

# Phonographic Performance Ltd. vs Ht Media Ltd. on 30 November, 2012

**Author: Manmohan Singh**

**Bench: Manmohan Singh**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: May 16, 2012  
Judgment delivered on: November 30, 2012

+ I.A. No.17604/2011 & I.A. No.20715-16/2011 in CS(OS) No.2749/2011  
Phonographic Performance Ltd. .... Plaintiff

Represented by: Mr. N.B. Joshi, Adv. with  
Mr. Niraj Gupta & Mr. Purushottam  
Mishra, Advs.

versus

HT Media Ltd. .... Defendant

Represented by: Mr Sandeep Sethi, Sr. Adv. with  
Mr. K. Datta, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff filed the suit for injunction, infringement of copyright and damages.

2. By this order, I shall dispose of IA No.17604/2011 filed by the plaintiff and IA No.20715/2011 filed by the defendant, both applications are under Order XXXIX Rule 1 and 2 CPC, 1908 seeking injunction.

a) IA No.17604/2011 filed by the plaintiff contained the following prayers :

i) Pending the hearing and final disposal of the above suit this Hon'ble Court, by an order of temporary injunction, be pleased to restrain the Defendants its agent, employees and all others acting on its behalf from performing/communicating to the public by broadcast or otherwise, the sound recordings administered by the plaintiff by way of mechanical devices or any other means from its FM radio stations located in 4 cities namely, New Delhi, Kolkata, Mumbai and Bangalore except in accordance with law;

ii) Pending the hearing and final disposal of the above suit, this Court be pleased to appoint a fit and proper person as a receiver being the Receiver of this Court having all powers under Order XL of the Civil Procedure Code, 1908 to take detailed inspection of the books of account of the defendants for the period 01.11.2010 till date

and submit a report to this Court giving details of the income of the defendants by the unauthorized and illegal exploitation of the plaintiffs' repertoire by performing/communicating it to the public by broadcast or otherwise by way of mechanical devices or any other means from its FM radio stations located in 4 cities namely, New Delhi, Kolkata, Mumbai and Bangalore.

3. Likewise, the defendant's application contains the following prayers:

(i) Grant an ex-parte ad interim injunction in favour of the counter claimant restraining the plaintiff, its agents, employees and all others acting on its behalf from interfering with the broadcasts of the counter claimant till such time as the amount of excess royalty of Rs.2,39,92,172/- paid to the plaintiff get completely adjusted.

4. The facts leading up to filing of the instant suit and the applications by the plaintiff and the defendant can be enumerated as under:

a) The plaintiff is stated to be a company registered under the Companies Act, 1956 is registered as a copyright society under Section 33 (3) of the Copyright Act, 1957. The plaintiff claims to be engaged in the copyright business of sound recordings in pursuance of the statutory registration granted by the Government of India. It is stated that the plaintiff is entitled to obtain the exclusive authorization to administer the copyright in the sound recordings owned by its members, to issue licenses of such sound recordings for exploitation by third parties. The plaintiff society is the only one carrying on business of licensing of copyright in the sound recording on behalf of its members.

b) It is stated that the plaintiff's tariff for its license fees is fixed by its members in the manner required by Section 35 of the Act and rules framed there under. It is stated that the plaintiff serves as a collective bargaining mechanism for various music companies who are not able to demand their legitimate dues against the exploitation of their copyright due to their incapacity to sue or for any other reason.

c) It is stated that the plaintiff owns the repertoire of the sound recordings, the copyright of which is owned by music companies. The plaintiff has over 256 members who are the owners or assignees of copyright in national, international and regional sound recordings which are commercially referred as labels. These music companies have granted the plaintiff exclusive authorizations in the form of written mandates in terms of provisions of Section 34 (1) (a) of the Act to administer the said works on behalf of the said companies.

d) The plaintiff then explained in the plaint the rights available to the owner of the copyright envisaged under Section 14 of the Copyright Act, 1952, which in turn are available to the plaintiff as an exclusive licensee. It has been stated that the grievance of the plaintiff is that the defendant is in the business of operating a FM radio station

located in New Delhi and Kolkata namely Fever 104 FM where the defendant is communicating the sound recordings to the public which are administered by the plaintiff without the license and/or the permission from the plaintiff.

e) The plaintiff has also explained in detail in the plaint as how the copyrights play a significant role in the process of film making and investment in the future film projects. It has been stated that there are several films, the sound track of which are sold in several crores of rupees and the examples are cited to demonstrate the importance of the royalty business in the film industry.

f) With the aforementioned and some other facts narrated in the plaint, it has been explained by the plaintiff as to how the commercial radio channels came into picture in the later 2000 and their existence in a way triggered the royalty business extensively as the said channel started using the sound recordings on a large scale that too in a commercial sense.

g) The plaintiff has stated that in the year 2006, the HT Music and Entertainment Co. Ltd. herein approached the plaintiff for a license to broadcast the sound recordings administered by the plaintiff and entered into four separate voluntary license agreements with the plaintiff for each radio stations situated in New Delhi, Kolkata, Mumbai and Bangalore.

h) Later by a scheme of arrangement and restructuring dated 19 th March 2009, made effective from 19th May 2009, this court approved and allowed to transfer the FM radio business to the defendant herein in the instant suit.

i) The plaintiff has stated that all the four agreements expired on account of efflux of time on 31st October, 2010. The plaintiff has thereafter not renewed or granted any fresh license to the Defendant for any of its Radio stations.

j) As per the plaintiff, the defendant had not been complying the terms of the licensing agreements, the said defendant was irregular in providing the log reports relating to usage of the sound recordings. All these circumstances amongst some others became the reason for not renewing the terms of the licensing agreements by the plaintiff.

k) The plaintiff has also explained that there were some other radio broadcasters excluding the defendant who approached the Copyright Board by filing an application under Section 31 (1) (b) of the Act for compulsory licensing. The Copyright Board by its order dated 25th August, 2010 disposed of the said applications by granting the compulsory license in favour of the applicant at the rate of 2 % of the net-advertisement revenue of radio station.

l) It has been stated by the plaintiff that the said order dated 25th August, 2010 of the Copyright Board has been assailed by it before the Madras High Court in an appeal, the said appeal is pending for final hearing after being admitted.

m) The plaintiff state that suddenly the defendant stopped paying licensee fee to the plaintiff under the voluntary agreements from 1st February, 2010. It is stated in the plaint that the defendant with the intention to defy the contractual obligations had sought to rely upon the clauses under the agreements by misinterpreting them.

n) The plaintiff states that there were huge outstanding amount on account of license fee payable by the defendant. The defendant had under the voluntary license agreement placed certain security deposit. The plaintiff reminded the defendant to pay the outstanding amount time and again but the defendant did not pay the same. Therefore, the plaintiff was constrained to adjust the security deposit placed by the defendant towards the outstanding license fee.

o) It is stated that the misconstruction of the provisions of the voluntary license agreements was a matter of dispute under the agreements which already stood terminated by efflux of time.

p) The plaintiff state that the defendant despite the termination of the voluntary agreements continue to infringe the plaintiff's sound recordings by not paying the license fees and continue to broadcast and communicate the works to the public. The said act of the defendant is an infringement of the plaintiffs copyright under Section 51 of the Copyright Act, 1957 as alleged by the plaintiff.

q) The plaintiff state that on 26th October, 2010, the defendant addressed a letter to the plaintiff referring to the voluntary license agreements and acknowledged that the agreements will come to an end by efflux of time, the defendant however attempted to revise the terms of the agreement by calling upon the plaintiff to accept the license fee as per the lower rate as per the terms and conditions set down by the Copyright Board. The defendant again wrote to the plaintiff on 1st November, 2010.

r) Likewise, the plaintiff refuted the contents of the letter by replying on 30th April, 2011 and called upon the defendant to pay the license fees as per the voluntary license agreement. Thereafter, some communications were exchanged between the defendant and plaintiff in the year 2011 and thereafter the plaintiff approached this court seeking the restraint order and other reliefs against the defendant from broadcasting the sound recordings of the plaintiff on the basis of infringement of copyright.

5. The suit first came up for hearing on 9th November, 2011, when the summons were issued in the suit and notice in the application.

6. Pursuant to the summons, the defendant has filed the written statement and has taken the following defences. The defendant has also filed the counter claim as it is the defendant's belief that the defendant is entitled to recover the sum of the royalty already paid on account of what has been agreed between the plaintiff and defendant in the voluntary license agreement. The defences and the averments in the counterclaim can be collectively summarized and outlined as under:

a) The plaintiff by filing the present suit is attempting to wriggle out from the financial liability which the plaintiff is otherwise liable under the agreement to pay to the defendant and thus, the present suit is an abuse of the process of the law.

b) There is no legal or other right of the plaintiff to restrain the defendant from broadcasting sound recordings belonging to the plaintiff's repertoire.

c) The plaintiff has acknowledge and acquiesced to the defendant's rights to broadcast the sound recordings till such time as it has duly adjusted a sum of `2,39,92,172/- (Rupees Two Crore Thirty Nine Lac Ninety Thousand One Hundred and Seventy Two Only) which it is entitled to adjust in terms of the agreement between the parties. Therefore, the plaintiff is guilty of acquiescence and inaction, latches and delay.

d) The plaintiff is guilty of non disclosure of relevant facts. The plaintiff has suppressed that in the agreement between the parties the defendant would be entitled to broadcast the plaintiff's sound recordings and adjust the royalty so payable as determined by the Copyright Board against the sum of `2,39,92,172/-, which crystallized on the date when the Copyright Board passed its judgment and order dated 25th August, 2010.

e) The plaintiff is estopped from objecting the defendant from broadcasting the sound recordings till the time the adjustment of the sum as stated above takes place in view of the new rates laid down by the Copyright Board. The plaintiff therefore on the date of institution of the suit had no cause of action for copyright infringement.

f) The present suit has been filed to overreach the order passed by the Copyright Board where under the rates of the royalty relating to radio channels and broadcasters are determined. The said order is still pending in appeal where in no stay of operation has been granted by Madras High Court. The said suit therefore is clearly an attempt by the plaintiff to come out of the purview of the Copyright Board order.

g) The defendant states that in the voluntary agreements entered into between the plaintiff and the defendant, there is a clear stipulation that HTME agreed to take a license from the plaintiff on the payment of the license fee at the rates of `1200 per needle hour, `720-/ per needle hour and `300 per needle hour on the basis of the rates determined by the Copyright Board in the judgment and order dated 19 th

November 2002. It was also agreed that payment at such rate is subject to the adjustments as per the final order that may be passed by the Copyright Board. It was also agreed that in case the rate finally decided by the Copyright Board was less than the rate at which the HT Radio Stations are paying, then, the plaintiff would adjust the differences from further usages by HT radio stations. The said stipulations are provided under clause 6, 7 and 8 of the agreements.

h) The defendant has filed a complaint under Section 31 (1) (b) of the Copyright Act, 1957 on 25th November, 2010 seeking compulsory license from the Copyright Board. The said complaint was necessitated on account of breach of the clauses of agreement done by the plaintiff with the repeated demands of royalty at higher rates.

i) The averments made in the counter claim are the same as those contained in the written statement. At present, this court is only concerned with the decision on the interim applications filed by the plaintiff and the defendant, therefore, to that extent, the averments and the narration of events in the written statement and the counter claim are the same.

7. The plaintiff has filed the written statement to the counter claim refuting all the allegations made in the counter claim and reiterating the stand taken by the plaintiff in the plaint. Likewise, both the parties, the plaintiff and the defendant have filed the interim applications seeking injunction from this court as per the prayers contained in the applications. The replies thereto have also been filed.

8. The said applications which are IA No.17604/2011 and IA No.20715/2011 came up before this court for hearing when Mr. N. B. Joshi, learned counsel appearing on behalf of the plaintiff has made his submissions which can be outlined in the following manner:

a) Firstly, Mr. Joshi, learned counsel for the plaintiff has argued that the defendant's act without the extension of the permission in the form of voluntary license agreements which expired in the year 2010 clearly falls within the purview of the infringement of copyright as per Section 51 of the Act. Mr. Joshi argued that the mere pendency of the application of compulsory licensing before the Copyright Board does not mean that this court should presuppose that the said license has been granted and proceed to fix a license fee in the instant case pending the request for compulsory license. Therefore, the defendant cannot take any advantage from mere pendency of the application before the Copyright Board.

b) Secondly, Mr. Joshi argued that the defendant's stand that the plaintiff is entitled to adjust the sum in the event of reduction of the royalty rate by the Copyright Board is totally untenable in as much as the said fixation of the royalty was not between the defendant and the plaintiff. The defendant was not a party to the said proceedings before the Copyright Board. Instead, the defendant has filed the application seeking compulsory licensing separately which is yet to be decided by the Copyright Board in view of the decision passed by the Supreme Court in the case of Entertainment

Network (India) Limited v. Super Cassette Industries Limited, (2008) 13 SCC 30 as well as view subsequently taken by the Division Bench of this Court vide order dated 11th May, 2011 passed in Entertainment Network (India) Limited v. Super Cassette Industries Limited and Others in case L.P.A. No.448/2011. In that event of the matter, no aid can be drawn from the said clause 6, 7 & 8 of the agreements.

c) Thirdly, Mr. Joshi argued that the invocation of the said clauses 6, 7 and 8 could be made only during the time said kind of voluntary licensing agreements were in existence. It is the admitted position that the said licensing agreements expired on account of efflux of the time. Therefore, whatever adjustment the defendant is stating is something which is at the highest breach under the said contracts. The said alleged breaches have no nexus with the copyright infringement which the defendant is continuing to do under the garb that there are such adjustments which are pending or outstanding at the plaintiff's end. Therefore, no aid can be drawn from the said clauses of the agreements so as to justify the continuing acts of infringement.

d) Fourthly, Mr. Joshi argued that defendant's stand that the same rate of royalty as stated by the Copyright Board in the cases No.1 to 6/2002 between plaintiff and many radio and music stations applied in the instant case is wrong and the same should not be accepted by the court. There are number of reasons which have been given by Mr. Joshi in order to support his submission which can be enlisted in the following manner:

Each case of compulsory licensing is distinct from the other due to the peculiar facts. The said change in facts may change the decision making of the tribunal deciding the compulsory licensing application. Mr. Joshi, drawing the aid from the judgment passed by Supreme Court in the case of Entertainment Network (India) Limited (supra) and argued that even Supreme Court recognized that no two cases relating to compulsory licensing are same and therefore, the argument of the defendant that they should be treated alike is not sustainable. Mr. Joshi, argued that the order of Copyright Board dated 25th August, 2010 which even the defendant is setting up against the plaintiff in order to state that the rate 2 % of the royalty should be set as tentative rate in order to continue the licensing arrangement has been appealed against in Madras High Court and thereafter, before Supreme Court in Special Leave to Appeal (Civil) No(s).5727- 5735/2011 filed by plaintiff wherein the Supreme Court again reiterated the same observations while dismissing the SLP that the petitioner may be allowed to maintain the stand that their case is distinct from the other cases. All this would mean that the plea of distinctness of the case can be set up in each and every case as no two cases are alike and Supreme Court has time and again opined so to this effect.

The application for compulsory licensing has been filed by the defendant before the Copyright Board which is pending adjudication, therefore, the said plea of distinct nature of the case is available to the plaintiff and can be urged before the competent

authority at the relevant stage of the proceedings. Therefore, it is not safe for this court to assume that the rate of 2 % which has been held in the cases decided by the Copyright Board on 25th August, 2010 may be applicable to this case without the decision of the competent authority on the said aspect.

The jurisdiction to determine the rate of royalty payable is otherwise vested with the competent authority which is the Copyright Board. The said jurisdiction is exclusive as per the provisions of the Copyright Act, 1957. Therefore, till the time, the said application is finally disposed of, this court cannot proceed to fix the rate of royalty. This would result in transgressing into the jurisdiction of the Copyright Board and therefore, either the defendant be directed to pay the royalty as per rate card of the plaintiff or at least as per earlier understanding of the parties, the details of the same are mentioned in the agreement which have now been expired, otherwise, the defendant has to be restrained for infringement of copyrights of the plaintiff.

Mr. Joshi, has read the pleadings and grounds of appeal paper book filed by South Indian Music Companies Association filed before the Madras High Court in order to support his submission that there may be several grounds available to the non parties to the dispute relating to fixation of the royalty rate arbitrarily. The grounds like principles of natural justice amongst others are worth considering as fixing the same rate of royalty in a standard form arbitrarily would be like passing the order without giving hearing to the non party. Therefore, if this court will proceed to apply the said order of Copyright Board dated 25th August 2010, the same would equally suffer from the vice of arbitrariness.

Mr. Joshi, by giving afore noted reasons argued that this court should not accept the order passed by the Copyright Board as such and should rather consider the case by taking an independent view of the matter which is that till date, the acts of the defendant are infringing, and if they are infringing in nature being without permission of the plaintiff, the same ought to be injuncted immediately.

e) Mr. Joshi argued that the court's power to pass the injunction order in the cases where there is a pending application of compulsory licensing is not limited. The court can in a given case pass the injunction especially when the case relates to the one of ex-licensee. Mr. Joshi in order to support his submission relied upon the judgment passed by this court in the case of Super Cassettes Industries Ltd. v. Mr. Puneet Goenka & Anr. which is an order dated 13th August 2009 wherein this court laid down the said proposition and has made some observation to this effect.

f) Mr. Joshi has also made his submission resisting the injunction application filed by the defendant on the ground that the law in this respect is well settled that till the time, the application for the compulsory licensing is pending adjudication before the copyright, the relief of injunction or declaration at the behest of the applicant for the



compulsory licensing cannot be granted by the civil court. This is due to the reason that the same would result in allowing the infringer (which is the status of the said person or entity till the time compulsory licensing is allowed) to infringe the work of the owner of the copyright. Mr. Joshi in this respect relied upon the judgment passed by learned Single Judge of Bombay High Court in the case of Music Choice India Pvt. Limited v. Phonographic Performance Limited, (2009) (39) PTC 597 wherein this proposition has been laid down by the learned judge. The said decision has been also affirmed by the learned Division Bench of Bombay High Court in a separate order reported in 2010 (44) PTC 171 (DB). Consequently, as per Mr. Joshi the injunction application filed by the defendant ought to be dismissed.

9. By making the above submissions, Mr. Joshi argued that the acts of the defendant are prima facie infringing and no tenable defence has been raised by the defendant justifying the acts. The defendant is continuing to infringe the works of the plaintiff without paying the royalty for more than 1.5 years. Therefore, this court should immediately pass the temporary injunction orders as prayed in the interim application.

10. Per contra, Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the defendant has made his submissions which can be outlined in the following manner:

a) Firstly, Mr. Sethi, learned Senior counsel for the defendant argued that the present case is peculiar in its own facts in as much as in the instant case there was a clear understanding between the parties under the agreement which include the plaintiff and defendant (or its predecessors) that there is a litigation going on in relation to licensee fee rates between the plaintiff and other radio broadcast channels and the rates decided by the Copyright Board shall be determine the rates which may be applicable to the arrangement between the plaintiff and defendant as a licensor and licensee.

The said stipulations clearly indicate the intention of the parties which is to apply the said rates of the licensee fees between the plaintiff and the defendant. The same is evident from the clause 6, 7 and 8 of the voluntary licensing agreement, Mr. Sethi argued that once the order of Copyright Board has determined the rate which as per the tribunal is the industrial trend after analyzing the evidence available on record. Thereafter, the plaintiff cannot escape their liability towards adjustment of the amount already paid by way of operation of clause 8 of the agreement. The question of the granting the injunction does not arise in the instant case.

b) Secondly, Mr. Sethi argued that the order of the Copyright Board prescribes a rate of 2 % of net advertisement earning of each FM radio station as a fees for licensing. The said order has not been stayed by the Madras High Court. Rather, the Supreme Court declined to interfere by dismissing the Special Leave to Appeal (Civil) No(s).5727-5735/2011 by its order dated 5th April 2011. It has been stated that therefore in a way the order of copyright is board is in force which was passed after considering the various factors as stated in the order though the appeal is pending adjudication before Madras High Court. It has been argued under these circumstances, there is a prevailing rate

of 2 % which is available on record after a fact finding enquiry done by the Learned Copyright Board after recording evidence. Accordingly, this court can tentatively arrive at the interim, arrangement so as to prevent the competing prejudice which may be caused to radio channels which are run by the defendant all across India, especially when the defendant did all the time pay the licensing fee earlier and only intend to follow the industrial practice as per the law. Therefore, the question of the grant of injunction in the instant case does not arise at all.

Mr. Sethi, learned Senior counsel in order to buttress his submission also relies upon the order passed in the case of Super Cassettes (supra) where such interim arrangement was made in the order.

Mr. Sethi submits that in Super Cassettes (supra) interim arrangement made on the basis of the royalty rates previously paid by the defendant to the plaintiff. Since, the defendant failed to pay the same in subsequent period, therefore, the court was right in passing such orders. In the instant case, due to difference in the facts, when the parties under agreement agreed to follow the decision of the Copyright Board as per the stipulations contained in the agreement, the interim arrangement as per the rates fixed by the Copyright Board after the adjustment of the sums which are already lying with the plaintiff in extra should be done which should sufficiently safeguard the interests of both the sides. Further, the facts and subject matter of that was totally different.

c) Mr. Sethi, learned Senior counsel for the defendant argued that the plaintiff is guilty of inaction as it did not respond to the communications addressed by the defendant unjustly and waited for almost a year thereafter to approach this court. This is another reason which is coming in the way of the plaintiff to seek injunction from this court. The plaintiff is therefore guilty of inequitable conduct.

d) Mr. Sethi, learned Senior counsel argued that if this court directs the payment of royalty by the defendant to the plaintiff, this court should protect the defendant's interest by directing the plaintiff to provide for adequate security in a sum of `2,39,92,172/- as claimed by the defendant in the counter claim and at least at this stage pass the direction for adjustment of the abovementioned amount from the amount due as per agreement at the rate of 2% as royalty amount recoverable by the plaintiff as per the order passed by the Copyright Board on 25th August, 2010 in the similarly situated cases as the said order passed by the Board has not been stayed by any court in India in order to strike the balance between the parties. He further submits that the Copyright Board is likely to pass the similar order in its pending application under Section 31 of the Act.

11. By making the aforesaid submissions, it has been suggested by Mr. Sethi that till the time Copyright Board is seized of the application seeking grant of compulsory license, this court should pass an interim arrangement on the lines of the rate of license fee fixed by the Copyright Board treating it as prevailing rate with the direction to adjust the monies lying due from the plaintiff as claimed in the counter claim by the defendant.

12. I have gone through the plaint, written statement, counter claim, written statement thereto and documents filed by the parties and have also given careful consideration to the submissions advance

by the learned counsel for the parties across the bar. I shall now discuss the matter on merits.

13. First and foremost I think it is noteworthy to mention that the relationship of the plaintiff and the defendant when it had started in the year 2006 was governed by the contract or voluntary license agreement. The said agreement was between the plaintiff and HT Music and Entertainment Co. Ltd. (which was subsequently by way of scheme restricting was transferred into defendant herein to which there is no dispute). The said agreement dated 11th October 2006 has been renewed from time to time by the parties in order to govern their relationship as a licensor and licensee. The said agreement provided for certain terms and conditions relating to payment of license fees. The said terms and conditions which are relevant for the present controversy are reproduced below:

"5. The Licensee is aware of the tariff fee published by the Licensor in the Government Gazette dated 11th March, 2005, which is as follows:-

"The License Fee for Broadcast of sound recordings on FM channels @ Rs.2400/- per hour of recorded music per transmitter or 20% of Net Advertising Revenue whichever is higher."

6. The Licensee is aware that the Pvt F.M. radio stations who commenced their operations in 2001 & 2002 are not paying the licence fees to the Licensor as per its tariff and had approached the Courts/Copyright Board. These stations are paying the license fees as per the interim orders passed & modified by the Courts and respective cases. The matters are pending before the Hon'ble Supreme Court and the Copyright Board.

7. In such a scenario some Pvt F.M. radio stations who started their stations in 2003 agreed to obtain voluntary license from the Licensor on the tariff which is broadly based on the orders passed by Courts/Copyright Board subject to adjustments as per the final order that may be passed by appropriate court/Copyright Board. The Licensor & the Licensee agree that this approach is practical as it protects the interests of both the parties without taking recourse to the court process.

8. The Licensor hereby grants voluntary license for the existing and future works of Licensor's members, upon following terms and conditions:-

Licensor to issue an interim license to the Licensee for a period of 12 months.

The Licensee before the commencement of the broadcast to pay an advance payment of Rs.30,00,000/- (Rs. Thirty Lacs only) per station as interest free security deposit. The deposit amount shall be paid back to the Licensee subject to deduction of dues if any, in case the radio station is closed or if the license is cancelled.

However in view of the commitment made by the Licensee to commence four stations - one each Mumbai, Delhi, Bangalore and Kolkata and obtain voluntary license from the Licensor for each of these stations on the same terms and conditions as this license, the Licensor as a special consideration agrees to accept Rs.20,00,000/- (Rs.

Twenty Lacs only) per station as interest free security deposit. The Licensee before the commencement of the broadcast to pay an advance payment of Rs.20,00,000/- for Delhi station as an interest free security deposit. The deposit amount shall be paid back to the Licensee subject to the deduction of dues if any, in case the radio station is closed or if the license is cancelled.

The Licensee before the commencement of the broadcast to make an adhoc advance payment of Rs.3,00,000/-. This amount shall be adjusted at the end of the month @ Rs.1200/- per needle hour during 8 a.m. to 10 a.m. & 6 p.m. to 8 p.m. Rs.300/- per needle hour during 10 p.m. to 6 a.m. and Rs.720/- per needle hour during rest of the day-of recorded music, per hour of recorded music.

The same process shall be followed every month in order to maintain an advance payment of Rs.3,00,000/- with the Licensor.

The Licensee do hereby agree to pay arrears, if any, from the date of commencement of broadcast to Licensor in accordance with the final orders that may be passed in the pending proceedings. In case the rates are reduced by the final order then the Licensor shall adjust the difference from further usages by the Licensee.

It is further agreed declared and confirmed that the rate of license fee payable by the Licensee to the Licensor under this agreement shall be construed as a discount or rebate or concession granted by the Licensor to the Licensee and that the rate of license fee shall be such as may be finally determined for Licensees operating at the city of operation by the Hon'ble Court and/or Copyright Board.

The licence fee is exclusive of any Sales Tax, Services Tax, Lease Tax and/or other such taxes as may be levied on the licence fee payable, by any government authority and regulations. All taxes, duties, or other similar payments (including VAT) shall be borne by the Licensee."

14. From the bare reading of the said clauses 5, 6, 7 and 8 collectively as contained in the agreement, the following aspects relating to intent of the parties under the agreement come to the light:

a) That both the parties to the agreement under the capacity of licensor and licensee recognize the fact that there are litigation pending between the plaintiff and the other radio stations before the court or the Copyright Board. The said matters are pending before Supreme Court and the Copyright Board. All this is indicative of the fact that the parties are conscious of the legal battle on the subject of the fixation of royalty is carrying on in the courts which has been fought at the various forums by the plaintiff.

b) Both the parties also realize the fact that the outcome of such matters before the court or the Copyright Board may come in the favour of either side which means that

there may be increase in the prevailing rate or the decrease in the same and depending upon the said final order, the arrears shall be calculated. This is evident from clause 8 where such stipulation is provided. This again is indicative of the intent of the parties which is clear that the parties intend to operate the arrangement of acting as a licensor and licensee as per the governing rate of license fee fixed by the Copyright Board, which the other channels are paying and the same shall hold good under the agreement subject to such adjustments as the need be.

15. The aforementioned pointers indicate the intention of the parties under the agreement which was to act as a licensor and licensee on the basis of the rates fixed by the Copyright Board or the court. The discernment of the intention of the parties under the agreement became necessary so as to understand on what terms the parties were operating, which will act as a backdrop in the event this court finds that any such interim arrangement is required to be done till the time the application filed by the defendant for the compulsory licensing is pending adjudication before the Copyright Board.

16. With this backdrop that the intention of the parties was to govern themselves on the rates of license fees to be fixed by the Copyright Board or the court in the connected matters pending already, let me now proceed to examine the submission of the learned counsel for the plaintiff atleast for prima facie consideration that the rates fixed by the Copyright Board were relating to different facts and therefore each case is a different case.

17. It is true that the facts and the circumstances of two cases may or may not be the same. The right or remedy emanating from statute which has been available to a party or applicant for compulsory license, defendant herein has to be decided independently on the basis of the facts of the instant case unbound by the factual matrix of the other cases. The observations of Supreme Court in Entertainment Network (*supra*) in this context are equally noteworthy and there is no dispute to such proposition that every application for the compulsory licensing before the Copyright Board has to be adjudicated upon its own facts and circumstances.

18. However, the said proposition laid down by the Supreme Court nowhere precludes this court from drawing an inference on the basis of the intention of the parties under the agreement which immediately preceded the alleged infringing acts as to whether prima facie the parties actually intended to treat the said facts differently given that there exists a stipulation under the agreement that the parties will apply the rates of license fee fixed by the Copyright Board in the connected matters and shall make the adjustments accordingly.

19. Basing on the said inference, the court is also not precluded from coming to the prima facie finding for the purposes of deciding the case on an ad interim stage as to whether the rates fixed by the Copyright Board in the connected matters can be tentatively made applicable to the parties as a working arrangement (when the agreement has expired and the intention of the parties earlier in the agreement was to govern themselves on the rates fixed by the Copyright Board), till the time application for compulsory licensing filed by the defendant is decided by the Copyright Board.

20. It is different matter what actually the Copyright Board determines in the given facts inter se the parties on the basis of the actual pleas raised by the parties in relation to difference in facts in their case vis-à-vis the other connected matters and evidence adduced before it. But that by itself does not mean that the civil court is powerless to arrive at the prima facie conclusion that the rates fixed by the Copyright Board earlier cannot be made applicable when the parties themselves recognize so under the covenant entered between them earlier for the purpose of arriving at an interim arrangement.

21. It is one thing to say that the court or the competent authority seized of the application or petition arising out of statutory right or remedy has to decide the same as per its own facts and circumstances by according the treatment prescribed under the law. However, it is altogether different thing to say that the civil court while hearing an interim application is precluded from drawing an inference on the basis of the facts presented before it for the purpose of arriving at the prima facie finding in the matter solely because the matter is pending before the competent authority for adjudication. Both the propositions are distinct and thus cannot be equated with each other.

22. I find that the former has been laid down by the Supreme Court in Entertainment Network (supra) and later has not been observed by the Supreme Court in Entertainment (supra) and nor the same can be said to be necessary consequence of the observations of the Supreme Court as it will tantamount to unnecessary limiting the powers of the civil court seized of the infringement proceedings.

23. Therefore, I do agree with the learned counsel for the plaintiff that there may exist some difference in facts of the instant case which may if be presented before the Copyright Board, persuade the Board to arrive at some different conclusion as to the fixation of the royalty rates which may be higher or lower than the ones fixed in the pending matters. But the said difference in facts and requirement of fixation of royalty have to be urged before the Copyright Board and till that time if the court is required to come to any prima facie view as to whether such radio stations which were already carried on business for a considerable period of time can at all function and if so on what basis, then surely the court will first ask the question what was the previous arrangement between the parties under the agreement. In the instant case, it is clear after reading the agreement that the previous arrangement or agreed rates were all subject to final orders of the Copyright Board. Therefore, the court atleast in such peculiar circumstances may fix an interim rate of royalty so as to continue the arrangement pending disposal of compulsory licensing application.

24. Now, I shall proceed to examine the submission that the defendant till the time does not seek license at the agreed rates with the plaintiff, the continuation of the said acts amounts to infringement and the court can pass injunction orders in such cases. Learned counsel for the plaintiff in order to support his argument relies upon the judgment of Super Cassettes (supra).

25. I agree with the proposition laid down in the case of Super Cassettes (supra) that the court is not powerless to grant the relief of injunction pending the application seeking compulsory license as the same cannot be treated as an escape route for continuation of infringement. However, the same is

not an absolute proposition without any exception. The said discretion of grant or non grant of injunction has to be decided on the basis of examining the competing equities operating in favour of the parties. In *Super Cassettes (supra)* too, I have done an interim arrangement in the end so that the television program which was being telecasted along with the sound recording should continue to operate on the basis of the previous years arrangement by payment of royalty with the liberty to the plaintiff to approach civil court for revision of the royalty in case of future change in the rates. Likewise, it can be done in the instant case depending upon the facts and circumstances of the present case.

26. The only distinguishing factor in *Super Cassettes (Supra)* with that of the instant case is that the present case relates to radio channels where parties agree that the rates decided in the pending litigation shall have bearing on their existing arrangement under the agreement. Accordingly, not only the previous arrangement is relevant but the effect of fixation of the royalty by the Copyright Board and the true intention of the parties also gains importance so as to understand what actually parties intended to agree under the agreement. Therefore, even if *Super Cassettes (supra)* principle is applied to the instant case, still the court can fix an interim arrangement so that the radio channels which are under operation for years together should not immediately be stopped just because of the pendency of the application seeking compulsory licensing.

27. It is also true that the jurisdiction to fix the rate of royalty in the event of compulsory licensing application filed by aggrieved party vests with the Copyright Board. Therefore, normally the courts shall wash off their hands in the cases where the suits are preferred by the proposed licensees before the civil court. Such has been done by Bombay High Court in the case of *Music Choice India Private (supra)* and affirmed by Division Bench of the same court. But again there lies a difference in the a case where civil court is seized of with the suit for infringement of copyright as against the suit filed by the proposed licensees in the civil court claiming the relief of fixation of royalty. In the civil suit for infringement, the court while deciding an interim application has the powers to arrive at the interim arrangement of any nature to balance the equities as against the suit seeking declaration by the defendant seeking that the acts are non infringing and seeking fixation of royalty in the form of final relief which may amount to interference with the jurisdiction of the designated authorities.

28. The power to arrive at the interim arrangement in the civil suit for infringement can also not be completely abrogated in view of the fact that quite recently, the power to issue interim compulsory license has been taken away from the Copyright Board in view of the explicit finding of the Supreme Court of India in the case of *Super Cassettes Industries Ltd. vs. Music Broadcast Pvt. Ltd.* decided on 30th May 2012 wherein Supreme Court after analyzing the powers of the Copyright Board as envisaged under the copyright act has come to the conclusion that the Copyright Board has no power to grant interim compulsory license which would amount to grant of final relief itself. In the words of Supreme Court speaking through Hon'ble Kabir J, it has been observed thus:

"The language used in the Section clearly contemplates a final order after a hearing and after holding an inquiry to see whether the ground for withholding of the work from the public was justified or not. There is no hint of any power having been given to the Board to make interim arrangements, such as, grant of interim compulsory

licences, during the pendency of a final decision of an application. (Emphasis Supplied)

39. As has been held by this Court in innumerable cases, a Tribunal is a creature of Statute and can exercise only such powers as are vested in it by the Statute. There is a second school of thought which propagates the view that since most Tribunals have the trappings of a Court, it would be deemed to have certain ancillary powers, though not provided by the Statute, to maintain the status-quo as prevailing at the time of filing of an application, so that the relief sought for by the Applicant is not ultimately rendered otiose. While construing the provisions of Section 14 of the Consumer Protection Act, 1986, in the Morgan Stanley Mutual Fund's case (supra), this Court categorically held that in the absence of any specific vesting of power, no interim relief could be granted, not even of an ad- interim nature. The decision in the recent judgment of this Court in Rajeev Hitendra Pathak's case (supra) also supports the case made out by Mr. Sibal to the extent that in the absence of any express power conferred on the District Forum and the State Commission under the Consumer Protection Act, they had no jurisdiction to exercise powers which had not been expressly given to them. (Emphasis Supplied)"

"It is no doubt true, that Tribunals discharging quasi-judicial functions and having the trappings of a Court, are generally considered to be vested with incidental and ancillary powers to discharge their functions, but that cannot surely mean that in the absence of any provision to the contrary, such Tribunal would have the power to grant at the interim stage the final relief which it could grant.

44. As also indicated hereinbefore, such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as will no doubt happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. The submission made that there is no bar to grant such interim relief in Section 31 has to be rejected since the presence of a power cannot be inferred from the absence thereof in the Statute itself."

29. In view of the afore quoted observations of the Supreme Court, it is clear that the Copyright Board does not possess power to pass an order of fixing the interim arrangement or to issue interim license or rates in order to enable the said proposed licensees to continue their businesses when the main application for issuance of license is pending. This is due to the reason that the tribunals are creature of statute, the powers which are specifically invested in the said tribunals by statute can only govern the permissible extent to which the relief can be granted by the said tribunals. But the position of the civil court which is a court in the strict sense of term is different which has got all the ample powers to grant interim relief of diversified nature.



30. The defendant in the suit for infringement of copyright may be an applicant for compulsory license or proposed licensee. The said proposed licensees include the ones who are new in the field and the others who are already doing business for considerable period of time. Therefore, there must remain atleast a fora where such interim powers are available so that the proposed licensees who are in imminent need for license should not be rendered remediless on the sudden breach of contracts or termination done on either side and simultaneously the delay in the disposing of the compulsory licensing application should not enable the owners of the copyright to strike an unfair bargain upon such proposed licensee doing businesses for years together. All such balancing acts can be done in the interim by the civil court in an infringement proceeding by carefully analyzing whether the relief of temporary injunction is actually warranted or not.

31. Consequently, what is left is the civil court which is presented with the case alleging the infringement of copyright is, thus not precluded to go into the question as to what is nature of infringement carried out by the defendant, whether the defendant was earlier acting as licensee or not, if so at what rate or what was intention of the parties earlier. Basing upon answers to these question, the civil court can grant reliefs at the interim stage or may refuse the same or pass any interim arrangement so that the interests of the parties are not jeopardized be it plaintiff or defendant.

32. I also do not agree with the submission of the learned counsel for the plaintiff Mr. Joshi that because the defendant was not party to the proceedings before the Copyright Board where the order dated 25th August 2010 was passed, therefore under no circumstances, the rates fixed therein can be made applicable to the defendant. I find the said submission totally ignores the fact that the agreement entered into between the parties itself records that there exists a litigation with the other radio broadcasters and in the agreement the plaintiff itself agreed to do adjust the monies on the basis of the decision of Copyright Board. Under these circumstances, it is doubtful as to how the plaintiff could contend that the decision of the Copyright Board is immaterial and inapplicable for all practical purposes.

33. The submission can also come what has been agreed in the agreement is the final order passed by the Copyright Board. The order dated 25th August 2010 has been appealed against before the Madras High Court and the same has not attained finality and therefore this court should not apply the rates on the basis of the orders of Copyright Board. It is true that the order of the Copyright Board has been appealed against. However, the Madras High Court has refused to grant any stay on the operation of impugned order and by its order dated 22nd December, 2010, the stay application has been dismissed. Further, the Supreme Court of India equally declined to intervene in the appeal against the order of Madras High Court. All this would be mean that the rates fixed by the Copyright Board are still in force and the appellate court was seized of the matter in appeal against the final order of Copyright Board.

34. The resultant effect of the pending proceedings so far arising out of the order of the Copyright Board till date is that there are rates of licence fee which are available on record which are decided by the fact finding authority which is Copyright Board after the adducing the evidence of the various parties in the matter in relation to . The said rates were not upset by the higher appellate court till

date. Therefore, this court can certainly take into consideration the attending circumstances in the form of rate of license fee available on record decided by the fact finding authority which is Copyright Board which were earlier unavailable and can proceed to set the said rates as interim rates till the time the Copyright Board disposes of the application seeking compulsory licensing of the defendant.

35. By applying the said interim rates given by the fact finding authority, which is Copyright Board to the defendants as an interim measure, this court is not actually intruding upon the jurisdiction of the Copyright Board. Rather, this court while examining the prima facie similarity in the facts and circumstances of the case and intention of the parties to govern themselves on the basis of the said rates as per the decision of the Copyright Board is just applying the same very rates as set down by the Copyright Board as tentative measure by not going into any other fact finding enquiry. Of course, the Copyright Board is and shall continue to remain the fact finding tribunal which shall decide the matter if it finds merits on the pleas of the parties differently. Accordingly, the submission advanced by the learned counsel for the plaintiff that the application of the rates fixed by the Copyright Board by this court is intrusion of jurisdiction is rejected.

36. The terms of agreement earlier agreed by the parties, are somehow relevant in order to find out the true intent of the parties prior to expiry of the agreement which was to govern themselves on the basis of the rates fixed by the Copyright Board. The submission of the learned counsel for the plaintiff to the said effect is also rejected as meritless.

37. Now, I shall examine the submission of the learned senior counsel for the defendant which is that this court should order for adjustment of the sums lying with the plaintiff as per the terms of the agreement as alleged by the defendant. I am of the view that unless the defendant's pending application is decided by the Copyright Board in consonance with the order dated 25th August, 2010 after hearing the parties or the appeal pending in Madras High Court pending against the said order, the prayer for adjustment of the amount cannot be allowed. The order of adjustment at the interim stage would result in granting the final relief in the counter claim and prayer made in the interim application made by defendant. Till such time, the proceedings are decided, interim arrangement between the parties can be made by applying the rates fixed by the Copyright Board in its order dated 25th August 2010 which is in consistent with intention of the parties all the time during the operation of the agreement and the parties can be relegated to trial for the recovery aspect of the matter. Thus, I am of the considered view that the interim injunction prayed for by the plaintiff cannot be granted under these circumstances except in order to strike balance between the parties at this stage, certain directions are to be issued.

38. The interim directions are issued by directing the defendant to pay the license fee on the basis of 2% of the net advertisement earnings of each FM Radio station accruing from the radio business only within four weeks from today from the date of non-payment of royalty amount to the plaintiff upto date till the time the application seeking the compulsory licensing is disposed of and the defendant shall continue to pay the same. In failure to comply with the direction, the interim orders as prayed in I.A. No.17604/2011 shall follow. The said payment of license fees shall be paid to the plaintiff without prejudice to rights and contentions of the defendant to claim adjustments of the

monies which the defendant seeks in the counter claim. Liberty is also granted to either party to move an application in this regard in case of disposal of application of compulsory licensing or any decision is rendered by the Madras High Court against the order passed by Copyright Board dated 25th August, 2010 if situation changes.

39. Needless to state that the view taken by this court is tentative in nature being prima facie in nature, the Copyright Board shall decide the application for compulsory licensing pending before it on the basis of facts to be presented before it, which shall be decided without being influenced by the order passed by this Court.

40. Applications being IA No.17604/2011 and IA No.20715-16/2011 are disposed of with the above observations. For the reasons stated in the application being I.A. No.20716/2011 under Order II, Rule 2 CPC, leave sought by the defendant in said application is granted.

List on 11th January, 2013 before Joint Registrar for admission/denial of documents and before Court for framing of issues and directions for trial on 8th February, 2013.

(MANMOHAN SINGH) JUDGE NOVEMBER 30, 2012