

Dhiraj Dharamdas Dewani vs M/S Sonal Info Systems Pvt. Ltd on 6 March, 2012

Author: A.B. Chaudhari

Bench: A.B. Chaudhari

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO.1076/2011

APPELLANT :- Dhiraj Dharamdas Dewani,
Aged 26 years, Occ. : Business,

Proprietor M/s Dewani Soft Inc. Office
situated at 303, 3rd Floor, Panjwani
Market, Teen Nal Chowk, Itwari, Nagpur.

...VERSUS...

RESPONDENTS:- 1. M/s Sonal Info Systems Pvt. Ltd.
through its Directors.
ig 1a) Suresh Mansukhlal Bothra,
aged adult, Occupation Business,
Director Sonal Info Systems
Private Limited.
1b) Usha Suresh Bothra, Aged adult,
Occupation business, Director

Sonal Info Systems Private Limited.

1c) Jatanbai Mansukhlal Bothra,
Aged adult, Occupation business,

Director Sonal Info Systems
Private Limited.

Directors (1a to 1c) c/o Office
at G-1, Ganga Apartment, Gharpure

Ghat, Ashok Stambh, Nasik-422002.

Nos. 1a to 1c R/o Ridhi Siddhi
Apartment, Indankat, Panchavati,
Nasik 422131.

[Shri U.N. Vyas, Adv. for appellant]

[Shri K.V. Deshmukh, Adv. for respdt. nos.1 (a) to (c)]

CORAM : A.B. CHAUDHARI, J.

Date of reserving the judgment : 27.01.2012

Date of pronouncing the judgment : 06.03.2012

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J U D G M E N T

1. Heard. Admit. Taken up for final disposal with the consent of the learned Counsel for the rival parties.

2. This appeal was taken up for final disposal with the consent of the Counsel for the rival parties in view of the fact that application under Order VII Rule 11 of the Code of Civil Procedure filed by the respondent/defendant was allowed and consequently, the appellant contended that he stands without any remedy.

FACTS

3. The appellant is the original plaintiff, who filed Special Civil Suit No.3/2010 in the Court of District Judge 5, Nagpur under Section 60 of the Copyright Act, 1957 for declaration and permanent injunction. He averred that he developed a software to facilitate the professionals like Income Tax Advocates, Chartered Accountants, Sales Tax practitioners, Accountants in their professional work.

The objective is to facilitate automatic preparation of return, namely form No.231 to 324, to validate 'E-

3 fa1076.11.odt returns' with inbuilt validation, utility and auto calculation facility etc. amongst so many other functions and programmes developed in the said software. It was processed since the year 2005 and finally was launched in the market in the year 2007.

The software became popular in the market and consequently, the competitors of the plaintiff including the respondents/defendants started creating obstacles in the marketing of the said product. As a result of the intention of the respondents to obstruct the plaintiff from doing his business of marketing the said product, the respondents filed F.I.R. with Police Station Nasik on 30.1.2010 which registered as Crime No.3007/2010 under Sections 63 and 65 of the Copyright Act. Acting on the said F.I.R., Nasik police suddenly visited the premises of the plaintiff on 3.2.2010 without any knowledge or intimation to the plaintiff and seized various materials from his office and went away. Even before the said action and thereafter the respondents started oral campaign about the plaintiff's said product falsely propagating that the product was not of good quality and so on and so forth. The plaintiff having no alternative filed 4 fa1076.11.odt Special Civil Suit No.3/2010 on 3.3.2010.

4. Thereafter, the respondents/defendants on 29.3.2010 filed a suit under Section 55 of the Copyright Act in the Court at Nasik vide Civil Suit No.1/2010 and also obtained ex parte injunction on 15.4.2010 and upon appearance of the present plaintiff before the Nasik Court and after hearing the parties, the said Court on 14.10.2010 suspended the said order of ex parte injunction till the decision on the application under Order VII Rule 11 of the Code of Civil Procedure filed by the respondents in the civil suit at Nagpur. In the civil suit at Nagpur the respondents/defendants filed an application under Order VII Rule 11 of the Code of Civil Procedure for rejection of plaint on the ground that Section 60 suit filed by the plaintiff was hit by its proviso since the defendants had already filed a suit in the Nasik Court with due diligence and in the police action F.I.R. was filed and now chargesheet has been filed against the appellant/plaintiff. Another reason to claim rejection of the plaint was non-disclosure of true cause of action. The said application was decided by the District Judge by his order dated 22.6.2011 and 5 fa1076.11.odt was allowed. The said order of rejection of plaint dated 22.6.2011 was challenged before this Court in First Appeal No.667/2011.

This Court disposed of the said appeal on 17.9.2011 and set aside the order of rejection of plaint dated 22.6.2011 with the consent of the parties and after framing two questions asked the trial Court to decide them in accordance with law.

The trial Court heard the parties on the said two questions framed and decided the application and again rejected the plaint by allowing the said application by the impugned order dated 10.10.2011. Hence, this appeal against the said order dated 11.10.2011.

SUBMISSIONS :

5. In support of the appeal, learned Counsel for the appellant made the following submissions.

(i) The learned District Judge committed an error in holding that lodgment of FIR with Police Station, seizure of the articles from the office of plaintiff after conducting raid do not amount to threat or threat to initiate legal proceeding.

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(ii) FIR, seizure of articles upon conduct of raid by the police would amount to commencement of legal proceeding on criminal side against the appellant.

(iii) There are clear averments in the plaint about threat by the respondents to the plaintiff including that of lodgment of FIR and that the plaintiff had not committed any infringement of any of the legal rights of the respondents and that is why the suit filed under Section 60 was perfectly maintainable.

(iv) Section 55 does bar the suit under Section 60 because Section 60 suit was filed first in point of time by the present appellant on 3.3.2010 while Section 55 suit was filed by the respondents on 29.3.2010.

(v) As a matter of fact even according to the respondents on 17.12.2009 complaint was filed by the respondents with Cyber Crime Department of Police at Nasik. Long thereafter i.e. on 29.3.2010 the suit under Section 55 came to be filed, which cannot be said to be with due diligence. The suit under Section 60 was filed earlier and therefore, the 7 fa1076.11.odt subsequent suit filed under Section 55 cannot render the appellant's suit under Section 60 infructuous as contended.

(vi) The decisions relied upon by the trial Court have no application at all in the instant case because they did not directly relate to the issue of suit under Section 60 filed earlier than the suit under Section 55 of the Act.

(vii) The District Judge trying the suit under Section 60 is definitely having the jurisdiction to entertain the suit and the suit was not barred as contemplated by Order VII Rule 11 of the Code of Civil Procedure.

(viii) The plaintiff/appellant had an ex parte order of injunction in his favour but because of the application under Order VII Rule 11 of the Code of Civil Procedure filed by the respondents/defendants and rejection of the plaint by the trial Court on both occasions, the relief of injunction has been taken away at the behest of respondents/defendants, resulting into severe financial loss to the appellant/plaintiff. The trial Court did not at all undertake the exercise of trying application Exh.5 and 8 fa1076.11.odt looking to the fact that prima facie strong case has been made out by the appellant/plaintiff, temporary injunction is required to be granted in favour of the plaintiff to save any further loss as it is the respondents/defendants who are responsible for prolonging the matter by insertion of frivolous application under Order VII Rule 11 of the Code of Civil Procedure and compelling the plaintiff to make rounds of litigation.

(ix) This Court, therefore, should issue injunction in favour of the plaintiff, looking to the vicious conduct of the respondents with exemplary costs.

He relied the following decision.

(a) Delhi High Court (Super Cassette Industries Ltd...Versus...Bathla Cassettes India (P) Ltd. on 4 February, 1993 = 50 (1993) DLT 7).

6. Per contra, learned Counsel for the respondents vehemently opposed the appeal and made the following submissions.

(a) The impugned order passed by the trial Court is perfectly justified and no interference is required to be made.

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(b) The suit filed under Section 60 by the plaintiff has automatically become infructuous no sooner the suit under Section 55 was filed by the respondents/defendants before the District Judge at Nasik.

(c) Merely because the suit at Nasik Court was filed after about 26 days after filing of the suit by the plaintiff, it cannot be said that it was not filed with due diligence.

(d) The defendants took the remedy of lodgment of FIR with police station which itself shows that it was an act of due diligence on the part of the defendants. The fact that the police have conducted raid on 2.3.2010 and thereafter filed chargesheet on 23.7.2010 against the plaintiff clearly indicates prima facie evidence against the plaintiff about piracy.

(e) FIR lodged by the defendants cannot be called as 'threat' of any legal proceedings because the complaint was about infringement of rights of the defendants in respect of copyright and the cognizable offence under the Copyright Act.

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(f) The observations made by the trial Court in that behalf are legal, correct and proper.

(g) The plaint allegations nowhere show any cause of action for filing the suit under Section 60.

(h) The very requirement of Section 60 for filing a suit is that there should be threat of legal proceeding or liability and such allegations of infringement of any legal rights were in fact not true. Proviso to Section 60 is very important inasmuch as it specifically prohibits the suit, if the ingredients of threat and legal proceeding are absent and those are absent in the instant case.

(i) Nothing has been shown by the plaintiff that the plaintiff received any threat

within the meaning of Section 60 and therefore, the suit under Section 60 is not maintainable. At any rate, after filing of the suit by the respondents in the District Court at Nasik, with due diligence, the present suit under Section 60 of the Act filed by the appellant in Nagpur District Court has to be dismissed as per the proviso to Section 60 of the Act.

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(j) The plaintiff has not filed the software either in the trial Court or before this Court and in the absence thereof a prayer for injunction is not at all maintainable.

(k) The demonstration made by the plaintiff as well as defendants before this Court about software indicated that there were several clearly visible items showing piracy made by the plaintiff and therefore, there is no prima facie case in favour of the plaintiff to claim any temporary injunction even for some period.

(l) Since there has been no injunction in favour of the plaintiff from 2010, he is not entitled to any injunction as claimed in the instant appeal.

Finally, learned Counsel for the respondents/defendants prayed for dismissal of the appeal.

He relied on the following decisions.

(i) AIR 2002 Bombay 151 (M.V. Sea Success I ...Versus...Liverpool and London Steamship Protection and Indemnity Association Ltd. and another).

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(ii) Special Leave Petition (Civil) No.4483 of 1977, Decided on 14.10.1977 (T. Arivandandam...Versus...T.V. Satyapal and Anr.) MANU/SC/0034/1977 Eq Cit : AIR 1977SC2421, 1977 (O) KLT965 (SC), (1997)4SCC467, [1978]1SCR742, 1977 (9) UJ697 (SC).

(iii) 1998 (2) Supreme Court Cases 70 (I.T.C. Limited...Versus...Debts Recovery Appellate Tribunal and others).

(iv) Calcutta High Court (Montek Singh...Versus...State of West Bengal 8 October, 2002 = 2003 (2) CALLT 85 HC, 202 Cri LJ and Anr. on 4617.

(v)	AIR	2007	Kerala	212	(Abdul
Sathar...	Versus...	Nodal	Officer,	Anti-Piracy	Cell,

Kerala Crime Branch Office and another).

(vi) AIR 1981 Allahabad 200 (Nav Sahitya Prakash and others...Versus...Anand Kumar and others).

(vii) Bombay High Court (Burroughs Wellcome (India) Ltd...Versus...Uni-Sole Pvt. Ltd. and another on 3 July, 1997).

(viii) Calcutta High Court (Zahir Ahmed...Versus...Azam Khan on 21 September, 1995 = 1996 CriLJ 290).

(ix) Delhi High Court (Camlin Pvt. Ltd....Versus...National Pencil Industries on 7 November, 1985 = AIR 1986 Delhi 444, 1986 (1) ARBLR 86 Delhi).

(x) AIR 2009 Delhi 44 (Rajesh Masrani...Versus...Tahiliani Design Pvt. Ltd.).

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(xi) Civil Appeal No.3637 of 2008 (Arising out of SLP (C) No.20941 of 2006) Decided on 16.05.2008 (Dabur India Ltd...Versus...K.R. Industries).

CONSIDERATION :

7. I have gone through the entire record so also the impugned order. I have gone through the provisions of the Copyright Act, 1957. I have heard learned Counsel for the rival parties at length on number of occasions. During the course of hearing since the learned Counsel for the parties wanted to demonstrate by exhibition of relevant compact disc that there was infringement of copyright, they were allowed by this Court. During the demonstration, Counsel for the respondents with the help of respondents started showing similarities or the copying made in the compact disc marketed by the appellant. When the demonstration was going on it was pointed out by the learned Counsel for the appellant upon instructions from the appellant that the portions which were being shown from the disc of the respondents as similar or

pirated in the compact disc of the appellant was not the copyright registered under the Copyright Act. Learned Counsel for the

14 fa1076.11.odt respondent was therefore asked to show the registration thereof but then even after taking few adjournments learned Counsel for the respondent did not produce any registration of that disc/copyright which was being objected to at the time of demonstration and that is why the learned Counsel for the respondent then took a stand that it was not necessary to have copyright registered under the Copyright Act and in support of the said proposition, learned Counsel for the respondent showed certain decisions including the one rendered by the Delhi High Court. Counsel for the appellant argued that registration was compulsory or mandatory. Fact, however, remains that respondents could not produce the evidence of registration in order to show that their copyright was registered much less earlier to than that of the appellant or that their product was brought into existence before the product of the appellant was brought into existence. Learned Counsel for the respondents even filed written note of argument and referred to the expression of opinion made by this Court vide paragraph no.5 of the note and as answer to the said expression, in paragraph no.16 15 fa1076.11.odt of the written note, took a clearcut stand with support of the decisions referred in that paragraph saying that registration is not necessary. In the entire written note of argument nowhere has been mentioned that the copyright in question was registered by the respondents anywhere in the country with the Registrar. Since the question about registration has been vehemently raised by both parties, I am required to decide it. In view of the above discussion, following points arise for my determination in this appeal.

(1) Whether registration

copyright is compulsory or mandatory
taking recourse to the provisions

Copyright Act, 1957 ?

...Yes.

(2) (a) Whether lodgment of FIR,

registration of offence, seizure
Section 64 against the appellant

under
would

constitute 'threat' of legal proceedings or liability against the appellant ?

...Yes.

(b) Whether averments in the plaint would constitute 'threat' within the meaning of Section 60 of the Copyright Act ?

...Yes.

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(3) Whether the suit under

Section 60 of the Copyright Act, 1957 filed on 3.3.2010 by the plaintiff-appellant became infructuous after the respondents- defendants filed a suit on 29.3.2010 under Section 55 of the Copyright Act and was thus liable to be rejected under Order VII, Rule 11 of the Code of Civil Procedure ?

...No.

ig (4) Whether the

plaintiff is entitled to grant of temporary appellant-

injunction till decision of Exh.5 ?

...Yes.

(5) What order ?

...Appeal is partly allowed.

REASONS :

8. Copyright Act, 1911 of the United Kingdom as modified by the Indian Copyright Act, 1914 was in force before the Copyright Act, 1957 was brought into force after independence. It is true that

Statements of Objects and Reasons accompanying a Bill cannot be used to interpret and determine the true meaning and effect of the substantive provisions of the Statute.

They can not be used except for the limited purpose of 17 fa1076.11.odt understanding the background and the antecedent state of affairs leading up to the legislation. I, therefore, undertake the limited exercise to find out the several new features when the Copyright Act, 1957 was brought into existence from the Statement of objects and Reasons, which I quote hereunder :

(1) A Copyright Office is
sought to be established under the
immediate
Copyrights
control
who shall
of a
act
Registrar
under
of
the
superintendence and direction of the
Central Government. The principal

function of the Copyright Office will be to maintain Register of Copyrights in which may be entered, at the option of the authors, the names and addresses of authors and owners of copyright for the time being, and other relevant particulars. Such Register will easily make available useful information to interested members of public in regard to copyrighted works. In order to encourage registration of copyrights, provision is made that no proceeding regarding infringement of copyright shall be instituted unless copyright is registered in the Copyright Office. In addition to being in charge of the Copyright Office, 18 fa1076.11.odt the duties of the Registrar of Copyrights will be to entertain and dispose of applications for compulsory licences and to inquire into complaints of importation of infringing copies. An appeal to the Copyright Board is provided for against the orders of the Registrar of Copyrights.

(2) Provision is made for setting up a Copyright Board which will determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, consider applications for general licences for public performances of works and will assess compensation payable under the Bill in certain circumstances. An appeal will lie to the High Court against the decisions of the Copyright Board.

(3) The definition of copyright

is enlarged to include the exclusive
right to communicate works by

radio-diffusion.

(4) A cinematography film will have
a separate copyright apart from its

various components, namely, story, music etc. 19 fa1076.11.odt (5) An author assigning copyright in his work is allowed the option to re-acquire the copyright after seven years but before ten years of the assignment on the condition that he returns the amount received by him at the time of the assignment with interest thereon.

(6) The normal term of the copyright is fixed to be the life of the author and a period of 25 years after his death as against the existing term of the life of the author, and a period of 50 years after his death. Shorter terms are fixed for anonymous or pseudonymous works, cinematograph films, mechanical contrivances, photograph, etc. (7) Under the existing law, the sole right to produce a translation of a work first published in India is extinguished after ten years, unless a translation thereof is produced within that period. The Draft Bill makes the right co-extensive with other rights arising out of copyright.

(8) Provision is made for the issue of a general or special licence for 20 fa1076.11.odt public performances of any work by means of a radio-receiving set or a mechanical contrivance.

(9) A licence may be issued to any library to make or cause to be made one copy of any book in which copyright subsists and which is not available for sale.

regulating
Provision
the activities
is made
of performing
for

rights societies and also for controlling the fees, charges or royalties to be collected by them.

(11) Certain rights akin to

copyright are conferred on Broadcasting
authorities in respect of programmes
broadcast by them.

(12) International copyright
relations which are based on

international treaties will be regulated by specific orders to be made by the Central Government.

(13) A fair dealing with any work
for the purposes of radio summary or

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judicial proceeding will not hereafter

constitute an infringement of copyright.

9. In the year 1983, Amendment Act 23 of 1983 was brought to amend the said Act of 1957. Thereafter, the Amendment Act 65 of 1984 was brought but the provision as to the computer programmes and films was actually not inserted by the said amendment.

10. w.e.f.

It appears that thereafter by Act 38 of 1994 10.5.1995 clause (ff) of Section 2 was substituted to include (ffb) and (ffc) for inserting entries of computer and computer programme. It, therefore, appears that the terms computer and computer programme entered the Copyright Act for the first time by virtue of the said Amendment Act No.38 of 1994.

11. As to point no.1 : - The provisions of the Copyright Act and in particular the aspect whether the registration is mandatory or not was considered by the Division Bench of Madhya Pradesh High Court in the case of M/s. Mishra Bandhu Karyalaya and others...Versus...Shivratanlal Koshal,

reported in AIR 1970, Madhya Pradesh 261 (Per Justice A.P. Sen).

22 fa1076.11.odt Thereafter, the said issue fell for consideration before Calcutta High Court in the case of Satsang and another...Versus...Kiron Chandra Mukhopadhyay and others, reported in AIR 1972 Calcutta 533, before Madras High Court in the case of M/s. Manojah Cine Productions...Versus...A. Sundaresan and another, reported in AIR 1976 Madras 22, before Allahabad High Court in the case of Nav Sahitya Prakash and others...Versus...Anand Kumar and others, reported in AIR 1981 Allahabad 200, before Kerala High Court in the case of R. Madhavan...Versus...S.K.Nayar, reported in AIR 1988 Kerala 39 (D.B.) and before the Delhi High Court in the case of Rajesh Masrani...Versus...Tahiliani Design Pvt. Ltd., reported in AIR 2009 Delhi 44 (D.B.). The Division Bench decision of the Madhya Pradesh High Court, cited supra, was referred before these High Courts but they dissented therewith and took the view that the registration under the Copyright Act of a copyright is not compulsory or mandatory and the prominent reason for holding so was that Section 45 providing for registration uses the word may and Section 13 and Section 17 and the scheme of the said Act does not 23 fa1076.11.odt provide for any compulsory registration. They also held that Section 48 providing for presumption was only to indicate the rule of evidence provided for rebuttable presumption and for prima facie proof and nothing more. In the case of V. Errabhadrarao (wrongly described as Veerabhadrayya in decree) and another...Versus...B.N. Sarma and another, reported in AIR 1960 Andhra Pradesh 415, the Division Bench with reference to provisions of Copyright Act II of 1334F applicable to former State of Hyderabad held registration as condition precedent. Justice Jaganmohan Reddy speaking for the Bench in paragraph 11 held thus :

11. Though the work is an original one, the question of copyright therein would depend upon the protection given by the statute. Copyright is the exclusive right of multiplying for sale copies of works of literature or art allowed to the author thereof or his assignees and in so far as British India was concerned, the statute governing these matters was by virtue of S. 3 of the Indian Copyright Act III of 1914, the Copyright Act of 1911 enacted by the British Parliament, subject to such modifications 24 fa1076.11.odt as stated in the Indian Act. Under the English enactment, (Ss. 1 and 2) copyright may subsist subject to the provisions of that Act in every original literary, dramatic, musical artistic work.

The book Hyderabad Pai Police Charya will certainly be, as we have already held, an original work within the meaning of the English Copyright Act as applied to British India. We may, however, observe that under soon the English Act as applied to India, as as the contribution of an author satisfies the requirements of S.2, his copyright therein is protected without any registration. While this is so that Act is not applicable to this case as the former State of Hyderabad had its own Copyright Act II of 1334F which would govern this case. In the circumstances, it will have to be determined whether under the Hyderabad Act the 1st respondent acquired a copyright in his book at the time when the appellants are alleged to have infringed it.

Copyright has been defined by cl. (b) of S.2 to mean the special right which any person is entitled to enjoy, of printing, publishing or otherwise utilising or turning to account, every original

composition, compilation or drawing.

25 fa1076.11.odt Section 3 provides that every author shall enjoy the copyright in regard to every book registered and its subsequent editions, which no other person shall infringe. The cases in which no infringement is deemed to take place have also been set out, but these are not pertinent for our discussion. It is clear from the definition and S.3 that an original composition or compilation is only protected if the book will ensure under S.5 during the lifetime is registered and of the author and after his death for a further period of 50 years.

Section 8 prescribes the method of registering and preserving a copyright by providing that every author residing or carrying on business in His Exalted Highness's Dominions, may with a view to reserve the copyright of any book, apply for its registration to the office of the Judicial and General Secretary, by tendering with the application a copy of the book and a fee of Rs.2 and stating in the application the name or title of the book, the author's name, his age, occupation and residence, the date of the first edition of the book, the name and place of the press where it was printed, and, if its copyright has been sold or 26 fa1076.11.odt otherwise alienated to any person, the name of such person, and on these particulars being furnished the Judicial Secretary who is required to maintain a register in form No.1 annexed to the Act will cause the entry of the necessary particulars therein and to inform the author by a Fahmaishnama (memo of information) that the book has been registered and cause the publication of the fact of registration in the Jarida is (Gazette).

deemed
The publication in the Gazette
to be conclusive proof of
registration. Section 9 relates to the

procedure of registering the transfer of a copyright. These registers are open to public inspection under S.10. Section 11 provides for criminal prosecution and punishment of any person who by fraud or misrepresentation causes an entry under S. 8 or S. 9 to be incorrectly made in the register. Section 12 provides for penalties for infringement of the copyright.

A plain reading of the several provisions of the Act, to which we have already referred, leaves no doubt in our minds that a copyright in a book or drawing is only secured if it is an original compilation and has been duly registered according to the provisions of the Act. Learned advocate for the respondent, 27 fa1076.11.odt Sri Madhava Reddy, attempted to persuade us that a person has an inherent copyright in an original composition or compilation without the necessity of its registration and that registration is only meant as a conclusive proof of that right. Whatever may be the position in what was British India, this argument is not warranted by the clear and specific provisions of the Hyderabad Act which makes registration a work.

condition of acquiring a copyright in any The definition section cannot by itself give any protection unless that is read with S.3 which gives protection only to a book which is registered.

Apart from the registration of the book, no right is conferred on an author, but once it is registered, the author is deemed to acquire property rights in the book as set out in Section to which we shall presently refer. The right arising on the registration of the book can be the subject matter of civil or criminal remedy, so that, without it the author can have no rights, nor remedies in spite of the fact that his work is an original one. The infringement of the copyright so registered, which in Urdu is expressed as a theft, can most appropriately be said to be based on the moral principle, as observed 28 fa1076.11.odt by Lord Atkinson in *Macmillan and Co. v. Cooper*, AIR 1924 PC 75 dealing with S.2 of the Copyright Act of 1911 as resting on the eighth commandment Thou shalt not steal.

A person whose copyright is protected cannot only have recourse to criminal Courts but also sue in a civil Court under S. 20 to obtain possession of such copies infringing his right which is deemed to be a right of property or cause them to be destroyed or obtain an injunction or call for an account thereof. This remedy as is evident from explanation to S.20 is not an alternative remedy, but is an addition to the remedy which he may have in criminal Courts, for, the compensation if any awarded to him by any criminal Court is to be taken into consideration in the civil Court.

In the case of *Brundaban Sahu...Versus...*

B. Rajendra Subudhi, reported in AIR 1986 Orissa 210, a Single Judge of Orissa High Court (G.B. Patnaik J.) held upon going through the provisions of Copyright Act 1957 and the scheme there under that registration was mandatory for action for infringement under the Copyright Act, 1957. Then came the Full Bench decision of the Madhya Pradesh High Court in the case of K.C. 29 fa1076.11.odt *Bokadia and another...Versus...Dinesh Chandra Dubey*, reported in 1999 (1) M.P.L.J. 33 by which they overruled the Division Bench judgment reported in AIR 1970 Madhya Pradesh 261 (Supra). The Full Bench held in the first place that the said Division Bench decision in AIR 1970 Madhya Pradesh 261 (Supra) was obiter dicta as the issue for determination before the Division Bench was never about the optional or mandatory/compulsory registration and secondly, they held that the scheme of the Copyright Act, 1957 nowhere shows or mandates compulsory registration and that the Full Bench would like to agree with the decisions recorded by the Calcutta, Madras, Allahabad, Kerala and Delhi High Court but to differ with Orissa High Court. In the case of R. Madhavan...Versus...S.K. Nayar, reported in AIR 1988 Kerala 39 a Division Bench held after agreeing with the view taken by Calcutta and Allahabad High Court and dissenting with the view taken by Division Bench of Madhya Pradesh High Court in the case of M/s. Mishra Bandhu Karyalaya and others...Versus...Shivratanlal Koshal (Supra) as under :

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19. A Division Bench of High Court had occasion to consider this question in *Kumari Kanaka v Sundararajan*, 1972 Ker LR

536. In the above decision, this court took the view that registration of the work under the Act is not compulsory and that registration is not a condition precedent for maintaining a suit for damages for infringement of copyright.

22. The English Copyright Act of 1862 expressly provided that no proprietor of any such copyright shall be entitled to the benefit of that Act until the same has been registered. This provision was however repealed by the English Copyright Act 1911 and therefore the registration is not a condition precedent for action against infringement even in England now.

23. Sections 44 and 45 of the Act is only an enabling provision and the provisions contained therein do not affect common law right to sue for infringement of the copyright. In the circumstances, we are of the view that AIR 1970 Madh. Pra.261 has been wrongly decided. We therefore agree with the learned counsel for the appellant that the suit is not bad for non-registration of the copyright by the plaintiff in the instant case.

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24. However, the question for consideration in this case is whether an infringement is made or present in the instant case.

It appears from para 24 of this Kerala decision that issue about registration did not fall for consideration as in that case trial Court had not said anything about registration. That apart there appears to be no decision of the Bombay High Court directly on this point.

12. In the above background, this Court is required to decide as to whether registration of copyright is compulsory in order to invoke the provisions of the Copyright Act or remedies provided there under for a person who alleges infringement of copyright under the Act.

13. Keeping in mind the entire scheme of the Act and the provisions of the Copyright Act, I have herewith undertaken this exercise. Chapter-II of the Act provides for establishment of copyright office and copyright board. Chapter-III relates to copyright.

Section 13 in this Chapter deals with literary etc. cinematograph and sound recording works but does not 32 fa1076.11.odt deal with any work relating to computer or computerized programme. Section 14 (1) (a) and (b), however, and in particular in relation to computer programme reads thus :

Section 14(1) For the purposes of this Act, copyright means the exclusive right, subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :-

(a) in the case of a literary, dramatic or musical work, not being a computer programme,-

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

- (iii) to perform the work in public, or communicate it to the public;
- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation of the work;
- (vi) to make any adaptation of the work;

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(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme, -

- (i) to do any of the acts specified in clause (a);
- (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

14. Relevant portion of Section 17 and 21 read thus :

Section 17. First owner of copyright.- Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that -

Section 21. Right of author to relinquish copyright. - (1) The author of a work may relinquish all or any of the

34 fa1076.11.odt rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section(1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(3) The relinquishment of all or any of the rights comprised in the

copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1).

15. Section 17 of the Copyright Act, thus, provides for first owner of the copyright, while Section 21 of the Copyright Act provides for right of author to relinquish copyright whereupon the said relinquishment is published in the official gazette by the Registrar. Chapter-V provides for term of copyright. Chapter-V provides for licences given by owners of copyright. It enables the owner of the 35 fa1076.11.odt copyright to grant licences to others so also for termination of licences. Chapter-X relates to registration of copyright. Section 44 reads thus :

Section 44. Register of Copyrights.- There shall be kept at the Copyright Office a register in the prescribed form to be called the Register of Copyrights in which may be entered the names or titles of works and the names and addresses of authors, publishers and owners of copyright and such other particulars as may be prescribed.

16. It provides for keeping a register in the prescribed form to be called as register of copyrights in which names and titles of owners of copyright and other particulars would be entered. The word 'may' used in this Section 44 casts a duty on the Registrar to make entries if everything is in order.

17. Section 45 reads thus :

Section 45. Entries in Register of Copyrights.- (1) The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the 36 fa1076.11.odt prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights:

Provided that in respect of an artistic work which is used or is capable of being used in relation to any goods, the application shall include a statement to that effect and shall be accompanied by Marks a certificate from the Registrar of Trade referred to in section 4 of the Trade and Merchandise Marks Act, 1958 (43 of 1958), to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of, or that no application has been made under that Act for such registration by, any person other than the applicant.

(2) On receipt of an application in respect of any work under sub-section (1), the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights.

18. Section 45 (2) thus provides for holding of an enquiry, if necessary by Registrar for making 37 fa1076.11.odt entries.

19. Section 47 reads thus :

Section 47. Form and inspection of register.- The Register of Copyrights and indexes thereof kept under this Act shall at all reasonable times be open to inspection, and any person shall be entitled to take copies of, or make extracts from, such register or indexes on payment of such fee and subject to such conditions as may be prescribed.

20. Section 48 provides that register of copyright shall be a prima facie evidence of particulars entered therein.

21. Section 50-A is an important provision. It reads thus :

Section 50-A. Entries in the Register of Copyrights, etc., to be published.- Every entry made in the Register of Copyrights or the particulars of any work entered under section 45, the correction of every entry made in such register under section 49, and every rectification ordered under section 50, shall be published by the Registrar of Copyrights in the Official Gazette or in such other manner as he may deem fit.

22. Section 50-A thus shows that public at large would come to know about every entry made in the register of copyrights or particulars entered in Section 45 after its publication and it would be deemed that they are known to the public at large after publication. Chapter 9 thus provides for infringement of copyright.

23. Section 51 reads thus :

Section 51. When copyright infringed.- Copyright in a work shall be deemed to be infringed -

(a) when any person, without a
licence granted by the owner of the

copyright or the Registrar of Copyrights

under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is (by this Act) conferred upon the owner of the copyright, or 39 fa1076.11.odt

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) if when any person -

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports (***) into India, any infringing copies of the work:

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

of this	Explanation. -	For the	purposes
literary,	section,	the reproduction	of a
	dramatic,	musical or	artistic

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work in the form of a cinematograph film shall be deemed to be an infringing copy.

24. Perusal of Section 51 clearly shows that it shall be deemed that there shall be infringement of the copyright when any person does anything, the exclusive right to do is conferred upon the owner of the copyright by the Copyright Act or any person makes sale of copies of such work by infringement of the copyright in the said work. It is thus clear from the reading of Section 51 that infringement shall be deemed when exclusive right to do of the owner of the copyright is utilized by some other person viz. the infringer. Now unless such person (the infringer) knows that there is any particular owner of the copyright in India or that such owner of copyright has registered his work under Section 44 of the Act before he did, attributing infringement by him or on his part intentionally or unintentionally, would be an preposterous. Such a person who is infringing the copyright in a work must be deemed to have knowledge about the owner of the copyright and such knowledge cannot be attributed unless the provisions of Chapter 41 fa1076.11.odt 10 regarding registration of copyright, publication thereof etc. are complied with. Otherwise a person who is innocent can in that event be easily brought in the net of infringement under civil law or criminally, which can never be the intention of the legislature.

Thus, reading of Section 51 which defines infringement of right conferred by this Act, with Section 45 (1) and the word 'may' therein to my mind means; if a owner of a copyright wants to invoke the provisions of this Act for enforcing civil and criminal nature of remedies before the special forum, namely the District Judge rather than a normal civil Court, he must have the registration. At this stage, it is necessary to reproduce Section 62 of the Copyright Act, which reads thus :

Section 62 (1). Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district Court having jurisdiction.

(2) For the purpose of sub-section (1), a district Court having jurisdiction shall, notwithstanding 42 fa1076.11.odt anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

It is clear that a Special Forum at the level of the district Court to try a suit which otherwise would have been triable by ordinary Civil Court has been provided, if a suit is brought under the provisions of this Act. Further an additional ground over and above Section 20 of the Code of Civil Procedure has been provided. Provision for registration is to regulate the business and for the benefit of registered owner as well as public at large lest there should be any infringement attracting Criminal and Civil liability. As to the scope of Section 62, in the case of Exphar Sa and another...Versus...Eupharma Laboratories Ltd. and 43 fa1076.11.odt another, reported in 2004 (3) Supreme Court Cases 688, the Apex Court in paragraph nos.12 and 13 stated thus :

12. We would like to emphasise the work include . This shows that the jurisdiction for the purposes of Section 62 is wider than that of the court as prescribed under the Code of Civil Procedure, 1908. The relevant extract of the report of the Joint Committee published in the Gazette of India dated 23-11-1956 which preceded and laid the foundation for Section 62 (2) said :

In the opinion of the Committee many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence.

The Committee feels that this
impediment should be removed and

the new sub-clause (2) accordingly provides that infringement proceedings may be instituted in the District Court within the local limits of whose jurisdiction the person instituting the proceedings

44 fa1076.11.odt ordinarily resides, carries on business etc.

13. It is, therefore, clear that the object and reason for the introduction of sub-section (2) of Section 62 was not to restrict the owners of the copyright to exercise their rights but to remove any impediment from their doing so. Section 62 (2) cannot be read as limiting the jurisdiction of the District Court only to cases where the person instituting the suit or other proceeding, or where there are more than one such persons, any of them actually and voluntarily resides or carries on business or presently works for gain. It prescribes an additional ground for attracting the jurisdiction of a court over and above the normal grounds as laid down in Section 20 of the Code.

If he does not want to register the copyright, he may omit to do so; but he will not be entitled to seek remedy under this Act for want of registration of his copyright. He may have the remedy elsewhere. At this stage, it is necessary to notice the provisions of Chapter 13, which deals with offences. Section 63 reads thus :

45 fa1076.11.odt Section 63. Offence of infringement of copyright or other rights conferred by this Act.- Any person who knowingly infringes or abets the infringement of-

(a) the copyright in a work, or

(b) any other right conferred by this Act (except the right conferred by section 53-A) shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees:

Provided that where the infringement has not been made for gain in the course of trade or business the Court may, for adequate and special reasons to be mentioned in the Judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.

Explanation. - Construction of a building or other structure which, infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.

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25. Sections 63-B and 64 are relevant for our purpose, which read thus :

Section 63-B. Knowing use of infringing copy of computer programme to be an offence.- Any person who knowingly makes use on a computer of an infringing copy of a computer programme shall be punishable with imprisonment for a term which shall not be less than seven days but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees :

Provided that where the computer programme has not been used for gain or in the course of trade or business, the Court may, for adequate and special reasons to be mentioned in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees.

Section 64. Power of police to seize infringing copies.- (1) Any police officer, not below the rank of a sub-inspector, may, if he is satisfied that an offence under section 63 in respect of the infringement of copyright in any work has been, is being or is likely to be, committed, seize without warrant, all copies of the work, and all plates used for the purpose of 47 fa1076.11.odt making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable, be produced before a Magistrate.

(2) Any person having an interest in any copies of a work (or plates) seized under sub-section (1) may, within fifteen days of such seizure, make an application to the Magistrate for such copies or plates being restored to him and the Magistrate, after ighearing the applicant complainant and making such further inquiry and the as may be necessary, shall make such order on the application as he may deem fit.

26. Reading of the above penal provisions of Sections 63, 63-B and 64 of the Copyright Act clearly show that a person knowingly making use of a computer by infringing copy of a computer programme shall be criminally liable. It is well settled that provisions relating to penal provisions are required to be interpreted strictly. Now if there is no registration of copyright by its owner and such owner of a copyright is not known to the infringer due to non-

registration of the copyright he still would be held criminally liable under these provisions. To make a 48 fa1076.11.odt person liable criminally, it will have to be shown that such a person was fully knowing about the owner of the copyright and that he indulged in infringing the said copyright despite knowing the ownership thereof. If registration is not made and published in the official gazette such infringer cannot be expected to be aware nor can he be attributed knowledge about the ownership of the copyright of a particular copyright owner and in that event the criminal Court would not be able to convict such a person. That may lead to chaotic situations. Similarly, reading of Section 64 regarding power of police to seize shows that police officer will have to get himself satisfied that a particular person (complainant) is the owner of copyright and he will be so satisfied if such a copyright is registered. When both the complainant and the alleged infringer claim that their product was launched first and that their copyright work was made first, in the absence of registration under Section 44 of the Act, how the police officer will be satisfied to proceed to take

cognizance. The police officer in that case would not be able to move an inch to effect seizure of the alleged infringing copies. After all 49 fa1076.11.odt the provision regarding seizure is another serious act, which infringes upon the privacy of a person.

Hence, the word 'may' used in Section 45 of the Act will have to be read as 'shall' having regard to the scheme of the Act of which all material provisions have been quoted and analyzed by me. I am therefore inclined to agree with and to follow the interpretation made by the Division Bench of Andhra Pradesh High Court in AIR 1960 A.P. 415 and Orissa High Court in AIR 1986 Orissa 210.

27. Thus careful survey of the above provisions of the Copyright Act, 1957 to my mind clearly denotes that in the absence of registration under Section 44 of the Copyright Act by the owner of the copyright it would be impossible to enforce the remedies under the provisions of the Copyright Act against the infringer for any infringement under Section 51 of the Copyright Act. Thus, I answer point no.1 in the affirmative.

28. As to point no.2 (a) and (b) :- In order to answer this point, it will be necessary to have a look at the provisions of Chapter XII of the Act. The heading of this Chapter is Civil Remedies .

Section 54 of this Chapter defines owner of 50 fa1076.11.odt copyright . Section 55 reads thus :

Section	55.	Civil	remedies	for
	infringement	of	copyright.-	(1) Where

copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher, as the case may be, appears on copies of the work as

51 fa1076.11.odt published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the Court.

29. Perusal of Section 55 of the Act shows that the owner of the copyright is entitled to claim the remedy of injunction and damages.

30. Section 60 of the Copyright Act, 1957 reads thus :

Section 60. Remedy in the case of groundless threat of legal proceedings. -

Where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens, any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may, notwithstanding anything contained in section 34 of the Specific Relief Act, 1963 (47 of 1963) institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit -

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any, as he has sustained by reason of such threats:

Provided that this section shall not apply if the person making such threats, with due diligence, commences and prosecutes an action for infringement of the copyright claimed by him.

31. Perusal of Section 60 of the Act clearly shows that a person who has been threatened with any legal proceeding or liability in respect of alleged infringement of copyright can institute a suit under this provision. In the instant case, it is seen from 53 fa1076.11.odt the body of the plaint that the appellant averred that the respondents started writing letters to the customers of the appellant that his product was not user friendly and was pirated one and thus started affecting the image of the appellant. Learned Counsel for the respondents urged that the pleadings in the plaint filed by the appellant do not give specific dates or instances of various aspects. The Court below has also in paragraph 12 of the judgment impugned made the same criticism. But that is not correct. In fact, there are pleadings required to constitute cause of action. It may be true that these pleadings are not verbose, or with exact date and time. But in my opinion, at the stage of evidence, the appellant is entitled to give details and it is not necessary to plead the evidence in the suit. In paragraph no.10, the appellant stated that he introduced the software in question in the year 2007 and the said fact was very well known to the defendants but then thereafter he started threatening the appellant with criminal action etc.. It is also a matter of record that the FIR was lodged by the respondents with Police Station at Nasik on 3.2.2010. FIR was lodged, seizure was made 54 fa1076.11.odt by the police and now even chargesheet has been filed.

Lodgment of FIR, seizure carried out by the police against the appellant and finally filing of the chargesheet is nothing but the initiation of legal proceeding and criminal liability against the appellant for the alleged infringement of the copyright of the respondents. The Court below recorded a self-contradictory finding in paragraph 11 of its order. It says that without lodging FIR,

no criminal proceeding under the Act could be initiated, but suddenly with wrong application of rule of ejusdem generis it held that lodgment of FIR would not constitute 'threat' to initiate legal proceedings or liability. When FIR is lodged, it is certainly a step to set up or set the wheels of criminal law in motion.

That is done obviously with a view to initiate criminal proceedings or criminal liability. The learned District Judge fell in grave error in holding that lodgment of FIR is not a legal proceeding or a legal liability and that therefore there was no threat in the eye of law within the meaning of Section 60 of the Act. Here it would be profitable to quote paragraph no.15 from the Apex Court judgment in the 55 fa1076.11.odt case of Exphar Sa and another...Versus...Eupharma Laboratories Ltd. and another, reported in 2004 (3) Supreme Court Cases 688.

15. Furthermore, the appellants' plaint said that the cease- and-desist notice was sent to Appellant 2 at its office in New Delhi and in that notice it was alleged that Appellant 2 had infringed the copyright of Respondent 2 to the trade mark Maloxine . Now a cease-and-

desist notice means that the recipient is alleged to have infringed the rights of the sender of the notice to the copyright and as a result of such alleged infringement, the recipient is liable to institution of civil and/or criminal proceedings. It is a threat. The plaint says that this threat was received within the jurisdiction of the High Court, a fact which was sufficient to invoke the jurisdiction of that Court. The respondents' reliance on the decision of this Court in Oil and Natural Gas Commission v. Utpal Kumar Basu and Union of India v. Adani Exports Ltd. is inapposite. Those decisions held that the service of a mere notice may not be sufficient to found jurisdiction unless such notice formed an integral part of the cause of action. But a 56 fa1076.11.odt cease-and-desist notice in a copyright action cannot, particularly in view of Section 60 of the Act, be termed to be a mere notice. Such a threat may give rise to the right to institute a suit to counter such threat and to ask for relief on the ground that the alleged infringement to which the threat related was not in fact an infringement of any legal right of the person making such threat.

I, thus, answer point no.2 (a) and (b) both in the affirmative.

32. As to point no.3 : - In the instant case, earlier to 3.2.2010 the respondent was propagating against the business interest of the appellant in the market about the product of the appellant and was also threatening the appellant with legal proceedings as averred in paragraph 10 of the plaint. Since according to the appellant in fact, he did not infringe any of the legal rights of the respondents, the alleged owner of the copyright but still he was being threatened, he filed a suit under Section 60 of the Act. Section 60 of the Act is the special provision for a person like the appellant who is under threat of initiation of 57 fa1076.11.odt legal proceeding or criminal liability when the alleged infringer in fact feels that he did not infringe any of the rights of the alleged owner of the copyright. Section 55 of the Act provides for remedy only to the owner of the copyright and except Section 60 there is no other provision for the alleged infringer, who is of the firm opinion that he did not infringe any copyright. Thus, remedy under Section 60 has been provided by the Copyright Act so that person like the appellant should not be without any remedy.

This goes with elementary principle *ubi jus ibi remedium*. Indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. The appellant has a right to protect his interest by showing that the threat imparted by the respondents by lodging FIR, by getting the seizure done through police machinery is groundless since the appellant did not infringe any of the legal rights of the respondents. The only remedy for the appellant in that event is under Section 60 of the Act. Now I shall consider the next question about the effect of filing of suit under Section 55 of the Act by the respondents in Nasik Court on 29.3.2010 58 fa1076.11.odt i.e. after Section 60 suit was filed on 3.3.2010.

Reading of the proviso with main Section 60 of the Act, which is in aid of the main Section, to my mind shows that Section 60 cannot be taken recourse to if the alleged owner of the copyright exercises his alleged right first in point of time under Section 55 of the Copyright Act. If such alleged owner institutes proceeding under Section 55 of the Act with due diligence i.e. before the 'infringer' files Section 60 suit, the alleged infringer shall not be entitled to file a suit under Section 60 of the Act due to prohibition provided by the said proviso to Section 60. However, if the alleged infringer exercises his right to show that threat given to him is groundless and therefore, institutes civil proceeding under Section 60 of the Act before filing of the suit under Section 55 of the Act by the alleged owner, he can continue to prosecute suit under Section 60 of the Act since in that case the suit under Section 55 was not earlier filed with due diligence.

The suit filed by the appellant under Section 60 earlier in point of time than the suit filed by the respondent under Section 55 would not be therefore hit 59 fa1076.11.odt because of filing of subsequent suit under Section 55 of the Act later by the respondents. Any interpretation contrary to the above would result into doing harm to the main Section 60 and even the main provision will become otiose. Where the alleged 'infringer' who believes that groundless threats of legal proceedings are imparted to him for months together, can he be asked to wait at the mercy of the alleged owner of the Copyright to file a suit under Section 55 of the Act? Similarly, if the savvy copyright owner as a counter-blast files a suit under Section 55 of the Act after filing of the suit under Section 60 of the Act by the alleged infringer with a view to make earlier suit infructuous, it will in my opinion, making the remedy provided under main Section 60 nugatory or meaningless. The only function of the proviso to Section 60 is to prevent filing of suit by the alleged infringer when owner of the copyright has already and earlier filed a suit under Section 55 of the Act. In this case, suit under Section 60 was filed on 3.3.2010 while suit under Section 55 was filed on 29.3.2010. In that view of the matter, I am inclined to hold that the suit filed by 60 fa1076.11.odt the plaintiff under Section 60 does not become infructuous. Hence, I answer point no.3 in the negative.

33. As to point no.4 : - On the question of grant of injunction by this Court, learned Counsel for the respondents vehemently opposed issuance of any order of temporary injunction even for a limited period till the date of hearing on Exh.5 before the District Judge. Even in the written note of argument there is opposition to that effect. However, I do not agree with the learned Counsel for the respondents for the following reasons.

The suit under Section 60 of the Act was filed on 3.3.2010 and even the status quo order was obtained by the appellant in the District Court in that suit. The respondents, however, came with an

application under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint. The plaint was rejected and the said order was put to challenge in First Appeal No.667/2011 before this Court which was decided on 17.9.2011 and the said order with the consent of the learned Counsel for the parties was set aside and the District Judge was again asked to decide the question in a proper manner, which he decided by the impugned order on 10.10.2011. It may be true that the appellant did not apply for injunction in the second round when the matter was remanded by this Court to the trial Court but then this Court had made the matter time bound and therefore, one can understand that filing of temporary injunction application would have delayed the main matter. Be it that as it may, the question of jurisdiction and rejection of plaint have now been decided under this judgment in favour of the appellant. That apart, the respondents though were given enough opportunity to show the factual infringement of copyright but that was not shown by the respondents and on the contrary, it was found that the copyright of the respondents itself was not registered. It is clear that the respondents have been guilty of not allowing detailed hearing on Exh.5 application for temporary injunction but the respondents indulged in taking objections on the question of jurisdiction and prayed for rejection of plaint under Order XII Rule 11 of the Code of Civil Procedure for no justifiable reasons and on a totally ill-founded and unwarranted legal advice. There is no reason why the appellant should suffer for the frivolous objections about jurisdiction taken by the respondents. At any rate, following tests by the Apex Court in the case of R.G. Anand...Versus...M/s. Delux Films and others, reported in AIR 1978 Supreme Court 1613 have also been considered by me and found no material infringement as claimed from the pleadings and documents and even in the unregistered disc of the respondent.

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.
2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences

appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

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6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.

7. Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest broader that unlike a stage play a film has a much perspective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

34. That apart, even prima facie it has not been shown by the respondents that their product was registered under Copyright Act. To say that respondents would show the same later on during the course of trial and hence, no injunction should be granted, would be doing injustice to the appellant, 65 fa1076.11.odt who has been marketing his product since the year 2007 and has now been suddenly prevented from doing so.

Even the offence has been registered against the appellant and his property has been seized.

35. In my opinion, application Exh.5 is required to be heard in details by the District Judge, who never undertook the said exercise but then the appellant has made out a strong prima facie case in his favour for an order of injunction till Exh.5 is decided by the District Judge at least now. In that view of the matter, I had expressed in the open Court and which I do here that the order of temporary injunction should operate for a period of two months only and within that period Exh.5 should be decided by the District Judge by giving full opportunity to both sides. I follow the same course and therefore, I am inclined to grant temporary injunction against the respondents and in favour of the appellant only for a period of two months. The balance of convenience is, obviously in the above background, in favour of the appellant. Hence, I answer point no.4 in the affirmative.

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36. As discussed earlier, respondents raised frivolous objection and claimed rejection of plaint and thus resulting into two rounds of litigation before this Court. Hence, the appellant will have to be compensated by an order of costs. I direct the respondents to pay costs of Rs.30,000/- (Rupees Thirty Thousand Only) to the appellant within a period of four weeks.

37. The upshot of the above discussion is that this appeal will have to be partly allowed. Hence, I make the following order.

O R D E R

(i) First Appeal No.1076/2011 is partly allowed with costs quantified at Rs.30,000/- (Rupees Thirty Thousand Only) payable by the respondents to the appellant within a period of four weeks from today.

(ii) There shall an order of temporary injunction against the respondents in terms of prayer clause (2) and (3) of application Exh.5 in Special Civil Suit No.3/2010 for a limited period of two months from today.

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(iii) The trial Court shall decide the application (Exh.5) for temporary injunction within a period of two months from today.

(iv) Parties to appear before the trial Court on 16th March, 2012.

JUDGE Advocate Shri Deshmukh prays for stay of the judgment for a period of six weeks.

Advocate Shri Vyas opposes the request.

Prayer for stay of the judgment is rejected for the reasons stated in the judgment itself.

JUDGE ssw