CYBER APPELLATE TRIBUNAL
(Ministry of Communications & Information Technology)
Jeevan Bharti (LIC) Building, Connaught Place,
New Delhi

APPEAL NO. 2/2010

Date of decision June 29 , 2011.

SH. Vinod Kaushik & Anr. **…..APPELLANTS**
Through Mrs.S.R.Padhy, Advocate

Vs

Ms.Madhvika Joshi & others **…..RESPONDENTS**
Through Ms.Vaishali Bhagwat,
Advocate for R-1 to 3
Mr.Susmit Pushkar, Adv
for R-4

CORAM:

HON'BLE MR. JUSTICE RAJESH TANDON, CHAIRPERSON

1. **Whether the Reporters of local papers may be allowed to see the judgment?** _____
2. **To be referred to the Reporter or not** _____
3. **Whether the judgment should be Reported in the Digest.** _____

CYBER APPELLATE TRIBUNAL
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APPEAL NO. 2/2010

Date of decision June 29 , 2011

In Re:

Sh.Vinod Kaushik
s/o Late Dr.Raj Krishan,
Vice President, Tristars Alliance Ltd.Hongkong,
r/o 141-A, Super MIG Flats, Sector-93, Noida

Sh.Neeraj Kaushik,
s/o Sh.Vinod Kaushik,
R/o 141-A, Super MIG Flats, Sector-93, Noida

Appellants
Through Mrs.S.R.Padhy,Advocate

Versus

Ms.Madhvika Joshi,
d/o Sh.Manoj Joshi,
R/o 121, Dussehra Maidan, Ujjain (MP)

Sh.Atul Tripathi
s/o Sh.Brij Mohan Tripathi,
R/o P-II, Flat No.202,
Vishrant Wadi, Pune

Ms.Monika Agnihotri
D/o Sh.Prem Prakash Agnihotri,
R/o 89, Dussehara Maidan, Ujjain (MP)

Cognizant Technology Solutions Pvt.Ltd.
Through its Director (HR)
ICC Techpark, Senapati Bapat Marg,
Pune-411016 Respondents
Through Ms.Vaishali Bhagwat,Advo.
for respondents 1 to 3
Mr.Sushmit Pushkar,Advo. for R-4.

JUSTICE RAJESH TANDON, CHAIRPERSON

Heard Mrs.S.R.Padhy, Advocate for the appellant, Ms.Vaishali Bhagwat, Advocate for the respondents 1 to 3 and Mr.Sushmit Pushkar, Advocate for respondent No.4.

By the present appeal, the appellants have prayed for the setting aside of the impugned order dated 9th August,2010 passed in Complaint case No.2/2010 by Dr.Ajay Bhushan Pandey, Adjudicating Officer, Maharashtra State whereby dismissing the complaint filed by the complainant, appellant No.1 herein, under Sections 43,65,66(E),72 and 85 of the Information Technology Act,2000.

Briefly stated the facts of the present appeal are that the appellant No.1 is engaged in trading of commodities i.e. Chrome, Manganese and Iron Ore and the appellant No.2 is his son who got married on 26.1.2088 to respondent No.1 working with respondent No.4 and that due to severe dispute/differences with respondent No.1, his son, appellant No.2 left his house and started living separately from respondent No.1 at Maggarpatta Township in Pune, thereafter respondent No.1 got registered a frivolous case at Ujjain on 18.6.2008 which was transferred and got registered at Pune. Further the appellants have alleged that appellant No.1 deals in international trading, can never share the pass word for his G.mail account with anybody and again appellant No.1 became soar to such an extent that he had to leave the house on 17.6.2008 and live separately, he can never share pass word for his G.mail account. Both the appellants were changing their passwords very frequently so that nobody should be able to have any access to the information stored in their personal G.mail accounts and after separation, respondent No.1 submitted some hacked E.mail messages and chat sessions of both the appellants to the Pune police which are clear from the printouts of the copies dated 8.7.2008, 17.7.2008, 1.7.2008, 22.7.2008, 24.7.2008, 28.7.2008,

1.9.2008, 24.9.2008 and 4.10.2008, filed on record. Further the appellants have stated that from these printouts, it was clear that the illegal hacking, unauthorized accessing and tempering chat sessions were done by respondent no.1 along with respondents 2 and 3 who were her associates working in the same place i..e respondent No.4ôs office by illegally using the equipments i.e. the server, computer, printer and internet facility of the respondent No.4.

Learned counsel has stated that after getting the copies and coming to know from it, the appellant No.1 filed a complaint No.02/2010 before the Adjudicating Officer, State of Maharashtra which was dismissed by the Adjudicating Officer vide order dated 9th August, 2010.

The appellants have further stated that by furnishing these hacked documents, respondent No.1 managed eight days police custody of appellant No.2, due to this hacking and using of hacked documents, the overseas business assignment of appellant No.1 to Hong Kong was blocked, by using these hacked documents blocked client-site posting of appellant No.2 to US by way of detention of his passport, blocked various business opportunities of appellant No.1 by way of deleting business mails regularly and repeatedly for more than 15 months despite change of password frequently, by circulating hacked messages/ documents, damaged and hampered reputation of appellant No.1 and appellant No.2 in the Society and claimed a sum of Rs.50 lacs from respondents 1 to 4 jointly and severally for causing huge loss in terms of monetary as well as reputation.

The appeal was contested by the respondents by denying the averments contained therein.

Respondents 1 to 3 have raised preliminary objection stating that the record of the complaint shows that the complainant No.2 neither signed the said vakalatnama nor issued any authority letter or power of attorney in favour of complainant No.1, hence the complainant has no locus to file the complaint on behalf of complainant no.2 and that cause of action against complainant No.1 and complainant No.2 are different and distinct and also nature of reliefs is different.

The allegations made by complainant No.1 on behalf of complainant No.2 are without any personal knowledge, authority and are hearsay and, therefore, cannot be considered.

Respondent No.4 denied all the averments and submissions contained in the appeal. It is stated that the appeal is based on false and misleading representations of facts and law and is devoid of any merit.

A preliminary objection was raised by the respondent No.4 that the appellant No.1 is not authorized to file the present appeal on behalf of the appellant No.2 and that the appellant No.1 in his original complaint did not implead the email service provider of the appellants i.e. Google/Gmal. It is also stated that respondent No.4 was dropped from the array of the respondents vide order dated 18th March, 2010.

At the time of admission of the appeal, I have formulated following two points for consideration.

(1) Whether the complaint on behalf of Shri Vinod Kaushik is maintainable and the same requires to be decided by the Adjudicating Officer on merits on account of loss suffered by him?

(2) Whether absence of Sh.Neeraj Kaushik can give rise to him without impleading him as a complainant?

Since learned counsel for the appellants has raised objection for dropping respondent No.4 from the array of the respondents, point No.3 is framed to the following effect:-

(3) Whether respondent No.4 was dropped from the array of the respondents.?

I have heard the learned counsels for the parties at length.

Since points No.1 and 2 are interconnected, I am discussing both the points together. However point No.3 is discussed separately. My findings on the above points are as under:-

Points 1 and 2

The points for consideration are (1) ñWhether the complaint on behalf of Shri Vinod Kaushik is maintainable and the same requires to be decided by the

Adjudicating Officer on merits on account of loss suffered by him? **And** (2) Whether absence of Sh.Neeraj Kaushik can give rise to him without impleading him as a complainant?

Coming to the first submission regarding the maintainability of the complaint on behalf of appellant No.1, detailed arguments were heard.

Arguments of learned counsel for the appellants are that they never wanted compensation from the Adjudicating Officer for the false criminal case of the Pune Police or the Criminal Court in Pune but wanted the damages and compensation under the provisions of IT Act,2000 only for the damages caused, because of illegal hacking, unauthorized access, deleting, forwarding and tempering with messages, tempering with chat sessions etc. by respondents 1 to 3, by using unauthorized the electronic equipments of respondent No.4.

Further argument of learned counsel for the appellants is that while passing the impugned judgment, the Adjudicating Officer has also completely ignored the provisions of Section 47 (c) of the Information Technology Act in regard to the repetitive nature of default when the respondent No.1 has admitted in her reply stating, ñthat after filing the police complaint, the respondent accessed the emails of the appellants up to 24.9.2009 which means nearly for 15 months. Learned counsel for the appellants has referred Section 47(c) of the IT Act in order to establish the repetitive nature of the default regarding false e-mails. He has also referred Section 47 of the IT Act in order to assess the quantifiable claimed by the appellants in their complaint. For ready reference, Section 47 of the IT Act provides the criteria of granting compensation to the extent of repetitive nature of the default. Section 47 of the IT Act is quoted below:-

> ñ47.**Factors to be taken into account by the adjudicating officer.**- While adjudging the quantum of compensation under this Chapter, the adjudicating officer shall have due regard to the following factors, namely:-
>
> (a)the amount of gain of unfair advantage, wherever quantifiable, made as a result of the default;

(b)the amount of loss caused to any person as a result of the default;

(c) the repetitive nature of the default.ò

Learned counsel for the appellants has referred Section 43(a) of the Information Technology Act,2000, which reads as under:-

43. (**Penalty and compensation) for damage to computer, computer system, etc.**- If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network,-

(a) accesses or secures access to such computer, computer system or computer network (or computer resource).

é é é ..(he shall be liable to pay damages by way of compensation to the person so affected.)

Learned counsel for the appellants has also stated about the role of respondents 2 and 3 along with respondent No.1 after illegal hacking, unauthorized access and after taking the fabricated and tempered printouts of the email messages and chat sessions from the E-mail accounts of the appellants, on the very first day went to the Investigation Officer of that false complaint filed under Section 498A at Pune and gave their statements by submitting those hacked and fabricated printouts and from this complicity of respondents 2 and 3 is proved.

Learned counsel for the appellants has submitted that the findings of the Adjudicating Officer that the complaint is not maintainable on behalf of appellant No.2 i.e. Sh.Neeraj Kaushik as he himself has not filed the complaint is erroneous in law in as much as Court has vast powers of impleading any of the parties as the appellant.

Learned counsel for the appellants has referred the case of **Dr.Kunal Saha Vs. Dr.Sukumar Mukherjee** and others, Civil Appeal No.1727/2007 decided on 7.8.2009 by the Hon'ble Apex Court **(2009 (4) R.C.R.(Civil) 14** In this judgment in para-22, it is stated that,

> ñNo suit shall fail because of mis-joinder or non-joinder of parties- It can proceed against the persons who are parties before the Court- Even the Court has the power under Order 1 Rule 10(4) to give direction to implead a person who is a necessary party.ò

In the case of **Shitladin and others Vs. Board of Revenue, Uttar Pradesh Allahabad and others,** reported in AIR 1963 Allahabad 549, it was held as under:-

> ñThere are various provisions in statutes requiring certain persons to be impleaded as defendants, such as O XXXIV, R.1, CPC, Sections 49,59,183 and 246 of the U.P.Tenancy Act. If these persons are not impleaded as defendants, the suit will fail. Order 1 Rule 9 is subject to any special or local law, or any special form of procedure prescribed by any other law, vide Section 4 CPC. Consequently if any law prescribes that a certain person must be impleaded as a defendant, even though no relief is sought against him, the failure to implead him will be fatal to the suit, notwithstanding the provision in Order 1 Rule 9. Persons who are not essential to be impleaded as defendants to a suit again fall in two classes, (1) of those who are in some way interested in or connected with, the relief sought against others and (2) of others, who are not at all interested in or connected with it. Persons of the latter class must not be impleaded as defendants at all, but persons of the former class may be impleaded as proper parties at the discretion of the plaintiff by way of abundant caution, or to avoid future litigation and the relief will not be refused on the ground that they have not been impleaded.ò

Learned counsel for the appellants has referred to a decision in IA No.1938/2009 in CS(OS) No.1447 of 2008 dated 20.8.2009 reported in **2009 (9) A.D. (Delhi) 374** of Honôble Delhi High Court wherein it is stated, ñNecessary party is one without whom no order can be made effectivelyò.

In the case of **Rabi Rani Basu Vs. Naresh Gope alias Ghosh, reported in 2004(4) ICC 402**, Honôble Calcutta High Court has held that, There are certain established principles governing the cases of addition of parties viz.

(1) if for adjudication of the `real controversyô between the parties on record, the presence of a third party is necessary, then he can be impleaded,

(2) by such impleading of the proposed party, all controversies arising in the suit and all issues arising there under may be finally determined and set at rest thereby avoiding multiplicity of suit over a subject matter.

In the case of **Sumtibai & others Vs. Paras Finance Co.Mankanwar, reported in 2007 AIR SC, 3166,** Honôble Apex Court has held, Suit for specific performance filed by purchaser- A third party can be impleaded in the suit where third party shows some semblance of title or interest in property.

In the case of **M/s Neyveli Lignite Corpn.Ltd. Vs. Special Tehsildar (Land Acquisition) Neyvely, reported in 1995(1) SCC 221,** Honôble Apex Court has held, as a necessary or property party affected by the determination of higher compensation, the beneficiary must have a right to challenge the correctness of the award made by the Reference Court.

Learned counsel for the respondents 1 to 3 has argued that the cause of action against complainant No.1 and complainant No.2 are different and distinct and also nature of reliefs is different. She argued that all the allegations made by complainant No.1 on behalf of complainant No.2 are without any personal knowledge, authority and are hearsay and, therefore, cannot be considered.

Learned counsel for the respondents 1 to 3 argued that the Adjudicating Officer, Mumbai has rightly held while recording the finding on issue (b) that the Complainantôs son is an adult and has not himself filed any claim for the damages, therefore, question of paying damages on account of the alleged loss suffered by the complainantôs son does not arise.

Obviously the court has power to implead the parties and if the evidence was necessary in order to come to the conclusion regarding the compensation which should be allowed in accordance with the provisions contained under Section 47 of the Information Technology Act. The Adjudicating Officer should have allowed to implead the complainant as necessary parties in order to come to the conclusion regarding the compensation as claimed by the complainant.

Coming to the main thrust of the appellants regarding the compensation to be claimed by the appellant No.2 who was not a party to the proceedings before the Adjudicating Officer, it may be pointed out that in order to claim the quantifiable compensation under Section 47 of the IT Act, the Claimant has to prove the amount of gain or unfair advantage wherever quantifiable. The appellant No.2, therefore, being a necessary party should have been filed an application to be impleaded as a party in accordance with Order 1 Rule 10 sub-clause (2) of the Code of Civil Procedure, which reads as under:-

> ñ(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.ò

As will appear from sub-clause (2) of Order 1 Rule 10 CPC that whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon may be in such of the proceedings be directed to be impleaded as one of the parties.

In the case of **Savitri Devi Vs. District Judge, Gorakhpur & others, reported in** AIR 1999 SC 976 , it has been held as under:-

> ñThe Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose.ò

The Apex Court in the case of **Savitri Devi (supra)** has observed as under:-

> ñIn Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, (1992) 2SCC 524 : (1992 AIR SCW 846), this Court discussed the matter at length and held that though the plaintiff is a ódominus litisô and not bound to sue every possible

> adverse claimant in the same suit, the Court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the fact and circumstances of a particular case. The court said:-
>
> ñThe case really turns on the true construction of the rule in particular the meaning of the words ñwhose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suitò. The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the Court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions.ò
>
> The Court also observed that though prevention of actions cannot be said to be main object of the rule, it is a desirable consequence of the rule. The test for impleading parties prescribed in Razia Begum v. Anwar Begum, 1959 SCR 1111: (AIR 1958 SC 836), that the person concerned must be having a direct interest in the action was reiterated by the Bench.ò

In the event, an application for impleadment is filed, the same shall be decided in accordance with law. The Adjudicating Officer shall give sufficient opportunity to the parties to lead evidence in respect of their claim and defence including the newly added parties.

In view of the aforesaid, the Court has ample power to add the parties on the facts of the present case, as will appear from the record that the appellant never expressed his rights for impleadment, and as such the relief in the present case depends upon the fact and evidence to be lead by the complainant in case he is impleaded as one of the parties.

Points 1 and 2 are decided accordingly.

Point No.3

Whether respondent No.4 was dropped from the array of the respondents.?

Learned counsel for the respondent No.4 has argued that respondent No.4 was dropped by the learned Adjudicating Officer vide order dated 18th March,

2010 and the appellants did not challenge the said order and as such it has attained finality and is binding on the appellants. Learned counsel for the respondent No.4 has also argued that the learned Adjudicating Officer also did not frame any issue against respondent No.4 and that the appellants have not made their email service provider (FMAIL/GOOGLE) a party to the present proceedings.

From the records of the complaint filed before the learned Adjudicating Officer, it appears that there is no order passed on 18th March, 2010 for dropping the respondent No.4. No doubt there is mention that the proceedings were adjourned to 18th March, 2010. Even from the application filed by appellant before the learned Adjudicating Officer, it appears that appellant has knowledge of the fact that some order was passed for dropping the name of respondent No.4 from the proceedings of the Adjudicating officer. Since there is no order dated 18th March, 2010 dropping the respondent No.4, we cannot say at this stage that name of respondent No.4 was dropped from the proceedings of the complaint. This point is also required to be considered by the Adjudicating Officer.

CONCLUSION

In view of the above, the matter is remanded to the Adjudicating Officer, Maharashtra State with the following directions:

(1) The appellant No.2 is directed to file a proper application for impleadment before the Adjudicating Officer who shall pass the appropriate orders on the application in accordance with law.

(2) The Adjudicating Officer shall decide, whether the proceedings has been dropped so far as respondent No.4 is concerned.

The Adjudicating Officer shall decide the matter afresh in accordance with the observations made above.

This appeal is allowed accordingly.

Parties to bear their own costs in the appeal.

Parties are directed to appear before the Adjudicating Officer, Maharashtra State on 2nd August, 2011

Let the appeal file be consigned to record room. Records of the complaint Case No.2/2010 titled Vinod Kaushik Vs. Madhvika Joshi and others, filed before the Adjudicating Officer, Government of Maharashtra be sent back forthwith.

Registrar is directed to send a copy of this judgment to all the Adjudicating Officers of the States and the Union Territories with a direction to decide the cases in accordance with the observations made in this judgment.

June 29 ,2011

(Justice Rajesh Tandon)
Chairperson