

## **M/S. Video Master & Another vs M/S. Nishi Productions & Others on 21 October, 1997**

**Equivalent citations: 1998(3)BOMCR782**

**Author: A.Y. Sakhare**

**Bench: A.Y. Sakhare**

ORDER

A.Y. Sakhare, J.

1. By this motion, plaintiffs are praying for various reliefs in respect of cinematograph film "BEES SAAL BAAD".

2. Plaintiffs have filed this suit for declaration that plaintiff No. 1 has sole and exclusive video copyrights in respect of aforesaid cinematograph film for period of 10 years from 27-1-1989, plaintiff No. 1 alone is entitled to make video cassettes, discs, tapes, grams or any other video format of the said film, plaintiff No. 1 alone is entitled to exhibit, exploit, broadcast, cause to be broadcast, exhibited, and exploit the said film by use of video format and to sell or give it on hire etc. video cassettes of the said film. Plaintiffs have also claimed that assignment of satellite TV broadcasting rights in favour of defendant No. 3 or defendant No. 4 by defendant No. 1 be declared as violative and infringing the sole and exclusive video copyrights assigned in favour of plaintiff No. 1 under the agreement. Other consequential reliefs are also prayed for by plaintiffs.

3. As per plaintiffs, plaintiff No. 1 is partnership concern and plaintiff No. 2 is proprietary concern, both carrying on business of manufacturing and/or as dealers of video cassettes and exhibiting video cassettes commercially and/or home viewing. Defendant No. 1 is proprietorship firm carrying on business of production of cinematograph. Defendant No. 2 is company incorporated in India carrying on business of making video cassettes and/or broadcasting films. As per plaintiffs, defendant No. 3 is company, which enters into an agreement in India with various producers on behalf of defendant No. 4. Defendant No. 3 acts as agent of defendant No. 4 for procuring and acquiring rights from various producers for the purpose of broadcasting and/or causing to broadcast films in India. Defendant No. 4 is company incorporated under the Laws of Hongkong, which has its office in Hongkong.

4. As per plaintiffs, video copyrights in respect of cinematograph film BEES SAAL BAAD vest solely and exclusively with plaintiff No. 1. By agreement dated 15-12-1988, entered into between defendant No. 1 and plaintiff No. 2, defendant No. 1 being producer of the film and owner of all copyrights therein assigned in favour of plaintiff No. 2 the sole and exclusive video copyrights in respect of the

said film, which rights include right to exhibit, distribute, sell, offer for sale, lease, let on hire or licence or otherwise exploit or to make copies or deal with the video cassettes/ videograms/discs/tapes and Cable TV rights. Agreement between defendant No. 1 and plaintiff No. 2 is annexed at Ex. 'A' to the plaint. Plaintiffs claim that in pursuance of the agreement, plaintiff No. 2 has become sole and exclusive owner of video copyrights of the said film and alone became entitled to make videograms, discs, tapes, video cassettes etc. of the said film in India and also entitled to exhibit and/or broadcast the said film in India by use of video format in any manner including over Cable TV or otherwise. As per plaintiffs, plaintiff No. 2 by agreement dated 24-1-1989 assigned all rights in respect of said film to plaintiff No. 1. Plaintiffs have claimed that defendant No. 3 enters into agreement with various producers in India and purports to take assignment in its favour of purported satellite broadcasting TV rights in respect of cinematograph. Defendant No. 3 also takes assignment in its favour of Cable TV rights and PAY TV rights. A draft agreement, which defendant No. 3 enters into with various producers is annexed to the plaint at Ex. 'C' and is not in dispute. As per plaintiffs, after the agreement is entered into between defendant No. 3 and producers, print-copies of the said cinematograph are given to defendant No. 3. Defendant No. 3 in turn authorizes defendant No. 2 to make copies of the said film on Betachem cassettes, for use for satellite TV transmission. Plaintiffs have claimed that Betachem cassette is video cassette. Plaintiffs have further averred that defendant No. 4 has leased one of the -transponders of a satellite, namely Asiasat-1 satellite. A transponder on satellite is a channel and it is part of the satellite, which receives signal from Earth at one point and relays back the said signal covering a major portion of the Earth. Defendant No. 4 is operating a channel known as "Zee TV" for broadcasting Hindi films/programmes for the Asia region. The signals of Zee TV are broadcast from the transponder of the satellite Asiasat-1 are received in the countries of South East Asia, India, Sri-lanka, Nepal, Bangla Desh, Pakistan, Gulf Countries etc. This area is known as foot prints. As per plaintiffs, defendant No. 4 procures Betachem video cassettes through defendant Nos. 2 and 3, transmits film from Hongkong to the said Asiasat-I satellite by use of Betachem cassette-video format. As per plaintiffs, defendant Nos. 2, 3 and 4 in transmitting the said film through Asiasat-1 satellite by use of Betachem cassette video format are causing infringement of plaintiffs' rights in the said film.

5. Defendant Nos. 1 and 4 are absent though duly served. Defendant Nos. 2 and 3 have filed their affidavit in reply. These defendants have denied that they have infringed the alleged sole and exclusive video rights of film BEES SAAL BAAD on the reasons as alleged by plaintiffs. As per these defendants, defendant No. 1 has assigned satellite broadcasting rights in favour of M/s. Pan India Paryaton Limited, who in turn has assigned the said rights to defendant No. 2. As per these defendants, defendant No. 4 broadcasts various programmes through satellite from Hongkong. It is open for any person in India and various other countries to catch the signals beamed by defendant No. 4 through 'satellite. These defendants have denied that they are acting as agent for defendant No. 4. These defendants on merit have contended that these defendants by act of telecast of the said film through satellite broadcasting have not infringed plaintiffs' alleged rights. As per these defendants, copyrights in respect of cinematograph comprise of distinct classes/species of rights, all separately divisible and which can exist in different persons (owners) at the same time. As per these defendants, different classes/species of copyrights are there namely Theatrical Rights, Terrestrial Television Broadcasting Rights, Satellite Broadcasting Rights, Cable. TV. Rights and Video Rights.

The first four classes/species of rights fall within the class of 'communication to the public' and under the video rights, holder of the said rights is entitled to make/sell/distribute copies of the film but he has no right to communicate the said film to the public. As per these defendants, as per the terms of agreement between plaintiff No. 2 and defendant No. 1, plaintiffs hold only video right i.e. rights to sell/make/distribute copies of the film. That plaintiffs are holders of video rights and they do not have right of broadcasting the film to the public. As per these defendants, plaintiffs have also recognised video rights, cable TV rights and satellite rights as distinct and separate and that satellite rights are not conferred upon plaintiffs. As per these defendants, there are distinct modes of communication to the public such as (i) Theatrical, (ii) Terrestrial Television Broadcasting (Doordarshan Rights), (iii) Satellite Broadcasting and (iv) Video TV. As per these defendants, all these are independent modes of communication, which exist separately in harmony. As per these defendants, even-though, plaintiffs have some rights, these rights are restricted to particular mode of communication i.e. by video cassettes for home TV only. These defendants have stated that cable TV rights are distinct from satellite broadcasting rights. As per these defendants, by broadcasting over satellite defendants have not committed infringement of plaintiffs' rights. By placing reliance upon section 52 of the Copyright Act, 1957 (hereinafter referred to as the Act for sake of brevity), defendants also disputed plaintiffs' contention that by using Betachem cassettes for satellite broadcasting, defendants have infringed plaintiff's video rights. As per these defendants, for purposes of satellite broadcasting, Betachem cassette is prepared and preparation of the said cassette does not infringe plaintiffs' video rights. On these averments, defendants have claimed that plaintiffs have no rights over satellite broadcasting, by causing satellite broadcasting defendants have not committed infringement of plaintiffs' alleged rights.

6. Before dealing with the submissions advanced, it is necessary to note relevant provisions of Act. Section 2(d) defines author in relation to cinematograph film, section 2(dd) defines 'broadcast', section 2(f) defines 'cinematograph film', section 2(ff) defines 'communication to the public', section 2(m)(ii) defines infringement of cinematograph film, section 2(y) defines 'work' in copyrights. Section 13 provides for work in which copy rights exists. Section 14(d) provides for meaning of copyright in case of cinematograph film. Section 51 provides infringement of copyright. As per section 52 certain acts are not to be treated as infringement of copyright. The aforesaid provisions of the Act read as under :

"Section 2(d)(v):---'author' means in relation to a cinematograph film, the owner of the film at the time of its completion.

" "Section 2(dd):--- 'broadcast' means communication to the public

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire."

"Section 2(f):---"cinematograph" includes the sound track, if any, and "cinematograph" shall be construed as including any work produced by any process

analogous to cinematography."

"Section 2(ff):---"communication to the public" means communication to the public in whatever manner, including communication through satellite."

"Section 2(m)(ii):---"infringing copy" means in relation to a cinematograph film, a copy of the film or a record embodying the recording in any part of the sound track associated with the film."

"Section 2(u):---"prescribed" means prescribed by rules made under this Act."

"Section 2(y)(ii):---"work" means any of the following works, namely, a cinematograph film."

"Section 13:---Work in which copyright subsists---(1) Subject to the provisions of this section and the other provisions of this Act, copy right shall subsist through out India in the following classes of works, that is to say,-

(a) original, literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) records."

"Section 14(d):---in the case of a cinematograph film,-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sell on hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public;"

"Section 52(1):---The following acts shall not constitute an infringement of copyright namely-

(z) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character."

7. The agreement between defendant No. 1 and plaintiff No, 2 dated 15-12-1988 is annexed at Ex. 'A', page 45 of the plaint. Some of the relevant clauses of the said agreement read as under:

"AND WHEREAS the Assignors have approached the Assignees to take the Assignment of the Video Copyrights for transferring, processing, recording, duplicating, copying taping on to Videograms, Cassettes, Discs, Tapes of the SAID FILM for the territories mentioned in Schedule 'B' hereto and hereinafter referred to as THE SAID CONTRACTED TERRITORIES' which the Assignees have agreed to do on the terms and conditions hereinafter appearing."

"On the aforesaid representations and declarations and believing the same to be true, the Assignees hereby accept the Assignment of the Video Copyrights as mentioned hereinabove in their favour and the Assignors hereby assign in favour of the Assignee the Video Copyrights of the said contracted territories of the SAID FILM."

The Assignees shall have full, complete and unrestricted right to alter, delete or cut any portion or add any portion of other film/s or documentaries, advertisements or sound, in the said film either before or after or intervening including the right to make the Videograms, Discs, Cassettes, Tapes in respect of songs, dialogues scenes, extracts and/or communications thereof of the said film. In short, the Assignees shall have unrestricted rights to use the said film for Videograms, Cassettes, Discs, Tapes for any purpose in any manner whatsoever."

As per this agreement, defendant No. 1 producer has assigned video copy rights to plaintiff No. 2 for home video viewing only. Rights assigned to plaintiff No. 2 are right to make Videograms, discs, cassettes, tapes etc. in respect of songs, dialogues, scenes, extracts and/or communication of the films to home video viewers.

The rights assigned to plaintiff No. 2 include right to reproduce the film including sound track thereof for videograms, cassettes, discs, tapes and to distribute them for exhibition on video by play back equipment and cable TV rights. Thus rights assigned to plaintiff No. 2 are right to make videograms, discs, cassettes, tapes in respect of songs, dialogues, scenes, extracts and/or communication thereof. By reading the said agreement, it is clear that satellite broadcasting rights are not assigned to plaintiffs by defendant No. 1.

8. Section 2(ff) provides for communication to public in any manner including communication through satellite. It is regardless as to whether any member of public sees or hears or otherwise enjoys the same or not. As per section 14(d)(iii), copyrights exist in communication of the film to the public. As stated hereinabove, plaintiffs have with them copyrights for exhibition of the film on video by play back equipment or Cable TV rights. There are several ways of communication and each one is separately divisible and can exist in different person at the same time. Difference classes/species of communication are as under :

(i) Theatrical Rights :i.e. right to exhibit the cinematograph film in theatres.

(ii) Terrestrial Television Broadcasting Rights: i.e. the right to exhibit the film on terrestrial television (i.e. Doordarshan)

(iii) Satellite Broadcasting Rights : i.e. the right to exhibit/communicate the film by satellite signals to the public with or without cable and through the satellite medium.

(iv) Cable TV Rights i.e. the right to exhibit the film by a Cable originated programme.

Thus, plaintiffs have with them copyrights in Cable TV rights, which is one of the modes of communication, while contesting defendants have with them satellite broadcasting rights. Both these rights can exist in different persons without infringing copyright of each other. The Single Judge of (Madras High Court in O.A. No. 294 of 1994), and (A. No. 2326 of 1994 in C.S. No. 362 of 1994), a judgment delivered on 25-7-1994, has held that satellite broadcasting rights as are independent right as per the Act. The satellite rights involve preparation of Umatic tapes and exclusive rights for Satellite TV broadcast is entirely different from Cable TV rights. The Satellite television differs from ordinary Terrestrial Television (T.V.). Thus, as per learned Judge of Madras High Court satellite broadcasting rights are different rights. In the present case, there is no dispute before me that satellite broadcasting rights are independent rights. There is also ample material brought on record by defendants, which clearly indicates that satellite broadcasting rights must be treated and are treated as separate rights and the said rights are recognised throughout the world as independent rights.

9. The question is whether by preparation/manufacturing of Betachem cassettes either by defendant No. 2 or defendant No. 3, rights conferred upon plaintiffs are infringed and that whether after receipt of satellite signals, transmission of said signals by media of cable, plaintiffs' Cable TV rights are infringed. As far as video rights are concerned, said rights are admittedly with plaintiffs. Broadcast on Cable TV means cassette is put in Video Cassette Recorder (VCR). and signals generated on cassette player are then transmitted to the viewers through Cable. Satellite transmission is different way or channel of broadcasting. To broadcast on satellite, Betachem cassette is prepared on the basis of original film of the cinematograph. Betachem cassette is, thereafter, used for purpose of broadcasting on highly specialised and sophisticated machine. The signals generated by Betachem cassette are uplinked to satellite. The said signals are in turn transmitted to foot prints by downlinking the satellite signals which are either received on common dish antenna owned by Cable TV operator. Society or on private dish antenna owned by the viewers. For receipt of satellite signals a decoder is applied by broadcaster. The signals received on dish antenna are, in turn, without any addition/alteration/deletion are transmitted, as it is through media of Cable to viewers. The said cables are attached to television.

10. Thus/the question is by preparation or manufacturing of Betachem cassettes for the purpose of or its. user for satellite broadcasting for transmission whether it infringes plaintiffs' copyrights. Answer to this question must be in negative. Section 52(z) of the Act saves some infringement of copyright. As per section 52(z), making of an ephemeral recording by broadcasting organisation, using its own facility for its own broadcasting by broadcasting organisation of a work which it has right to broadcast does not amount to infringement. In the present case, defendant Nos. 2 to 4 to enable them to broadcast films on satellite have to prepare Betachem cassette. Unless and until the cassette is prepared film cannot be broadcast through satellite. Author Michael F. Flint in his book

'A user's Guide to copyright' Fourth Edition has explained ephemeral right as under :

"The ephemeral right: To understand the 'ephemeral right' it must be borne in mind that to make a recording of a literary, dramatic or musical or artistic work, or of a sound recording or film infringes the restricted act of copying the work which is a quite separate restricted act from that of 'broadcasting the work'. The Copyright Act contains an express exception permitting the use of copyright material for the purposes of broadcasting only (section 68). This is the 'ephemeral right' exception. In the case of literary, dramatic or musical works or adaptations of them, the broadcaster may make sound recordings or films of the works or the adaptations. In the case of artistic works, the broadcaster may take a photograph or make film of the works. In the case of sound recordings or films, the broadcaster may make copies of them.

The ephemeral right does not extend to making further reproductions from the original recording."

For ephemeral rights, the Act contains express exception permitting the use of copyright material for the purpose of broadcasting only. Thus, this is an exception. Thus, even-though, for the sake of argument it is treated that Betachem cassette is one of the cassettes, producing or manufacturing of the Betachem cassette is specifically, saved under section 52(z) of the Act. By producing or manufacturing Betachem Cassette for the purposes of broadcasting film on satellite, defendants have not committed any infringement of plaintiffs' copyrights. Thus, to broadcast the film on satellite, defendant Nos. 2 to 4 have to manufacture Betachem cassette by using original film print. As per draft agreement annexed to the plaint between defendant No. 1 and defendant No. 3 (which is not in dispute), it is for defendant No. 1 producer/author of the film to provide for Betachem cassette or to give good original film print to enable defendants to prepare 'Betachem cassette. Thus, preparation/manufacture of the Betachem cassette is in aid or in furtherance of broadcasting on satellite. Thus, by preparation or manufacturing of Betachem cassette, plaintiffs' rights under the agreement (Ex. 'A' to the plaint) are not infringed. In view of section 52(z) of the Act, act of defendants to produce/manufacture Betachem cassette does not amount to infringement of copyrights as claimed by plaintiffs.

11. The next question is whether by receiving satellite signals on dish antenna owned/maintained by Cable TV operator or private party and by relaying signals through media of Cable to the viewers whether plaintiffs' copyrights are infringed. Answer to this question must also be in negative.

12. Role of Dish Antenna of Cable TV operators or of Society is that signals are received on dish antenna and carried further by cable without editing whatever programmes they receive. Thus, by receipt of satellite signals on Dish Antenna by Cable TV operators or society and by carrying the same, no rights of plaintiffs are infringed. 90% of the viewers are depending upon Cable TV system operated by the Cable TV operators. The role of Cable TV operators is to receive the signals on Dish Antenna and transmit the same as it is to the viewers.

13. Defendants' reliance upon decision of U.S. Supreme Court in *Fortnightly Corp. v. United Artists*, reported in 392 U.S. 390, 20L. Ed. 1176, 88S.Ct. 2084 must be upheld. As per U.S. Supreme Court, by receiving signals on Community Antenna Television (CATV systems) and by transmitting them copyright is not infringed. Relevant discussion is as under ;

"When CATV is considered in this framework we conclude that it falls on the viewers' side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well located antenna with an efficient connection to the viewer's television sets. It is true that a CATV system plays "ACTIVE" role in making reception possible in a given area. But so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished (392 US 400) by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programmes he received on his television sets. The result would be no different if several people combine to erect a co-operative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur. (7) The function of CATV systems has little in common with the function of broadcaster. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programmes to be viewed, CATV system simple carry, without editing, whatever programmes they received. The Broadcasters procured the programmes and propagate them to the public; CATV systems receive programmes that have been released to the public and carry them by private channels to additional viewers.

We hold that CATV operators, like viewers and unlike broadcasters do not perform the programmes that they receive and carry."

14. A reference can also be made to Division Bench Decision of this Court in Appeal No. 405 of 1997 dated 1-8-1997. In the aforesaid decision, Division Bench has observed as under:

"The advertisers choose programmes in which to advertise, according to their popularity and time of showing. Zee TV Channel, which is a free-to-air signal, is seen by viewers only if they have connectivity through dish antennae. An individual viewer may install his own dish antennae, or, as is more common, dish antennae are installed and managed by cable operators, who have their own set of subscribers, to which subscribers the cable operators disseminate the TV signal for a fee or charge. Thus instead of individual viewers having their own separate dish antennae, the cable operators have common dish antennae and other equipment for deploying the signals by means of wire to viewers for a charge. In cities like Mumbai the majority of viewers will be subscribers to Cable Television Networks."



"It is not open to the defendants to state that they would re-broadcast or cause the programme to be seen or heard by the public on payment of charges, but they would not be bound to comply with the conditions laid down by the plaintiffs. It appears that the plaintiffs are issuing a form of certificate to various cable operators. This certificate is in effect a licence. In our view the defendants can only avail of the "free to air" programme provided they agree to and comply with the conditions laid down by the plaintiffs. This would necessarily mean that the defendants must communicate or broadcast the plaintiffs' programme in its entirety, including the advertisement portion. It will not be permissible for the defendants to substitute the plaintiffs' advertisements with their own advertisements."

Considering the activity of the Cable TV operators of receiving signals on dish antenna and thereafter transmitting it by cables to viewers either at fees or otherwise, do not amount to infringement of plaintiffs' copyrights.

15. Thus, in my judgment, by broadcasting cinematograph through satellite, defendants are not committing infringement of plaintiffs' copyrights in the cinematograph 'BEES SAAL BAAD', therefore, plaintiffs will not be entitled for interim order in this Notice of Motion.

16. In the result, Notice of Motion to stand dismissed with costs quantified at Rs. 10,000/-, Rs. 5,000- each to be paid to defendant Nos. 2 and 3.

17. Issuance of certified copy expedited.

18. Suit dismissed.