

Aasia Industrial Technologies Ltd. And ... vs Ambience Space Sellers Ltd. And Ors. on 1 August, 1997

Equivalent citations: (1997)99BOMLR613

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Bench: A.P. Shah, B.B. Vagyani

JUDGMENT

A.P. Shah, J.

1. This appeal is directed against an order of temporary injunction passed by the learned single Judge. Briefly the facts are that the second plaintiffs are a company incorporated under the provisions of the Companies Act and owners of copyrights in various programmes which are produced in India. The third plaintiffs are a body corporate constituted and existing in accordance with the laws of the British Virgin Islands and carry on business as a Satellite TV Channel in Hong Kong. The third plaintiffs are the owners of Zee TV. Channel and operate the Zee TV Channel from Hong Kong through the uplinking facility and satellite under the third plaintiffs' arrangement with Star TV. The first plaintiffs are the exclusive licensees of the copyright in the programmes broadcast on the Zee TV Channel. The second plaintiffs have given an exclusive licence to the third plaintiffs to broadcast these programmes on a 'Zee TV Channel'. This broadcast is made from Hong Kong to the "Asian Footprint" of Asiasat I. This includes India. Zee TV is being telecast since about October, 1992 showing various types of programmes, education, social, entertainment, news-based, etc. which programmes are interspersed with commercial advertisement. The advertisement shown on Zee TV are by way of advertising slots sponsored by business houses, who wish to promote themselves, their products and services in South East Asian countries. Zee TV Channel is a "Free to Air Programme" that is the viewers are not charged for watching the programme. As this is a "Free to Air Programme" the expenses are naturally met through advertisements. The first plaintiffs are the sole agent, who procure for the third plaintiffs advertisements in India. The third plaintiffs after receiving the programme from the second plaintiffs and the advertisements from the first plaintiffs combine the two and broadcast the programme on the Zee TV Channel. The advertisers choose programmes in which to advertise, according to their popularity and time of showing. Zee TV Channel, which is a free-to-air signal, is seen by viewers only if they have connectivity through dish antenna. An individual viewer may install his own dish antenna, or, as is more common, dish antenna are installed and managed by cable operators, who have their own set of subscribers, to which subscribers the cable operators disseminate the TV signal for a fee or charge. Thus instead of individual viewers having their own separate dish antenna, the cable operators have common dish antenna and other equipment for deploying the signals by means of wire to viewers for a charge. In cities like Mumbai the majority of viewers will be subscribers to Cable Television Networks.

2. The defendants are private companies incorporated under the Companies Act, 1956 which own, control and operate Cable Television Networks in several cities. With the sophisticated equipment which is now available Cable Television Networks are in a position to blank out/switch off the signals sent by various broadcasters and interpose/substitute their own programmes or materials. The result of such unauthorised interception or interruption of the Zee TV signal is that the programme and original advertisements forming part of the Zee TV broadcast are cut off from the viewers and the local advertisements inserted by cable operators by means of their own video films. The plaintiffs allege that the defendants are blanking out the plaintiffs' advertisements and substituting their (i.e. defendants) advertisements during the period that the plaintiffs are broadcasting their advertisements. This is admitted by the defendants. The defendants claim that they have a right to and are entitled to do so. The plaintiffs also allege that the defendants are running an advertisement film along the lower part of the TV screen simultaneously with (the main programme). The plaintiffs allege that this advertisement film runs along with the programme and covers about 20 to 25 per cent of the TV screen. The defendants deny that they are doing so. In fact the argument advanced on behalf of the defendants before the learned single Judge was that if the defendants were running a film along the foot of the TV screen during the programme, the defendants would be committing a wrongful act. The learned single Judge after hearing the parties granted an injunction against the defendants on both counts i.e. against blanking out the plaintiffs advertisements and substituting their advertisements along the lower part of the TV screen simultaneously with the main programme.

3. We have heard Mr. Kapadia for the appellants and Mr. Chagla for the respondents. The principal issue arising in this case is whether the defendants have a right and are entitled to substitute their advertisements during the broadcast of the plaintiffs. According to the plaintiffs, the action of the defendants in substituting advertisements in intercepting the programmes broadcast by the third plaintiffs and substituting the advertisements in the programmes by their own advertisements is per se unlawful. The plaintiffs have based their action upon various causes of action viz.:-

(a) Passing off;

(b) Inducing a breach of contract;

(c) Conversion;

(d) Copyright and Broadcast Reproduction Rights. Re (a) Passing off :-

4. The case of the plaintiffs under this head is that by reason of unauthorised intervention or interruption of the Zee TV signal the programmes and original advertisements forming part of the Zee TV broadcast are cut off from the viewers and the "local advertisements" are inserted by cable operators by means of their own video films. Such interception or interruption of the original Zee TV broadcast by cutting off the programme and inserting local advertisements also results in the defendants wrongfully and illegally passing off something not part of the original broadcast made by the third plaintiffs on the Zee TV Channel as if they were so broadcast by the third plaintiffs. The defendants thus pass off their local advertisements broadcast by them through their video cassette

recording/TV network system, as if the said local advertisements are being broadcast by the third plaintiffs on the Zee TV Channel. The quality of such local advertisements is poor and in any event not in keeping with the high standard of the third plaintiffs broadcast. By reason thereof, and in any event, such local advertisements broadcast by the defendants, and passed off as broadcast by third plaintiffs, adversely affects and harms the third plaintiffs reputation among the viewers. The third plaintiffs, by reason of the excellent quality of their broadcast, have a tremendous reputation among all the viewers of Zee TV which reputation is being injured by the defendants wrongful acts.

5. Mr. Chagla relied upon the cases of *Illustrated Newspapers Ltd., The Illustrated London News and Sketch, Ltd. and The Sporting and Dramatic Publishing Co. Ltd. v. Publicity Services (London) Ltd.* reported in LV reports of Patents, Design and Trade Mark Cases 172. In this case the Plaintiffs were publishers of a paper. The defendants inserted supplements carrying their own advertisement and then bound the papers as a whole. The defendants then supplied the papers. The defendants printed on the supplement (which they inserted) that the supplement has been issued by them. In spite of this the Chancery Division held that the defendants were passing off the supplement as those of the plaintiffs. The Court observed at page 182 :-

I think that it is sufficient for the purpose of this action to hold, as I do that if a person represents his goods as the goods of another for trading purposes and damage to the other person is likely to result therefrom, the other person, has the right to stop the first person from doing this. I find in this case that the defendants by their acts prior to the issue of the work represented (and here I do not suggest that when they did so they did any deliberate and wrongful act knowing it to be wrong) for trading purposes their advertising media, that is to say, their copies of the plaintiffs publications together with the defendants insets, as being the plaintiffs original publications and that damage to the plaintiffs was likely to result from such misrepresentation and accordingly the plaintiffs were in my judgment, entitled at the time of the issue of the writ to an injunction.

6. Mr. Chagla also brought to our notice the case of *Associated Newspaper Group v. Insert Media Limited and Ors.* 1991) Fleet Street Reports 380. In that case the plaintiffs published two national newspapers, one of which had a colour magazine. They sold the right to advertising space both within the pages of their newspapers and by way of inserts. The defendants were in the business of insert advertising and proposed to arrange with retail newsagents to have their customers material inserted between the pages of various national newspapers without the publishers knowledge or consent. They canvassed customers by pointing out the advantages of having advertisements even for small businesses inserted in national newspapers and used the reputation of those newspaper as a selling point. They were, however, prepared should such activities be found to be lawful, to print on the inserts statements of disclaimer, disassociating themselves from the plaintiffs, The plaintiffs brought a *qua lime* action for passing off, seeking a permanent injunction to restrain the insertion of unauthorised advertising material into their publication, whether or not such material carried the proposed disclaimer. The Court held that where an original product had been altered and resold under its original name, such activity was capable of constituting a misrepresentation. There was an implied representation that the advertisements were approved by the publishers and were of the

quality associated with their advertisements with the backup that they provided. That representation was in this case untrue. The insertion of such material within the plaintiffs' publications was clearly likely to cause loss of goodwill. Such an adverse effect on their goodwill was readily foreseeable. A *qua time* action was, therefore, justified.

7. It is clearly seen that the action of the defendants in blanking out the plaintiffs advertisements during the telecast of plaintiffs programmes is calculated to deceive the public into believing that it emanated from the plaintiffs. Besides the fact that the plaintiffs might suffer damage to goodwill, there is also likelihood of the plaintiffs losing their advertisers due to wrongful action of the defendants. In our judgment, the act of insertion of local advertisements clearly amounts to passing off. Mr. Kapadia, however, submitted that when the programmes of the plaintiffs are going on the plaintiffs logo appears on the screen. He submitted that when the defendants advertisements appear the logo is no longer shown on the screen. He submitted that therefore the viewers immediately know that those are not the advertisements of the plaintiffs. It is not possible to accept this argument. Surely the absence or presence of a small logo on the screen will not enable viewers to know that the advertisements are not those of the plaintiffs. Mr. Kapadia then submitted that the defendants are willing to display on the screen a notice stating that all advertisements were of the defendants and not of the plaintiffs. The advertisements slots are for shorter duration of between 10 to 15 seconds. Even if a statement as suggested by Mr. Kapadia is published, the very presence of these advertisements in the programme broadcast by the third plaintiffs is a misrepresentation that they are advertisements broadcast by the plaintiffs. The statement does not have the effect of converting that false representation into a true representation. In fact if such a notice is displayed, it will add to the confusion of the viewers as to who is in fact responsible for the advertisements and may even reinforce the representation to the reader that the advertisement was shown as a result of some arrangement or collaboration with the plaintiffs.

Re (b) inducing a breach of contract :-

8. It is a violation of legal right to interfere with contractual relations recognised by law if there be no justification for interference. Thus A commits a tort if, without lawful justification, he intentionally interferes with a contract between B and C, (a) by persuading B to break his contract with C, or (b) if by some unlawful act he directly or indirectly prevents B from performing his contract (see Winfield and Jolowicz on Tort Thirteenth Edition page 497). This tort had its origin in the action for enticing away the servant of another. In *Lamley v. Gye* (1853) 2 E and B 216 the plaintiff's declaration alleged that he was owner of the Queen's Theatre, that he had contracted with Johanna Wagner, a famous operatic singer, to perform exclusively in the theatre for a certain time and that the defendant, owner of a rival theatre, wishing himself to obtain Miss Wagner's services knowing the premises and maliciously intending to injure the plaintiff enticed and persuaded her to refuse to perform. It was held that such an action lay even when the contract, the breach of which had been procured, was not one of service in the strict sense of the term. It was, however, for some time believed that the principle so established was confined to cases, where (i) the defendant's action was malicious and (ii) the contract in question was one to render exclusive personal services for a fixed period. But now it is perfectly well established that the scope of the action is not limited in either of these ways. Indeed, the modern cases indicate that the tort has become so broad as to be

better described as unlawful interference with contractual relations, (see Salmond and Houston on The Law of Torts Twentieth Edition page 358). It will be useful to refer to some leading English decisions relating to tort of inducing breach of contract.

9. In the case of *Quinn v. Leathom*, reported in (1901) Appeal Cases Page 495 an action was brought for damage for having induced a breach of a contract. The plaintiff used to regularly supply meat to a butcher. The plaintiff employed certain persons who were not members of a particular Union. The Union asked the plaintiff not to employ non-members and to only employ their members. The plaintiff having refused, the Union convinced the employees of the butcher to boycott work if plaintiff's meat was accepted by the butcher. As the butcher's employees threatened to strike work the butcher refused to take meat from the plaintiff. The plaintiff thus could not sell the meat. It was held that malicious intention was not the gist of the action. The action was on the ground of violation of legal right committed knowingly and the violation of the legal right was the interference with the contractual relations recognised by law without any sufficient justification for the interference, if the interference was wrongful and intended to damage third person, his rights are infringed. It was held that the principle involved could not be confined but must reach all wrongful acts done intentionally to damage a particular individual. Lord Justice Macneughten said at page 510:-

Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention - that was not, I think the gist of the action - but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

Lord Lindley at page 535 of the same case said :-

But if the interference is wrongful and is intended to damage a third person and he is damaged intact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified the whole aspect of the case is changed. The wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. If the above reasoning is correct, *Lamely v. Gye* was rightly decided, as I am of the opinion it clearly was. Further the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

10. The next case is *Jasperson v. Dominion Tobacco Co.* (1923) Appeal Cases 709. In that case two companies appointed an agent to buy tobacco on their behalf from the growers. One of the terms of appointment was that the agent would not act for anybody else. The respondents in order to avoid increase in the price of tobacco by reason of competition, persuaded the agent also to purchase on

their behalf but in the name of the principals of the agent. The agent thus purchased a larger quantity in the name of his principals. The respondents refused to accept the excess quantity. The principals became liable to the growers even for the excess quantity. The principals brought action against the respondents for recovery of the amounts which they had been forced to pay. Their Lordships of the Judicial Committee observed at page 712: -

Their Lordships think that this order, the only order made as to which any question, arises in the appeal, was right. Jasperson must be taken to have known that Deacon was not at liberty to purchase for him or for the MacDonald Company whom he represented, and that he had no authority to purchase quantities largely in excess of his instructions from the respondent company. By inducing Deacon to violate the duty to the respondent company he has occasioned to them a loss which their Lordships consider that he was rightly ordered to make good. The reason on which the conclusion rests is one which is now well established. Interference directed to bringing about a violation of legal right, such as that of the respondent company to have their contract with Deacon duly observed, is a cause of action and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference. It is an illustration of the principle when the interference is directed to inducing an agent to act in contravention of his duty by pleading his principal's credit. What was laid down long ago in *Lamley v. Gye* reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. The law as thus stated was explained by the House of Lords in *Quinn v. Loathem* and in their Lordships opinion it applies in the case before them.

11. In *G.W.K. Limited and Ors. v. Dunlop Rubber Co. (1926)* 42. The Times Law Reports 376 the first plaintiffs, who were manufacturers of G.W.K. motorcars, made with the second plaintiffs, who were manufacturers of "Bal-lon-ette" tyres, an agreement which had the effect that all new G.W.K. cars were to be fitted with "Bal-lon-ette" tyres whenever the cars were exhibited. Under the agreement, the tyres were supplied to the first plaintiffs at reduced prices but were to be sold by them only as part of a new car. The first plaintiffs, sent to an Exhibition, two of their cars duly fitted with "Bal-lon-ette" tyres and on the night before the opening the defendants, who were manufacturers of Dunlop tyres, removed the "Bal-lon-ette" tyres and substituted Dunlop tyres, although they were aware of the agreement between the first and the second plaintiffs. In an action brought by the plaintiffs, it was held that the defendants had knowingly committed a violation of the second plaintiffs legal rights by interfering without any justification with the contractual relations between the first and the second plaintiffs.

12. In the case of *D.C. Thomson and Co. Ltd. V. Deakin and Ors. (1952)* The Law Reports Chancery 646 the plaintiffs, having dismissed one of the workmen, who was a member of a union known as "Natsopa", that union called out on strike its members who were employees of the plaintiffs. At the same time officials of Natsopa called on other unions to support them. Thereupon Bowaters loaders and drivers informed Bowaters that they might not be prepared to load and deliver paper to the plaintiffs. Bowaters never required the loaders to load or their drivers to deliver paper to the

plaintiffs, but informed the plaintiffs that they would not be able to deliver paper in accordance with their contract. Plaintiffs sought an interlocutory injunction against officers of the several unions concerned. It was held that, the tort of procuring a breach of contract is not confined to direct intervention. The intervenor knowing of the existence of a contract between A and B and acting with the object of procuring the breach by A to the damage of B will be liable not only (1) if he directly intervenes, by persuading A to break it, but also (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from infact performing the contract and also (3) if he persuades a third party to do an act in itself wrongful or not legitimate (as committing a breach of contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B. On facts however it was held that the plaintiffs failed to establish that there had been any direct procurement by the defendants of any wrongful acts by the employees of Bowaters or that there were in fact any wrongful acts by Bowaters' employees. Further there was no evidence of any actual knowledge by the defendants of any contract between Bowaters and the plaintiff. Accordingly, the plaintiffs were held not to be entitled to an interlocutory injunction.

13. In the case of *Merkur Island Shipping Corporation v. Laughton and Ors.* (1983) 2 All England Law Reports 189 the ship owners were engaging Asian crew, who were being paid salaries below the rates approved by the International Transport Workers Federation. Whilst the ship, on a sub-charter, was docked at Liverpool, the International Transport Workers Federation (I.T.W.F.) decided to blackball the ship because of the low wages paid by the ship owners. I.Y.W.F. persuaded the tugmen to refuse to operate tugs assigned to move the ship. The result was that the ship was unable to leave port. The ship owners applied for an injunction against the I.T.W.F. to lift the blackball and for collateral advantages to Esso as mortgagees. Two years before the expiry date of the solus tie agreement and with the purpose of defeating it, Impact Holdings acquired the shares of Kingswood, who repaid the outstanding mortgage debt. Unknown to Esso, Impact Holdings procured the transfer of the legal title of the land on which the garage stood from Kingswood to Impact Motor, a subsidiary of Impact Holdings, and the agreements in relation to operating the garage were broken. Impact Motor charged the garage to L. In an action brought by Esso, it was held that there would be no clearer case than the present of an interference, namely, by Impact Holdings and Impact Motor, as soon as they had controlled and wherein a decision to interfere, which procured not merely a prevention or hindrance to Kingswood in the performance of their obligations, but procured direct breach of Kingswood of their contractual obligations. The interference was held to be plainly deliberate and plainly direct.

15. A reference may also be made to the observation of Lord Denning MR in *Torquay Hotel Co. Ltd. v. Cowsins* (1969) All ER 522. That was a case in which the contract the performance of which was interfered with was one for the delivery of fuel. It contained a force majeure clause excusing the seller from liability for non-delivery if delayed, hindered or prevented by inter alia, labour disputes. Lord Denning MR stated the principle thus :-

First there must be interference in the execution of a contract. The interference is not confined to the procurement of a breach of contract. It extends to a case where a third person prevents or hinders one party from performing his contract even though it may not be a breach. Second, the interference must be deliberate. The person must

know of the contract or, at any rate, turn a blind eye to it and intend to interfere with it.... Third, the interference must be direct. Indirect interference will not do.

16. Thus it is to be seen that the tort of inducing breach of contract, as now developed in England is that if the act of third party, either by persuasion, inducement or procurement results in breach of a contract, the third party would have committed an actionable interference with the contract. Again so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either if with knowledge of the contract, he does an act which if done by one of the parties to it, would have been a breach. Of this type of interference the case of *G.W.K. Ltd.* (supra) affords a striking example. If, instead of persuading B of unlawful action against him, A brings about the break of the contract between B and C by operating through a third party. A may still be liable to C, provided unlawful means are used. The act of the third party may be against the will of both and without the knowledge of either. It must however be with the knowledge of the contract. But the plaintiff is not obliged to prove that the defendant knew the precise terms of the contract breached; it is enough if the defendant's knowledge is sufficient to entitle the Court to say that he has knowingly or recklessly procured a breach. Proof of malice in the sense of spite or ill-will is unnecessary. It is no justification for the defendant to say that he had an honest doubt whether he was interfering with the plaintiff's contract, or that he acted without malice or in good faith. It is enough to show that the defendant did an act which must damage the plaintiff; it need not be proved that he intended to do so. It is certain that justification is capable of being a defence to this tort, but what constitutes justification is incapable of exact definition. It has been said that regard must be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure it, the relation of the person procuring it to the person who breaks the contract, and the object of the person procuring the breach.

17. In applying the well settled principles to the facts of the present case, it is required to be noted at the outset that it is admitted that the defendants knew that the plaintiffs have agreements with advertisers. Such advertisers are required to pay and pay substantial amount for broadcasting their advertisements on Zee TV. The plaintiffs are, therefore, bound to ensure that the advertisements procured for being broadcast on Zee TV as a part of a particular programme, are actually broadcast and communicated to the viewing public. With knowledge of this contract, the defendants by simple expedient of switching off the programmes at the time the advertisements are being broadcast are preventing the third plaintiffs from carrying out their contractual obligations. Apart from inducing the plaintiffs to commit a breach by effectively preventing them from showing their advertisers advertisements the action of the defendants would directly have the effect of the third plaintiffs losing their advertisers. This also causes injury to the lawful trade and business of the first and the third plaintiffs and their right to have broadcast in its original form reach the ultimate viewer. The defendants are thus procuring a breach of contract by the third plaintiffs. This is clearly a case of direct invasion and, therefore, amounts to an actionable interference.

18. Mr. Kapadia strenuously submitted that the defendants were not directly interfering with the contractual relations between the plaintiffs and their advertisers. The defendants have neither persuaded the third plaintiffs or the advertisers or anybody else nor induced any of them or exerted

any pressure on any of the contracting parties. He submitted that the defendants were merely exercising their right of carrying on their own trade by use of their own equipments. He urged that if the purpose of the defendants was by the acts complained of to promote their own trade interest, they are entitled to do so although injurious to their competitors. If in exercise of their right to carry on their own trade the plaintiffs or any one else gets affected, it is only incidental. He also urged that there being no direct interference the plaintiffs cannot succeed unless the acts complained of are held to be wrongful or unlawful.

19. We are not impressed by the arguments of Mr. Kapadia. Actionable interference does not necessarily mean that there must be an oral or physical communication or persuasion. Any act which has the effect of interfering/ preventing performance, even though it is without the knowledge or consent of both the contracting parties, would be an actionable interference. Mr. Kapadia is also not right in saying that interference by the defendants is not of "direct" nature. In *Greig v. Insole* (1978) 1 W.L.R. 32 it was observed that the phrase "direct interference" covers the case where the intervenor, either by himself or his agents, speaks, writes or publishes words, or does other acts which communicate pressure or persuasion to the mind or person of one of the contracting parties themselves, while "indirect interference" refer to the case where, without actually doing any of these things, the intervenor nevertheless procures or attempts to procure a situation which will result or may result in a breach of the contract. Has there been a direct interference in this sense by the defendants with the contracts between the third plaintiffs and the advertisers? In our judgment, beyond doubt, there has. In this case apart from inducing the third plaintiffs to commit a breach by effectually preventing them from showing their advertiser the advertisement, the action of the defendants would directly have the effect of the third plaintiffs losing all the advertisers. If this were to be allowed to continue, nobody would want to advertise with the third plaintiffs. This is because to a large audience in the cities, advertisements will not be available for viewing. The third plaintiffs thus would ultimately lose all contracts and get no advertisers. But that apart, the action of the defendants is wrongful in itself. The only purpose of giving the defendants advertisement during the plaintiffs programmes is to capitalise on the popularity of the plaintiffs programme. Needless to say that the advertisers would want their advertisement to appear during popular programmes which have a much larger viewing. Obviously the intention in blacking out the plaintiffs advertisements and putting their own advertisements is nothing else but to ensure that the, defendants' advertisements are seen by the viewers on the plaintiffs programmes. In these circumstances, "direct interference" on the part of the defendants has been clearly proved. It is not disputed that the defendants had knowledge of the contracts between the third plaintiffs and the advertisers. There does not appear to be any justification for the action of the defendants. In fact, no plea of justification was raised by the defendants. We have, therefore, no hesitation to hold that the plaintiffs have prima facie established the cause of action based on inducement of breach of contract.

Re (c) Conversion :-

20. It is argued before us that on the admitted facts the acts of the defendants also amount to conversion. Here the conversion is of property in the form of signals. The conversion is based on the defendants doing an act which is inconsistent with the rights of the true owner. In support of this

contention, Mr. Chagla relied upon the authority in the case of *Okley v. Lyster* (1931) King's Bench Division 148. In this case the plaintiff, demolition contractor, had agreed to pull down an aerodrome and to reinstate the land on which it stood. This work involved removal of large quantity of hard core and tar macadam. On removal these became the property of the plaintiff. The plaintiff had arranged with the tenant of a farm, on the opposite side road from the aerodrome, to rent three and a half acres of the land whereon he dumped the stuff. The plaintiff then started selling portion of this stuff. However at the time of the cause of action approximately about 4000 tons of this stuff was still undisposed and lying on that land. The defendants purchased this farm. He then started removing the hard core. The defendant claimed that as he had bought the land all that was on it belonged to him. The plaintiff, therefore, claimed damage for conversion. Rejecting the argument of the defendant that what was done by him does not amount to conversion. Scrutton L.J. observed :-

Mr. Bensley Wells, while admitting that the appellant was mistaken as to his right to the hard core contends that what was done by him was not conversion. Conversion has been very much extended in the last two hundred years. In early times the plaintiff began with a writ for trespass. That was found not to be sufficient, then came a writ on the case framed, on the special circumstances, which extended the writ for trover, and all those remedies have been labelled as action for conversion. I take the modern definition of conversion from the judgment of Atkin, J. in *Lancashire and Yorkshire Ry. Co. v. MacNicol* where he said: "It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right". Mr. Bensley Wells argued that there can be no conversion if the defendant is not in possession of the thing alleged to have been converted and he cited in support of that proposition *England v. Cowley*, but in that case I find Kelly C.B. saying this "Apart from mere dicta no case so far as I am aware, can be found where a man not in possession of the property has been held liable to trover unless he has absolutely denied the plaintiffs right. In this case the appellant has denied the respondent's right to remove the hard core, which he says is his own, and he backed that opinion by acts namely, by using some of the stuff himself and by stopping the respondent and his purchaser from removing it. That brings the case within the definition of conversion given by Kelly C.B. and by Atkin, J. in the cases I have referred to; and damage were rightly claimed in an action for damages.... I am happy to say that this contention also fails. In dismissing this appeal, I think we are carrying out the modern duty of the Court to do justice irrespective of the form of the writ.

21. Thus it has been laid down that there may be a conversion of goods even though the defendant has never been in physical possession of them if, his act amounts to an absolute denial and repudiation of the plaintiff's right. This legal position was reiterated by the House of Lords in *Caxton Publishing Co. Ltd. v. Sutherland* 1938 All England Reports (Vol. IV) 389. On page 403 of the report it was observed:-

Under the head of damages, two further questions arise (i) what is the act of conversion and (ii) what damages flow from that act. As to the first question, conversion was defined by Atkin, J. as he then was in *Lancashire and Yorkshire Ry. Co. v. MacNicol* at page 605 : -

...dealing with the goods in a manner inconsistent with the right of the true owner amounts to a conversion provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right." The definition was approved by Serutton L.J. in *Chickley v. Lyster*. Atkin, J. goes on to point out that where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right though the doer may not know of or intend to challenge the property or possession of the owner.

22. Mr. Kapadia however submitted that conversion necessarily has to be of chattel. In this case there is no chattel or goods. The plaintiffs are merely transmitting signals. He submitted that these signals do not constitute goods and in any event the defendants are not interfering with the transmission or the signals in any manner. Plaintiffs signals are not distorted or affected or diminished in any manner. Any person who has a satellite dish can pick up the plaintiffs signals at the same time that the defendants are showing their advertisements. Plaintiffs broadcast their programme on their entire "Asian Footprint". On the other hand, he submitted that the defendant viewers are restricted to certain cities in India. He submitted that all other viewers can watch the plaintiffs' programmes on their signals are in no way distorted, or affected. He also submitted that the true owners of the advertisement portion of the programme are the advertisers who are not before the Court and who have not made a complaint. He submitted that, therefore, there was no conversion.

23. So far as the question whether signals constitute goods or chattels, a reference may be made to the definition of the "goods" in the Sale of Goods Act. Section 2(7) defines "goods" to mean any movable property other than an actionable claim and money. The term "movable property" has been construed by the Supreme Court in respect of electric energy. In the case of *The Commissioner of Sales Tax, Madhya Pradesh Indore v. Madhya Pradesh Electricity Board, Jabalpur* the Supreme Court was dealing with a question whether "electric energy" is "goods" for the purpose of sales tax. In para 9, the Supreme Court observed:-

The definition in terms is very wide according to which "goods" means all kinds of movable property, Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It can be

transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Therefore, electric energy was intended to be covered by the definition of "Goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of Sales Tax by making, a provision for it in the Schedule to the two Acts.

24. Under the definition of "goods" as given in the Sale of goods Act, "goods" must be property and must be movable. Any kind of property which is movable would fall within the definition of "goods" provided it was transmissible or transferable from hand to hand or capable of delivery which need not necessary, be in a tangible physical sense. In *Malerkotla Power Supply Co. v. Excise Taxation Officer, Sangrur* (1968) 22 STC 325 (Punj). Tek Chand, J. observed that electric energy has the commonly accepted attributes of movable property. It can be stored and transmitted. It is also capable of theft. It may not be tangible, in the sense that it cannot be touched without considerable danger of destruction or injury but it was perceptible both as an illuminant and a fuel and also in other energy giving forms. Electric energy may not be property in the sense of the term "movable property" as used in producing steam. Similarly, signals transmitted by the third plaintiffs can also be transmitted, transferred, delivered, stored and possessed. Infact they are being communicated by the defendants. Many of the programmes are being stored and they can be possessed. In our view, therefore, all the attributes of a movable property are present. It must thus be held that signals are "movable property" within the meaning of Sale of Goods Act. There is also no merit in the argument of Mr. Kapadia that there is no conversion because the plaintiffs signals are not distorted or affected or diminished. The mere fact that signals themselves are not interfered with or distorted is of no consequence. The signals are transmitted for the purpose of viewing by the public. Public in the cities, wherein the defendants run their cable network, will not receive the signals of the plaintiffs during the advertisement programme as the defendants shut it off. The defendants are claiming a right to do so. Thus the defendants are claiming a right contrary to the right of the true owner. Conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby the other is deprived of the use and possession of it. Two elements are combined in such interference : (i) a dealing with a chattel in a manner inconsistent with the right of the person entitled to it, and (ii) an intention in so doing to deny that person the right or to assert a right which is infact inconsistent with such right. Both the elements are present in this case. By asserting a right to interfere with the plaintiffs signals, the defendants are asserting a right contrary to the right of the true owner. Therefore, the action of the defendants clearly amount to conversion.

Re (d) copyright and broadcast reproduction rights:-

25. The plaintiffs allege that the programme broadcast by the third plaintiffs, on Zee TV channel, apart from being a cinematograph film also constitutes an original artistic, literary and musical work, all of which are incorporated in the ultimate programme broadcast. The second plaintiffs are the owners of the copyright and the programmes. The second plaintiffs have given an exclusive licence to the third plaintiffs. The third plaintiffs receive the main component of the programme from the second plaintiffs and the advertisement films from the advertisers as booked by the third plaintiffs. The third plaintiffs slot the two components together to form a complete programme to be

broadcast as one composite programme comprising of the said two components on the Zee TV channel. The unauthorised interruption and/or interception by the defendants constitute an illegal and wrongful infringement in the third plaintiffs copyright in the programme as broadcast by them on Zee TV This also constitutes unauthorised adaptation by re-arranging altering or mutilating the original broadcast in which the plaintiffs are claiming the copyright. The plaintiffs allege that even though Zee TV is "Free to Air Programme", yet the plaintiffs have permitted viewing on certain conditions. Those conditions are set out in para 13 A of the plaint. It is submitted by the plaintiffs that the copyright being in the plaintiffs, a party may view or further communicate the programme only on these conditions. All cable operators including the defendants are bound by these conditions and to comply with the same. The defendants, however, are acting in breach thereof. Therefore, the defendants' wrongful acts also constitute rebroadcast of the Zee TV signals in a form different from the signals broadcast by the third plaintiffs.

26. In order to appreciate the plaintiffs' case it is necessary to refer to the relevant provisions of the Copyright Act. Under Section 2(dd) broadcast means communication to the public by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or by wire and includes re-broadcast. Section 2(f) provides that a cinematograph film includes any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording. Under Section 2(ff) communication to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, bears or otherwise enjoys the work so made available. The explanation to Section 2(ff) says that for the purpose of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication in public. Section 2(1) defines "Indian Work" to mean a literary, dramatic or musical work, the author of which is a citizen of India; or the author of which, in the case of an unpublished work, is, at the time of making of the work, a citizen of India. Section 13 enumerates works in which copyright subsists. Sub-section (2) of Section 13 provides that copyright shall not subsist in any work specified in Sub-section (1), other than a work to which the provisions of Section 40 or Section 41 applies, unless in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date was at the time of his death, a citizen of India. Section 14 gives an exclusive right amongst other things, in India to a film for the public. Under Section 30 an owner of the copyright may grant a licence in writing to an agent.

27. Section 37 then confers what is known as a "Broadcast Reproduction Right". Under Section 37 every broadcasting organisation has been given a broadcast reproduction right. Section 39-A provides that certain provisions of the Act with necessary adaptations and modifications shall apply to broadcast reproduction right. Section 40 deals with power of the Central Government to extend copyright to foreign works. Section 51(a) provide that copyright in a work shall be deemed to be infringed if a person, without a licence granted by the owner or in contravention of the conditions of a licence does anything, the right to do which is conferred upon the owner of the copyright. Under Section 54 owner of a copyright also includes an exclusive licensee.

28. It is contended by Mr. Kapadia that the third plaintiffs have no copyright in India. The argument is based on fact that the third plaintiffs are established in British Virgin Island and are broadcasting from Hong Kong. What was relied on was the fact that neither British Virgin Island nor Hong Kong were parties to the Berne Convention and thus do not have any arrangement with India whereby copyrights in their country were recognised in India. Mr. Kapadia's argument is also based on fact that admittedly the copyright in the advertisement belongs to various advertisers who are not before the Court. Mr. Kapadia's submission is that even though the second plaintiffs are owners of copyright, the defendants are not interfering with their programme and thus not interfering with the copyright of the second plaintiffs. As regards advertisements component of the programme is concerned, Mr. Kapadia argues that copyright does not vest in any of the plaintiffs. Mr. Kapadia also argues that there was no binding contract between the plaintiffs and the defendants. He submits that the defendants are not bound to comply with the conditions imposed by the plaintiffs, He submits that the defendants had a right to and are entitled to use their own equipments in such a manner as they like, including switching off of the plaintiffs' signal and substituted their own broadcast during the plaintiffs programme. Mr. Kapadia submits that it was the third plaintiff who were broadcasting. The third plaintiffs had no copyright in India. Therefore, there is no infringement of the copyright of the third plaintiffs.

29. It is true that neither British Virgin Island nor Hong Kong are parties to Berne Convention and, therefore those countries do not have any arrangement with India whereby copyright in their country are recognised in India. But the arguments of Mr. Kapadia overlooks the fact that what is broadcast by the third plaintiffs is one composite programme. That composite programme consist of entertainment portion supplied by the second plaintiffs and the advertisement portion. But the advertisement portion is an essential part of entertainment programme. Without the advertisement it would be difficult to sustain the entertainment part. Therefore, any interference with the advertisement part has a direct, result of interfering with the entertainment part also. The two components of the programme cannot, be separated in the manner as suggested by Mr. Kapadia. Admittedly, the second plaintiffs have copyright in the entertainment part. As exclusive licensee the third plaintiffs are also owners of the copyright in India of the entertainment part. If the interference affects this part, then copyright in India is infringed. Thus the plaintiffs have cause of action against the defendants under the copyright Act.

30. The plaintiffs have also based their cause of action on "Broadcast Reproduction Right" under Section 37 of the Act. Mr. Kapadia's argument is that since the third plaintiffs are operating from countries which are not parties to the Berne Convention, they have no right to seek protection of Section 37 since the whole Act is inapplicable so far as the third plaintiffs are concerned. In this behalf reliance is placed by Mr. Kapadia on Section 40 of the Act and International Copyright Order, 1991 issued by the Central Government under Section 40. We are unable to accept the argument of Mr. Kapadia. In our view the right conferred under Section 37 is available to all broadcasting organisations, wherever they are situated, so long as the broadcast is available in India for viewing. Sub-section (1) of Section 37 clearly provides that every broadcasting organisation shall have a special right to be known as "broadcasting reproduction right" in respect of its broadcast. Under Sub-section (2) it is provided that the broadcast reproduction right shall subsist until 25 years from the beginning of the calender year next following the year in which the broadcast is made.

Sub-section (3) provides that any person who, without the licence of the owner of the right rebroadcasts the broadcast or causes the broadcast to be heard or seen by the public on payment of any charge or does any other acts mentioned in the said sub-section, shall be deemed to have infringed the broadcast reproduction right. The language of the section makes it very clear that the right is not confined only to Berne Convention countries. This is also clear from the fact that the International Copyright Order, 1991 exclude the application of Chapter VIII which deals with broadcast reproduction right. Under the broadcast reproduction right nobody can rebroadcasts the broadcast or cause the broadcast to be seen or heard by the public on payment of any charge without a licence from the owner. Therefore, the defendants cannot broadcast the third plaintiffs programme nor cause the third plaintiffs to be heard or seen by the public on payment of charges without licence from the plaintiffs. Mr. Kapadia submitted that since the plaintiffs programme was "Free to Air", the defendants did not need a licence. However, it is required to be noted that the programme is "free to air" subject to the conditions imposed by the plaintiffs. Therefore, if the defendants want to avail of the "free to air" programme they can only do so provided they comply with the conditions laid down by the plaintiffs. It is not open to the defendants to state that they would rebroadcast the broadcast or cause the programme to be seen or heard by the public on payment of charges, but they would not be bound to comply with the conditions laid down by the plaintiffs. It appears that the plaintiffs are issuing a form of certificate to various cable operators. This certificate is in effect a licence. In our view the defendants can only avail of the "free to air" programme provided they agree to and comply with the conditions laid down by the plaintiffs. This would necessarily mean that the defendants must communicate or broadcast the plaintiffs programme in its entirety, including the advertisement portion. It will not be permissible for the defendants to substitute the plaintiffs advertisements with their own advertisements.

31. Mr. Chagla also brought to our notice the provisions of the Cable Television Networks (Regulation) Act, 1995. Under Section 2(g) of the Act "programme" means any television broadcast and includes any exhibition of films, features, dramas, advertisements and serials through video cassette, recorders or video cassette players. Under Section 6 no person shall transmit or retransmit through a cable service any advertisement unless such advertisement, is in conformity with the prescribed advertisement Code. The proviso, however, states that this section would not apply to programmes of foreign satellite channels which can be received without the use of any specialised gadgets or decoder. In view of Section 6 the advertisements contained in the broadcast of the third plaintiffs need not be in conformity with the advertisement Code By substituting their own advertisements through the plaintiffs programme, the defendants can effectively not comply with the advertisement Code on the ground that these are through the programme of foreign satellite channels. They can thus commit a breach of the Indian law.

32. In our opinion, the plaintiffs have made out a strong prima facie case. Even the balance of convenience lies in favour of the plaintiffs.

33. In the result, the appeal is dismissed. No order as to costs. Application is rejected.