

Indian Performing Right Society Ltd. vs Debashis Patnaik And Ors. on 15 January, 2007

Equivalent citations: MIPR2007(1)323, 2007(34)PTC201(DEL)

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Bench: Gita Mittal

JUDGMENT

Gita Mittal, J.

Page 0678

1. The plaintiff before this Court is a company limited by guarantee and registered under the Companies Act, 1956. It is also registered as a Copyright Society under Section 33 of the Copyright Act, 1957. On allegations that the defendants have committed flagrant violation of the rights of the plaintiff in the works assigned to him by numerous members, the plaintiff has sought the following relief in the present suit:

- a) An order for permanent injunction restraining the defendants, its agents, employees and all others acting on its behalf from playing of music by live or any other means, or by way of mechanical devices at the hotel operated by the Defendants and /or channeling musical and or literary works of the plaintiff or those of its sister copyright societies, by way of mechanical devices such as Radio, Cable TV and /or RA. systems within the Defendants' premises without obtaining a license from the plaintiff Society and without paying the requisite royalties, thereby amounting to infringement of the plaintiff Society's performing Rights in the same.
- b) An order for damages to the tune of Rs. 20,01,000/- and a decree for the same be passed in favor of the Plaintiff's Society and against the defendant.
- c) An order for costs of the proceedings.

Page 0679

2. The case set out in the plaint has been established in the affidavit by way of evidence in this behalf. It is stated that the plaintiff is a non-profit making body established on 23rd August, 1969 to monitor, protect and enforce the rights, interest and privileges of its members which consists of authors, composers and publishers of literary and musical works, as well as on behalf of members of

other sister societies who are owners of copyright in their literary and musical works. The plaintiff has contended that it is, in fact, the sole representative body as also the sole national copyright society of authors, composers and publishers of literary and musical works. Its members consist not only of persons from this country but also other nationalities.

3. After the amendment of the Copyright Act in 1994, the plaintiff-society was re-registered as a copyright society under Section 33(3) of the amended Act. The plaintiff-society is thus a registered copyright society under Section 33(3) of the Copyright Act, 1957 and has received a certificate of registration from the Registrar of Copyrights, Government of India in Form No. IID dated 27th March, 1996 authorising it to carry on copyright business in literary and musical works and/or in any words or any action intended to be sung, spoken or performed with the music.

4. The primary task of the plaintiff society is to collect royalties from users of music and thereafter disburse the same to the owners of the copyright in the music who inter alia it represents. The rates of royalties are decided collectively by members of the plaintiff society.

5. The plaintiff has stated that it is affiliated to around 194 world societies which are included within the Federation known as CISAC, Paris (established under the aegis of UNESCO and the WIPO Charter). By virtue of the assignment deeds executed in its favor by its members, the plaintiff has exclusive ownership of the public performance rights in respect of the literary and musical work of its members which have been assigned to it. A list of 32 such assignment deeds have been proved before this Court as Exhibits P-4 to P-35. The plaintiff has fixed a tariff structure in respect of communication by third parties to the public of the literary and musical work of the members of the plaintiff-society in which copyright has been assigned to the plaintiff. Such tariff fixation is effected in the annual general meeting of the plaintiff-society, which is guided by the importance or the value addition of music to the user organizations.

The plaintiff has proved before this Court the tariff card of The Indian Performing Right Society Ltd. as Exhibit P-36 wherein the rates at which license is given to different persons and authorities to perform or play music have been set out. It has been stated that invoices are raised by the plaintiff strictly in terms of the tariff which is applicable for the period for which invoice has been raised.

6. In the plaint, it has been pointed out that the defendant No. 1 Mr. Debashis Patnaik is the Director of a hotel, 'The Crown' located at Bhubaneswar in the State of Orissa. The defendant No. 2 is the hotel in question which is a 57 room hotel and is stated to be a unit of defendant No. 3 namely Hotel Sukhamaya Pvt. Ltd. The plaintiff upon learning of the defendant's communication to the public of literary and musical works without due Page 0680 authorizations addressed a reminder cum invoice dated 3rd January, 2003 to the defendant No. 2 calling upon the defendants to pay a sum of Rs. 22,886/- towards the license fee, for having communicated such work to the public for the period 1st December, 2002 to 30th November, 2003. This reminder cum invoice has been proved on record as Exhibit P-37. Instead of honouring the statutory rights of the plaintiff, the defendant No. 2 instituted a suit seeking a decree for declaration and permanent injunction against the plaintiff before the court of the District Judge at Khurda, Bhubaneswar in the State of Orissa seeking following prayer:

(i) An order declaring that the invoice issued by the Defendant(i.e, the plaintiff herein) is null and void;

(ii) A perpetual injunction restraining the Defendant)i.e the plaintiff herein) from claiming license fees;

7. A copy of the plaint has been placed before this Court and marked as Mark A. In this suit, Hotel The Crown as plaintiff had arrayed M/s Phonographic Performance Ltd. as defendant No. 1; The Indian Performing Right Society Ltd. as defendant No. 2; and the Registrar of Copyrights as the defendant No. 3. The defendant has admitted receipt of the afore-noticed invoice Exhibit P-37 from the plaintiff in its plaint and alleged that it was not aware as to whom the license fee is to be paid and hence the afore-noticed prayer.

8. The present plaintiff contested the interim injunction application filed by the defendant No. 2 in these proceedings which consequently came to be dismissed by a judgment of the District Judge dated 4th February, 2006. It was held by the court that the defendant herein has no prima facie case and balance of convenience was in favor of the present plaintiff. The court also held that if the plaintiff succeeded in the suit ultimately, he could claim refund of the amount, if paid by him towards the license fee. The court in its order had noticed that it was not the case of the plaintiff that he is not playing music by way of mechanical devices such as radio, cable T.V. etc. and that the defendant nos. 1 and 2 were authorized under the provisions of the Copyright Act, 1957 to collect the license fee.

9. The plaintiff has also proved before this Court a letter dated 15th December, 2003 received from the defendant herein whereby the defendant No. 2 requested the plaintiff to supply the copy of a license agreement to explore the possibility of an out of court settlement in C.S No. 14/2003 pending before the District Judge, Khurda, Bhubaneswar. As the defendants were not desisting from their illegal action, the plaintiff was constrained to file the present suit on or about the 19th August, 2005. The plaint was signed and verified by Mr. Hasan Kamal in his capacity as Chairman of the plaintiff. He has deposed an affidavit proving before this Court, the resolution dated 21st October, 2004 whereby he was authorized inter alia to sign and verify pleadings and to institute the legal proceedings. The resolution has been marked as Exhibit P-1.

10. Summons were issued by this Court to the defendants on 29th August, 2005. However, the defendants despite service by ordinary process as well as by registered post opted not to appear or contest the present case before Page 0681 this Court. In these circumstances, by an order passed on 23rd January, 2006 the defendants were directed to be proceeded against ex parte and the plaintiff was directed to lead ex parte evidence. Accordingly, the plaintiff has filed affidavits by way of evidence of its witnesses in support of the averments in the plaint.

11. When the suit was taken up on 29th August, 2005, the court had also granted an ad interim injunction in I.A. 6501/2005 which was in the following terms:

...Accordingly, till the next date of hearing, the defendants, its agents, employees and all others acting on its behalf are restrained from playing of music by live of any other means, or by way of mechanical devices at the hotel operated by the defendants and/or channeling musical and or literary works of the plaintiff or those of its sister copyright societies, by way of mechanical devices such as Radio, Cable TV and / or P.A systems within the defendants' premises without paying a sum of Rs. 22,800/- and without obtaining a license from the plaintiff society and without paying the requisite royalties to the plaintiff in respect of the work.

12. Upon the failure of the defendants to appear and contest the application, the above injunction order was also confirmed by the court on the 23rd January, 2006.

13. The plaintiff has established that the defendant No. 2 continued with its illegal activities of playing music at its hotel premises in violation of the copyright possessed by the plaintiff therein without a license from the plaintiff and without making payment of the license fee. Consequently, the plaintiff raised a second invoice dated 17th of November, 2005 bearing invoice No. 2005-2006/3320 purporting to be on account of the license fee which would be due from the defendants for the period 1st of December, 2002 to 30th November, 2006. By this invoice, the plaintiff demanded a sum of Rs. 1,41,788.57/- from the defendant which demand has been exhibited as Exhibit P-40 before this Court. The plaintiff has contended that this amount is inclusive of the amount of Rs. 22,886/- demanded earlier by Exhibit P-37.

14. The further contention of the plaintiff is that the defendants have chosen to ignore the court process despite issuance of the injunction order and they continued to persist with their illegal activities. For this reason, the plaintiff is entitled to recover the amount of Rs. 1,41,788.57/- as actual compensatory damages from the defendants. On account of their continued illegal action, the plaintiff has claimed that it is further entitled to the sum of Rs. 18,58,211.42/- as punitive damages apart from the relief of permanent prohibitory injunction which has been noticed hereinabove. The statements made in the plaint and in the evidence on behalf of the plaintiff stand uncontroverted.

15. I find that there is no dispute to the averments in the plaint and the plaintiff has conclusively established its copyright in the musical and literary works which have been assigned in its favor by its members. Thus, it would appear that no person would have any right to undertake a public performance or communication to the public of such literary and musical work, exclusive rights in respect of which vest with the plaintiff as established from the assignment deeds proved as Exhibit P-4 to P-35 before this Court.

Page 0682

16. The defendant No. 2 had filed C.S No. 14/2003 in the court of the district Judge, Khurda at Bhubaneswar wherein he has admitted that such musical works are being played at the hotel and that it was unaware as to who was the real licensee to collect the fees under the statutory provisions. This fact was even noticed by the District Judge in the judgment dated 4th February, 2006 dismissing the injunction application filed by the defendant No. 2.

17. In the instant case, a further submission has been made that the defendants knowingly have opted not to appear before this Court. By this refusal, the defendants have adequately established their defiance and have refused to accede to the summons issued by the court. Placing reliance on the pronouncement of the Division Bench of the Punjab and Haryana High Court reported at *Bhagwandas Ramji Lal v. Watkins Mayer and Co., Jalandhar and Ors.*, it has been urged by Mr. Praveen Anand, learned Counsel for the plaintiff that such refusal amounts to a refusal to divulge details relating to the wrongful acts of the defendants before this Court and that in the face of such defiance and absence of details relating to the defendants' acts, this Court would be justified in raising all presumptions against the defendants.

18. Perusal of this judgment shows that it related to passing of an action wherein the court held that the plaintiffs were entitled to recoup the loss that they incurred as a direct and natural consequence of the defendants' wrongful action. In such a case, if the defendants refuse to produce their books of account showing the quantity of goods manufactured or sold by them during the period of infringement and profits earned thereon, the court would be justified in raising every presumption against them. It is their duty to produce their account books as the issue is within their special and exclusive knowledge.

19. The plaintiff has established before this Court that the defendants have knowledge of the illegality in their action. The plaintiff has also asserted that the defendants' illegal activities would have a cascading effect. The assignment of the copyright is effected in the favor of the plaintiff for the reason that the original owners of the copyrights who are lyricists, producers of music recording companies etc. are unable to enforce their rights or to effect recoveries. There can be no manner of doubt that the action of the defendants is blatant, deliberate and mala fide. Despite dismissal of the injunction application and the observations made by the District Judge, the defendants are persisting with their illegal action and have not made payment of the license fee demanded by the plaintiff. The plaintiff has consequently prayed for injunction and damages.

20. Apart from the factual matrix noticed above, I find that the plaintiff has laid a claim of compensatory and punitive damages. Several pronouncements have been cited at the Bar in support of the suit prayers. It therefore becomes necessary to examine the principles which govern award of such damages.

21. Damages have been traditionally defined as 'pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a Page 0683 breach of contract' (Re: *Broome v. Cassel & Co.* 1972 AC 1027). Thus the traditional concept of damages is to compensate a claimant for loss and damage and can also be referred to as compensatory damages which are awarded to compensate a plaintiff for damages which he has suffered or is expected to suffer and to replace something that the plaintiff has lost or is expected to lose because of the wrongful act of the defendant. The primary purpose of the damages is to restore those losses to the plaintiff. However as tort litigation has evolved, we find that the concept of damages is not limited to compensation for loss and damages alone. Three kinds of damages are being awarded by courts which include nominal damages, exemplary damages and compensatory damages.

22. Nominal damages are usually awarded where a legal right of the plaintiff is found to be infringed and there is, however, no proof of actual loss. There may be another situation where nominal damages may be awarded which is a case where loss is shown, but there is no evidence as to its exact quantum.

The purpose of the award of nominal damages thus is vindictory i.e. to mark the existence of the right in question as well as the fact of violation of such right of the plaintiff by the wrong doer who is the defendant.

Thus a notional amount may be awarded as such damages so as to vindicate the stand of the plaintiff and the claim lodged by him.

23. The next kind of damages are in the nature of compensatory damages which are awarded to compensate a plaintiff for the loss suffered by him and to put him in the same position as if the tort has not been committed. Such a loss may be a pecuniary loss or an intangible loss which would be non-pecuniary. The intangible loss would include mental and emotional distress apart from other incidents where the award of damages is intended to compensate for such distress.

24. So far as damages due to infringement of trademark are concerned, the traditional English approach has been to assess the same according to the extent of the plaintiff's or the claimant's loss. The established rule was that in the event of no loss being shown or no evidence with regard to the damages being led, no damages could be awarded or recovered.

25. In the United States the approach has been to assess damages for trademark infringement according to the extent of the plaintiff's loss and thereby, compensatory damages must be equal to the loss suffered by the individual victim. [Ref: Simon Greenleaf, A Treatise On The Law of Evidence see 253 at 242-43 (2d ed.1972)].

26. In India in a case reported at 481 IC 450 at p. 465 Lakpat Rai v. Sri Krishna Das, the Court held that where there is no evidence to calculate actual damages, it is not worthwhile to give damages other than nominal damages.

In AIR 1932 Rangoon 56 entitled Sally Mahomed Sulaiman v. Neogi & Co., the Court has held that the best evidence of such loss and damage is the loss of trade that the plaintiff has suffered during the period in which the defendant is importing the offending goods.

Page 0684 Thus so far as awarding compensatory damages is concerned, there has to be evidence of the plaintiff's loss.

It is also necessary to bear in mind that the basis of calculation of damages is entirely different from an account of profits of the defendant and the two remedies stand on the alternative footings.

27. The third kind of damages which are being considered more and more while considering cases of trademark infringement and passing of actions relates to award of exemplary damages, which are

commonly known as punitive damages. Such damages can commonly be given in addition to compensatory damages. The expression 'punitive' masks a variety of specific purposes that such damages are intended to actually serve apart from the punishing element and the deterrent cause of award of such damages. Such damages have various other useful purposes which include, inter alia, retribution, deterrence, compensation, education and law enforcement. Some authors have suggested that such damages have the effect of deterring not only the defendant from repeating the offence, but also deter others from committing the same; preserving peace; inducing private law enforcement; compensating victims for otherwise uncompensable loss and the payments of the plaintiff's attorney's fees.

28. It would be topical and instructive to examine the principles laid down by the Supreme Court of the United States of America in a decision rendered on May 20, 1996 in *BMW of North America, Inc. v. Gore* reported in 517 US 559. In this case the following guide posts were given as to the method of calculation of punitive damages:

(i) **Reprehensibility:** The Supreme Court held that 'perhaps the most important indicium of the reasonableness of a punitive damage award is a degree of reprehensibility of the defendant's conduct.' In the case in hand, the Court noted that reprehensibility included economic torts which were present in the BMW case. It is also noted that conduct involving a substantial risk of bodily injury would be deemed more serious and more deserving of a sanction than pure economic torts.

(ii) **Rationality in the award of damages:** While emphasising that the primary goal in awarding punitive damages is to punish present conduct with the further objective of deterring future egregious conduct, the court, however, drew a note of caution emphasising that the punitive damages must rationally relate to the award of compensatory damages.

(iii) **Imperative Criminal Penalty** - the third guide post as indicated in the BMW case requires the Court to compare 'the punitive damages award' and the civil or criminal penalties that could be imposed for comparable misconduct.

29. In a later case decided on 7th April, 2003 entitled *State Farm Mutual Automobile Insurance Co. v. Campbell Et. Al* reported at 538 U.S. 408, 2003, the Supreme Court provided a further useful guideline while considering rationality of the punitive damages award, where it stated that single digit multipliers are more likely to comport with due process, while still achieving the state goals of deterrence and detribution, than awards in the range of 500:1 or in this case 145:1.

Page 0685 In the State Farm case, the Supreme Court further emphasised that the application of punitive damages must be limited to harm related to the plaintiff.

30. In the United Kingdom, three common law categories have been identified where exemplary damages can be imposed.

One of such categories is where the defendant's conduct is calculated to make profits for himself which may exceed compensation payable to the plaintiff. Thus exemplary damages are imposed to prevent unjust enrichment (Reference - 1964 AC 1129 at 1226). The criterion which are utilised for calculation of punitive damages include conduct of the defendant, relevance of the compensation amount, relevance of criminal liability, means of the parties and moderation of the award. (McGregor on Damages, 16th Edition at page nos. 461-470).

31. From the consideration of the foregoing, it would appear that law as applied and as has been evolved in the United States of America and United Kingdom, suggest that punitive damages would not be possible in isolation of compensatory damages. Where no compensatory damages are awarded, the implication would appear to be that the plaintiff has suffered no compensable injury. Receipt of exemplary damages, therefore, would be in the nature of a 'windfall award', which is imposed to serve a public law function.

32. In *Toler v. Cassinelli* 129 W.Va 591 : 41 S.E. 2d 672 (1946), it was held that 'finding of compensatory damages by a jury is an indispensable predicate to a finding of exemplary or punitive damages, and damages awarded by way of punishment must bear a reasonable proportion to compensatory damages so found.'

33. A case in which the question as to whether exemplary damages can be given without award of any compensatory damages, fell for consideration before the Supreme Court in *Common Cause v. UOI*. Though the question was not directly answered, however, the Court held that in public law, it can be done. The Court also stated that in the case of punitive damages, it should be moderate and also keep in mind the means of the parties.

34. There have been several cases where the Court had awarded punitive damages in addition to compensatory damages. In this behalf, in 2005 (30) PTC 3 (Del), *Time Incorporated v. Lokesh Srivastava and Anr.*, apart from compensatory damages of Rs. 5 lakhs, the Court also awarded punitive damages, emphasising that the award of compensatory damages to a plaintiff is aimed at compensating the plaintiff for the loss suffered by him, whereas the punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also, the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases, these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not a party to the lis but suffered on account of the breach. The Court Page 0686 emphasised the distinction between compensatory damages and punitive damages which are noticed above and held thus:

7. ...Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and, as such, in appropriate cases these must be awarded to give a signal to the wrong-doers that law does not take a breach merely as

a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trademark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademarks, copyrights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In *Mathias v. Accor Economi Lodging, Inc.* 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs. 5 lacs only which can be safely awarded. Had it been higher even this Court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement.

In this case, the Court thus emphasised the intent of exemplary damages to punish the wrong doer and also emphasised the deterrent effect of the damages.

35. Another aspect of damages in cases relating to infringement of trademark and passing off action arose for consideration before this Court in the judgment Page 0687 reported at *Hero Honda Motors Ltd. v. Shree Assuramjit Scooters*, wherein Court noticed that the plaintiff had claimed token damages and compensation of Rs. 5 lacs as it was not possible to determine the exact nature of damages at the time of filing of the suit. The punitive damages were not specifically claimed. Defendant had further opted to not appear before the Court and had stayed away from the proceedings. Consequently, it was successfully able to prevent the Court from having before it any evidence which would have been available, had its accounts been produced before the Court. In this case, the Court held that the plaintiff could not be prejudiced by the act of the defendant in staying

away from the court proceedings. In this background the Court held that such defendant must suffer the consequences of damages, which would be awarded as stated and set out by the plaintiff. However, the Court issued a note of caution that the plaintiff could not be granted any irrational figure which may be claimed but while making the award of damages, it would be necessary to keep in mind the nature of deception alleged by the plaintiff which not only causes direct loss to the plaintiff, but also effects the reputation of the plaintiff by selling sub-standard goods and services in the market where the public may be deceived in buying the goods thinking the same to be that of the plaintiff. There is a larger public interest and purpose involved to discourage such parties from indulging in such acts of infringement and deception and , thus, even if the same has a punitive element, it must be granted. Placing reliance on the principles laid down in the Time Incorporated case (supra), it was further stated that punitive damages should be really punitive and should not merely flee bite. The quantum thereof should depend upon the flagrancy of the infringement. The courts also recognize the effort which the plaintiff has to put in contesting the offending traders in the market who continue with their illegal conduct with impunity and without any remorse. Thereby the plaintiff is compelled to utilize energy, funds and resources for contesting such litigation which could have been otherwise utilized in business promotion and expansion activities.

36. In CS (OS) No. 1385/2005 entitled The Heels v. V.K. Abrol and Anr., the plaintiff had claimed damages for a sum of Rs. 21 lacs on grounds of infringement of trade mark by the defendant. The defendant opted to stay away from the proceedings. In these circumstances, the Court noticed thus:

11. This court has taken a view that where a defendant deliberately stays away from the proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place, the plaintiff cannot be deprived of the claim for damages as that would amount to a premium on the conduct of such defendant. The result would be that parties who appear before the court and contest the matter would be liable to damages while the parties who choose to stay away from the court after having infringed the right of the plaintiff, would go scotfree. This position cannot be acceptable.

12. No doubt it is not possible to give an exact figure of damages on the basis of actual loss, but certain token amounts on the basis of the sales Page 0688 of the plaintiff can certainly be made. The plaintiff is unnecessarily dragged into litigation and the defendants must bear consequences thereof. In fact in such a case both compensatory and punitive damages ought to be granted apart from the costs incurred by the plaintiff on such litigation. In view of the given sales figure of the plaintiff, I consider it appropriate to grant a decree of damages in favor of the plaintiff and against the defendants for a sum of Rs 3 lakh apart from costs of the suit.

Thus the Court has awarded damages in favor of the plaintiff based on the sales of the plaintiff.

37. In a judgment of this Court dated 24th April, 2006, rendered in CS(OS) 1333/2005 entitled Intel Corporation v. Dina Karan Nayar, again the defendant had failed to appear. The Court decreed the suit for permanent injunction and delivery up of the offending material placing reliance on the

pronouncements on the Hero Honda Case and Time Incorporated case (supra), the Court awarded damages of Rs. 3 lacs as opposed to the amount of Rs. 20 lacs which had been prayed for by the plaintiff. In this case, the Court had noticed yet another reason for awarding punitive damages in this behalf in the Time Incorporated case (supra) the Court held thus:

6. The plaintiff has claimed a decree of Rs. 12.5 lacs on account of damages suffered by the plaintiff or an order of rendition of accounts of the profits illegally earned by the defendants by use of the impugned trademark. In view of the fact that the defendants have not chosen to turn up and face these proceedings, this Court is of the considered view that an order of rendition of accounts is fully warranted and called for. Damages in the sum of Rs. 12.5 lacs as claimed cannot be awarded on account of the fact that the plaintiff has not succeeded in proving on record as to how and on what basis these damages have been calculated. Damages of Rs. 5 lacs are claimed on account of loss of reputation of the plaintiff. These can be awarded inasmuch as the readers who might have read the defendants' 'TIME ASIA SANSKARAN' must have formed a very poor opinion about the plaintiff's Magazine and, as such, the reputation and goodwill of the plaintiff has suffered.

7. Coming to the claim of Rs. 5 lakh as punitive and exemplary damages for the flagrant infringement of the plaintiff's trademark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and, as such, in appropriate cases these must be awarded to give a signal to the wrong-doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case Page 0689 in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trademark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademarks, copyrights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In Mathias v. Accor

Economi Lodging, Inc. 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs. 5 lacs only which can be safely awarded. Had it been higher even this Court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement.

38. It would be also instructive to consider the principles on which damages was awarded in the judgment dated 8th May, 2006 rendered in CS(OS) 1528/2003 entitled Hindustan Pencils Ltd. v. Aparna Enamel Industries reported at 2006 (131) DLT 65. In this case, the plaintiff had filed a suit for permanent injunction as well as damages against the defendant on allegations of infringement of its trade mark and copyright as well as deceptive passing off by the defendant in respect of the plaintiff's trademarks 'Nataraj' and 'Apsara'. Defendants were only seeking to make a difference by spelling 'Nataraj' as spelt by the plaintiff, as 'Natraj'. The Court on consideration of the matter passed a decree of permanent injunction offending the trademarks 'Natraj' and 'Apsara'.

So far as damages are concerned, the defendant had stayed away from the judicial proceedings and consequently enquiry into the accounts of the Page 0690 defendant for determination of damages could not take place. The Court held that if this was to flow as a result of the defendants remaining ex-parte, it would amount to "a premium on the conduct of such defendant". The observation of the Court on the aspect of damages is pertinent and reads thus:

11. The last aspect to be considered is the question of damages. This Court has already taken a view in Hero Honda Motors Ltd. v. Shree Assuramji Scooters, , that even if the defendant stays away from the judicial proceedings, the plaintiff cannot be deprived of the claim for damages. This is so since the result of the defendant staying away from the judicial proceedings is that any inquiry into the accounts of the defendant for determination of damages cannot take place and a view to the contrary would amount to a premium on the conduct of such defendant. The result would be that parties who appear before the Court and contest the matter would be liable to damages while parties who choose to stay away from the Court after having infringed the right of the plaintiff would go scot-free. This position cannot be acceptable. No doubt it is not possible to give an exact figure of damages on the basis of actual loss, but certain token amounts on the basis of sales of the plaintiff can certainly be

assessed. The plaintiff has unnecessarily been dragged into litigation and the defendant must bear the consequences thereof. I am of the considered view that taking into consideration the facts and circumstances of the case, the plaintiff is also entitled for a decree of damages against the defendants for a sum of Rs. 1 lakh apart from the costs of the suit. Decree sheet be drawn up accordingly.

In this case, the plaintiff had proved sales for the year 2000-01 as Rs. 95 crores and its expenses on advertisement to be in the range of Rs. 3 crores.

The defendants had herein also failed to enter into appearance in this case.

The Court granted a decree of permanent injunction and also awarded damages of Rs. 1 lakh. In this case also the Court had stated that it was not possible to give an exact figure of damages on the basis of actual loss but certain token amounts on the basis of sales of the plaintiff could be assessed.

39. Again in CS (OS) No. 2039/2003 entitled Mahendra & Mahendra Ltd. v. Ashwani Kumar, the plaintiff sought a permanent injunction restraining infringement of the plaintiff's copyright and trademark "Mahindra" including Mahendra and Mahendra coloured Wheel logo. The plaintiff had indicated that it had suffered tremendous losses which were well over Rs. 20 lacs. However, no evidence had been led by the plaintiff to indicate the amount of the loss or the extent of actual damages resulting to it. The Court was of the view that it would be sufficient if damages to the extent of Rs. 1 lakh were awarded in favor of the plaintiff and against the defendant.

40. From the above discussion, it is evident that undoubtedly, assessment of damages has to be based on cogent evidence which is placed on record. The burden of proving damages as well as the facts which caused the damages is upon the plaintiff who has to adduce the best evidence in support of his case. The onus on the plaintiff to prove damages is not rendered lighter because the defendant does not appear and is ex parte or does not contest Page 0691 the case. So far as facts which are relevant are concerned, Section 12 of the Indian Evidence Act set out that any fact which enables the court to determine the amount of damages which ought to be awarded is relevant.

The most material evidence which would enable a court to arrive at a fair assessment of the gains which have accrued to a defendant by the acts complained of, would be a true and fair rendition of accounts by a defendant who is engaged in the acts of infringement. However, a defendant who is indulging in such illegal activity would obviously not maintain correct accounts and in any case would not place the material in respect thereof before the court. Therefore, it is left to the court to ascertain the probable level of sales of the defendant by other modes.

41. In an action for infringement of trademark, the profits made by the defendant also cannot always be the true criterion of the damages awardable to the plaintiff as the defendant's gain may not always be proportionate to the plaintiff's loss. However, it is trite that the plaintiff's loss or the defendant's gain will not be assumed in the absence of proof. The plaintiff is required to prove some distinct damage from the infringement of his trademark by defendant. The effect of the infringing acts of the defendant may be evidenced by the diminishing quantum of goods sold by the plaintiff

for the reason that the defendant took away the plaintiff's customers. The defendant may also impact the plaintiff's customers. The defendant may also impact the plaintiff's business by causing him to sell its products at a lower price. In either event, there would be a reduction in either the total volume of the plaintiff's business or lowering in the percentage increase of business as compared to the previous years. Thus the measure of damage suffered by the plaintiff is to be found by an assessment of the profits the plaintiff would have made if the offending article had not been introduced by the defendant in the market or if the defendant had not undertaken the illegal activities complained of by the plaintiff. These facts have to be proved by the evidence on record either relating to the business of the defendants or which could be assessed from a decline in the business of the plaintiff on account of the activities of the defendant which could be gathered from the figures of sales over the period of time during which the defendant has continued with the activities complained of and an assertion of such loss by the plaintiff in its evidence.

42. Reference can usefully be made to the method for computation and award of damages in another pronouncement of this Court in entitled *Microsoft Corporation v. Yogesh Popat and Anr.* In a suit by the plaintiff praying for a decree of prohibitory injunction, an order for delivery up to the plaintiff of the counterfeit/unlicensed copies of the plaintiff's software and other infringing material and for an order for rendition of accounts of profits illegally earned by the defendant by reasons of infringement of plaintiff's copyright including compensatory damages and a decree in the sum of the amount so ascertained, the Court has to consider the evidence led by the plaintiff. The defendant had opted to remain ex-parte and did not contest the suit. The Court noticed that the evidence on record established hard disc piracy by the defendants who were pirating software of the plaintiff and Page 0692 loading the same on the hard disc of computers sold by them without permission from the plaintiffs. Based on the popularity of the computer software of the plaintiff, the Court adopted an assumptive process whereby it based financial loss to the plaintiff on assumption of sale of 100 computers each year, which were loaded with pirated software. On such assumption, the Court arrived at a computation of loss of profits in the sum of Rs. 19.75 lacs. In this background, the Court decreed the suit in terms of the prayers in the plaint and awarded compensation/damages against the defendants in the sum of Rs. 19.75 lacs with interest @ 9% per annum from the date of decree till payment.

43. From the principles laid down in the afore-noticed judicial pronouncements, it is apparent that the punitive damages would necessarily follow an award of compensatory damages in favor of the plaintiff. The punitive damages also have to bear a fair ratio to the compensatory damages awarded to the plaintiff.

44. In the light of the foregoing discussion, I have no manner of doubt that the defendants have no right whatsoever of playing such music by any means within their premises, copyright whereof stands assigned to the plaintiff without obtaining the license from the plaintiff and without paying the requisite royalties thereby. The defendants have not been licensed by the plaintiff to do so.

45. The defendants have deliberately, knowingly and mala fide have admittedly played such music and thereby breached the copyrights of the plaintiff. They have persisted with their illegal actions despite objections of the plaintiff, and have effected public performances of the music which they

could not do so without obtaining the license from the plaintiff and without paying the requisite royalties. The defendants deserve to be discouraged from their illegal actions by imposition of most stringent terms from playing music by any means at their premises in which the copyright vests with the plaintiff. Undoubtedly, the plaintiff is entitled to the amount of license fee for such action from the defendants.

46. The plaintiff has pointed out that the license fee due to it for the period from 1st December, 2002 to 30th November, 2006 is Rs. 1,41,788.57/-. There is no contest to the assertions of the plaintiff. The defendant has no right whatsoever for playing the music without obtaining the license from the plaintiff and without paying the royalties to the plaintiff.

47. The matter however does not rest here. As the defendants are persisting in their illegal and mala fide conduct and the plaintiff would be entitled to the injunction prayed for and the license fee for the period it continues to so act without license from the plaintiff and without payment of royalties. Apart from that, the defendant has with malafide intent caused the plaintiff to persist with the present suit.

48. The claim of the plaintiff that it is entitled to a sum of Rs. 18,58,211.42/- as punitive damages has gone un rebutted. However, in the light of the legal principles which guide award of punitive damages noticed above, award of the claimed amount would be grossly disproportionate to the claim of Page 0693 compensatory damages and highly excessive. An award of Rs. 3,00,000.00/- as punitive damages to the plaintiff would be fair and justified. The same is in the proximity of double the amount of compensatory damages and is being awarded having regard to the mandate in several judicial pronouncements that damages should not merely flee bite the defendant.

In these circumstances, I have no hesitation in decreeing the claim of the plaintiff and hereby pass a decree in favor of the plaintiff and against the defendants for the sum of Rs. 1,41,788.57/- towards the actual and compensatory damages suffered by the plaintiff and the sum of Rs. 3,00,000.00/- as punitive damages. The plaintiff shall be entitled to interest at the rate of 10% per annum on these amounts from the date of decree till payment.

49. I hereby also pass decree of permanent prohibitory injunction restraining the defendants, its agents, employees and all others acting on its behalf from playing of music by live or any other means, or by way of mechanical devices at the hotel operated by the Defendants and /or channeling musical and/or literary works of the plaintiff or those of its sister copyright societies, by way of mechanical devices such as Radio, Cable TV and /or RA. systems within the defendants' premises without obtaining a license from the plaintiff Society and without paying the requisite royalties, thereby amounting to infringement of the plaintiff society's copyrights in the same.

50. The plaintiff would be entitled to cost of proceedings which are quantified at Rs. 50,000/-.

51. The suit is accordingly decreed in the above terms.