

M/S. International Film Distributors vs Shri Rishi Raj on 23 October, 2008

Author: Manmohan Singh

Bench: A.K. Sikri, Manmohan Singh

* HIGH COURT OF DELHI : NEW DELHI

+ FAO (OS) No.81/2002

Reserved on : 5th August, 2008

% Decided on: 23 October, 2008

M/s INTERNATIONAL FILM DISTRIBUTORS ...Appellant
Through : Mr. D.S. Narula, Adv. with Mr. A.S.
Narula,Adv.

Versus

SHRI RISHI RAJRespondent
Through : Mr. Harish Malhotra, Sr. Adv.
with Mr. Vipul Gupta, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. This appeal is directed against the order dated 18th January, 2002 passed by the learned Single Judge of this Court whereby the appellant s (hereinafter referred to as „defendant) application under Order 7 Rule 10 of the CPC being I.A. No. 8262/2000 seeking return of the plaint to the respondent (hereinafter referred to as „plaintiff") to be presented in the court having proper jurisdiction was dismissed and plaintiff s application under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 being I.A. No. 7236/2000 seeking injunction restraining the Defendant, its employees, agents and representatives from in any manner interfering in the negative rights, sole and exclusive commercial and non-commercial video rights in all formats, including CVD, DVD,

satellite and television rights (both terrestrial and extra- terrestrial), cable T.V. rights, pay T.V. rights and the available theatrical rights for all India and overseas territories i.e. the entire world including India, in picture „KOHINOOR till the disposal of the suit has been allowed.

2. Brief facts relevant for deciding this appeal are that the plaintiff is carrying on the business of film distribution, exhibition and exploitation of cinematographic films and is also dealing in satellite right and negative rights of cinematograph films.

3. A cinematographic film „KOHINOOR was produced by M/s Republic Films Corporation, whose producer was later declared as insolvent and all assets of the said producer were taken over by the Official Assignee of Bombay High Court and thus the entire negative right of the picture „KOHINOOR including the negative rights, sole and exclusive commercial and non-commercial video rights in all formats including CVD, DVD, satellite and television rights (both terrestrial and extra terrestrial), cable TV, Pay TV rights and the available theatrical rights for All India and overseas territories i.e. the entire world including India allegedly vest with the Official Assignee of the Bombay High Court.

4. One M/s A.G. Exports who were already enjoying the rights of the above said movie made an offer of Rs. 75,000/- on 1st June, 2000 to the Official Assignee for acquiring the sole and exclusive rights for further 10 years from 1st January, 2000.

5. The Official Assignee made a similar offer to various people including the plaintiff vide letter dated 27 th July, 2000 whereby it was made clear that the distribution rights of the said picture are perpetually held by M/s Seth & Sayyed for U.P., Delhi, East Punjab, CPCI, Nizam Circuit under agreement dated 24th August, 1962, thus, only the other rights were available with the Official Assignee for sale.

6. It was submitted that at the first instance, the plaintiff in response to the said letter, made an offer vide his letter dated 26 th August, 2000 to purchase the said rights for Rs.2 lakhs and deposited a banker s cheque for Rs.50,000/- which was duly acknowledged by the Official Assignee on 29th August, 2000. The plaintiff by offering the highest bid of Rs. 14,10,000/- on 30th August, 2000 got the said rights and an agreement dated 20th December, 2000 was executed by the Official Assignee in favour of the Plaintiff.

7. It was alleged that in view of the agreement dated 20 th December, 2000, the plaintiff has been granted negative rights, sole and exclusive commercial and non-commercial video rights in all formats, including CVD, DVD, satellite and television rights (both terrestrial and extra terrestrial), cable TV rights, Pay TV rights and the available theatrical rights of the said picture Kohinoor for all India and overseas territories i.e. the entire world including India, for ten years commencing on 1st January, 2000 on „as is where is basis irrespective of the condition of the negative subject to existing valid rights, liens, charges etc if any of any party and all encumbrances and adverse claims if any. It is averred in the plaint that after grant of the said rights, it is the plaintiff who is now entitled to deal with the said picture Kohinoor in respect of the said rights and nobody else can interfere in the said rights.

8. It was stated that before the said agreement could be executed, the plaintiff received a letter dated 10 th October, 2000 from the defendant stating that they have also certain rights in the said film, but along the said letter the defendant did not enclose a copy of any agreement in regard to their alleged rights. In reply to the abovesaid letter dated 27th October, 2000 was written by the plaintiff to the defendant alleging that the defendant has no right nor the defendant s name ever appeared in the notice of auction along with other right holders and called upon the defendant to produce a copy of the agreement so that the same could be verified.

9. In response to the said letter the defendant furnished a photo copy of agreement alleged to have been signed by the defendant with the producer and asserted that they were holding rights for overseas excluding India, Burma, Pakistan, Ceylon, Aden, Continent of Africa, Complete Middle East, West Indies, Fiji UK, and Greece and has alleged that there is an agreement dated 13 th October, 1961 with M/s. Republic Films Corporation.

10. It was further alleged that the said rights of the claim by the defendants were never disclosed by the official was not at any point of time and the plaintiff have no information in this regard and even if it is presumed that the defendant has any right then it is only theatrical distribution rights for certain overseas countries. When the said agreement dated 13th October, 1961 was executed there was no satellite rights or video rights, video rights came in vogue in 1970s while the satellite rights came in vogue in 1990s and thus the defendant cannot allege that they are holding the said video rights and satellite rights and in fact the defendant has no right to interfere in the negative rights, sole and exclusive commercial and non-commercial Video rights in all formats including CVD, DVD, satellite and television rights (both terrestrial and extra terrestrial), cable TV rights, Pay TV rights and the available theatrical rights for All India and overseas territories i.e. the entire world including India, but despite that the defendant has been interfering in the said rights of the plaintiff by illegally writing letters to Zee TV, Sony TV and other satellite channels as a result of which the plaintiff has not been able to enjoy such rights. It would be pertinent to note that even as per allegation, though it is not recorded by the Official Assignee the defendant has only theatrical distribution right over certain overseas countries and thus the defendant cannot allege having any right in satellite channels. Lastly it was alleged that defendant has no authority to interfere in the said right as it would mean that the plaintiff has paid the money and got nothing.

11. The defendant filed the written statement raising various pleas, inter-alia, that this Court has no territorial jurisdiction to entertain and try the suit, the suit does not disclose any cause of action etc. Defendant averred in the written statement that the rights acquired by the plaintiff from the Official Assignee, High Court of Bombay under agreement dated 20th December 2000 are clearly subject to the existing rights of various parties.

12. The Defendant also filed an application under Order 7 Rule 10 of CPC for return of the plaint for presentation before appropriate courts on the grounds that this court does not have the territorial jurisdiction and submitted that plaintiff is claiming the alleged rights in respect of picture under agreement dated 20th December, 2000 which provides that only the Courts in Bombay will have the jurisdiction to entertain the matter.

13. It was alleged by the defendant that he is carrying on business of exploitation, exhibition and distribution of Hindi feature film throughout the world and by two agreements dated 13 th October 1961 and 9th October 1963 the producer of the feature film Kohinoor granted to the defendants the sole, exclusive and proprietary copyrights for exploitation, distribution and exhibition of commercial as well as non-commercial rights in respect of the said feature film Kohinoor in 35mm as well as reduced size and sizes including the rights of Television and all other rights attached to that exploitation, exhibition and distribution for the territories i.e. complete world excluding India, Burma, Pakistan, Ceylon, Aden, continent of Africa, complete Middle East, West Indies, Fiji, UK and Greece (hereinafter called the contracted territories) against the consideration paid to the producer and, therefore, the defendant has absolute rights in their favour.

14. It was alleged by the defendant that the producer of the said film has subsequently become insolvent and all his rights and properties have been vested in the Official Assignee of the High Court of Bombay. The Official Assignee, High Court of Bombay had invited claims and the defendant by letter dated 11th October 2000 informed about his right in respect of the said film to the Official Assignee who has not responded to the said letter and the defendant was under the impression that the Official Assignee is deemed to have accepted the contents of the said letter.

15. However, the defendant further alleges that the Official Assignee, High Court of Bombay has entered into an agreement with the plaintiff in respect of the said film but the said assignment is subject to the right already created in favour of the existing parties and in view of the said contention the Official Assignee and the plaintiff has accepted the said rights of the defendant, therefore, now the plaintiff is estopped from challenging the said rights of the defendant which is barred by law as the plaintiff was aware about the claim of the defendant. That the defendant was not aware about the infringement of copyright of the said film by M/s. A.G. Exports, therefore, the defendant did not take any action in the matter.

16. We have perused the rival submissions of the parties, pleadings and documents. Now, we shall deal with the submissions made by learned counsel for the parties.

17. The main questions for determination are regarding the question of territorial jurisdiction of this Hon ble court and as to whether the defendants right in the picture Kohinoor includes only copyrights of exploitation, distribution and exhibition and does not include the video rights in all formats including CVD, DVD, Satellite and Television rights (both terrestrial and extra terrestrial) Cable TV and Pay TV rights and theatrical rights and whether the plaintiff is entitled for injunction as prayed for on the basis of the rights taken over from the Official Assignee of the Bombay High Court. We feel that the main controversy between the parties centers around the territorial jurisdiction of this Court to entertain and try the present suit in this court or not and in view of the rights, if available whether the plaintiff is entitled for injunction as prayed for on the basis of these rights, as claimed.

18. First, we will consider the question of territorial jurisdiction raised by the defendant in the matter. The plaintiff has invoked the jurisdiction of this Court as per Para 15 of the plaint which is reproduced herein-below for the sake of convenience:-

"That the cause of action arose at Delhi as the plaintiff enjoys the rights of film Kohinoor at Delhi. The defendant has advanced the threat to interfere in the right of the plaintiff at Delhi, therefore, this Hon ble court has the jurisdiction to try and adjudicate upon the present suit."

19. The learned single Judge while deciding the question of jurisdiction has observed as under:-

"The jurisdiction of the court does not depend upon the defence taken by the defendant and it is the allegation made in the plaint which decide the forum as was held in the case of P.M.Diesel Ltd vs. Patel Field Marshal, reported in AIR 1998 Delhi 225. In view of the nature of statement made in the plaint read with the documents placed on record, I am of prima facie opinion that this Hon ble court has the jurisdiction to try this suit. This, however, is my tentative view at this stage only for the purpose of deciding of issue of grant of interim injunction. The right, which is claimed by the plaintiff pursuant to agreement with the Official Assignee dated 20 th December 2000 could be prima facie established by the plaintiff in Delhi. The plaintiff has also claimed injunction regarding threatened breach of its rights at Delhi and, therefore, prima facie it cannot be said that this Hon ble court does not have the territorial jurisdiction."

20. Since the matter pertains to the infringement of copyright also, therefore, it is necessary to refer to Section 62(2) of the Copyright Act, which reads as under:-

"Section 62(2):- for the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding 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 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."

21. This provision of Copyright Act shows that the jurisdiction for the purpose of Section 62 is an additional ground to invoke the jurisdiction as prescribed under Section 20 of the Code of Civil Procedure, 1908. In Exphar S.A. vs. Eupharma Laboratories 2004 SC 251 at Paras 13 & 15 it was observed as under:-

Para 13. Even if the jurisdiction of the Court were restricted in the manner construed by the Division Bench, it is evident not only from the cause title but also from the body of the plaint that the appellant No.2 carries on business within the jurisdiction of the Delhi High Court. The appellant No.2 is certainly "a person instituting the suit". The Division Bench went beyond the express words of the statute and negated the jurisdiction of the Court because it found that the appellant No.2 had not claimed ownership of the copyright of the trademark infringement of which was claimed in the suit. The appellant No.2 may not be entitled to the relief claimed in the suit but that is no reason for holding that it was not a person who had instituted the suit

within the meaning of Section 62(2) of the Act.

Para 14. Furthermore, the appellants' plaint said that the 'cease and desist' notice was sent to the appellant No.2 at its office in New Delhi and in that notice it was alleged that the appellant NO.2 had infringed the copyright of the respondent No.2 to the trademark '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.

22. In Tata Iron & Steel Co. Ltd. V. Mahavir Steels & Ors.; 47(1992) DLT 412 it was observed in paras 11&13 as under :

"11. The question regarding jurisdiction can only be gone into after the evidence of the parties is recorded in the case. Even in the Punjab case the suit was not thrown out at the threshold under Order 7 Rule 11 CPC but only after the parties were given an opportunity to lead evidence. The plaint in the present suit categorically states that the defendant no.1 was selling the channels of defendant no.2 under the offending trade mark which is deceptively similar to that of the plaintiff. On these averments the Court must assume jurisdiction and proceed with the suit to determine the question relating to the confirmation/vacation of the stay order at this stage."

23. This aspect has been decided by Justice Badar Durez Ahmed in Pfizer Products Inc. Vs Rajesh Chopra & Ors, 2006(32) PTC 301(Delhi) wherein it was observed as under :-

"12. The other aspect of the matter is that a threat of selling the offending goods in Delhi would in itself confer jurisdiction in the courts in Delhi to entertain a suit claiming an injunction in respect thereof. Whether the threat perception is justified or not is another matter which has to be considered and decided upon in the application filed by the plaintiff under Order 39 Rules 1 and 2 or on merits when the suit is taken up for disposal. Insofar as Order 7 Rule 10 is concerned, assuming that whatever is stated in the plaint is correct, one would have to also assume that the threat or the intention of the defendants to sell and offer for sale the offending goods in Delhi is also correct. Therefore, if the threat exists then this court would certainly have jurisdiction to entertain the present suit."

24. In LG Corporation & Anr. Vs Intermarket Electroplasters(P) Ltd. and Anr.; 2006 (32) PTC 429, following observations were made in para 7 :-

"7.The question as to whether the Court has territorial jurisdiction to entertain a suit or not has to be arrived at on the basis of averments made in the plaint, that truth or otherwise thereof being immaterial as it cannot be gone into at this stage....."

25. In the present case it is an undisputed fact that the plaintiff is residing and carrying on business within the territory of this Hon ble court. The allegation made in the plaint is also that the defendant has advanced threat to interfere in the rights of the plaintiff at Delhi. Further the suit is also for the infringement of copyright. In view of the specific averments made in the plaint, we hold that the finding of the learned single Judge is correct that this Hon ble court has got the territorial jurisdiction to try the suit. In these circumstances the plea taken by the defendant in the appeal as well as the application has no force, untenable and is hereby rejected.

26. As regards the next controversy in this appeal is concerned, the submission of the defendant is that on 30th October 1961 M/s. Republic Film Corporation, Bombay, Producer of the picture Kohinoor executed the film distribution agreement in favour of the appellant thereby assigning distribution, exhibition and exploitation rights of the said picture including Television rights mentioned in the agreement for the territories i.e. complete world excluding India, Burma, Pakistan, Ceylon, Aden, continents of Africa, complete S.U. Sunny, Middle East, Complete Far East, West Indies, Fiji, UK and Greece.

27. Apart from the aforesaid as per clause (1) of the agreement the producer also assigned the sole and exclusive and perpetual copyrights of exploitation, distribution and exhibition commercial as well as non-commercial in respect of the said picture Kohinoor in 35 mm as well as in reduced size or sizes including the right of television and all other rights attached to such distribution, exploitation and exhibition of the said picture for a consideration of Rs.10,000/-. The price include price of copyright and prints and publicity material. As per clause (5) further rights are granted in favour of the appellant by virtue of the said agreement and the same are reproduced herein-below:-

"The Assignor hereby agree and undertake that the said picture shall not be exhibited or distributed commercially, non-commercially or in any other manner in the contracted territory either by themselves, their servants or agents or otherwise and hereby agree to indemnify and keep indemnified the Assignees against such unauthorized distribution or exploitation of the said picture in the contracted territory. Any breach in this connection will make the Assignors liable to damages which in no case shall be less than the amount of the said price."

28. Learned Senior counsel for the plaintiff has argued that the said two agreements are false, fabricated, manipulated and arranged documents. He also argued that the defendant was fully aware about the assignment in favour of the plaintiff before the official assignee and Bombay High Court. Learned counsel has further argued that the appellant did not take any action against M/s. A.G. Exports who was exploiting the picture at earlier point of time but now the defendant is trying to interfere in the same when the plaintiff has purchased the rights and cooked up the pleas in order to blackmail the plaintiff and to extract money for which the defendant has no right.

29. We have perused the pleadings and find that the plaint is silent about the alleged averment of the false and fabrication of the said agreements. The said plea was taken by the plaintiff first time in the replication. Rather in Para 10 of the plaint the plaintiff has stated the different facts, the relevant portion of Para 10 of the plaint is reproduced below:-

"10. That even if it is presumed that the defendant has any right then it is only theatrical distribution rights for certain overseas countries. When the said agreement dated 13th October, 1961 was executed there was no satellite rights or video rights came in vogue in 1990s and thus the defendant cannot allege that they are holding the said video rights and satellite rights and in fact the defendant has no right to interfere in the negative rights, sole and exclusive commercial and non-commercial Video rights in all formats, including CVD, DVD, satellite and television rights (both terrestrial and extra terrestrial), cable TV rights, Pay TV rights and the available theatrical rights for All India and overseas territories i.e. the entire world including India, but despite that the defendant has been interfering in the said rights of the plaintiff by illegally writing letters to Zee TV, Sony TV and other satellite channels as a result of which the plaintiff has not been able to enjoy such rights....."

30. As regard the second submission of the learned counsel of the plaintiff that the defendant did not raise any objection when the picture was being exploited by M/s. A.G. Exports, the defendant has made the submissions in the written statement that the defendant was not aware about the same otherwise action would have been taken against the said firm.

31. Next submission of the plaintiff relates to the knowledge about the assignment of the film Kohinoor through official assignee and later on said assignment being confirmed by the Bombay High Court, the justification given by the defendant is that the defendant had written various letters to official assignee about the earlier rights in its favour and further the assignment in favour of the plaintiff was subject to the existing valid rights, lien, charges etc, if any, by any party and all encumbrances and adverse claims, if any, created by the producer and further the distribution rights are granted to the respondent on "as is where is basis". Learned counsel for the defendant has argued that having not contested the assignment proceeding before the official assignee and in the Bombay High Court, it does not affect the legal rights of the defendant due to the reason that the assignment in favour of the plaintiff was subject to the above mentioned conditions and the defendant always has the chance to assert its legal rights.

32. While considering the application of injunction the learned single Judge has granted the interim orders by giving the finding against the defendant on the reasons the defendant was duly represented before the official assignee as well as before the Bombay High Court and since the plaintiff has acquired the bonafide claim in respect of the aforesaid claim, therefore, prima facie, the plaintiff has arguable case in his favour. Another reason for granting the interim order by the learned single Judge was that the defendant, if at all, acquired the right in the year 1961 the said rights are related to particular overseas areas. On the basis of these main findings the learned single Judge granted the interim injunction against the appellant.

33. In view of the above said submissions of the learned counsel for the parties and facts stated in the pleadings, the question before us is as to whether the defendant has any right in the picture Kohinoor for exploitation, distribution and exhibition does or does not include video rights in all forms including CVD, DVD, Satellite and Television rights (both terrestrial and extra terrestrial), Cable TV and Pay TV rights and theatrical rights by virtue of the two agreements or the plaintiff is

entitled for injunction as claimed. We may point out that on the subject matter of the present dispute two separate views on the same legal proposition have been taken by the different High Courts.

34. One view which has been taken by the Madra High Court in the case of Raj Video Vision vs. K. Mohanakrishnan and another; AIR 1998 Madras 294 at para 10 page 297 : -

"10.....However, the conclusion which can be arrived at is that when the producers themselves were not aware of their future rights accrued due to scientific advancements, it cannot be said they had already transferred the rights not in existence by way of assignments. The assignments cannot be made on rights not in existence and therefore it can be safely decided that the video rights of the film were not given to the assignees M/s Azam and Company and the assignee in turn an assignors could not have assigned the video rights to the 2nd defendant herein."

In para 13 of the above said judgment the learned High Court has also referred another decision of Madras High Court in Raj Video Vision, Registered Partnership Firm Rep. by its Partners vs. M/s. Sun T.V. (1994) 2 LW 158 who has also taken the almost the same view. The relevant portion of para 13 is reproduced hereunder :-

"13.....while considering the satellite right which was not contemplated in the year 1986, it was held "what was not contemplated at the time of agreement cannot be claimed by the applicants now". While considering this view taken by the learned Judge which is more appropriate to the present case and if that view is taken for consideration in the instant case, in the year 1961 when the Negative Right was given to M/s. Azam and Company neither party could have dreamt of the later scientific advancements of video, satellite, etc. could not have assigned or granted those rights."

35. The second view is taken by the Bombay High Court on the same point. In the case of Maganlal Shivani vs. Khosla Enterprises wherein the present defendant was the plaintiff in Suit No. 925/99 S.S.Nijjar, J, vide order dated 17th August 1999 has considered the same point and has given his finding in Para 7 of the judgment which is reproduced herein below:-

"7. I have considered the arguments put forward by the learned counsel for the parties. A perusal of clause(1) of the agreement shows that the plaintiff has been granted the sole exclusive and perpetual copyrights of exploitation, distribution and exhibition , commercial as well as non-commercial, in respect of the said pictures in 35mm, as well as any reduced size or sizes. This includes the rights of television and all other rights attached to such exploitation. These rights have been assigned to the plaintiff for the price of £16,700 (Pound Sterling Sixteen Thousand Seven Hundred only). The overseas territories are mentioned which include USA and Canada. In my view, the most natural meaning to be given to the aforesaid clause is that plaintiff has been given perpetual copyrights of exploitation, distribution and exhibition of films.

These rights include the rights of television and all other rights attached to such exploitation. The phrase all other rights attached to such exploitation cannot be read to mean that the other rights referred only to television right. The clause clearly shows that the plaintiff is the sole exclusive and perpetual copyright holder for exploitation of the films. The size of the pictures viz. 35 mm. as well as any reduced size or sizes cannot be read to mean that all other rights where the film is exhibited through the medium of video cassettes and DVD has been excluded. Ultimately what was assigned to the plaintiff was the right to exploit and exhibit the films through different sizes of the film and by the medium of television. Video cassettes, VCD and DVD are only improved versions of exhibiting the film. What was earlier done by the spool containing the film, is now being done by video cassettes and DVDs. Satellite broadcasting can also not be said to be excluded from the television rights which had been granted to the plaintiff. By using the satellite channels the plaintiff is still exhibiting the films on television. In fact the clause clearly indicates that all rights for exploiting the film had been assigned to the plaintiff. Prima facie, I am also of the view that the defendants have acted in infringement of the negative covenant contained in clause 5 of the agreement. The judgment relied upon by Mr. Shah in the case of Video Master (supra) is distinguishable. Therein the court was interpreting a clause pertains only to the assignment of video right. The court accepted that there are several ways of communication and each one is separately divisible and can exist in different persons at the same time. There is no dispute with the aforesaid proposition. The court, however, has to construe clause 1 of the agreements in the present suit which has assigned all the copyrights to the plaintiffs without any restrictions. Prima facie, I am of the view that no restrictions can be placed on the enjoyment of the copyright of the film which is vested in the plaintiff only on the ground that the mode of execution in the film had not been invented at the time when the agreement had been entered into. With regard to jurisdiction of this court, I am of the considered opinion that by virtue of section 62 (2) of the Copyright Act, it is not necessary to seek leave under clause 12 of the Letters Patent. I am also satisfied that the copyright of the plaintiff has been infringed within the territorial jurisdiction of this court by defendants No.1 to 3 by entering into an agreement with defendant No.4 with regard to satellite and video rights. This agreement has been entered in Bombay."

36. The said order was also challenged before a Division Bench of the Bombay High Court by the defendant in Appeal No. 1246/99 in the case of Khosla Enterprises and others vs. Maganlal Savani. The said appeal was dismissed on 10th January 2000 by a Division Bench consisting of Y.K.Sabharwal, J. (as his Lordship then was) and Smt. Ranjana Desai, J, confirming the order passed by Nijjar,J.

37. The same view was taken by the Bombay High Court in another case reported in 2000 PTC 556 in the case of Maganlal Savani vs. Roopam Pictures Pvt Ltd. The relevant Paras 5 and 6 of the said judgment are reproduced herein below:-

"Para 5. The defendants contested the application and submitted that the telecasting of the picture through Satellite was not assigned to the plaintiff. The counsel appearing for them submits that in fact in the year 1973 when the agreement was executed between the parties, this satellite television was not under the contemplation of the parties at all. Therefore the plaintiff No. 1 cannot object to any other party doing satellite telecast of the picture as it is not in the contracted territory. Prima facie the contention of the learned counsel for the defendants that in 1973 the parties would never envisage that the picture should be given for satellite telecasting to the plaintiff No. 1, appeared to be sound. But the rights which was assigned to the plaintiff No.1 is to take the satellite telecasting or any other manner which may be able to do by the first plaintiff through scientific device or technology. In this context it is relevant to quote the relevant paragraph of the agreement.

The Assignors hereby agree and under-take that the said picture shall not be exploited or distributed or exhibited commercially, non-commercially or in any other manner whatsoever, in the contracted Territory, either by themselves, their servants or agents or otherwise and hereby agree to indemnify and keep indemnified the Assignees against such unauthorized distribution or exploitation or exhibition of the said picture in the contracted territory. Any breach in this connection will make the Assignors liable to the damages which in no case shall be less than twice the amount of the price.

Para 6. What is assigned to the first plaintiffs the exploitation, distribution and exhibition commercially or otherwise of the picture. In this context we have to give a wider meaning of the term "exploitation".

Exploitation of a film takes in all the scientific and technological device that may be invented in future also and the plaintiff could make use of those inventions. Given such an interpretation of the word "exploitation" the objection raised by first plaintiff in conducting satellite telecasting of the picture "Chupke Chupke"

will per se violative of the provisions of the agreement. The similar view has been taken by this court in the context of interpreting similar contract in Notice of Motion No. 8663/99 dated 17th August 1999. I need not go into the details of that order because the matter has been taken in appeal before the Division Bench of this Court and Division Bench of this Court by order dated 10.1.2000 in Appeal No. 1246/99 upheld the order of the learned single Judge and held that the exploitation is taking of the kind of exploit, including the internet, satellite telecast. It is profitable to quote the observation of the Division Bench.

We find no infirmity in the prima facie opinion expressed by the learned single Judge that the phrase all other rights attached to such exploitation cannot be read to mean that the other rights referred only to television rights and the clause shows that the plaintiff is the sole exclusive and perpetual copyright holder for exploitation of the

films in question.

In view of this, I find that the agreement executed between the first plaintiff and the first defendant will take in satellite telecast of the said film also."

38. In a recent judgment of the Bombay High Court reported in 2008 (Vol. 110) Bombay Law Reporter 925 in the case of Maganlal Shivani Vs. Uttam Chitra by V.V. Chandrachud, J. the Hon ble court while considering the earlier judgment at length agreed with the judgment of Nijjar, J. (as his Lordship then was). The relevant Paras 4 and 5 of the said judgment are reproduced below:-

"4. The Assignors hereby agree and undertake that the said Picture shall not be exploited or distributed or exhibited commercially, non-commercially or in any other manner whatsoever, in the Contracted Territory either by themselves, their servants or agents or otherwise and hereby agree to indemnify and keep indemnified the Assignees against such unauthorized distribution or exploitation or exhibition of the said picture in the Contracted Territory.

By virtue of Clause (1), the assignor (the First Defendant) has granted to the assignee, "the sole, exclusive and perpetual copyright of exploitation, distribution and exhibition, commercial as well as noncommercial, in respect of the said pictures in 35 mm as well as in reduced size or sizes..." for the territories spelt out therein. Exploitation is an act or process of exploiting, making use of or working up; a process of utilization by the application of industry (Black's Law Dictionary, 5th Edition page 519. P.Ramanatha Aiyar, Law Lexicon, Vol.II, page 724). The provisions of Clause (1) must prima facie be juxtaposed together with Clause (4) under which the assignors have agreed and undertaken that the films shall not be exploited or distributed or exhibited commercially, non-commercially or in any manner whatsoever in the contracted territory. The positive act of assignment in Clause (1) is coupled with the negative obligation precluding the assignors from exploiting the films in the contracted territories.

4. The right which has been assigned is to exploit, distribute and exhibit the film in 35 mm as well as in reduced size or sizes, including all the rights of Television, High Seas, Air "and all other rights attached to such exploitation, distribution and exhibition". The assignment of these rights is prima facie absolute.

5. Prima facie, at the ad-interim stage, the interpretation of Clause (1) of the Agreement of assignment in the present case is not res integra. A similar clause came up for interpretation before S.S. Nijjar, J (as the Learned Chief Justice then was), in a judgment dated 17th August 1999 in Maganlal Savani v. Khosla Enterprises (Notice of Motion 863 of 1999 in Suit 925 of 1999). It was urged on behalf of the Defendants that at the time when the agreement was executed in 1971-72, there was no occasion to assign copyrights in Video, satellite transmission and DVD since such media was unknown on the date of the agreement and only rights for exhibiting of the film were

assigned together with terrestrial television. The Learned Single Judge, while rejecting the submission, held as follows:

A perusal of Clause (1) of the agreement shows that the Plaintiff has been granted the sole exclusive and perpetual copyrights of exploitation, distribution and exhibition, commercial as well as non-commercial, in respect of the said pictures in 35 mm as well as any reduced size or sizes. This includes the rights of television and Page 0931 all other rights attached to such exploitation.... In my view, the most natural meaning to be given to the aforesaid clause is that Plaintiff has been given perpetual copyrights of exploitation, distribution and exhibition of films. These rights include the rights of television and all other rights attached to such exploitation. The phrase all other rights attached to such exploitation cannot be read to mean that the other rights referred only to television rights.

One of the submissions which was urged before the Learned Single Judge was that the reference in Clause (1) to a 35 mm or reduced size of film would show that Video Cassettes and DVDs were excluded. Rejecting the submission, the Learned Single Judge, while upholding the case of the Plaintiff, held thus:

The size of the pictures viz., 35 mm. as well as any reduced size or sizes cannot be read to mean that all other rights where the film is exhibited through the medium of video cassettes and DVD has been excluded. Ultimately what was assigned to the Plaintiff was the right to exploit and exhibit the films through different sizes of the film and by the medium of television. Video cassette, VCD and DVD are only improved versions of exhibiting the film. What was earlier done by the spool containing the film, is now being done by video cassettes and DVDs. Satellite broadcasting can also not be said to be excluded from the television rights which had been granted to the Plaintiff. By using the satellite channels the Plaintiff is still exhibiting the films on television. In fact the clause clearly indicates that all rights for exploiting the film had been assigned to the Plaintiff.... Prima facie, I am of the view that no restrictions can be placed on the enjoyment of the copyright of the film which is vested in the Plaintiff only on the ground that the mode of exhibition of the film had not been invented at the time when the agreement had been entered into.

The judgment of Mr. Justice Nijjar was carried in appeal and a Division Bench of this Court in its order dated 10th January 2000 (*Khosla Enterprises v. Maganlal Savani*, Appeal 1246 of 1999) held thus:

Having heard Learned Counsel for the parties and read various clauses of the Agreement dated 21st October, 1970, in particular Clause 1 thereof, we find no infirmity in the prima facie opinion expressed by the Learned Single Judge that the phrase 'all other rights attached to such exploitation' cannot be read to mean that the other rights referred only to television rights and the clause shows that the Plaintiff is the sole, exclusive and perpetual copyright holder for exploitation of the films in

question.

The Division Bench, however, directed the Plaintiff to the suit to maintain accounts in respect of the exploitation of the films. The same view of the Learned Single Judge has been reiterated in a judgment of T.K. Chadrashekhara Das, J. dated 20th June 2000 in Maganlal Savani v. Rupam Pictures (P) Ltd. (Notice of Motion 1481 of 2000 in Suit 1806 of 2000. A judgment of another Learned Single Judge, S.U. Kamdar, J. in Page 0932 Shemaroo Video P. Ltd. v. Movie Tee Vee Enterprises, 2006(1) All MR 37, adopts the same line of reasoning. An Appeal against the judgment of Kamdar J. is stated to be pending. The judgment of S.S. Nijjar, J., as noted earlier, has been approved by the Division Bench.

39. In A.A. Associates vs. Prem Goel & Ors, AIR 2002 Delhi 142 decided by V. S. Aggarwal, J, the Delhi High Court had also an occasion to deal with both the views i.e. one was taken by the Madras High Court and another by the Bombay High Court and Hon ble Judge has agreed with the view taken by the Bombay High Court. The relevant Paras 17- 20 of the said decision are reproduced below:-

"17. It is common knowledge that with the passage of time the television rights have assumed great importance. Whenever an agreement therefore has been arrived at the intention of the parties cannot be lost sight of. The intention of the parties will spell as to what exactly was agreed and intended to be performed by the parties.

18. Reference in this connection can well be made to the decision from the Madras High Court in Raj Video Vision vs. M/s Sun TV 1994-2-LW.158. Somewhat a similar question came up for consideration in that court. It was held that intention of the parties have to be determined to find out as to whether it included all other rights or it was confined to features or television or satellite. The Madras High Court held that satellite television broadcasting right is an independent right for which a copyright could not have claimed. It was further held:

".....Thus, looked at from any angle, satellite TV broadcasting rights are independent rights and the same have to be assigned specifically and so far as such rights have not been assigned in favour of the applicant/plaintiff specifically, the plaintiffs cannot claim any copyright in the same or seek any order of injunction on the ground of alleged infringement by the defendant. The plaintiff//applicants therefore in my opinion have no prima facie case....."

19. The attention of the court has also been drawn towards the decision of the Bombay High Court in the case of Video Master vs. Nishi Productions 1998 PTC (18) 117. The Bombay High Court referred to the differences and clauses/species of the communication and held that theatrical rights include the right to exhibit the cinematograph film in theatres, terrestrial rights is the right to exhibit the film on Doordarshan and satellite broadcasting rights is the right to exhibit/communicate the film by satellite signals to public with or without cable and through the satellite medium. While the cable

TV right is right to exhibit a film by cable originated programme.

20. One finds itself in respectful agreement of these pleas as projected by the defendants. It is true that in the agreement it has not specifically been mentioned that the rights exclude the cable television or any other satellite rights but the intention of the parties can easily be inferred from the nature of the transaction that had been arrived at....."

40. After having gone through the above said decisions, we are of the view that there cannot be any restriction being imposed on the enjoyment of copyright which is vested with the earlier exclusive owner on the ground that the exhibition of the film on DVD and satellites and video have not been invented at the time when the agreement had been entered into. As a matter of fact it is common knowledge that with the passage of time television rights have become important and whenever an agreement has been arrived at, we have to see the intention of the parties which will indicate as to what exactly was agreed and intended to be performed.

41. Having regard to the above, with great respect we are unable to agree with the decision given by the Madras High Court in the judgment reported in the case of Raj Video Vision vs. K. MohanaKrishnan. Rather we agree with the views taken by the Bombay High Court and followed a learned Single Judge of this Court.

42. It also appears from the four decisions given by the Bombay High Court, the present defendant/appellant is the party in the matters and the terms and conditions of the respective agreements involved in the said matters are almost same. Further, in two cases as earlier referred and reported in AIR 2002 Delhi-142 and 1998 PTC-117, the Courts have given their findings by distinguishing the case of Raj Video vision vs. K. Mohan Krishan.

43. After the discussion of law and considering the rival submissions of the learned counsel for the parties, we are of the view that prima facie it is not in dispute that the defendant has acquired the rights in the year 1961 by virtue of the agreement prior in time the rights acquired by the plaintiff. It is not denied by the plaintiff that the plaintiff has acquired the rights through official assignee and subsequently the second rights were confirmed by the Bombay High Court on "as is where is basis" subject to the existing valid rights, liens, charges, etc, if any, of any party and all encumbrances and adverse claims, if any, created by the said insolvent over the negatives of the said rights of the picture.

44. Therefore, it appears to us that the rights granted in favour of the plaintiff are not exclusive and absolute but the same are conditional. Otherwise the terms and conditions mentioned above ought not to have formed part of the said assignment. At the same time the defendant is asserting its rights only in a limited way i.e. for overseas countries as described in the agreement. In view of the above, interim order in respect of other countries of the world including India shall continue till the disposal of the suit.

45. In view of the above, we modify the interim order by allowing the defendant for exploitation, distribution and exhibition commercially as well as non-commercially in respect of the said picture

Kohinoor in 35 mm as well as in reduced size or sizes including the right of Television or all other rights attached to such distribution, exploitation and exhibition of the said picture Kohinoor in the contracted territories excluding India, Burma, Pakistan, Ceylon, Aden, continent of Africa, complete S.U., Sunny, Middle East, complete Far East, West Indies, Fiji, U.K. and Greece as per agreement dated 13th October, 1961 and 9th October, 1963. However, the interim order would continue in respect of the countries specifically excluded in the agreement as pointed out above, till the disposal of the suit. The appeal is partly allowed in the aforesaid terms. No costs.

46. Needless to say that the prima facie view taken by us in the present case and any observations made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in the matter and shall have no bearing on the outcome of the case.

MANMOHAN SINGH, J.

A.K. SIKRI, J.

October 23, 2008 sa/sd