

**REPORTABLE****IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 79 OF 2008****B.N. FIROS** . . . APPELLANT(S)**VERSUS****STATE OF KERALA & ORS.** . . . RESPONDENT(S)**JUDGMENT****RANJAN GOGOI, J.**

1. The appellant-B.N. Firos - proprietor of Comtech IT Solutions, Thiruvananthapuram had filed a Writ Petition challenging a Notification dated 27<sup>th</sup> December, 2002 issued under Section 70(1) of the Information Technology Act, 2000 (hereinafter referred to as "I.T. Act") declaring the computer, computer system and computer network specified in the Schedule to the Notification to be

“protected systems” under the I.T. Act. The vires of Section 70 of the I.T. Act itself was also challenged. The Writ Petition was dismissed. The said order of dismissal has been affirmed in writ appeal by a Division Bench of the High Court and the review filed there against has also been dismissed. Aggrieved, this appeal(s) has been filed.

2. The brief facts that will be required to be noticed are as follows:

In the writ/original petition filed by the appellant before the High Court it is stated that the appellant is the proprietor of Comtech IT Solutions, an Information Technology concern which is a member of Microsoft Developer Forum, a professional group of developers technically supported and guided by the Microsoft Corporation (India) Pvt. Ltd.

3. In the year 1999, the 1<sup>st</sup> respondent - State of Kerala through the 4<sup>th</sup> respondent - Centre for Development of Imaging Technology (C-DIT), Thiruvanthapuram, a Total Solution Provider (TSP), had conceptualized a single window multiple agency bill collection system. The project was called "FRIENDS" (i.e. Fast, Reliable Instant, Efficient, Network for Disbursement of Services). According to the appellant - writ petitioner, Microsoft Corporation of India (Pvt.) Ltd. (hereinafter referred to as "Microsoft") had offered to provide the Application Software and System Software free of cost for the pilot project. The appellant - writ petitioner, being a member of the Microsoft Developer's Forum, was required by Microsoft to carry out the system study and to develop the pilot

project for the "FRIENDS" project.

4. After completion of the preliminary work, Microsoft placed orders with the appellant on 23<sup>rd</sup> May, 2000 pursuant to which the Software developed by the appellant was handed over to the 4<sup>th</sup> respondent and the Software was implemented as a pilot project at the first FRIENDS Centre at Palayam, Thiruvanthapuram in June 2000. As the said project was a success, the 1<sup>st</sup> respondent decided to extend the same to its 13 District Centres.

5. By a communication dated 31<sup>st</sup> January, 2001, the 4<sup>th</sup> respondent informed the appellant that the FRIENDS project, for which the appellant had developed the Application Software free of cost as part of the developers forum agreement with Microsoft, has been successful and the

Government has decided to establish FRIENDS Integrated Citizens Service Centres in all the other 13 districts of the State for which the respondent No.4 would like to associate with the appellant for customization of the FRIENDS application software. Pursuant thereto an Agreement cum Memorandum of Understanding dated 19<sup>th</sup> February, 2001 was entered into between the appellant and the 4<sup>th</sup> respondent.

6. According to the appellant as the 4<sup>th</sup> respondent was attempting to transfer some of the essentials of the FRIENDS application software to another concern, namely, M/s Stanhop Technology, a criminal proceeding was instituted by the appellant against said M/s Stanhop Technology. Apprehending further attempts, an application for registration of his

copyright in the FRIENDS application software was also filed by the appellant before the Registrar of Copyrights, New Delhi.

7. On the other hand, the 4<sup>th</sup> respondent had filed a suit i.e. O.S. No.8 of 2002 before the District Court, Thiruvananthapuram seeking a declaration that the 4<sup>th</sup> respondent is the exclusive owner of the copyright and the sole owner of the Intellectual Property Rights of the FRIENDS application software. In view of the aforesaid suit for infringement filed by the 4<sup>th</sup> respondent, the Registrar of Copyright rejected the appellant's application for registration of copyright in the "FRIENDS" software leaving the matter to be agitated after the decision in the civil suit.

8. The 4<sup>th</sup> respondent had also instituted a criminal case against the appellant for infringement of the application software.

9. While the said proceedings were pending, the State Government had issued a Notification dated 27<sup>th</sup> December, 2002 under Section 70(1) of the I.T. Act leading to the writ proceedings in question wherein the impugned orders have been passed by the High Court.

10. Before the High Court the appellant had founded his claim to the reliefs sought primarily on the ground that the copyright in FRIENDS application software had vested in the appellant under Section 17 of the Copyright Act, 1957 and the Notification dated 27<sup>th</sup> December, 2002

issued under Section 70(1) of the I.T. Act was an infringement of the said right. The challenge to the vires of Section 70 of the I.T. Act was founded on the basis of excessive delegation of the legislative power inasmuch as, according to the appellant, the power of declaration as a "protected system" was unbridled, unguided and uncanalized.

11. The High Court negatived the challenge made by holding that the provisions of Section 2(k) of the Copyright Act, 1957 which defines "Government work" and Section 17(d) of the same Act on one hand and Section 70 of the I.T. Act has to be construed harmoniously. According to the High Court, if the said provisions are to be read and construed harmoniously the power of declaration of a "protected system" would be only in



respect of "Government work", the copyright in which of the Government is acknowledged by Section 17(d) of the Copyright Act, 1957. It is on the aforesaid broad basis that the contention of the appellant as regards invalidity of Section 70 of the I.T. Act was repelled.

12. Insofar as the challenge to the Notification dated 27/12/2002 under Section 70(1) of the I.T. Act, based on a claim of a copyright, is concerned the High Court took into account the fact that the registration of copyright sought by the appellant had been negatived by the Registrar of Copyright and that the civil suit in this regard filed by the 4<sup>th</sup> respondent was pending. The High Court further took the view that if according to the appellant he was the first owner of the copyright, as claimed, nothing

prevented him from instituting a suit for infringement under Sections 60 and 61 of the Copyright Act, 1957 or from resorting to arbitration which is contemplated by clause 7 of the agreement dated 19<sup>th</sup> February, 2001.

13. The High Court, however, went a little further and took into account clause 10 (under the head "Role of Government of Kerala") of the Memorandum of Understanding between Total Solution Providers for E-Governance and Government of Kerala. The said clause 10 reads as under:

**"10. Departmental Task Force will monitor the actual implementation of the project vis a vis the milestones set by the TSP**

**Intellectual Property Rights of the system developed by all the TSPs and Departments shall vest in the Government of Kerala. Government of Kerala will be**

free to deploy the same system or with modification in any of the Government/Semi Government/Quasi Government Department/ Organization.”

The High Court held that the 4<sup>th</sup> respondent was a government agency and the Government had created the above agency as a Total Solution provider for developing software for the Government. The High Court further held that the 4<sup>th</sup> respondent was bound by the above clause and the appellant who undertook technical support by executing an agreement with the 4<sup>th</sup> respondent was also bound by the above clause 10. The IPR copyright in respect of “FRIENDS” software therefore vests in the government and there is no clause in the agreement between the appellant and the 4<sup>th</sup> respondent to show that the 4<sup>th</sup> respondent has assigned the IPR right to the appellant. The High Court,

accordingly, held that the Intellectual Property Rights in the software vested in the Government so as to entitle it to declare the same as a "protected system" under Section 70(1) of the I.T. Act.

14. We have heard the learned counsels for the parties.

15. Shri R. Basant, learned Senior Counsel appearing for the appellant has basically reiterated the arguments advanced before the High Court additionally reinforced by the amendments made to Section 70 of the I.T. Act which enables the exercise of the power to declare any computer resource as a "protected system" only if the same directly or indirectly affects the facility of Critical Information Infrastructure which has been defined by

the Explanation to Section 70(1) of the I.T. Act as:

“Explanation: For the purposes of this section , “Critical Information Infrastructure” means the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety.”

16. Shri Basant has submitted that in clear distinction to what had been introduced by the Amendment (Act No.10 of 2009) the power under the erstwhile Section 70(1) of the I.T. Act to declare any computer, computer system or computer network to be a protected system was uncanalized and unguided delegation of legislative power. The learned counsel has submitted that the Amendment brought in by Act No. 10 of 2009 reinforces the contention of the appellant and vindicates the constitutional fragility of Section

70(1) of the I.T. Act as it then existed.

17. Shri Basant has further submitted that from the materials on record there is no manner of doubt that the appellant had on its/his own developed the software and, therefore, under the provisions of the Copyright Act, 1957 the appellant must be acknowledged to be the first owner of the copyright. Incidentally, the computer programmes, tables and compilations including computer databases have been included in the definition of "literary work" under Section 2(o) of the Copyright Act, 1957 with effect from 10<sup>th</sup> May, 1995.

18. Shri Pallav Sisodia, learned Senior Counsel appearing for the respondent - State has contested the arguments advanced and has submitted that, as rightly held by the High Court, Section

70 of the I.T. Act has to be read along with Section 2(k) and Section 17 of the Copyright Act, 1957 in which event the power of declaration of "protected system" would be available within clearly circumscribed limits and would not suffer from any excessive delegation. So far as the claim of copyright is concerned, Shri Sisodia has submitted that the appellant had developed the software for Microsoft which had undertaken to make available the same to the first respondent through the 4<sup>th</sup> respondent free of cost. The invoice raised by the appellant on Microsoft in this regard shows payment of remuneration by Microsoft to the appellant. Therefore, under Section 17(a) of the Copyright Act, 1957 Microsoft is the first owner of the copyright. In any event, according to Shri Sisodia under clause 10 (under the head "Role of Government of Kerala") of

the Memorandum of Understanding between Total Solution Providers for E-Governance and Government of Kerala, the intellectual property vests in the Government. The claim of copyright by the appellant will, therefore, not subsist.

19. The contention with regard to excessive delegation of legislative power under Section 70(1) of the I.T. Act has been sought to be fortified by Shri Basant by relying upon several pronouncements of this Court. It will hardly be necessary to take specific notice of any of the said decisions inasmuch as the proposition sought to be canvassed is too well established to raise any dispute or doubt. However, while considering the said question as raised before it the High Court in the impugned order had, and in our view correctly, held that the



provisions of Section 70(1) of the I.T. Act has to be read conjointly with Section 2(k) and Section 17 of the Copyright Act, 1957 in order to give due effect to the related provisions of two different enactments made by the legislature. Section 70(1) of the I.T. Act as in force at the relevant point of time (at the time when the matter was under consideration in the High Court) or even after its amendment in 2009 bars access to a person to the system declared as a "protected system" without authorization from the Appropriate Government. Plainly read, the power of declaration of a "protected system" may invade a copyright which may be vested in a private owner. However, such a situation is taken care of by the provisions contained in Section 2(k) of the Copyright Act, 1957 which defines "Government work" and Section 17(d) of the

Copyright Act, 1957 which vests in the Government, copyright in a government work as defined by Section 2(k). The balance is struck by Section 17 between copyright pertaining to any other person and copyright vested in the Government in a "government work". Section 70 of the I.T. Act, therefore, cannot be construed independent of the provisions of the Copyright Act; if Section 70 of the I.T. Act has to be read in conjunction with Section 2(k) and Section 17 of the Copyright Act 1957 the rigours that would control the operation of Section 70(1) of the I.T. Act are clearly manifested.

20. The amendment to Section 70(1) of the I.T. Act brought in by Act No. 10 of 2009, in our considered view, makes the power of declaration of protected system even more stringent by further

circumscribing the power of declaration of protected system only in respect of a computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, which is a defined expression in the I.T. Act (already extracted). The amendment, in our considered view is not a first time introduction of parameters to govern the exercise of power under Section 70(1) of the I.T. Act. Rather, it is an attempt to circumscribe the power even further than what was prevailing under the pre-amended law, by narrowing down the ambit of "government work" so far as it is relatable to the facility of Critical Information Infrastructure, as defined under the Act.

21. The challenge made by the appellant before the High Court insofar as

the Notification dated 27<sup>th</sup> December, 2002 is concerned was founded on a claim of copyright in the FRIENDS application software. The said claim, *ex facie*, is not tenable in the light of the provisions contained in Section 17(a) of the Copyright Act and the admitted/pleaded case of the appellant in the writ petition to the effect that it was entrusted by Microsoft to develop the software for which it received due consideration from Microsoft. If that be so, on the appellant's own pleadings in the writ petition, it would not be entitled to claim copyright in the FRIENDS application software under Section 17(a) of the Copyright Act. Whether under clause 10 (under the head "Role of Government of Kerala") of the Memorandum of Understanding between Total Solution Providers for E-Governance and Government

of Kerala, the State would have a claim of copyright in view of Section 17(a) of the Copyright Act is altogether a different question which has no bearing on the claim of the appellant to copyright in the FRIENDS application software. In the present proceedings, the issue of inter-parties rights between Microsoft and 1<sup>st</sup> respondent/4<sup>th</sup> respondent is not in dispute to require any resolution. The only point for adjudication is the claim of the appellant, as the developer of the application software, to be the first author of the said work so as to vest in him/it a copyright under the provisions of Section 17 of the Copyright Act, 1957, a claim which is palpably unfounded both on the basis of the provisions of Section 17(a) of the Copyright Act and under clause 10 (under the head "Role of Government of Kerala") of the Memorandum

of Understanding between Total Solution Providers for E-Governance and Government of Kerala.

22. For the aforesaid reasons, we do not find any ground for interference with the orders passed by the High Court. Accordingly, while affirming the said orders of the High Court we dismiss the appeal(s) leaving the parties to bear their own costs.

....., J.  
(RANJAN GOGOI)

....., J.  
(MOHAN M. SHANTANAGODAR)

NEW DELHI  
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