

# **The Performing Right Society, Limited vs The Indian Morning Post Restaurant on 7 November, 1938**

**Equivalent citations: (1939)41BOMLR530, AIR 1939 BOMBAY 347**

## **JUDGMENT**

**B.J. Wadia, J.**

1. This is a suit in respect of an alleged infringement of copyright. Plaintiffs are a company having their registered office in London and are the present owners of a copyright in a musical work or composition called "Classica", which copyright is still subsisting. They allege that the defendants infringed that copyright on March 23, 1937, by either performing the musical work or causing it to be performed on their premises without the plaintiffs' knowledge and consent. Plaintiffs have accordingly filed this suit for an injunction and damages through their constituted attorney Mr. Charles Mortimer Eastley, a partner of the firm of Messrs. Little & Co., attorneys of this Court.

2. The defendants contended at first that the musical composition "Classica" could not form the subject-matter of a copyright, and a commission was accordingly issued to England to take evidence on the point. That contention was, however, abandoned at the hearing. Defendants further denied that the copyright still subsisted or was vested in the plaintiffs, but that contention has also been given up, and no issue has been framed on it. Defendants only deny the alleged infringement on March 23, and accordingly deny liability. They have, however, raised three issues with regard to the frame of the suit which I will first deal with.

3. The first issue is whether Mr. C.M. Eastley is the constituted attorney of the plaintiffs. The power-of-attorney under which the suit is filed is dated March 10, 1932, and is given in favour of the members of the firm of Messrs. Little & Co., plaintiffs' attorneys, including Mr. C.M. Eastley. It is a general power-of-attorney, and has been put in as Exhibit 1. The power is given under the seal of the company which is affixed at the end, but defendants' counsel argued that under Article 48 of the articles of association of the company the seal of the company could not be affixed to any instrument except by the authority of a resolution of the directors and in the presence of at least two directors and the secretary or such other person as the board of directors may appoint for the purpose, and that such resolution had not been produced. A true copy of the resolution was, however, produced and shown to the Court. The power-of-attorney is given under the seal of a Notary Public of the city of London, and has been duly executed and attested. Under Section 85 of the Indian Evidence Act the Court shall presume that a power-of-attorney executed before, and authenticated by, a notary public, was so executed and authenticated. The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power-of-attorney have been duly fulfilled. I may further point out that under Section 57(6) of the Indian Evidence Act the Court shall take judicial notice of, inter alia, all seals of notaries public. It has also been held in In re

Sladn (1898) I.L.R. 21 Mad. 492 that there are different legal modes of executing a power-of-attorney, and that the provision of Section 85 was not exhaustive. There is a certificate annexed to the power-of-attorney in suit by the notary public in which he says that the common seal of the plaintiff company had been affixed to the power, and that it was executed in his presence in pursuance of a resolution of the board of directors and in the presence of two of the directors of the company and its secretary. In my opinion the power-of-attorney is properly executed, and I, therefore, answer issue No. 1 in the affirmative.

4. The second issue is whether Mr. Eastley is the recognised agent of the plaintiffs. It is provided by Order III, Rule 1, of the Civil Procedure Code, that any appearance, application or act in or to any Court, required or authorised by law, may be done by the party in person, or by his recognised agent. Under Order III, Rule 2, the recognised agents of parties by whom such appearances, applications and acts may be made or done are amongst others persons holding power-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties. The word 'general' preceding the words 'powers-of-attorney' in Section 37 of the old Code of 1882 was omitted in Order III, Rule 2, and the clause making specific provision for Mukhtears in that section has also been deleted. The result was that Order III, Rule 2(a), as it originally stood, authorised any person holding a power-of-attorney to act or make applications or appearances in Court. The rule, however, has been amended from time to time; but it is not necessary to discuss the different amendments in this place. The present amendment in force, which is applicable, runs as follows :

(a) Persons holding on behalf of such parties either (i) a general power-of-attorney, or (ii) in the case of proceedings in the High! Court of Bombay an attorney of such High Court..., holding the requisite special power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them or him to make and do such appearances, applications and acts on behalf of such parties.

It was argued that the two parts of this amended rule were disjunctive, and the power-of-attorney under which an attorney of the High Court could act in High Court proceedings could only be a special power-of-attorney and no other. The word 'persons' in the first part of the amendment is comprehensive, and does not exclude an attorney of the High Court. What is meant under the second part is that an attorney of the High Court of Bombay can also appear under a special power-of-attorney. It is a person who is not an attorney who can only act for a party under a general power-of-attorney. It was pointed out that it was not clearly stated in part two that the special power-of-attorney was in addition to a general power-of-attorney under which an attorney could act. The rule is not clearly worded. But if it had been the intention of the makers of the amended rule to restrict an attorney only to a special power-of-attorney, it would have been provided specifically that an attorney of the Court could only act under a special power-of-attorney and no other. The words "requisite special power-of-attorney" do not mean that only a special power-of-attorney is required. They mean that the special power-of-attorney must be a proper power. If an attorney could not act also under a general power-of-attorney, a great deal of inconvenience would arise if the attorney who had to file suits on behalf of an absent party and to make interlocutory applications

immediately was to wait to get a special power-of-attorney in every case. Defendants' counsel argued that a general power-of-attorney might be easily abused by an attorney who might be tempted to file suit after suit without reference to the party. But to that] the answer is that a general power-of-attorney need not be given to the attorney if the party does not so wish.

5. In my opinion, therefore, an attorney of this Court can act both under a general as well as a special power-of-attorney, but a person who is not an attorney can act only under a general power. I, therefore, hold that Mr. Eastley is the recognised agent of the plaintiffs, and would answer issue No. 2 also in the affirmative.

6. The third issue is whether the plaint is properly signed and verified. My attention was drawn to Order XXIX, Rule 1, of the Code, under which suits by a corporation may be signed and verified on its behalf by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. It was argued that this plaint had not been verified by a person who would fall under any one of these categories. It has, however, been held by the Appeal Court in *Calico Printers' Association v. Karim & Bros.* that Order XXIX, Rule 1, is a permissive rule, and does not exclude the operation of Order VI, Rules 14 and 15, of the Code. That case was also followed by *Rangnekar J. in Bundi Portland Cement Limited v. Abdul Hussein Essaji* (1935) 38 Bom. L.R. 894. Under Order VI, Rule 14, every pleading shall be signed by the party and his pleader (if any) : provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. The plaint has been signed by Mr. Eastley as the constituted attorney of the plaintiffs, and I have already held that his appointment as such is valid and that he is the recognised agent of the plaintiffs. It is provided by Order VI, Rule 15, that every pleading shall be verified at the foot by the party or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. It is further provided that the person verifying shall specify by reference to the particular paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true. There is nothing in this rule which prevents the person verifying from saying that the whole plaint is upon information received and believed to be true. That has been done, and I would therefore also answer issue No. 3 in the affirmative.

7. Issues 4 and 5 deal with the merits and the respective contentions of the parties. Issue 4 is whether there was an infringement of the plaintiffs' copyright on March 23, 1937. As I have said before, there is no dispute now that the plaintiffs are the owners of the copyright, and that the musical composition "Classica" is a proper subject-matter of a copyright. The only question is really one of fact, whether on that particular date there was or was not an infringement of the copyright. The plaintiffs' case is set out in paragraphs 6 and 7 of the plaint. The only answer of the defendants to these paragraphs is contained in paras. 5 and 6 of the written statement. They deny the infringement on that particular date or any other date, and allege that they were duly authorised by the Secretary of State through the Director General of Posts and Telegraphs to receive messages and other musical programme transmitted for general reception by the Indian State Broadcasting Service. This last allegation in paragraph 6 is really no defence to the action, if in fact there was an infringement of the copyright. It is not denied that at all material times the defendants had a radio set installed in their restaurant and that music broadcasted from the Broadcasting Station of

Bombay was relayed on the premises. The fact that music was so relayed has not been denied. What is now alleged is that no non-Indian music, which would include English music, was in fact relayed on the premises. This has been nowhere alleged in correspondence, nor in the written statement, and the defendants' proprietor K.R. Irani said so for the first time in the witness-box. He was at first positive that no English music was ever relayed in the restaurant, but later on he seemed to modify his answer by saying that he was not aware whether his partners may have done so in his absence. He went further and said that some Indian music was relayed on that particular date on the premises between 12 noon and 1 p.m. only, but that he switched off the radio at 1 o'clock when English music was about to be relayed. That cannot be true, because according to the evidence of Mr. Dholekar and the Studio Log Book which he has produced no music of any sort was in fact relayed on that day from the Bombay Station between 12 noon and 1 p.m. It is, however, not for the defendants to prove that there was no infringement. The onus is upon the plaintiffs to prove that in fact there was. They have called as their witness Mr. Joseph Phillip De Costa who is an Inspector in the service of the plaintiffs. He said that he had visited these premises before, that he had written to the plaintiffs' agents in Madras, Messrs. Vernon & Co., and that he was asked by them to go and inspect, inter alia, this particular restaurant of the defendants. He said he did so on March 23, 1937, at 1 p.m. when he entered the restaurant, and after a few minutes which were taken up in broadcasting certain market rates he actually heard the different excerpts and tunes of this musical composition "Classica" relayed in the restaurant of the defendants till about 1-35 p.m. He made a note in his diary at the moment of what he actually heard and the number of people that were present. Counsel for the defendants argued that Mr. De Costa should not be believed as he is an interested witness because he is remunerated at the rate of Rs. 15 for every premises inspected by him. That, in my opinion, is no reason for disbelieving his testimony. The diary is no doubt a rough one, but it does not appear to have been made up for the suit, It mentions the different excerpts that were played and which he himself heard at the time, and further he followed it up by a letter written on the very next day to Vernon & Co. setting out what he had heard. He is supported by Mr. Dholekar who stated from the Studio Log Book and the Indian Listener that between 1 and 2 p.m. the musical composition "Classica" was broadcasted from the Bombay Station on that date. On the question of fact, therefore, I believe the evidence of Mr. De Costa and Mr. Dholekar. I disbelieve the evidence of the defendants' proprietor Mr. Irani. He did not impress me as a truthful witness from the manner in which he was trying to answer plain questions put to him. I would, therefore, hold on issue No. 4 that on that particular date there was an infringement of the plaintiffs' copyright.

8. The last issue is whether plaintiffs are entitled to any, and if so, what' relief. Different licences were issued by the postal authorities to the defendants from time to time, and under their last licence one of the conditions is that the licence does not authorise the licensee to do any act which is an infringement of a subsisting copyright. It may be that when the music was relayed on the particular date in the defendants' restaurant the defendants were not aware that the relaying was an infringement of the plaintiffs' copyright, but it is provided by Section 8(1) of the English Copyright Act of 1911 which has been incorporated in the Indian Copyright Act, III of 1914, that where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright, the plaintiffs shall not be entitled to any remedy other than an injunction. In order to come within the provisions of Section 8 it is for the defendants to allege and prove that the infringement was innocent. There is no such

allegation, and no evidence before me either. Even therefore assuming that there was no condition in the licence held by the defendants on March 23, 1937, similar to condition 13 in exhibit 4, the liability of the defendants under the law still remains. They would, therefore, be liable to pay damages, and I assess the same at Rs. 50.

9. Plaintiffs will be entitled to an injunction for the full term of their copyright in the musical work "Classica" restraining the defendants, their servants and agents from performing or causing to be performed or authorising the performance of the said musical work or any part thereof in public without the plaintiffs' written consent or permitting their premises mentioned in the plaint or any other place of entertainment to be used for their private profit for the public performance of the said work without the plaintiffs' consent or from otherwise however infringing the plaintiffs' copyright. There will be a decree for Rs. 50 by way of damages. The defendants must pay plaintiffs' costs of the suit including the cost of evidence taken on commission which was necessitated by the contention taken by the defendants which they ultimately abandoned at the hearing. Interest on judgment at six per cent, per annum till payment.