

IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : December 15, 2014

DECIDED ON : January 27, 2015

+ CS(OS) 1842/2008

SYMANTEC SOFTWARE SOLUTIONS PVT. LTD. & ORS

..... Plaintiffs

Through : Mr.R.K.Virmani, Sr.Advocate with
Mr.P.Anand, Mr.Shantanu &
Mr.Ashish, Advocates.

versus

MS. R. MODI & ORS.

..... Defendants

Through : Mr.C.M.Lall, Advocate with
Ms.Nancy Roy, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

The order is pronounced today as 23.01.2015 was declared holiday on account of Full Dress Rehearsal of Republic Day, 2015.

IA No.22920/2012 (For recalling the summons issued to witnesses)

1. The instant suit is for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts, damages etc. instituted by the plaintiffs against the defendants. After the settlement of issues on 26.10.2009 and two additional issues on 4.10.2010, the

plaintiffs examined five witnesses PW-1 (Ashwin Mehta), PW-2 (Gaurav Shankar), PW-3 (Ms.Tanu Arora), PW-4 (Vinish Mehra) and PW-5 (Sachin Patel). They all except (PW-5) were cross-examined at length on various dates before the Local/Court Commissioner. The plaintiffs concluded their evidence before April 2011. On 26.04.2011 six weeks time was given to the defendants to produce evidence before the Local Commissioner. The defendants were burdened with costs ₹10,000/- for not complying with the order and by an order dated 3.11.2011 they were directed to file list of witnesses within a week. List of witnesses filed by the defendants is on record where the defendants opted to examine Ms.Rupali Modi and other witness (if any) with the permission of the Court. It appears that subsequently an application was moved in the Registry to summon seven witnesses for examination before the Local commissioner. Summons were issued to the witnesses for appearance.

2. The instant IA has been filed to recall the order summoning these witnesses as they are officials of the plaintiffs and only purpose to examine them is to harass them. Their evidence is not at all relevant. In reply, the defendants have emphasized that all these witnesses are relevant for recording findings on two additional issues. Their names have appeared in the cross-examination of the various witnesses examined by

the plaintiffs. In para No.9 reasons have been given for summoning the said witnesses.

3. Record further reveals that the plaintiffs volunteered to produce Mr.Anil Nayyar as a witness before the Court Commissioner.

4. I have heard the learned counsel for the parties and have examined the record. In the initial list of witnesses filed on record by the defendants, these witnesses were not cited or mentioned. Subsequently, the defendants without disclosing relevancy of these witnesses moved the application to summon them before the Court Commissioner. The defendants intend to examine seven witnesses who are admittedly officials /officers of the plaintiffs' company and were not examined by them.

5. So far as PW Anil Nayyar is concerned, he has already been permitted to be examined before the Court Commissioner.

6. Regarding PW-Achuthan Sreekumar, in my view, his testimony is necessary to decide the institution of the suit by a duly authorized person. He is the Constituted Attorney of the plaintiffs and has put his signatures on the plaint on their behalf. Specific issue regarding his competence and authority to institute the suit on behalf of the plaintiffs has been settled and onus to prove it is on the defendants. The plaintiffs

themselves did not opt to examine him in their evidence though admittedly he had signed and verified the plaint.

7. So far as witness Ms.Rohini Boez is concerned, the plaintiffs themselves had cited her a witness in their list of witnesses (page 216). However, she was not examined by the plaintiffs. In the cross-examination, PW-2 (Gaurav Shankar) revealed that Ms.Rohini Boez had received information regarding the alleged use of unlicensed pirated software of the plaintiffs by the defendants. Under these circumstances, she is a relevant witness to be examined.

8. Regarding PW-Inzamuni, the plaintiffs in the application have stated that he is unknown to plaintiff No.4 and his presence is not required as a witness. His name emerged only in the cross-examination of PW-1 (Ashwin Mehta). Plea of the learned counsel for the defendants is that PW-1 (Ashwin Mehta) was unable to answer the questions regarding financial dealings of the plaintiffs with BSA. I have scrutinized the cross-examination of PW-1 (Ashwin Mehta) running into 148 questions. Name of Hiroshi Inzamuni surfaced when question was put by the plaintiffs as to name the people who would have the information in detail (Q.No.116). The witness gave the name of Hiroshi Inzamuni with the rider that he was not sure. No specific role has been attributed to Hiroshi Inzamuni as to

how the financial dealings of the plaintiffs with BSA are relevant for deciding the dispute between the parties. Merely because his name has surfaced in the cross-examination pursuant to the questions put by the defendants' counsel, the witness cannot be summoned for examination.

9. The defendants intend to examine Keshav S.Dhakad and PW-Tarun Sawhney merely because their names have emerged in the cross-examination of PW-4 (Vinish Mehra). When asked to name the members of the Committee, PW-4 (Vinish Mehra) disclosed that the Committee comprised of Mr.Keshav S.Dhakad, the then BSA Chair and Mr.Tarun Sawhney, Director (Anti-piracy), APAC, BSA and he himself. He further replied to another question that Mr.Keshav S.Dhakad was the member representative in the Committee. There was no other company representative. Another question was put by the counsel to PW-4 (Vinish Mehra) that the witness was aware that Mr.Anil Nayar took up employment wrongfully with a private investigation agency having foreign directors while in a sensitive position in the Army and this information was known to Mr.Sawhney and Mr.Dhakad. The witness expressed his ignorance of any such alleged incriminating information. He volunteered that to his belief Anil Nayar took voluntary retirement from the Indian Army and is a pensioner. It is not disclosed as to how

examination of Mr. Keshav S.Dhakad and Tarun Sawhney is relevant in the instant suit.

10. The defendants intend to summon Karishma Gandhi as in the cross-examination of PW-3 (Ms.Tanu Arora) she revealed that she had access to information regarding accounts of BSA. Perusal of the cross-examination of PW-3 reveals that all the relevant answers have been given in detail by the witness. If her testimony read as a whole, the presence of Ms.Karishma Gandhi is not required to answer any further question. She has merely stated in response to question 24 as to who in her company had access to this information. The witness has stated that at present it was Ms.Karishma Gandhi. On asking her designation, she revealed that her designation was Brand Protection Specialist.

11. In the light of the above discussion, I am of the view that the evidence of Keshav S.Dhakad, Tarun Sawhney, Karishma Gandhi and Inzamuni is not relevant for resolving the controversy raised in the suit. Simply because their names have appeared in the cross-examination of certain witnesses pursuant to the questions put to them, they cannot be permitted to be examined by the defendants.

12. Regarding Anil Nayar, Achuthan Sreekumar and Rohini Boez, in my view, they are required to be examined by the defendants in

their evidence. The defendants have taken the risk to examine these official witnesses of the plaintiffs at their own risk.

13. The IA stands disposed of accordingly.

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Put up before the Roster Bench on 3.2.2015 for further directions.

**(S.P.GARG)
JUDGE**

JANUARY 27, 2015

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