was proceeded ex parte vide order dated January 18, 2008.

4. The Plaintiffs have filed affidavit by way of ex parte evidence of one witness namely Ms. Madhu Kolhi, which was adopted by Mr. Yogesh Goel since Madhu Kohli the constituted attorney left the services of the Plaintiff company. In the affidavit by way of evidence Ms. Madhu Kohli, attorney of the Plaintiff company has affirmed on oath the averments made in the plaint and has stated that the Plaintiff company developed and introduced SAP R/2 in the year 1979 and SAP R/3 in the year 1992. She has further stated that the products of the Plaintiff company are tailored to meet the specific needs of each customer and are not available off the shelf or through e-stores, etc. and are not bundled with any OEM computer hardware. She has further stated that the software programmes of the Plaintiffs require specially trained software professionals to load, execute, access, employ, utilize, store and display integrated end-to-end solutions derived from such software products and the Plaintiffs have entered into several specific arrangements with third party for imparting professional training to work on Plaintiffs' software programmes. She has also stated that the Plaintiffs' company computer programme works were first published in Germany and are registered there and these programmes were created for the Plaintiff company by their employees and are original literary works as contemplated in Section 2(o) and Section 13(1) of Copyright Act, 1957. It is also stated that India and Germany are both signatories to Berne and Universal Copyright Convention. She has further stated that a thorough search of the database of the Plaintiffs revealed that not even a single valid license subsists in favour of the Defendant. She has claimed that in the raid carried out by police on 19th October 2004, the police recovered two servers having pirated version of the Plaintiffs' computer programme SAP R/3 Version 4.7 IDES. According to her within three months of police action, the Defendant again resumed his illegal activities of imparting unauthorized training in Plaintiffs' software products.

5. Ex.PW-1/1 (Colly) are the documents evidencing registration of the software programme R/3 system, Employee Self Service Applications for R/3 in Germany. Thus, Plaintiff No. 1 is the copyright holder in respect of software programme R/3 as also the Employee Self Service Applications.

6. A Local Commissioner was appointed by this Court vide order dated 25th February 2005 to make an inventory of software programmes titled as SAP R/3 and ABAP/4 being used by the Defendant for the purpose of training or otherwise and to seize the discs containing unlicensed versions of the Plaintiffs' software. A perusal of the report of the Local Commissioner would show that three servers and twelve desktop computers in the premises of M/s Neologik India were found

loaded with:

1. SID: FUN

SAP Release: SAP R3 46C

2. SID: TEC

SAP Release: SAP R3 IDES 46C

3. SID: NEO

SAP Release: Business warehouse, 30B.

The hard discs were got removed by the Local Commissioner from those machines and were thereafter delivered on Superdari to Mr. N. Sarvesha, Incharge of GVS Complex where Neologik India was functioning.

7. It would thus be seen that pirated software of the Plaintiffs was found being used by the Defendant in its servers and other hardware. The advertisement published by the Defendant in "Education Times" of January 31, 2005 would show that the Defendant has been imparting training in SAP R/3 and claimed to be real-time consultants in SAP and implementation. Similar advertisement was published in February 14, 2005 issue of "Career Profile". A perusal of the print out taken from the website of the Defendant shows that it was offering packaged application solutions covering implementation and roll out, integration, support and maintenance of SAP. It further shows that the services being offered by the Defendant included training on ERP products such as SAP R/3 AND ABAP/4. A perusal of the e-mail dated 16th February 2005 sent by Neologik India would show that even after receipt of notice from the Plaintiffs and seizure of their servers, the Defendant continued to conduct SAP training very freely and also continued advertising his services on a regular basis.

8. Section 51 of the Copyright Act, to the extent it is relevant, provides that copyright in a work shall be deemed to be infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyrights under the Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under the Act does anything, the exclusive right to do which is by the Act is conferred upon the owner of the copyright.

Section 14 of the Copyright Act, to the extent it is relevant, provides that copyright means the exclusive rights subject to the provisions of the Act, to do or authorize the doing of specified acts in respect of a work or any substantial part thereof, which in the case of a computer programme would include to reproduce the work in any material form including the storing of it in any medium by electronic means. It has come in evidence that no license has been issued by the Plaintiffs to use the above referred software. Had any such license been issued and had the same been valid, it would have been found in the database maintained by the Plaintiff company. In any case, the Defendant has not come

forward to claim that the software found loaded on his hardware was licensed software and was not by pirated version. Therefore, by using pirated versions of the softwares, copyright of which vest in the Plaintiff companies, the Defendant infringed their copyrights in those softwares.

9. A perusal of the Standard SAP Software End User Value Licence Agreement filed by the Plaintiffs would show that such licence does not entitle the licensee to provide training to any third party except to the extent provided in the agreement, nor can the licensee use the software and third party database for a Service Bureau Application. Licensee is also precluded from sub-licensing or renting the software, documentation or third party database. It further shows that such a licence is granted to install the software and third party database only on designated units intranet servers, internet servers or third party front ends, as identified by the licensee pursuant to the agreement and the designated units cannot be shared for the purpose of software for the companies who are not defined as licensee or authorized affiliates and who have not been previously approved by SAP in writing or otherwise officially made known to the public as appropriate for use or interoperation with the software and third party database. The maximum number of persons licensed to use the software is specified in the appendices to the agreement. Thus even if the Defendant was to obtain an End User License from the Plaintiffs, it could have been used for the purpose of imparting training in SAP R/3 or any other programme copyright in which vests in the Plaintiff company.

10. A perusal of the standard Education License Agreement of the Plaintiff company would show that the Plaintiffs Authorized Training Centres utilize such part of SAP products as are shown in the appendix which SAP may in its discretion deem necessary as part of SAP Academics taught by TP-SAP training centre under the Education Partner Programme in the territory. It further shows that user would mean employees of TP-SAP training centre, who are required to carry out the obligations of the training centre under the agreement and the students who require access to software pursuant thereto. The training centres are required to register its qualified employees participating in any of the published SAP educational services training centres. SAP is required to handle the registration of students to its database registration system and training centre is required to declare and provide actual number and relevant data of participants to SAP. The training centre is required to ensure that only suitably qualified employees of the centres are selected to attend the SAP academy courses they also rapidly acquire and maintain a comprehensive and fundamental knowledge of SAP products. The training centres are also required to ensure that they have sufficient number of qualified staff and instructors.

11. The Defendant does not have any education license agreement with the Plaintiffs. Therefore, he has no right to impart training in the programme R/3 or any other SAP programme to any person. Any such act on the part of the Defendant would amount to infringement of the copyright which the Plaintiffs

have in the aforesaid software programme u/s 14 of Copyright Act.

12. Section 40 of the Copyright Act, 1957, to the extent it is relevant, provides that the Central Government may, by order published in the Official Gazette, direct that all or any provisions of the Act shall apply to work first published in any territory outside India to which the order relates in like manner as if they were first published within India.

13. Para 3 of International Copyright Order 1999 issued vide S.O. 228(E) dated 24th March, 1999 published in the Gazette of India, Extra Part II would show that vide aforesaid order, all the provisions of the Copyright Act, 1957 except those in Chapter VIII and those other provisions which apply exclusively to Indian works have been extended to any work first made or published in a country mentioned in Part I, II, III, IV or VI of the Schedule in like manner as if it was first published in India. Germany is included as one of the countries mentioned in Part I of the Schedule and its name appears at number 131 of the list. Paragraph 2 of the aforesaid order provides that "Berne Convention Country" means a country which is a member of the Berne Copyright Union and includes a country mentioned either in Part I or in Part II of the Schedule. Therefore, Germany is a member of the Berne Copyright Union and all the provisions of the Copyright Act, 1957 except those contained in Chapter VIII, and those other provisions which apply exclusively to Indian works are applicable to the copyrights in respect of any work which has been published first in Germany.

14. Clause (d) of Section 3 of the International Copyright Order, 1999, to the extent it is relevant, provides that the aforesaid provisions shall apply to any work first made or published by a body corporate incorporated under any law of a country mentioned in Part I, II, III, IV or Part VI of the Schedule, in like manner, as if it was incorporated under a law in force in India.

15. Thus, in view of the provisions contained in Section 40 of the Copyright Act read with International Copyright Order, 1999, the provisions of Chapter XI of the Copyright Act including Section 51 which deals with infringement of copyright would apply to the copyright registrations obtained by the Plaintiffs in respect of the software found to be installed in the computers of Defendant.

16. For the reasons given in the preceding paragraphs, I am of the view that the Defendant infringed the copyright of the Plaintiffs by using the pirated software R/3 and by imparting training using the aforesaid software. During the course of arguments the learned Counsel for the Plaintiffs confined his prayers to grant of permanent injunction and punitive damages. Regarding punitive damages in the case of Time Incorporated Vs. Lokesh Srivastava and Another, this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of Hero Honda Motors Ltd.

Vs. Shree Assuramji Scooters, this Court noticing that the Defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the Defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

In Microsoft Corporation Vs. Deepak Raval this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the Plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In Larsen and Toubro Limited Vs. Chagan Bhai Patel, this Court observed that it would be encouraging the violators of intellectual property, if the Defendants notwithstanding having not contested the suit are not burdened with punitive damages.

Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use the pirated software thereby depriving the copyright owner of the revenue to which he is entitled by sale of license to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the Plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using the infringing mark/pirated software for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

17. The companies which invest heavily in development of such highly useful software, will be discouraged from making further investments in designing new softwares and improving the existing ones, if they are deprived of license fee which they get on sale of licenses, since it is only from that money that they can develop new softwares by making substantial investments in research and development. Also, use of pirated software by a commercial enterprise needs to be dealt with more strictly than use by an individual for his personal purposes.

Since Defendant has been found using the pirated software of the Plaintiff company for its commercial purposes, there is likelihood of the Defendant persisting with the use of these pirated softwares. In fact, the Defendant has been persistent in imparting training using the pirated software of the Plaintiffs as is evident from the e-mail sent by him.

18. It is true that the Plaintiffs have not specifically claimed damages in the prayer clause but in para 26 of the plaint, they have valued the suit at Rs. 6 Lacs for the purpose of damages and have also paid the requisite Court fee on it. Therefore, the relief of damages in such circumstances can be granted to the Plaintiffs in the residual prayer contained in para 27 of the plaint.

19. For the reasons given in the preceding paragraphs, the Defendant is restrained from using any pirated/unlicensed software of the Plaintiff company including R/3 and is further restrained from imparting training in the aforesaid software programmes of the Plaintiffs without requisite license in this regard from the Plaintiffs. In the facts and circumstances of the case, I also award punitive damages amounting to Rs. 1 Lac to the Plaintiffs, against the Defendant. No other relief is granted to the Plaintiffs.

Decree sheet be drawn accordingly.