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TARUN TYAGI

v.

CENTRAL BUREAU OF INVESTIGATION

(Criminal Appeal No. 102 of 2017)

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FEBRUARY 08, 2017

[A. K. SIKRI AND R. K. AGRAWAL, JJ.]

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Code of Criminal Procedure, 1973 – s. 207 – Supply to the accused of copy of police report and other documents – Allegation that appellant stole the ‘source code of a software known as ‘quick recovery developed by complainant’s company and put it on sale on the website of the appellant company – Registration of case under the Information Technology Act and Copyright Act – Charge-sheet filed by CBI relying on hard disks – Appellant sought release of seized property – Refusal to supply the hard disk and compact disk to the appellant by the courts below – Correctness of – Held: s. 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay – If documents are voluminous, instead of furnishing the accused with the copy thereof, the magistrate can allow the accused to inspect it either personally or through pleader in the court – On facts, in order to comply with the provision of s. 207, marked hard disks be supplied to appellant subject to certain conditions – Information Technology Act, 2000 – s. 66 – Copyright Act, 1957 – ss. 63, 63B – Penal Code, 1860 – s. 381.

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Allowing the appeals, the Court

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HELD: 1.1 Section 207 of the Code of Criminal Procedure, 1973 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report under Section 173(5). Such a compliance has to be made on the first date when the accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of

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furnishing the accused with the copy thereof, the Magistrate can allow the accused to inspect it either personally or through pleader in the Court. [Para 8] [677-C-E] A

1.2 CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the appellant would try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same. [Para 10] [678-B-E] B C D E F

1.3 The said apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. In view of the opinion of the Expert, it needs to be ensured that the appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 which ensure G H

A fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of. [Para 11] [678-F; 679-A-B]

1.4 In order to comply with the provision of Section 207, the hard disks marked Q-2, 9 and 20 be supplied to the appellant subject to certain conditions. Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the appellant. The appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court. [Para 12] [679-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 102 of 2017.

From the Judgment and Order dated 13.06.2016 of the High Court of Delhi at New Delhi in Criminal M. C. No. 2729 of 2014.

Ashwin Vaish, Rajat Pahwa, Vinod Pandey, Nitin Kumar Thakur, Advs. for the Appellant.

P. K. Dey, Ms. Mecnakshi Grover, Rajat Singh, M. K. Maroria, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. On the basis of a complaint lodged by one Mr. Alok Gupta, Director of M/s. Unistal Systems Private Limited (hereinafter referred to as the complainant), a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) on July 23, 2007 wherein the appellant was made an accused. In the said FIR, the complainant had alleged that on or around March 11, 2005, the appellant had stolen the 'source code' of a software known as 'Quick Recovery' developed by the complainant's company and thereafter put it for sale on the website of the appellant company under the name 'Prodatadoctor'. Case was registered under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/

residential premises of the appellant after conducting search and seizure on August 03, 2007. The appellant moved, some time in January 2008, an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on March 03, 2008. The High Court of Delhi set aside this order in Criminal Misc. Case No. 1518 of 2008, which was preferred by the appellant against the order of the trial court rejecting this application. The order of the High Court is dated May 18, 2009. By this order, the High Court restored the application for release with direction to the concerned Magistrate to deal with the application afresh. Operative portion of the order reads as under:

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“2. The submission of learned counsel for the Petitioner is that the entire business of the Petitioner is affected because of the seizure of all the electronic hardware equipments although incriminating the evidence, if any, may be only on some of them. He further submits that although the chargesheet was filed in June, 2008, no cognizance has yet been taken of the offence, if any, by the learned ACMM.

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3. Learned counsel for the parties were unable to inform the Court whether the opinion of GEQD on the seized electronic hardware equipment has been received by the trial court.

4. In view of the facts as noticed hereinabove, it is directed that the learned ACMM will first and foremost if not done already, consider whether cognizance should be taken of the offence, if any, on the basis of the charge sheet filed. This will be done within ten days of the receipt by the learned ACMM of the certified copy of this order.”

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2. In the meantime, on June 28, 2006, the CBI had filed the charge sheet after completing the investigation. On May 27, 2009, the trial court took cognizance of offence under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the appellant for release of the seized property is concerned, the trial court passed the orders dated September 03, 2009 thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), Directorate

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A of Forensic Science, Hyderabad, vide letter dated January 01, 2009, addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared.

B 3. After receipt of this report, the appellant preferred another application on July 20, 2010 under Section 207/238 of the Code of Criminal Procedure, 1976 (hereinafter referred to as the 'Code') seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution, i.e. Q-2, 9 and 20. The learned Magistrate rejected this application vide orders dated November 06, 2013. This order was challenged by the appellant by filing Criminal Misc. Case under Section 482 of the Code. The High Court has, vide impugned judgment dated C June 13, 2016, dismissed the said petition. It is this order which is the subject matter of challenge in the instant appeal. To put it in nutshell, along with the chargesheet filed by the CBI, various documents are enclosed which include hard disk as well that was seized from the office of the appellant. These are Q-2, 9 and 20. Though, copies of all other D are supplied to the appellant, he is not given the aforesaid three disks. The appellant wants copies of these disks as well. His submission is that as per the report of GEQD, cloned copies of these hard disks can be prepared and, therefore, there is no problem in supplying the same to the appellant.

E 4. Before dealing with the aspect in detail, we may take note of the case put up by the CBI in the charge sheet submitted before the trial court after completing the investigation into the matter:

F 5. The prosecution case is that M/s. Unistel Systems Private Limited (hereinafter referred to as the 'company') is a company established in the year 1995 and the business of the company was to buy, sell, import-export and distribute all types of computer software and related works. The computer software manufactured by the company were all Data Recovery software related to recovery of lost data in crashed hard disks of the computer with various types of operating systems. The Data Recovery software developed by the company is under the brand name of G 'Quick Recovery'. This software was developed and launched in the year 1999 and later got renamed as 'Quick Recovery Windows'. The software was a DOS based software and used to work for File Allocation Table (FAT). Subsequently, the software was got upgraded to FAT and New Technology File System (NTFS). This software was H developed by a team headed by one Manu Bhardwaj and others in the

office premises of the complainant's company and all these persons were employed in the company in the capacity of Programmers. The source code of the software programme '*Quick Recovery for FAT & NTFS*' was stored in the programming room that was networked for the purpose of convenience and was not password protected and easily accessible by the other employees in the office of the company.

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6. The appellant was an employee of the company initially for a brief period of two months, i.e. in October and November 2003. He rejoined the company in June 2004 and worked till end of April 2005. The appellant had his own website, which he started while working in the complainant's company. The appellant, with dishonest intention of selling data recovery software, made out with the stolen source code. The website developed by the appellant was registered with Direct Internet Service of Mumbai. The appellant, during the period of his employment with the company, had access to the source code of '*Quick Recovery for FAT & NTFS*' and unauthorisedly misappropriated the same from the programming room of the company. After leaving the services of the company, the appellant formed his own company by the name M/s. Prodata Doctor Private Limited. The appellant secured the services of one Mr. Vikas Yadav as the Programmer, who was given the stolen source code of '*Quick Recovery for FAT & NTFS*' and was directed to make a recovery software by modifying the stolen code. During investigation, Vikas Yadav made a statement as to how he had prospered the software '*Data Doctor Recovery for FAT & NTFS*' based on the source code of the complainant's company. He further stated that how the appellant instructed him to remove the name of the company from the Graphical User Interface of the source code while adopting it for the new software '*Data Doctor Recovery for FAT & NTFS*'. He further disclosed that he had developed variant of the software like Data Doctor Recovery for iPOD, Pendrive, Memory Card, Digital Camera, SIM Card, etc. with the help of the stolen source code of the company. During investigation, the stolen source code was recovered from his mail which was sent by the appellant. The appellant, after developing the '*Data Doctor Recovery for FAT & NTFS*' out of the stolen source code of the company, put it for sale on his website and remittance was received by him from abroad, through various payment gateways, and the variant software developed by Vikas Yadav was sold through these gateways. As per the CBI, it is also found that the appellant obtained a total amount of more than ₹ 5 crores between 2004-2008 due to online sale of the

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A software under the name '*Data Doctor Recovery for FAT & NTFS*'.

7. It is on the basis of the aforesaid allegations in the chargesheet, that the cognizance is taken by the trial court of the offence under various provisions of the IPC, Information Technology Act as well as the Copyright Act. Keeping in mind the aforesaid case put up against the appellant, we now advert to the moot question, namely, whether the approach of the courts below is correct in refusing to supply the hard disk and compact disk to the appellant herein. Request was made by the appellant invoking the provisions of Section 207 of the Code. Other relevant provision, aid whereof is taken by the appellant, is Section 238 of the Code. We would, therefore, like to reproduce these two provisions herein:

"207. Supply to the accused of copy of police report and other documents. – In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:–

- (i) the police report,
- (ii) the first information report recorded under section 154;
- (iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub0section (6) of section 173;
- (iv) the confessions and statements, if any, recorded under section 164;
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred t in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any

document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

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238. Compliance with section 207. – When, in any warrant-case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of section 207.”

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8. Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report under Section 173(5) of the Code. Such a compliance has to be made on the first date when the accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the accused with the copy thereof, the Magistrate can allow the accused to inspect it either personally or through pleader in the Court.

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9. Learned counsel for the appellant referred to the aforesaid provisions and argued that it was his right to receive the documents in question relied upon by the prosecution, in the absence of which the appellant would not be able to put up his defence effectively. He also submitted that the complainant had filed a suit bearing CS (OS) No. 792 of 2008 against the appellant seeking to restrain him from using/selling the said/similar software or its versions. The Division Bench of the High Court declined to attach the bank account of the appellant in which monies were generated from the sale of the disputed software. The said suit came to be dismissed for non-prosecution on October 15, 2014, thus, demolishing the argument of the CBI that the appellant can misuse the same to the detriment of anyone much less the complainant who claimed to have a copyright in the same. It was pointed out that the CBI, in the second FIR against one accused Rupesh Kumar, has conceded to supply the mirror image/copies of the CDs, i.e. the questioned documents, and accepted the finding of the courts below wherein it has been held

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A that *'there is no answer from the CBI whether the software is unique and there is no other software in the market for the recovery of lost data'*.

B 10. It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same.

F 11. The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner:

G "to protect the data on a computer disk so that it cannot be changed or removed by a user"

Likewise, Collins Dictionary defines the term "write protected" as under:

H "(of a computer disk) having been protected from accidental writing or erasure"

In view of this opinion of the Expert, it needs to be ensured that the appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of.

12. We find that CBI, under similar circumstances in the case of Rupesh Kumar, accepted the order of the trial court whereby directions were given to the CBI to supply the hard disk. In the said case, the trial court found that there was no answer from the CBI whether the software in question was unique and there was no other software in the market for the recovery of lost data from the logical cracked hard disk. Number of softwares are available in the market which negated the arguments of CBI that by supplying the mirror image of the documents, the complainant will lose its money and it will be in violation of the Copyright Act, 1957. In that case, the Court took undertaking from the appellant that he would not misuse the copy of cloned CD. We, thus, are of the opinion that in order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the appellant subject to the following conditions:

(a) Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the appellant.

(b) The appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court.

13. The appeal stands allowed in the aforesaid terms.