

Super Cassettes Industries Private ... vs Hrcn Cable Network on 9 October, 2017

Author: Manmohan

Bench: Manmohan

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(COMM) 48/2015

SUPER CASSETTES INDUSTRIES PRIVATE LIMITED

..... Plaintiff

Through: Mr. Pravin Anand with
Ms. Prachi Agarwal, Advocate
with Ms. Minali Menon,
Advocate.

versus

HRCN CABLE NETWORK

..... Defendant

Through None

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Date of Decision: 9th October, 2017

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

JUDGMENT

MANMOHAN, J: (Oral)

1. Present suit has been filed for permanent injunction restraining infringement of copyright, rendition of accounts, delivery up, damages etc. The prayer clause in the plaint is reproduced hereinbelow:-

"(i) An order of permanent injunction restraining the Defendant, their officers, servants, agents, partners and representatives and all others acting for and on their behalf from either engaging in themselves or from authorizing, the recording, distributing, broadcasting, public performance/communication to the public or in any other way exploiting the cinematograph films, sound recordings and/or literary works (lyrics) and musical works (musical composition) or other work or part thereof throughout India, that is owned by the plaintiff including all works whereon the plaintiff has shown its copyright under Section 52A of the Copyright Act or doing any other act that would lead to infringement of plaintiff's copyright.

(ii) An order for rendition of accounts of profits directly or indirectly earned by the

Defendant, their officers, servants, agents, partners and representatives and all others acting for and on their behalf from their infringing activities and unlawful conduct throughout India and a decree of amount so found due to be passed in favour of the Plaintiff;

(iii) An order of delivery up to the Plaintiff or its authorized representative by the Defendants their officers, servants, agents, partners and representatives and all others acting for and on their behalf of all infringing tapes, copies and negatives, etc bearing the copyrighted materials of the Plaintiff;

(iv) An order requiring the Defendants their officers, servants, agents, partners and representatives and all others acting for and on their behalf, to pay the Plaintiff damages to the tune of Rs. 1,00,01,000/- towards past damages and further grant future damages along with pendent lite and future interest @ 18% p.a. till the time of decretal amount is paid.

(v) An order awarding the costs of the present suit to the Plaintiff."

2. On 21st December, 2015, this Court granted an ex-parte ad interim injunction in favour of the plaintiff and against the defendant. The relevant portion of the said order is reproduced hereinbelow:-

"I have heard the learned counsel for the plaintiff who has referred various paras of the plaint as well as the documents placed on the record. Prima-facie, it appears that the defendant is engaged in broadcasting/ communicating to the public the cinematographic clips of films, recordings literary and musical works of the plaintiff. I am of the view that the plaintiff has been able to make out a strong prima-facie case for the grant of an ex parte ad-interim injunction. Hence till the next date of hearing, the defendant is restrained from broadcasting, distributing and communicating to the public the cinematographic films, sound recordings and all related works including the musical works of the plaintiff."

3. Since defendant did not enter appearance despite service, it was proceeded ex parte vide order dated 20th October, 2016 and the ex parte interim injunction was confirmed till disposal of the suit.

4. It is the plaintiff's case that it is one of the largest and most reputed music companies in the country and is the owner of a large repertoire of copyrighted works comprising cinematographic films, sound recordings etc. operating under the brand T-SERIES.

5. It is further stated that plaintiff's business also includes giving licences to various organizations such as Broadcasting Organizations, Television Channels, FM Radio Stations, Multi-System Operators (MSO) and Cable TV Operators etc. for the use of its copyrighted works.

6. Mr. Pravin Anand, learned counsel for the plaintiff states that the defendant, HRCN Cable Network is a ground cable operator based in Rewari, Haryana and is providing Cable Television services under the logos CINEMA, TV, MUSIC & ASHIRWAD to various subscribers having operation throughout India including State of Haryana.

7. He states that in September, 2015 in the course of random monitoring of the defendant's broadcasts, the plaintiff company came to know about the unauthorized and unlicensed use of its copyrighted works on the defendant's cable television network. He further states that on coming to know of the said infringement, it sent a letter dated 16th September, 2015 and a legal notice dated 29th October, 2015 giving specific instances of infringement of the plaintiff's repertoire by the defendant and requesting it to obtain the requisite public performance license to make its broadcasts legal. However, no reply was received.

8. The plaintiff has filed its evidence by way of two affidavits. One affidavit of PW-1 Mr. S.K. Dutta and another of PW-2 Mr. Mohit Sharma.

9. PW-1 has relied upon various decisions regarding the plaintiff's copyright works as Ex. PW-1/3. PW-1 has further proved the copies of assignment deeds, license agreements and copyright certificates illustrating that the plaintiff is the exclusive copyright owner of the aforementioned copyrighted works as Ex. PW 1/8A - Ex. PW 1/8H. The letter dated 16th September, 2015 and legal notice dated 29th October, 2015 has been proved as Ex. PW-1/5 and PW-1/6 respectively. The plaintiff rate card on its website is proved as Ex.

10. PW-1 in his supplementary affidavit dated 21st August, 2017 has stated that "Defendant in the present suit has 15,000 subscriptions as this was alleged in the cease and desist notice dated October 29, 2015 addressed to the Defendant. Since the Defendant chose not to reply to the cease and desist notice, an adverse inference regarding the admission of the contents by the Defendant should be drawn as the same have gone unrebutted and uncontroverted by the Defendant..... I say that the subscription rate of the Plaintiff per account is charged at INR 18 per month. Therefore, I further state that the losses for the entire period of six (6) months to the Plaintiff would amount as :-

$$15,000 \text{ (Subscription)} \times 18 \text{ (Per month license fee)} \times 6 \text{ (No of months)} = \text{INR } 16,20,000/-"$$

11. PW-2 has proved the CD/DVD recordings of the infringing broadcasts made on 12th September, 2015 along with cue-sheets containing details of infringing broadcasts such as time of recording, film/album belonging to the plaintiff's repertoire, duration of infringement and reading along with the screenshots of the CD recordings as Ex. PW 2/1 and Ex. PW 2/2. Further, screenshots have been exhibited as Ex. PW 2/3.

12. Mr. Anand further states that the plaintiff is entitled to punitive or exemplary damages. In support of his contention, he relies upon the judgment of this Court in Hindustan Unilever Limited Vs. Reckitt Benckiser India Limited, 2014 (57) PTC 495 [Del] [DB] wherein the Division Bench

granted punitive damages to the extent of Rs.20,00,000/-. The relevant portion of the said judgment is reproduced hereinunder:-

"69. Reverting to the facts of this case, the defendant clearly was aware about its wrong doing and the harm which would ensue to HUL because of the published disparagement. Yet it went ahead and aired it in almost all the national and a large number of regional channels with repetitiveness. The deliberation points at an aim to denigrate the plaintiff's product and harm its reputation.

At no stage did it - even in these proceedings - offer to make amends. In the circumstances, the award of punitive damages was warranted. The award of general damages through this judgment (although of a figure of Rs. 20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen - and intended to be seen - by millions of viewers. As observed in John(supra) "The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."

Having regard to all these circumstances, the court is of opinion that the award of Rs. 5 lakhs as exemplary damages in the facts of this case was justified and not disproportionate; it is accordingly upheld."

13. Mr. Pravin Anand, learned counsel for the plaintiff contends that under Section 58 of the Copyright Act, 1957 the plaintiff is also entitled to conversion damages which would be the entire cost of the subscription. He states that typically, the cost of a subscription channel would roughly be several hundred rupees, for example Rs.700/- per month for Tata Sky, Rs. 400/- per month for Hathway Connections etc. Thus, according to him, the conversion damages in the present case would be Rs. 500 x 15,000 subscriptions = Rs.75,00,000/- per month. He submits that a plaintiff may claim both damages for infringement and those for conversion as they are cumulative and not mutually exclusive. He states that the measure of damages in conversion is the value of infringing copies of the article/number of subscription. In support of his contention, he relies upon the judgment of the Allahabad High Court in Gopal Das Vs. Jagannath Prasad and another, AIR 1938 All 266 wherein it has been held as under:-

".....This argument and contention of the appellant is based on a misconception of Section 7 of the Copyright Act. S. 7 provides:

All infringing copies of any work in which copy, right subsists or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Under the statutory provision of this section, all infringing copies of any work in which copyright subsists, or of any substantial part thereof, became the property of

the owner of the copyright. He has therefore a right to recover the possession of the infringing copies unsold and the price of the copies sold. The infringing copies which have been sold being regarded as the property of the plaintiffs, they are entitled to the money for which they were actually sold. The lower Court has also misunderstood the reliefs claimed by the plaintiffs under Cls. (c) and (e) in para 12 of the plaint. These are the reliefs to which the plaintiffs are entitled under Section 7 of the Copyright Act, 1911. The evidence of the defendant which has not been rebutted shows that he sold these copies at the rate of Re. 1 per copy. The plaintiffs themselves admit that they were sold at this rate. The plaintiffs themselves have claimed only the sale proceeds of the books sold by the defendant. They were therefore entitled to only Rs. 1142 for which the defendant sold these copies. We therefore reduce the amount from Rs. 2284 to Rs. 1142."

14. Having heard learned counsel for the plaintiff and having perused the ex parte evidence as well as documents placed on record, this Court is of the opinion that plaintiff has proved the facts stated in the plaint and has also exhibited the relevant documents in support of its case.

15. A bare perusal of the screenshot of the infringing recording (Ex. PW 2/3) shows the logo of the plaintiff 'T-SERIES'. This proves that the defendant was aware that the audio visual work broadcasted on their network belonged to the plaintiff. A perusal of the cue sheet also shows that the defendant has amongst others infringed the sound recordings, cinematograph films and underlying literary and musical works belonging to plaintiff's repertoire of devotional songs sung by 'Lakhhbir Singh Lakhhha' and the songs 'Blue Eyes' by Honey Singh; 'Raghupati Raghav Raja Raam' from the film 'Krrish-3', 'Tera Milna Us Rab Ka Ishaara-Raabta' from the film 'Agent Vinod'.

16. Since the plaintiff's evidence has gone unrebutted, said evidence is accepted as true and correct. In the opinion of this Court, the defendant has deliberately stayed away from this Court's proceeding with a view to frustrate the plaintiff's claim for damages. The said act is unjustified.

17. As the defendant has broadcast the plaintiff's video songs without any license, this Court is further of the opinion that defendant has infringed the plaintiff's rights under Sections 14(a)(iii), 14a(iv), 14(d)(iii) and 14(e)(iii) read with Section 51 of the Copyright Act, 1957.

18. As the plaintiff in his evidence has stated that the defendant had 15,000 subscriptions and the plaintiff used to charge licence fee of Rs.18/- per connection per household per month plus applicable taxes, the plaintiff is held entitled to compensation to the extent of Rs.16,20,000/- (15,000 subscriptions x 6 months x Rs.18/-).

19. However, this Court is not satisfied on the evidence led in the present case that the compensation awarded is inadequate in the circumstances having regard to the three categories in *Rookes v. Barnard*, [1964] 1 All ER 367 and also the five principles in *Cassell & Co. Ltd. v. Broome*, 1972 AC 1027. In the event punitive damages are awarded in the present case, it would be an ad-hoc judge centric award of damages, which the Division Bench specifically prohibited in *Hindustan Unilever Limited* (supra). The relevant portion of the said judgment is reproduced hereinbelow:-

"66. *Rookes v. Barnard*, [1964] 1 All ER 367, is the seminal authority of the House of Lords, on the issue of when punitive or exemplary (or sometimes alluded to as "aggravated") damages can be granted. The House defined three categories of case in which such damages might be awarded. These are:

- a. Oppressive, arbitrary or unconstitutional action any the servants of the government;
- b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and c. Any case where exemplary damages are authorised by the statute.

The later decision in *Cassell & Co. Ltd. v. Broome*, 1972 AC 1027, upheld the categories for which exemplary damages could be awarded, but made important clarificatory observations. Those relevant for the present purpose are reproduced below:

"A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories, (ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in *Ley v. Hamilton*, 153 L.T 384 the use of the word "fine" in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenues of central government."(emphasis supplied).

The House of Lords, in its discussion, remarked crucially that there is a considerable subjective element in the award of damages in cases involving defamation and similar actions. Courts, it remarked, used terminology to reflect overlapping, and sometimes undesirable ideas underlining the considerations weighing grant of damages:

"In my view it is desirable to drop the use of the phrase "vindictive" damages altogether, despite its use by the county court judge in *Williams v. Settle* [1960] 1 W.L.R 1072, Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

Likewise the use of "retributory" is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between "punitive" or "exemplary," one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary," not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants, counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v. Barnard* [1964] A.C 1129, 1221, when he defines the phrase as meaning all cases where "the award is not limited to the pecuniary loss that can be specifically proved." But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatizing "compensatory,"

"punitive," "exemplary" or "aggravated" damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another."

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68. This court is of the opinion that the impugned judgment fell into error in relying on the decision in *Times Incorporated v. Lokesh Srivastava*, 116 (2005) DLT 569. A Single Judge articulated, in his ex parte judgment in a trademark infringement action, as follows:

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade-marks, copy rights, 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 Economy Lodeine*.

Inc. reported in, 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 times he gets away. This Court feels that this approach is necessitated further 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 transaction since 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, the court would not have hesitated in awarding the same. This 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."

With due respect, this Court is unable to subscribe to that reasoning, which flies on the face of the circumstances spelt out in *Rookes* and later affirmed in *Cassell*. Both those judgments have received approval by the Supreme Court and are the law of the land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded. An added difficulty in holding that every violation of statute can result in punitive damages and proceeding to apply it in cases involving economic or commercial causes, such as intellectual property and not in other such matters, would be that even though statutes might provide penalties, prison sentences and fines (like under the Trademarks Act, the Copyrights Act, Designs Act, etc.) and such provisions invariably cap the amount of fine, sentence or statutory compensation, civil courts can nevertheless proceed unhindered, on the assumption that such causes involve criminal propensity, and award "punitive" damages despite the plaintiffs inability to prove any general damage. Further, the reasoning 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" is plainly wrong, because where the law provides that a crime is committed, it indicates the punishment. No statute authorizes the punishment of anyone for a libel - or infringement of trademark with a huge monetary fine-which goes not to the public exchequer, but to private coffers. Moreover, penalties and offences wherever prescribed require the prosecution to prove them without reasonable doubt. Therefore, to say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law. This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards. Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in Rookes (supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in Cassel. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant's action is so wrong that it has a "criminal" propensity or the case merely falls in one of the three categories mentioned in Rookes (to quote Cassel again - such event "does not of itself entitle the jury to award damages purely exemplary in character")."

(emphasis supplied)

20. This Court is also of the view that the plaintiff is not entitled to conversion damages as in the present instance the compensation amount awarded overlaps with the conversion damages sought. The Court of Appeal in Sutherland Publishing Company Vs. Caxton Publishing Company Limited, (1936) Ch. 323 has held as under:-

"But in a case where damages are awarded in respect both of the infringement and of the conversion the tribunal which fixes the damages must be careful to see that no injustice is done. Damages under the two heads may or may not overlap in whole or in part. In so far as they do overlap that circumstances must, in my judgment, be taken into account. As an example of what I mean by overlapping let me take the following case. The owner of a copyright in a book proves that, whereas if it had not been for the infringement he could have sold 1000 copies, he has only been able to sell 500, the infringer having printed and sold 500 copies. It is obvious that as the possible market for the book is limited to 1000 copies, if the damages for infringement under s. 6 are fixed on the basis that the copyright owner would have sold 1000 copies but for the infringement and at the same time the value of the 500 copies sold by the infringer is fixed for the purposes of s. 7 at the amount for which they were sold, the result will be that the copyright owner will have recovered damages on the footing that there was an available market for 1500 copies instead of the real market for 1000 copies only. If he had sold 1000 copies there would have been no market for the 500 copies made by the infringer, which would accordingly

have had no value. Conversely, if the 500 copies sold by the infringer were worth what they were sold for this could only be so on the basis that the copyright owner was only going to sell 500. In such a case it appears to me that to award to the copyright owner damages for infringement based on his inability to sell 500 copies sold by the infringer would not be permissible."

(emphasis supplied)

21. Consequently, present suit is decreed in accordance with prayer

(i) of the plaint as well as actual costs incurred by the plaintiff. The costs shall amongst others include the lawyer's fees as well as the amount spent on Court-fees. The plaintiff is also held entitled to compensation of Rs.16,20,000/-. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J OCTOBER 09, 2017 rn