

Delhi High Court

M/S. Kaleidoscope (India) P. Ltd. ... vs Phoolan Devi And Others on 19 January, 1995

Equivalent citations: AIR 1995 Delhi 316, ILR 1996 Delhi 586

Author: C M. Rao

Bench: M J Rao, D Jain

ORDER M. Jagannadha Rao, C. J.

1. At the outset we have to mention why we are taking up this CM. even though we are proposing to hear the main FAO within a short date, i.e. may be within a fortnight. Firstly, when the FAO came up before us, we were in several part heard cases one of which was remitted by the Supreme Court for urgent disposal and another was a preventive detention case. Even as and when the main FAO is taken up time would be taken for arguments and for the preparation of the judgment. In the meantime the respondent contends that she is seriously aggrieved by the ad interim partial suspension order dated 22-12-94 passed by the Vacation Judge suspending the injunction granted by the trial Judge, resulting in the uncensored version of the film 'Bandit Queen' being exhibited abroad. The order allowing exhibition abroad was passed at the instance of appellants (defendants 1 and 6) who, according to plaintiff, had admittedly no rights of exhibition abroad. Before the FAO could be disposed of, the application of the appellants -- treating the film as a foreign language film -- is being considered by various Committees abroad for nomination for the Oscar award at Los Angeles. As a plea of violation of valuable rights of the plaintiff was raised and a contention was also raised that the appeal stood virtually allowed at the admission stage for exhibition abroad, we have taken up the CM separately.

2. The suit was filed for permanent injunction against five defendants and the 6th defendant was imploded later. The 1st defendant (Mr. Shekhar Kapoor) is the Director, the 2nd defendant Mr. Bedi is the producer and a person entitled to exhibition of the film only in India (2nd appellant) and he is M.D. of Kaleidoscope (P.) Ltd. which is the 6th defendant (1st appellant). The 3rd defendant Channel Four is the the owner of the rights of exhibition abroad (except India). The 4th defendant, Ms. Mala Sen is the script writer who prepared the same from the prison diaries of Phoolan Devi whose contents are dictations by Phoolan Devi to her fellow prisoners about her life events. There are agreements between Phoolan Devi and Channel four, Phoolan Devi and Mala Sen and Mala Sen and Channel Four. Channel Four is the owner of the film and rights of the script and it got the film produced by the appellants and granted them only limited rights of exhibition in India. Mala Sen has a right to 2% of income of exhibition outside India.

3. In the suit, the learned trial Judge initially passed an order on 9-9-94 prohibiting exhibition in India, public as well as private.

4. Later, after a full hearing, the trial Judge passed a 37 page order dated 20-12-94 and thought it fit to prohibit exhibit ion of the film both in India and abroad against all defendants. No FAO has been filed by Channel Four which alone has rights of exhibition abroad, nor by Mala Sen who has a 2% interest in income abroad. FAO was filed only by Mr. Bedi (2nd defendant) and his company (6th defendant), who have only rights of exhibition in India. But the learned vacation Judge who heard the FAO and this CM, passed an ad interim order on 22-12-94 permitting exhibition abroad. He

however continued the injunction within India.

5. The point for consideration in this CM is whether the appellants (defendants 2 and 6) have any right to obtain suspension of the temporary injunction dated 20-12-94 and whether, even otherwise, the order of the Vacation Judge permitting exhibition abroad should be continued pending disposal of the FAO?

6. Firstly, as already stated, the agreement dated 27-4-94 is an agreement by Channel Four with the two appellants (defendants 6 and 2) in respect of the right of exhibition of "Bandit Queen" only in India. The trial Judge's final order dated 20-12-94 prohibited exhibition of film both in India and abroad.

Whether that was right or wrong has to be gone into in the FAO. In the absence of any appeal by Channel Four, which alone has the world rights (except India), the Vacation Judge, in our view, erred in permitting exhibition abroad. The appellants had, *prima facie*, no locus standi to seek such an order.

7. An argument has been advanced that prohibition of exhibition abroad also affects the "reputation" of the Indian producers (appellants) and the script writer. But whether it is a proprietary right to property or reputation -- and particularly when in India, the injunction is allowed to continue -- the appellants cannot, without having the *prima facie* findings against them set aside and without obtaining any right of exhibition abroad, obtain such an order. So far Mala Sen is concerned, who also says that her reputation is at stake abroad, she has not filed any appeal and is only a respondent. The contention on her behalf that Order 41 Rule 33, CPC applies at this stage in the CM is not tenable. Such a question of giving benefit to a non-appealing party arises only in the appeal and till the Court thinks it to be a fit case for giving benefit to a non-appealing respondent, it is not permissible for her to attack the adverse findings without filing an appeal. This is also not a case of a respondent trying to sustain an order or decree in her favor by attacking the adverse findings on the merits of the case.

8. Counsel for the appellants. Mr. Ashok Desai has made elaborate submissions on facts and law. So did counsel for Ms. Phoolan Devi -- Ms. Indira Jai Singh. Mr. Arun Jaitley argued for the script writer, Mala Sen, 4th respondent. The arguments covered the same field covered by the learned trial Judge in his elaborate 37 page order. In this limited exercise before us of maintaining the injunction as ordered by the trial Judge on 20-12-94 both in India and abroad, we do not think it proper to give further preliminary findings on the same questions which we have to decide in the FAO in the next few days.

9. But we may state that very important rights relating to privacy law, rights under Article 19(1)(a), scope of restriction as per Article 19(2), extent of consent by Phoolan Devi given in her written contracts, whether Channel Four has not submitted to Indian Courts by not raising objection at the initial stage/or because it has argued the case on merits, whether the American Court would apply the more favorable privacy law of the place of domicile (see -- Conflict of Laws, 2nd Ed, Scoles Hay, p. 631, para 17.40), whether Indian Courts can grant injunctions against a person subject to its

jurisdiction in relation to actions abroad, -- all arise for consideration. Question also is whether the uncensored version which purports to depict the story as a 'real life story' and depicting the heroine by name as 'Phoolan' can be shown abroad, if it contains scenes of several rapes, sexual exploitation and alleged murders by her on the screen -- when the criminal cases relating to alleged murders are still pending. Learned counsel for appellant, Mr. Ashok Desai contended that firstly Phoolan has thrust herself as a 'public figure' and hence the principles in *Auto Shankar's* case apply. He relies on the decision of Supreme Court of America in *Times v. Hill*, (1967) 385 US 374. Public figures expose their life to the press and media including their private life. He says that Article 19(2) protection in *Auto Shankar's* case, against use of material relating to rape, sexual exploitation etc. is only confined to material contained in public record like judgments and not to material contained in other Press Reports. If Press reports contain material as to rapes and alleged murders by Phoolan. As producer he contends, can include them in his film even though they are not included in the script prepared by Mala Sen. Mrs. Indira Jai Singh has given a list of items relating to rapes/alleged murders etc. not contained in the script but included in the film. She has also contended -- and learned single Judge also agreed - that the script admittedly included material not covered by the prison-diaries. But the other material was gathered by Mala Sen from 'research' in newspapers and by talking to others. Question arises whether and to what extent, even if *Times v. Hill*, (1967) 389 US 374 : 17 Led 2d 456 is to be accepted, the private life facts relating to rape of or alleged murders by a person can be commercially exploited and not merely as matters of public interest or as news items. Question is whether the statement of law : "It is quite a different matter when the details of sexual relations are spread before the public eye or there is highly personal portrayal of his intimate private characterisation or conduct (see *Right to Privacy*, Prosser Torts, 4th Ed E pp. 811-812, 1971) applies. Even with regard to the alleged consent in the agreements by Phoolan for 'additions', question arises whether she could have agreed for such scenes of rape of or alleged murders by her. Question is whether the statement of law: "But, if the actual invasion goes beyond the contract, fairly construed, as per example....." (ibid, page 817) applies. Counsel for respondent relies on Human Rights Conventions, Indian National Human Rights Act, 1993 and S.228A, I.P.C. In fact, a host of arguable questions have been raised by plaintiff and they were prima facie accepted by the trial Judge and require consideration. Prima facie, in our opinion, this was not the stage to lift the injunction abroad, pending hearing of the FAO.

10. But two questions remain to be decided in this C.M. The first one relates to the nomination of the film for the Oscar Awards at Los Angeles. We have on record the letter of the Film Federation of India, which is a private organisation of the film industry in India, dated 22-11-1994 (Annexure-Q in this appeal) addressed to Miss Teri Diller, Awards Office, Academy of Motion Picture Arts & Sciences, Beverly Hills, California bearing FAX No. (310) 247-2600. In that letter the Film Federation of India has informed Miss Teri Diller that the film "Bandit Queen" produced by M/s. B. V. Video graphics Pvt. Ltd. has been nominated by the Film Federation of India for the consideration of Oscar Award in the category of best foreign language film award, and that the necessary documents and the prints would reach her within the stipulated time limit.

11. Here we may mention that pending the disposal of the C.M. before the learned single Judge and before he passed the final orders on 20-12-1994, there was an appeal before a Division Bench of this Court in regard to the screening of the picture in India for the purposes of viewing the same at

Bangalore by a selection committee. The said selection committee was to recommend Indian films for consideration by the committees abroad for nomination for Oscar. When the Division Bench passed the order on 17-11-1994 in FAO(OS) 266/94 permitting the film to be viewed by the selection committee in India the position was that the first interim order of the learned single Judge dated 9-9-1994 was in operation. That order, as already stated, had not prohibited exhibition abroad. It was while interpreting the said order of the learned single Judge that the Division Bench passed an order that it was merely incidental to the interim order dated 9-9-1994 that for the purpose of exhibition abroad, it may be necessary to permit the screening of the picture before the selection committee. On account of the permission granted by the Division Bench by its order dated 17-11-1994, the selection committee in India viewed the picture at Bangalore and it was thereafter that the Film Federation of India had written its letter above mentioned to the organisation in U.S.A.

12. We have also on record a further letter by the Film Federation of India to the appellant, M/s. B. V. Video graphics Pvt. Ltd., dated 22-11-1994 informing the appellant that the Film Federation of India has decided to nominate the appellant's film "Bandit Queen" for the consideration of Oscar Award in the category of best foreign language film award. The appellant was required to send various documents duly filled in. The first one was Form No. 4 which contained details about the film and the second are Form Nos. 1 to 3, which have been filled by the Film Federation of India. All the the aforesaid forms should reach the Academy of Motion Picture Arts and Sciences not later than 2-12-1994 at the following address:--

Academy of Motion Picture Arts & Sciences 8949 Wilshire Boulevard, Beverly Hills, California 90211-1972, (310) 247-3000, Telex : 698-614 Fax: (310) 859-9351 or (310) 859-9619.

The letter further stated that the forms would be given to Shri Shekar Kapoor, the first defendant by the next morning. Meanwhile, the appellant should request the Directorate of Film Festivals to issue no objection certificate. It was also stated that the appellant should ensure that the print with English subtitles reaches the Academy not later than 15th December, 1994.

13. Certain events appear to have taken place subsequent to the final order passed by the learned single Judge on 20-12-1994. Learned counsel for the appellants, Shri Ashok Desai had informed us that the screening of the film by certain committees had taken place in Los Angeles and that it was most likely that there would be no further screening unless some of these committees required that the film should be further screened again before any of them. It is stated that thereafter the question of nomination of the film as an Indian entry in the category of foreign language film will be made by the Academy of Motion Picture Arts and Sciences at Beverly Hills, California and on that basis the question of award of Oscars would be decided. Learned counsel for the respondent No. 1 contended that the final order of the learned single Judge dated 20-12-1994 should be restored and that the ad interim order passed by the learned Vacation Judge on 22-12-1994 should be vacated and also that the appellants (defendants 2 and 6) should be directed to withdraw their letter and forms which were submitted to the above Academy pursuant to the letters of the Film Federation of India for the Oscar Awards. Learned counsel contends that any further exhibition of the picture before any of the

committees and the consequent nomination by Academy would seriously infringe the vital rights of the plaintiff which are yet to be decided in the FAO as well as in the suit.

14. We have already mentioned the important questions of law and facts that have to be decided in the suit and upon which various preliminary findings have been given by the learned single Judge in his final order dated 20-12-1994. We have also stated that the said findings would stand till the FAO is taken up and at this stage it is not permissible for us in this C.M. in the appeal to suspend the operation of the injunction order dated 20-12-1994 by way of preliminary setting aside the findings of the learned single Judge. In that view of the matter, we have to go to the logical and maintaining status quo ante as on 22-12-1994. As far as the exhibition of the film abroad is concerned, even assuming that the film had been screened before certain committees in California, the effect of the said screenings before the said committees must logically be neutralised by this Court, if the order passed by the learned single Judge on 20-12-1994 is to continue to have its validity. For that purpose, it will be necessary for us to decide whether this Court should issue further directions to defendants 2 and 6 in this C.M.

15. Learned counsel for the appellants has contended before us that even though the defendants 2 and 6 are in Delhi and are subject to the jurisdiction of this Court, we cannot pass any orders which may require the appellants to take action outside India. In this context, learned counsel for the appellants has relied upon the decision of the Supreme Court in *Suresh Jindal v. Rizsoli Corriere Delia Sera Prodzioni T.V.S.P.A.* . Learned counsel strongly relied upon the following passage in paragraph 7 of the judgment as to why this Court should not grant orders which may be effective outside in India, which reads as under :-

".....We have no doubt that the grant of such a direction would be absolutely within the scope of suit and would mete out proper justice to the appellant. On second thoughts, however, we refrain from doing this. We learn that, though the picture was shot in India, it is being exhibited only in foreign countries. Even if we give a direction as proposed, it might be difficult for this Court to ensure that the respondents carry out these directions.....

".....We, therefore, restrict the scope of the interim reliefs and direct, in the interests of justice, that in case the film is exhibited on T.V. or in any other medium in India, it shall not be so exhibited by the respondent or

It would be noticed that the above said passage in the judgment of the Supreme Court accepts the power of the Court, but mentions as to why on the facts of the case the Supreme Court was not inclined to pass the order. Further, that was a case wherein the limited question related to the inclusion of the name of the appellant in the screening of the film wherever it was exhibited. Before us, we are concerned with certain Constitutional rights of the plaintiff as also her rights of privacy, which according to the learned single Judge have been offended by the film.

16. For the aforesaid reasons, we should naturally consider whether the present one is a fit case for the grant of such directions. In this context we may also refer to an earlier decision of the Supreme

Court in *Viswanathan v. Abdul Wajid* wherein the question of effectiveness of a judgment abroad has been considered. The Supreme Court observed that on the question of conclusive character or the effectiveness of foreign judgments there is no unanimity, among the writers. After quoting Dicey and distinguishing the judgment in *Tallack v. Tallack* (1927 P 212), the Supreme Court quoted the following observations from Schmitthoff in "The English Conflict of Laws" at page 425 as follows :--

".....the jurisdiction of the courts is not based upon considerations of actual or probable effect of their decision. The argument from the effect of the judgment to the jurisdiction of the Court represents an approach to the problem, under investigation from the wrong end, in the same way as the argument from the effect of the choice of law to the choice itself is, in the words of Lord Russell, founded upon a fallacious basis."

The Supreme Court also quoted from Graveson in his "The Conflict of Laws" 4th Edition at p. 338 as follows:--

"In the doctrine of effectiveness English jurists have sought to provide for the courts as reasonable and adequate theory to determine the exercise of jurisdiction. The reasonableness of the theory is assured by its practical basis; but its complete adequacy is refused by the existence of English jurisdiction over defendants outside the jurisdiction in cases falling within O. 11 of the Rules of the Supreme Court..... The basis of jurisdiction in the English conflict of laws is wider than, though it comprehends, the principle of effective enforcement of judgments. It lies in the administration of justice."

17. Learned counsel for respondent/ plaintiff has relied upon two decisions of the Supreme Court in this context. The first one is reported as *Oil and Natural Gas Commission v. Western Company of North America*. The Supreme Court in that case observed in paragraph 18 that the High Court has undoubted jurisdiction in exercise of its inherent powers to grant such a restraint order whenever circumstances of the case make it necessary or expedient to do so or the ends of justice so require. Their Lordships observed in regard to the case before them that "It would be unfair to refuse the restraint order in a case like the present one for the action in the foreign Court would be oppressive in the facts and circumstances of the case". The Supreme Court, therefore, affirmed the action of the High Court granting ex parte interim restraint. That was a case where the appellant had filed an Arbitration Petition under Ss. 30 and 33 of the Indian Arbitration Act for setting aside the award of the Umpire and also praying for an interim order restraining the respondent from proceeding further with an action commenced by the respondent in U.S. Court. The learned single Judge had granted the ex parte injunction, but by a subsequent order the same was vacated after hearing the parties. The O.N.G.C. appealed against the vacating of the ex parte injunction and the Supreme Court allowed the appeal and granted the restraint order restraining the respondent from proceeding with the action filed by it in the U.S. It was in that context that the powers of the High Court to grant orders to a person within the jurisdiction of the Court to take affirmative action abroad was laid down by the Supreme Court.

18. Learned counsel for the respondent also referred to the decision of the Supreme Court in *V/O Tractoex Port, Moscow v. M/s. Tarapore & Company* wherein a similar proposition was laid down

and a passage from the Halsbury's Laws of England was quoted at page 70 and the Supreme Court has slated as follows:--

"The rule as stated in Halsbury's Laws of England, Vol.21, at page407, is that with regard to foreign proceedings, the Court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign Court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England, Courts have been very cautious and have largely refrained from granting stay of proceedings in foreign Courts (Cheshire's Private Industrial Law, 7th Ed. pages 108-110). The injunction is, however, issued against a party not a foreign Court".

19. In this context, we may also quote a passage from "The Conflict of Laws" second edition, by Eugene F. Scoles and Peter Hay at page 354, paragraph 10.5 which reads as follows :--

"There is abundant precedent for enjoining a defendant, personally before the Court, from doing acts abroad. He may be ordered not to trespass on foreign land, not to commit torts of any other nature, and may be enjoined from prosecuting foreign law suits. On the other hand, there are many cases in which the courts have refused to order a defendant to act affirmatively in another state. He will not be ordered to perform a criminal act in another state or to perform an act which would result in civil liability. In other cases, orders have been made against defendants, who, in order to do what they are ordered to do at the forum, would be compelled to act beyond the state of the forum. Considering the cases in which decrees ordering foreign acts have been upheld, whether such an order should be made depends upon the circumstances. Among the considerations will be the probable success of ensuring an effective performance of the decree and the possibilities of involving the defendant in difficulties with legal authorities in the foreign state."

In another passage it is also stated in regard to the effectiveness of the directions issued by Courts against a defendant to take action abroad that the questions of expediency are also relevant. The authors say "There are, of course, considerations as to expediency. The first might be that an order requiring an act outside the state should not be made because the order cannot be enforced. Once beyond the borders of the state, the defendant may disregard the Court's order, even though facing punishment for contempt on return to the state. But this danger is present in local cases as well, for a defendant may leave the state without compliance..... In some of these cases, economic pressure, through requiring a bond conditional upon obedience to the order, might be applied. And in other cases the necessary act could be done in the foreign state, through an agent. The difficulty of enforcement seems not much greater in the case of orders of affirmative acts than in orders to refrain from acting, and only a degree greater than the possibility that a defendant in any case will disappear before being made to obey".

20. The above said passage also supports the theory of effectiveness of orders. It is not related to the power of the Court, but relates to the facts and circumstances of the case.

21. We may also refer to a decision in *In re : Liddell's Settlement Trusts* (1936 CD 365) where the Court directed the mother, a British subject, to bring back a child into the country, the child having

been abroad. Even in the American courts, we find that similar jurisdiction has been exercised against non residents to take positive action in another State. (See Vol.35 (1921-22), Harvard Law Review pp. 617-618 referring to an American case *Madden v. Rosseter*).

22. For the aforesaid reasons, we think that we have the powers to direct the appellants to take affirmative action abroad. We accordingly direct the appellants before us (defendants 2 and 6) not to take any further steps in connection with the nomination of the film "Bandit Queen" for the Oscar Awards and the appellants are also hereby directed to send a message by FAX as well as by telex to the members of the Academy of Motion Pictures Arts and Sciences as already set out earlier in this order that the High Court of Delhi has pending disposal of FAO(OS) No. 305 of 1995 passed an order in this application that no further steps, as stated above, should be taken pursuant to the entry in Form Nos. 1 to 4 signed by the appellants, M/s. Kaleidoscope (India) Pvt. Ltd. or by the Film Federation of India till the disposal of the appeal. The above said steps shall be taken by the appellants on or before Monday, the 23rd January, 1995.

23. The second question which arises in this C.M. at this stage is with regard to the further assignments of rights by Channel Four. In this regard we have already stated that there is already an injunction w.e.f. 20-12-1994 against Channel Four from exhibition abroad, which naturally includes within it a direction that they should not make any further assignments for exhibition abroad on or after 20-12-1994. If that direction is already there against Channel Four which has not filed any appeal, it is not necessary for us except to reiterate the said direction against Channel Four. In other words, Channel Four should not make any further assignments of their world rights in favor of the third parties, but this order passed by us will not affect any transfers made by them during the period before 9-9-1994 or between 9-9-1994 and 20-12-1994. This prohibition against assignments will continue to be operative till the appeal is disposed of. This will not, however, preclude the plaintiff/respondent from resorting to any remedies in the various countries where the assignees are exhibiting the picture, if such assignments were made at a time when there was no prohibition from this Court against exhibition abroad i.e. before 20-12-1994.

24. It should not be understood that we have expressed any opinion on the merits of the case one way or the other. All the questions are left open except the ...two aspects- (1) as to the power of this Court to grant a direction to a defendant to take action abroad and (2) the prohibition against further assignments by Channel Four from today referred to above. This application is disposed of.

FAO(OS), 305/94

25. Admitted.

To be listed in the category of "After Notice Miscellaneous Matters" for final hearing on 31-1-1995.

26. Order accordingly.