

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ I.A. Nos.13867 of 2009 and 13868 of 2009 in
C.S. (OS) No.2027 of 2009

% MICROSOFT CORPORATION & ANR.Plaintiffs
Through: Mr. Pravin Anand, Advocate.
Versus
MR. DHIREN GOPAL & ORS.Defendants

WITH

+ I.A. Nos.14502 of 2009 and 14503 of 2009 in
C.S. (OS) No.2132 of 2009

MICROSOFT CORPORATION & ANR.Plaintiffs
Through: Mr. Pravin Anand, Advocate.
Versus
MR. S.R. MEHTA & ORS.Defendants

Reserved on : 17th November, 2009

WITH

+ I.A. Nos.13846 of 2009 and 13847 of 2009 in
C.S. (OS) No.2024 of 2009

MICROSOFT CORPORATION & ANR.Plaintiffs
Through: Mr. Sai Krishna Rajgopala, Ms. Safia,
Mr. Ankush Mahajan & Ms. Aashia Behl,
Advocates.
Versus
MR. MANISH CHOWDHURY & ORS.Defendants

WITH

+ I.A. Nos.13863 of 2009 and 13864 of 2009 in
C.S. (OS) No.2026 of 2009

MICROSOFT CORPORATION & ANR.Plaintiffs
Through: Mr. Sai Krishna Rajgopala, Ms. Safia,
Mr. Ankush Mahajan & Ms. Aashia Behl,
Advocates.
Versus
MR. PRADEEP KHANNA & ORS.Defendants

Reserved on : 16th November, 2009
Date of Order : 07th December, 2009

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. These four suits have been filed by Microsoft Corporation against four different defendants alleging violation of the copyright on the ground of suspicion that the defendants were using pirated/illegally-copied software of the plaintiffs at their offices/work place. The suspicion is based on the investigation done by an alleged independent “investigator” engaged by the plaintiffs, who through telephonic conversation with the employees of the defendants estimated the number of computers that may be installed at the office/work place of the defendants and thereafter matching the number of licenses of the software of the plaintiffs lawfully procured by the defendants. The plaintiffs also visited websites of the defendants to know the nature of work being done by them and the kind of software being used by the defendants and the claims being made by the defendants. On the basis of website information and the database maintained by the plaintiffs regarding sale of its licensed software and the assessment made by the investigator of the number of computers installed, the plaintiffs suspected that there was every probability of the defendants using pirated software of the plaintiffs committing infringement of copyright of the plaintiffs. Thus, it is prayed that an ex-parte injunction should be issued restraining defendants, their agents, servants and all other persons acting on their behalf from using pirated/unlicensed software programmes of the plaintiffs in any manner to protect the copyright of the plaintiffs. Coupled with the application for interim injunction under Order 39 Rules 1 and 2 CPC, there is an application under Order 26 Rules 9 and 10 CPC seeking appointment of a Local Commissioner to visit the offices of defendants and to seize the hard discs of the

computers, compact discs and other storage/replicating media installed at defendants offices with the help of technical expert of the plaintiff and to prepare an audit report/license summaries and to determine if they contain pirated, counterfeit unlicensed version and to seize and seal the computers' CPU, hard disc, compact disc and other storage/replicating media as found to contain unlicensed, pirated, counterfeit version of any of the plaintiff's softwares, returning them on *superdari* to defendants with a condition to produce the same before the court and directing the defendants and their employees to provide password and particulars of their computer systems.

2. Issuance of notice of the applications and the suit to defendants for hearing and deciding on merits is resisted on the ground that this shall defeat the very purpose of filing the suit since the defendants would have sufficient opportunity to delete the pirated software from its computer systems and that would make the suit of the plaintiffs infructuous. Thus, the issuance of an ex-parte injunction along with appointment of a Local Commissioner is pressed.

3. Out of the four defendants against whom these suits have been filed, none has business place in Delhi. In C.S. (OS) No.2027 of 2009, the defendants have offices and work places at Bangalore only. Four office addresses of defendants of Bangalore are given in this suit. In C.S. (OS) No.2024 of 2009, the defendants have offices at Ahmedabad, Pune and Bangalore. There are seven number of office addresses of defendants in these three cities. In C.S. (OS) No.2026 of 2009, the defendants are located at Mumbai and there are four number of office addresses of defendants in Mumbai. In C.S. (OS) No.2132 of 2009, the defendants are located at Chandigarh and Mohali (a town near Chandigarh) and Derabassi. There are five number of office address of defendants in Chandigarh and surrounding areas as given in the suit.

4. The plaintiff is a multinational company and is having extensive business in India. It has its offices in twelve major cities in India, namely, Ahmedabad, Bangalore, Kolkatta, Mumbai, Chandigarh, Pune, Chennai, Delhi, Gurgaon, Hyderabad, Indore and Nagpur. Thus, the plaintiffs have offices in all the cities where the defendants have offices. In Bangalore, the plaintiffs have four offices at four different places. In Hyderabad, the plaintiffs have three offices at three different places. In Mumbai, Chandigarh, Delhi and Pune, the plaintiffs have one office each. This information about the location of plaintiffs' offices is available on the website of plaintiffs and is not disputed. The plaintiffs have filed these suits against defendants, who are not located in Delhi on the basis of Section 62 (2) of the Copyright Act, 1957.

5. **Value of the Report of investigator**

Four cases have been filed by two different law firms (two each) and they have relied upon two different investigators. One of the investigator relied upon is Mr. Jatin Batra and other is Mr. Anil Nayer. It was considered appropriate by this Court to record the statements of investigators to know their status, qualification and expertise in the field. Mr. Jatin Batra had done a diploma in Tool & Die Technology from Central Tool Room, Ludhiana and had done his graduation (BA) from IGNOU through open learning. Thereafter, since he could not get a job in the field of Tools & Die area, he worked at a call center at Noida for about four years and after leaving the job of call center, he joined the law firm which filed the suit, as an investigator and was getting a retainership of Rs.80,000/- per month. He testified in the Court that he had no knowledge of piracy, etc., and he gets the names of companies and tries to find out what was the software being used by the companies and what were the number of computers. In this investigation, he did not visit the company physically and only conducted investigation through telephone by contacting employees. He was solely working for the law firm and was not doing any

other work than the work assigned by the law firm. It is obvious that the investigator is an indirect employee of law firm.

6. The other investigator Mr. Anil Nayer was B.Com and had done Executive Course from Indian School of Business. He was earlier in Army. He had no professional qualification in software, however, he does software investigation. He testified that his client gives necessary data in respect of the company. He does three level of investigation. One is internet investigation, other is interview of the employees and third was physical verification. His own credentials are doubtful because of the fact that while he was still in Army he got an appointment letter and also, entered into an agreement with Hill and Associates on 10th October, 2001. A news item was published about his clandestine activities in 'Tehelka'. He left Army on 2nd February, 2002.

7. I consider that the court cannot rely on the affidavits procured from such investigators by the law firms in support of their client's cases. Such affidavits can be procured on payment. Even otherwise, the affidavits filed by professional experts in support of their client's cases should be looked upon with suspicion since invariably these experts support their client's case irrespective of the factual situation. I am reminded of the affidavits filed in Supreme Court of New York, U.S.A. in a case filed by Japanese company against ICICI Bank where two former Chief Justices of this country filed contrary affidavits in support of their clients. One in favour of Japanese company and other in favour of ICICI Bank giving contradictory opinion about judicial system of this country and again affidavits were filed in the same court in respect of suit against State Bank of India by another Chief Justice of Supreme Court and a Judge of Madhya Pradesh High Court in support of their clients. Thus, such affidavits which are filed in support of their clients on receipt of professional charges should not be given much weight as the affidavit are always in support of their client and may be far from truth.

8. Even otherwise, both the investigators are not from the field of computer softwares or even computer science. Both seem to have no knowledge of piracy or copying of software. Both seem to have been used by the plaintiffs' law firms. Under any circumstances, they cannot be termed as independent investigators.

OTHER SIMILAR CASES

9. In plaints, the plaintiffs have given a list of several other cases conducted by the same law firm on behalf of different clients and it is stated that in each case, ex-parte injunction with appointment of Local Commissioner was ordered by the Court. Although, no addresses of defendants of these cases have been given in the list but I am sure that most of them have to be of outside Delhi. An inquiry during arguments as to what was the ultimate fate of these cases revealed that almost in all cases, a compromise was entered into by defendants with the plaintiffs.

10. A perusal of few Local Commissioner's reports of these cases show that invariably in all cases, Local Commissioners sealed the CPU's, computers of the defendants bringing the entire business of the defendants to a standstill. There is no gain saying that once an ex-parte injunction is granted by the Court, getting an ex-parte injunction vacated or a decision on the application on merits by the court becomes a herculean task for the other party. Granting of ex-parte injunction along with appointment of Local Commissioner has become a routine process and deciding of applications under Order 39 Rules 1 and 2 CPC on merits after hearing the parties in such cases is a rare phenomenon. All kinds of excuses are used to seek adjournments once a party gets ex parte injunction. This is one strong reason why the transfer of original jurisdiction from the High Court to the District Courts is strongly opposed by a lobby

having vested interest because it is easier to get ex-parte injunctions in High Court and once you get ex-parte injunction, the application on merits is invariably not allowed to be decided in time and the party having ex-parte injunction starts evading arguments on merits on one or the other ground. This results in those cases (of alleged copyright infringement) where computers are sealed, adopting a blackmailing tactics by the plaintiff and the defendants, in order to restart their business and lessen their losses, start succumbing to the pressure. Moreover, when the defendants are not situated in Delhi, to contest litigation coming from Mumbai, Hyderabad, Bangalore itself becomes a source of harassment for the defendants and that seems to be a reason that in all those cases where ex-parte injunctions are granted, specifically in alleged copyright infringement case, the suits are never contested. The contest takes place only in those cases where infringement of trade mark and design is involved and the parties are normally locally situated and are able to give a meaningful contest to the allegations of violation.

11. It is perhaps for this reason that the Supreme Court in the case of *Padam Sen and another Vs. The State of Uttar Pradesh AIR 1961 SC 218* in respect of appointment of Local Commissioner observed as under :-

“(9) The question for determination is whether the impugned order of the Additional Munsif appointing Sri Raghbir Pershad Commissioner for seizing the plaintiff's books of account can be said to be an order which is passed by the Court in the exercise of its inherent powers. The inherent powers saved by s.151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure. A party has full rights over its books of account. The Court has no inherent power forcibly to seize its property. If it does so, it invades the private rights of the party. Specific procedure is laid down in the Code for getting the relevant documents or books in Court for

the purpose of using them as evidence. A party is free to produce such documents or books in support of its case as be relevant. A party can ask the help of the Court to have produced in Court by the other party such documents as it would like to be used in evidence and are admitted by that party to be in its possession. If a party does not produce the documents it is lawfully called upon to produce, the Court has the power to penalize it, in accordance with the provisions of the Code. The Court has the further power to draw any presumption against such a party who does not produce the relevant document in its possession, especially after it has been summoned from it. Even in such cases where the Court summons a document from a party, the Court has not been given any power to get hold of the document forcibly from the possession of the defaulting party.

(10) The defendants had no rights to these account books. They could not lay any claim to them. They applied for the seizure of these books because they apprehended that the plaintiff might make such entries in those account books which could go against the case they were setting up in Court. The defendants' request really amounted to the Court's collecting documentary evidence which the defendants considered to be in their favour at that point of time. it is no business of the Court to collect evidence for a party or even to protect the rival party from the evil consequences of making forged entries in those account books. If the plaintiff does forge entries and uses forged entries as evidence in the case, the defendants would have ample opportunity to dispute those entries and to prove them forgeries.

(11) We are therefore of opinion that the Additional Munsif had no inherent power to pass the order appointing a Commissioner to seize the plaintiff's 889 account books. The order appointing Sri Raghubir Pershad as Commissioner for this purpose was therefore an order passed without jurisdiction and was therefore a null and void order."

(emphasis added)

12. The plaintiffs have relied upon decision of the Division Bench of this Court in the case of *Autodesk Inc. & Anr. Vs. Mr. A.V.T. Shankardass & Anr.* in F.A.O. (OS) No.116 of 2008 to press the claim for appointment of Local Commissioner wherein the Division Bench had observed as under :-

"10. We have considered the reasons as recorded by the learned Single Judge and are of the view that the order is not sustainable. The learned Single Judge erred in holding that the appellant did not have a strong prima facie case. Indisputably the appellant was the owner of the copyright in world famous software 3Ds Max and

Autodesk Maya. Appellant had only granted a single licence based on the information as obtained by the Investigator during his conversation with the Executive of the respondent, the software for which there was only a single licence was being used for 30 computers and 50 animators. The private Investigator had sworn an affidavit on oath with regard to his conversation and information as received. In these circumstances, it could not be said that the appellant did not have a strong prima facie case. At the initial stage itself, it would be unrealistic to expect production of evidence of actual usage. The learned Single Judge failed to consider that in an action of infringement of software and piracy, the element of surprise was of critical importance and necessary. Issuance of notice would result in effacement of entire incriminating evidence. It was thus not a question of collecting evidence but of preserving evidence. In Anton Piller KG Vs. Manufacturing Processes Limited and others (Supra) the Court duly recognized that the essence of the plaintiff's case was seeking an emergency order without the defendant being aware of the nature of the order unless it was presented to them.

.....

12. We are of the view that in this case the learned Single Judge has failed to exercise jurisdiction vested in him in accordance with law, especially in failing to pass orders, which would preserve and protect the incriminating evidence. Reference may be invited to Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Cooperative Society and others reported at AIR 1996 Kerala 276. Reference may also be usefully made to Basanta Kumar Swain VS. Baidya Kumar Parida and others reported at AIR 1989 Orissa 118, wherein it was observed that where the Court is satisfied that the party is not able to produce the desired evidence for reasonable circumstances, it may assist a party by appointing a Local Commissioner to get the evidence. The learned Single Judge failed to fathom that the service of the impugned order or notice in the application could result in either the movement of the system or the software to unknown destination leaving no surviving evidence thereby causing grave prejudice to the appellants.”

13. It is obvious that the judgment of Supreme Court in ***Padam Sen's*** case (*supra*) was not brought to the notice of the Division Bench. It is also obvious that the Division Bench had not considered the advancement of technology in the field of computer forensics.

14. I consider that in all those cases where there is a suspicion of use of pirated

software or data, there is no necessity of sealing or seizing the defendants CPUs, computers, etc. The orders of sealing and seizing and then keeping them sealed till the disposal of the case is being misused by the plaintiffs for black mailing the defendants. Today the technology has advanced to an extent and a mirror image of the hard disc can be obtained and preserved. The mirror images so obtained would contain all the data being used on computer systems. The appropriate method, therefore, in all such cases where the court considers appointment of Local Commissioner necessary and seizing of infringing material necessary is a direction for preparation of mirror images of the hard disc and get such mirror images sealed on the spot so that the plaintiffs are not able to use the database of the defendants either for blackmailing the defendants or for any other purpose and the sealed mirror images are produced in the court and inspected in the court by experts of the plaintiffs to find out if there was an infringement or not and if the plaintiffs finds an infringement, he should file an affidavit after viewing the mirror images to that extent and the suit should be continued further, otherwise the suit should be dismissed and the defendant should be suitably compensated by the plaintiff for making false allegations, by way of awarding cost to the defendants.

15. Appropriate forum

Section 62 (2) was introduced in Copyright Act by the Parliament to protect and see that the authors of original works should not be made to run from one court to other court wherever the infringement of their copyright takes place in order to initiate proceedings against the infringements and that they should be able to initiate such proceedings before the District Court where they live. The Division Bench of this court in *Indian Performing Right Society Limited Vs. Sanjay Dali and another* [F.A.O. (OS) No.359 of 2007] reported in *2009 (39) PTC (Delhi) (DB)* observed as under :-

“7. We have perused the Parliamentary Debates relating to the amendments carried out to the law of copyright and trademark. One of the Objections that was raised was that the new jurisdictional dispensation would favour multinational corporations as they would be able to initiate litigation according to their choice and secondly that a poor holder of a trademark will be at a disadvantage. In the context of the first Objection it was clarified that the new provisions would be to the advantage of the petty trader incidentally doing his trade on the basis of a registered trademark, and that if this purpose was not achieved, an amendment would be brought in. If the interpretation of Section 62 which we intend to impart, (which would also apply to Section 134 of the Trade Marks Act) is accepted, both these apprehensions would be addressed and resolved. Plainly, if the cause of action has arisen at a particular place where the plaintiff has its principal or subordinate office, and it is restricted to filing a case in that place alone, the Defendant would not be put to any unfair disadvantage. The intendment of Section 62 of the Copyright Act and Section 134 of the Trade Marks Act is to enable the Plaintiff to initiate litigation at a forum convenient to it. It is not intended to allow the plaintiff to choose a territorial forum which is not convenient to either of the parties, as is demonstrated by the case in hand. Bill No.XV of 1955 sought to “amend and consolidate the law relating to copyright”. The Parliamentary Committee was of the opinion that “many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new sub-clause (2) accordingly provides that infringement proceedings may be instituted in the district court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business, etc.” This is a manifestation, in reverse, of what we have assessed as a general principle of law, viz., that the intendment behind prescribing the place of suing is to ensure that litigation should be as best possible not a weapon of harassment. Since experience had exposed the reality that if a plaintiff in an action for infringement of copyright or trademark may not be able to enjoy the fruits thereof if he was compelled to file at the transgression’s place of business, the amendment was brought about. It could not have been the intention of Parliament to enable the Plaintiff to choose the place of suing on the basis of what would be the inconvenience to the Defendant.

8. The learned Single Judge is unassailably correct in opining that “the plaintiff would be deemed to carry on business at a branch office only if a cause of action has arisen in Delhi”. In doing so he has extracted and infused the rationale of Section 62 of the CPC into the Copyright Act. As we have already recorded above, it is the uncontrovered case of the parties that the cause of action has not arisen in Delhi. The neat question is whether a court of law is proscribed from introducing the aspect of cause of action

merely because it has not been prescribed in the legislation. Alternatively, in the absence of an Explanation as is to be found in Section 20 of the CPC can the pragmatic and equitable principles not be injected into the relevant Section. It is beyond cavil that the concept of cause of action is inseparably intertwined in each and every litigation. Without it the lis would be liable for rejection under Order VII Rule 11 of the CPC. The cause of action, therefore, permeates every sinew of the suit and all procedural provisions, which are but handmaidens of justice.

9. In *S. Sundaram Pillai vs. V.R. Pattabiraman*, AIR 1985 SC 582 their Lordships observed that – “it is manifest that the object of an Explanation to a statutory provision is (a) to explain the meaning and intendment of the Act itself, (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve, (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful, (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same”. The following observations in ***Keshavji Ravji vs. Commissioner of Income-tax*, AIR 1991 SC 1806** are in similar vein:

“14. An „Explanation“, generally speaking, is intended to explain the meaning of certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purposes and intendment of the „Explanation“ are determined by its own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation maybe introduced by way of abundant caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the legislature considers to be the true meaning beyond controversy or doubt. Hypothetically, such can be the possible purpose of an „Explanation“ cannot be doubted.”

10. So far as Section 20 is concerned, the Explanation is clarificatory in nature. The problem that is presented is that Section 62 of the Copyright Act does not have any similar Explanation. Strictly speaking, an Explanation found in one statute

cannot be read into another statute. The CPC, however, constitutes a grundnorm, the ethos and essence of which percolates through all other statutes. If any doubt persists in the context of the provisions of Copyright Act or the Trade Marks Act, we would not hesitate to dispel them with the aid of this Explanation found in the CPC. In **Harshad S. Mehta vs. State of Maharashtra, AIR 2001 SC 3774** it has been held that if two Acts are similar an external aid of statutory interpretation contained in one and omitted in another can be read into the latter. This course has also been favoured in **Shri Narakesari Prakashan Ltd. –vs- Employees” State Insurance Corporation, AIR 1984 SC 1916.**

11. The intention of the legislature is evident, inter alia, in the non-obstante clause pertaining to the CPC. The word “notwithstanding” in ordinary parlance means „inspite of” or despite. (See Concise Oxford Dictionary as well as Black”s Law Dictionary). This word does not indicate that the CPC has no role to play. In the factual matrix before us the word „notwithstanding” connotes that in addition to Section 20 of the CPC, by virtue of Section 62(2) of the Copyright Act, the plaintiff is free to choose a forum convenient to it, that is, wherever it actually and voluntarily resides or carries on business or personally works for gain, provided the cause of action arises there. This is in contradistinction to that of the defendant as prescribed by Section 20 of the CPC. It is difficult for us to conceive of a situation where the ameliorative advantage bestowed on the plaintiff by virtue of Section 62 of the Trade Marks Act or Section 134 of the Trademarks Act could be frustrated if this interpretation is given effect to. Let us assume that the cause of action has arisen in Kanyakumari. It is axiomatic that in the case of a violation of a trademark or copyright the Defendant would have some presence, that is, actual and voluntary residence, or carrying on of business or working for gain, in Kanyakumari. If the Plaintiff also carries on business etc. in Kanyakumari there would be no justifiable reason not to bring the suit only at Kanyakumari. Assuming, however, that the Plaintiff does not carry on business in Kanyakumari but in Delhi or in Bombay or Calcutta, he would face the disadvantage of having to file his suit at a hostile or inconvenient place. Section 62 would then enure to his benefit and enabling it to file the action in any of the three cities. However, if the Plaintiff were to be free to choose from any of the places where he is carrying on business etc. with no correlation to the cause of action, the consequence would be that his choice would create for the Defendant the very disadvantage which the legislation has sought to alleviate for the Plaintiff. In that event, no useful purpose would be served for the plaintiff except for additional harassment to the Defendant. This could never have been the intention or purpose of Parliament and if this pragmatic and commonsense interpretation is not imparted to the Section, the comment of Hon’ble Minister, Mr. Murosoli Maran that an amendment would be brought in would become imperative. Since the cause of action is an integral, inseparable and inevitable part of any litigation, by

reading it into Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, the law is made meaningful and expedient. This is the bounden duty of any Court which is called upon to interpret a provision of law.”

16. However another Division Bench of this court in ***Horlicks Limited and another Vs. Heinz India (Private)Limited*** in ***F.A.O. (OS) No.86-87 of 2009*** decided on 23rd October, 2009 took a contrary view and observed as under :-

“80. We are in agreement with the submissions of the learned counsel for the appellants that if the principle of forum non convenience would be applied to a civil suit governed by the said Code, the plaintiff would be left in the dark. There may be more than one court which may have jurisdiction in the matter but so long as a particular court has the jurisdiction, the privilege is of the plaintiff. The plaintiff may be made to run from one court to the other without knowing where the initial case ought to be instituted. Such a situation is not envisaged by the said Code.

*81. We have discussed the aforesaid judgments despite the substratum of the case of the respondent not surviving as it was based on the contention of principle of forum non convenience being the other side of the coin of the doctrine of anti suit injunction since if a court could restrain another court indirectly, it could certainly restrain itself. We find that the views expressed by the learned Single Judges in *Frank Finn Management Consultants v. Mr.Subhash Motwani and Anr.s case (supra)*, *L.G.Corporation & Anr. v. Intermarket Electroplasters (P) Ltd and Anr.s case (supra)* and *Jayaswals NECO Limited v. Union of India and Ors. case (supra)* holding that the principle of forum non convenience has no application to suits, enunciates the correct legal position and thus are unable to approve the view taken in *Rashtriya Mahila Kosh v. The Dale View and Anr.s case (supra)* and the impugned judgment.*

82. We thus hold that the principle of forum non convenience has no application to domestic forums in India which are governed by the said Code.”

17. Thus, the law on appropriate forum is not settled and a difference in opinion still exists between different benches. Taking advantage of this, suits of this nature are still being filed in the court of their choice (or choice of their advocates) by the plaintiffs. This creates a very peculiar situation in this country and shows how money power

becomes important in choosing the forum and the courts become helpless in dealing with such 'forum hiring'. The situation is more peculiar in Delhi where the original jurisdiction of the High Court starts from Rs.20 lac onwards and almost every suit for infringement of copyright, trademark, patent and design is valued around Rs.20 lac so as to create the jurisdiction of the High Court of Delhi while there is no realistic relationship between the valuation and the relief sought.

18. Over the time, it has become a settled law that it is discretion of the plaintiffs to value their suit for purpose of court fee and jurisdiction in cases of trade mark, copyright etc. and court cannot question the valuation done by the plaintiffs and had to entertain the suit. Thus, by paying court fee on amount of Rs.20 lac which comes to around Rs.21,900/-, all suits can be filed in Delhi High Court ignoring the District Court. Today in Delhi, the value of even one room apartment would be more than Rs.20 lac in most of the areas and if there is a suit to be filed in respect of one room apartment then suit must be filed before the High Court. It has become the choice of the advocate of the plaintiff where to file the suit. He shapes the valuation and the reliefs in accordance with the forum of intended trial. If the suit is to be filed before Civil Judge, the suit is valued accordingly and if the suit is to be filed before District Judge, it is valued accordingly and if the suit is to be filed before High Court, it is valued accordingly. Every suit relating to properties in Delhi can be filed on original side of the High Court, if the plaintiff so desires. It only seems that trial time taken in the High Court on the original side and the fees of advocates have deterred many of the plaintiffs from resorting to the High Court (Original side). However, when the jurisdiction of this court was Rs.5 lac and above, all IPR cases used to be filed in High Court by paying court fee on Rs.5 lac. When the jurisdiction was raised to Rs.20 lac, these cases were transferred to District Courts and almost in every case, an application for amendment of the suit was filed and the jurisdiction para and valuation and court fees para of every IPR suit was amended and the

cases again came back to High Court. Thus, it is the discretion of the person to choose the forum. If he can pay the Court fee of the High Court, he can value his suit accordingly (wherever there is original jurisdiction with the High Court) and choose the High Court as the court of original jurisdiction and if one cannot afford to pay the court fee as well as the fee of the High Court advocate, he can value the suit accordingly and choose either Civil Judge or a District Judge as the forum.

19. Given the present interpretation of Section 62(2) of the Copyright Act, a multinational company having its office within the same district where the cause of action arose, defendant resided and where witnesses would be there and it is convenient for the court as well as for the parties to contest the suit, may refuse to file the suit in that State court and choose a distant stand court far away from the office of defendant. Thus, on the strength of its money power it has added advantage of choosing a court of its own liking which is so far away from the defendant so that it becomes problematic and a harassment for the defendant to contest the suit itself. This has been reflected by the Division Bench in its order in Indian Performing Rights Society Ltd. case (*supra*).

20. I consider that when the Constitution of India provides equality before law this equality has to be all pervasive and cannot be allowed to be diluted because of money power or lobbying power. One cannot be given liberty to choose a court of his liking because of his money power. There should be one definite court where the suit can be filed by everybody and one cannot hire the services of the court of his choice, i.e., Civil Judge, District Judge or High Court, because he can pay more court fee and advocate fee. I consider that the Legislature and the authorities, who have to act, should seriously consider of removing this anomalous situation by making appropriate amendment in Section 62(2) of the Copyright Act and other similar statutes and it should be seriously considered why the original jurisdiction should not be only with District Courts and the

High Courts should be spared to deal with the appeals, writs and related work. Today, the situation is that even the criminal appeals of those who are in jail cannot be heard and disposed of within a reasonable time because enough judges cannot be put for hearing criminal appeals while High Courts have burdened themselves with the original jurisdiction where the jurisdiction should be vested with District Courts. Even if the District Judges are not that liberal in granting ex-parte injunctions, the High Courts are there to hear appeals and can give relief in appeals where appropriate, but it should not be that if you can pay more money, you can hire a more experienced judge (High Court Judges) to decide your cases and if you cannot pay more money, you will have to go to a newly appointed judge (Civil Judge).

21. Be that as it may, being bound by the judicial discipline, I am bound to entertain the suits despite the fact that the most appropriate forum for filing these suits would have been the places where Microsoft has offices and defendant also has office or place of work and the cause of action of infringement also took place.

22. I consider that the court cannot act as an investigating agency for a party. If the investigative suits are filed by a party on mere suspicion that there may be an infringement of copyright being committed by the defendant and seeks appointment of a Local Commissioner and notice to the defendant, having his office at a far of place so as to deter him from approaching the court at Delhi when the suit could have been filed at the place of defendant itself, the plaintiff should be asked to deposit costs for the defendant in the court so that in case, after notice it is found that the plaintiff instituted a false suit, he can be burdened with cost and the defendant can be compensated accordingly. The costs must commensurate with the expenses which the defendant will have to incur for coming to Delhi, staying here and engaging a counsel in Delhi and paying fee to the counsel. Fees of competent advocates in High Court of Delhi are quite

high. I, therefore, consider that the plaintiff should be asked to deposit a sum of Rs.2 lac per case as costs security in the court for the defendant as a pre-condition for entertaining a suit which is investigative in nature and Delhi is deliberately chosen as a forum despite having office at defendant's place where the basis of suit is a suspicion based on a hired investigator's report, who is bound to give affidavit favourable to the plaintiff being a salaried investigator.

23. Accordingly, ex parte ad interim injunction is allowed in following terms :-

1. The plaintiffs shall deposit with Registrar General of this Court a sum of Rs.2 lac as cost security in each case for the defendants, which will be paid to the defendants in case the suit is found speculative and the allegations made by the plaintiffs are found false. Notice of application under Order 39 Rule 1&2 CPC and summons of the suit be issued to the defendants subject to deposit of cost security, returnable for 18th January, 2010.
2. The defendants in case are using pirated software, shall cease and desist from using pirated software forthwith.
3. The Local Commissioner along with a technical expert of the plaintiffs shall visit each of the offices of the defendants and with the help of technical expert, shall prepare mirror images of the hard discs of the computers being used in the offices of the defendants and immediately thereafter, the mirror image shall be sealed by the Local Commissioner with his seal and the Local Commissioner shall bring those mirror images to the Court and deposit the same in the court. The mirror images will be inspected by the technical expert of the plaintiffs in presence of representative of the defendants in the court and the plaintiffs shall prepare a list of the software being used and found on the hard disc. The plaintiffs' responsible officer, who shall take personal liability to suffer consequences in case the affidavit is found false, shall file an affidavit about the infringements giving details of pirated/infringing softwares.

24. The fees of the Local Commissioner shall be Rs.25,000/- per day plus to and fro fare. In case he has to stay overnight, the expenses for his stay at a reasonable place in the city of visit shall be borne by the plaintiffs. The Local Commissioner shall serve notice of this order and the applications on the defendants and shall handover a copy of the order and application to the defendants before starting commission. In case of any resistance being put by the defendants, he shall be at liberty to take help of the local police. The Local Commissioner may be accompanied by one technical expert of the plaintiffs and one advocate of the plaintiffs. The technical expert shall carry all the equipments with him for preparing mirror images. He may keep with him one assistant for help.

25. With the above directions, applications under Order 26 Rule 9 CPC stand disposed of. The Local Commissioner for each city shall be appointed by the court on deposit of cost security as ordered, with the Registrar General.

C.S. (OS) Nos.2024/2009, 2026/2009, 2027/2009 & 2132/2009

List on 18th January, 2010.

DECEMBER 07, 2009
‘AA’

SHIV NARAYAN DHINGRA J.