

Arun Chadha vs Oca Productions Pvt. Ltd. &Ors on 5 July, 2012

Author: Kailash Gambhir

Bench: Kailash Gambhir

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 1096/2009

Judgment delivered on: 5.7.2012

ARUN CHADHA Plaintiff
Through Mr. Abhisekh Malhotra with Mr. Harsh
Vardhan Tripathi, Advs.

versus

OCA PRODUCTIONS PRIVATE LIMITED &
ORS Defendants
Through

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR:

KAILASH GAMBHIR, J.

1. This suit has been filed by the plaintiff for permanent injunction restraining infringement of copyright/author's Special Rights, rendition of accounts of profits, damages, delivery up, etc.

2. The case of the plaintiff as set out in the plaint is that the plaintiff is a documentary film maker of repute within the film and television industry, both in India and abroad and the plaintiff directs and produces his films through his production house Cine Pulse. The defendant no.1 is a company incorporated under the Companies Act having its registered office at Bungalow No.49/49,R.S.C-6,Opposite Jankidevi Public School, S.V.P. Nagar,MHADA,Andheri(West),Mumbai and Mr.Sanjay Singh, the defendant no.2 herein is the director and the principal shareholder of the said company and the defendant no.3 herein, Mr.Pradeep Prabhakar is the Managing director of the said company. It is the case of the plaintiff that the plaintiff in December, 2006 contacted one Ms. Maitreyi Pushpa, an author of repute, who has written a book titled "Kasturi Kundal Bassey" with a proposal to secure the rights to make a television serial based on the book to which the author agreed. Consequently, vide agreement dated 1.1.2007 between the author and the plaintiff, the author conferred on the plaintiff, the exclusive right to produce a television series based on the book with the exact title as that of the book. Thereafter the plaintiff entered into an agreement dated

9.1.2007 with the Department of Adult Education (hereinafter referred to as DAE) of the Ministry of Human Resource Development, Government of India, for funding the proposed venture, in return of which the plaintiff assigned the rights in the proposed serial/film in favour of the DAE, which assignment was to come into effect upon delivery of the master tapes to the DAE upon completion of the said serial. The plaintiff thereafter set upon the task of getting the cast and crew for the serial together and with the funds of the DAE alongwith his own funds filmed the serial in district Jhansi between 14.11.2007 and 13.12.2007. It is the case of the plaintiff that after the serial was completed, for the purposes of editing the plaintiff required a studio and Mr. Asim Kumar Sinha, the editor of the film, identified a studio in Mumbai known as "Optimum", which is owned by defendant no.2. The deal to execute the said film was executed through one Mr. Adil Wason, a video editor and friend of defendant no.2 and the plaintiff and the process of editing took place on the non-linear machines of the Optimum studio between first week of March and June 5, 2008. After the master prints and DVDs were handed over to the plaintiff on June 5, 2008, the plaintiff paid the agreed consideration amount via cheque dated June 7, 2008 to Mr. Adil Wason and another cheque dated June 9, 2008 in the name of Mr. Amit Singh, at Mr. Wason's request. The plaintiff after making all the final payments for use of the studio to Mr. Adil Wason requested him and the owner of the studio to delete all the software material and/or any other aspect of the serial work or parts thereof which was stored in the computers of the studio.

3. The plaintiff has averred that somewhere in the second week of April, 2009 the plaintiff was informed by certain members of the crew of the serial that three episodes of a television serial titled "Ek Kadam Aur" have been broadcast by the Doordarshan Kendra, Bhopal during the first week of April, 2009 and the said three episodes are identical to the episode no. 5, 6 and 7 of the plaintiff's yet to be telecast serial based on the book. As per the plaintiff, he further received confirmation of this fact from the DAE, who were upset that the serial for which they own the copyright has been broadcast without their permission. Thereafter the plaintiff alongwith the DAE officials was shocked upon viewing the footage of the serial as telecast by the Doordarshan as it was identical to the episode 5, 6, and 7 of the serial produced and directed by the plaintiff. The plaintiff has also stated that the credits appearing in the impugned serial were modified to replace plaintiff's name and other names as well, however the name of the author of the book as well as the cast was not changed.

4. The argument of the plaintiff was that the actions of the defendants amount to infringement/breach of the plaintiff's author's special rights enshrined in section 57 of the Copyright Act, 1957 as the defendants have not attributed the work to the plaintiff and have also distorted, mutilated and modified the plaintiff's film work to create the impugned serial and such acts of the defendants are mala fide and amount to the tort of breach of trust and confidence and misappropriation of the of the plaintiff's property in the serial and conversion of the said property entrusted to the defendant no.2 and his studio.

5. Learned counsel for the plaintiff argued the matter and referred the pleading and documents placed on record, as well as the evidence produced by the plaintiff by way of affidavit.

6. I have heard learned counsel for the plaintiff and perused the material placed on record.

7. This court vide order dated 29.5.2009 had granted an *ex parte ad interim* injunction in favour of the plaintiff and against the defendants restraining them from broadcasting/telecasting the impugned serial. Thereafter on 15.9.2009, the defendants entered their appearance and thereafter sought time on various dates to file written statement but eventually vide order dated 5.7.2010, this court closed the right of the defendants to file their written statement under order VIII rule 10 CPC. Thereafter the plaintiff adduced his evidence and produced himself as PW1 and despite granting number of opportunities the defendants failed to cross examine the plaintiff PW1 and accordingly vide order dated 18.3.2011, the right of the defendants to cross examine the plaintiff was closed. Thereafter the defendants filed an application under order 9 rule 7 for recall of the order dated 18.3.2011 which was allowed by this court vide order dated 23.5.2011 subject to payment of costs of Rs.10,000/-. On 1.9.2011, as the plaintiff was again present to be cross examined by the defendants, there was no one present for the defendants and in the interest of justice the date was again fixed for 21.11.2011 when again on the said date none appeared and thus the right of the defendants to cross examine the plaintiff PW1 stood closed. Thereafter on 16.2.2012, the counsel for the plaintiff argued before this court that the defendant has been deliberately causing delay in the matter and prayed that a decree in terms of order 8 rule 10 be passed in his favour.

8. Order 8 rule 10 of the Code of Civil Procedure is enacted on the statute book to expedite the disposal of the suit and is not penal in nature as the defendant has to be penalized for non filing of the written statement by passing a judgment against him. It provides for a discretionary power to the court to either pronounce the judgment against the defendant who has not filed the written statement within the stipulated time or make any order in relation to the suit which it deems fit. The failure to file written statement means the admission of the claims in the plaint made by the plaintiff by the defendant and based on such deemed admission, the court has ample power to pronounce the judgment against the defendant. It is however a settled legal position that the courts should be cautious in passing a judgment under order 8 rule 10 and before passing a judgment against the defendant it must see that the facts set out in the plaint and documentary material placed on record are of unimpeachable character and does not call for any evidence to prove the same. It is thus a matter of satisfaction of the court,,s judicial conscience to straightaway pass a judgment based on the deemed admission or to call upon the plaintiff to prove his case with the help of evidence. In nutshell, the facts of each case will determine as to which course of action should be adopted by the court. Here it needs to be made clear that it is not a matter of right of the plaintiff to claim a judgment or decree in his favour as in the given facts it can also result in the dismissal of a case as well. The Apex Court recently in the case of C.N Ramappa Gowda vs. C.C. Chandregowda 2012(4)SCALE541 held as under:

"However, if the Court is clearly of the view that the Plaintiff's case even without any evidence is *prima facie* unimpeachable and the Defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit."

In the case at hand the right of the defendant to file written statement was closed vide order dated 5.7.2010 after giving umpteen opportunities and imposing costs. From the narration of the events hereinabove, it would be manifest that the defendants took repeated adjournments and opportunities, but the defendants in a most cavalier manner have resorted to dilatory tactics to delay the passing of the decree in the present suit. It can be said without an iota of incertitude that the defendants in the present case have no defense to raise to rebut the arguments of the plaintiff. The defendants certainly have been callous and the complete inaction on their part cannot defeat the right of plaintiff and the court has to act to protect the interest of the plaintiff. Hence, this court would proceed to pass a judgment under order 8 rule 10 against the defendants in the present case.

9. Now coming to the pith of the case at hand, the plaintiff in evidence, appeared as PW1 and tendered his affidavit which is Ex PW1/A. He tendered the original agreement between him and Ms.Maitreyi Pushpa as Ex.PW1/1 and the agreement dated 9.1.2007 between him and the Department of Adult Education as Ex.PW1/2. The defendants, as is a matter of record, failed to cross examine the plaintiff PW1. The other two witnesses who appeared were Mrs. Swastika Chakaraborty who tendered her affidavit in evidence as Ex.PW2/A and Ms. Saroj Sharma as PW3 who tendered her affidavit in evidence as Ex.PW3/A.

10. The plaintiff in his affidavit affirmed what has been averred in the plaint. He also stated that he took the initiative and the responsibility of making the serial i.e "Kasturi Kundal Bassey" being the producer and author of the said serial/film work but since the rights in and to the serial/film work have been assigned by him in favour of DAE, therefore, the copyright owner in respect of the said film/works is the DAE. He has further stated that after it came to his knowledge about the said serial of his being broadcast, on making enquiries at the Doordarshan Kendra, Bhopal he was told that the defendant no.2 acting for and on behalf of defendant no.1 represented to the Doordarshan that defendant no.1 and /or 2 are the producers and owners of the cinematograph film comprising the television programme/impugned serial and that they own the exclusive and unencumbered television rights/copyright in the same. He has further stated that due to the action of the defendants the DAE was adamant on terminating the agreement dated 9.1.2007 with him , thereby seriously prejudicing his honour and reputation and future business prospects to deal with any government or other departments. The plaintiff has further stated that as he is primarily a documentary film maker on issues on which such endeavours that are supported by the Government, , he is at the risk of losing his credibility and future support from the Government that he has built so painstakingly over the last 29 years.

11. The other witnesses PW2 and PW3 stated that they both had acted in the serial "Kasturi Kundal Bassey" produced and directed by the plaintiff. They have stated that the defendants did not engage their services for any T.V. serial under any other title that is verbatim to the serial "Kasturi Kundal Bassey" produced and directed by the plaintiff and their services were hired exclusively for the T.V. serial "Kasturi Kundal Bassey". They further stated that the defendants have never taken their services to act in the T.V.serial "Ek Kadam Aur" that has been telecast on Bhopal Doordarshan.

12. It is the case of the plaintiff that by virtue of being the producer of the cinematograph film embodying the serial, he is the author of the said cinematograph film work under the Copyright Act,

1957. It has also been averred by him that even after assigning the copyright in the said work, he still retains the Author's Special Rights enshrined under section 57 of the Act. It is also his case that he had hired the Optimum Studio to get the serial edited and the said serial was on the computers of the said studio on his trust and confidence and no one could use or exploit or convert to their own use, the said film work without his permission which was never given by him as on the contrary he had categorically asked the studio to delete the said work. It is the contention of the plaintiff that the actions of the defendants amount to infringement of his special rights as per section 57 of the said act as the defendants have not attributed the work to him and have also distorted, mutilated and modified his work to create the impugned serial which is prejudicial to the honour and reputation of the plaintiff.

13. For appreciation of the case at hand, it would be relevant to reproduce section 57 of the Copyright Act as under:

57. Authors special rights -

(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right-

(a) To claim authorship of the work: and

(b) To restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honor or reputation.

Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub section (1) of Section 52 applies. Explanation- Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the right conferred by this section.

(2) The right conferred upon an author of a work by sub section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author. On a bare reading of the above provision it is evident that the author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other action in relation to the work, if such distortion, mutilation, modification or other act is prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned. The proviso to section 57 states that the author will not have the right to restrain or claim damages in respect of any adaptation of a computer programme by a lawful possessor of a copy of a computer programme, to utilise the computer programme for which it was supplied and to make backup copies as a temporary protection against loss.

14. This court in the case of Amar Nath Sehgal vs. Union of India 117(2005)DLT717 elucidated the origin of the authors' moral rights as it stands in the Copyright Act today. It would be useful to refer

to the relevant para of the said judgment hereunder:

"27. The community of nations set the International Standards for moral rights protection of the author under the 'Berne Convention For the Protection of Literary and Artistic Works'. Since its inception in 1886, the Berne Convention has been the primary instrument of International Copyright Law. Article 6bis of the Berne Convention enjoins the members of the Berne Union to provide legal recognition for the moral rights of attribution and integrity in a work in which copyright exists. Article 6bis of Berne Convention reads :-

"(1)Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

(2)The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

28. Should right to assert authorship in a work, include a right to object to distortion, mutilation or modification in a work? Why not, if it is prejudicial to the honour or reputation of the author. The contours, the hue and the colours of the original work, if tinkered, may distort the ethos of the work. Distorted and displayed, the viewer may form a poor impression of the author. A good name is worth more than good riches.

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29. Under Article 6bis of the Berne Convention, the moral right of integrity enables the author to seek appropriate legal remedies if the moral right of attribution and integrity in his work is violated. The moral rights set out in the Berne Convention are significant because they continue to be vested in the author even after he has parted with his economic rights in his work.

30. The right of the author under Article 6bis of the Berne Convention provides that an author may 'object to any distortion, mutilation or modification' of his work which is deemed to be 'prejudicial

to his honour or reputation'."

Hence, the rights of the author independent of the economic rights transferred via assignment are protected under section 57 of the Act. In the case at hand the plaintiff claims himself to be the author of the said serial and there is no suggestion or evidence to the contrary and thus this is an admitted position. He being the author of the said work has sought protection of his rights against the defendants' further attempts at mutilation and modification. The plaintiff herein claims such actions of the defendants' to be attack on his honour and reputation. For this reason, the credentials of the plaintiff as set out in the plaint are to be examined. The plaintiff is a film graduate from the prestigious Film and Television Institute of India (FTII), Pune and has been in the profession of film making for the past more than 29 years. The plaintiff specializes in documentary films and his films have been exhibited in various national and international film festivals and have won numerous awards which include the "Golden Conch" award, which is the highest award in documentary films in the Mumbai International Film Festival of India. The plaintiff has also served as member of jury at the International Film Festival of India at Goa. The plaintiff has made more than 75 documentary short films on various topics related to health, social anthropology, social problems and issues in India, a brief list of which has been given in para 6 of the plaint. Thus, from what has been enumerated above, the high standing of the plaintiff in the field of film making is not in dispute. Now the plaintiff alleges that the defendants have distorted, mutilated and modified the plaintiff's film work to create the impugned work. Now what is modification and mutilated in a context was explained by this court in the case of Mannu Bhandari vs. Kala Vikas Pictures AIR1987Delhi13 wherein it was held as under:

"(9) Section 57 falls in Chapter Xii of the Act concerning civil remedies.

Section 55 provides for certain remedies where there is infringement of copyright. Section 56 provides for protection of separate rights comprising the copyright in any work. Then comes Section 57, providing for authors' special rights, and the remedies for violation of those rights. This is a statutory recognition of the intellectual property of the author and special care with which the intellectual property is protected. Under Section 57 the author shall have a right to claim the authorship of the work. He has also a right to restrain the infringement or to claim damages for the infringement. These rights are independent of author's, copyright and the remedies open to the author under section 55. In other words Section 57 confers additional rights on the author of a literary work as compared to the owner of a general copyright. The special protection of the intellectual property is emphasised by the fact that the remedies of a restraint order or damages can be claimed "even after the assignment either wholly or partially of the said copynght". Section 57 thus clearly over-rides the terms of the Contract of assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions of Section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by Section 57. The Contract of Assignment will have to be so construed as to be consistent with Section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57. (10) What is the substance of the protection of special rights guaranteed by Section 57, Sub-Clause (a) of Clause (1) of the Section prohibits any distortion of mutilation of the author's work. The words "other modification" appearing in the sub-clause (a)

will have to be read ejusdem generis with the words "distortion" and "mutilation". The modification should not be so serious that the modified form of the work look quite different work from the original. "Modification" in the sense of the perversion of the original, may amount to distortion or mutilation. But, there can be. a modification implicate such as where 'A' is changed to 'B', both being quite, distinct. Sub-clause (a) thus provides inviolability to an intellectual work. Sub-clause (b) provides for remedies for protection of honour and reputation of the author. The bundle of rights and remedies provided by Section 57 is in tune with the modern development in law relating to protection of intellectual property of the author and the international agreements and treaties in that regard. The learned Judge is not right in saying that because the modifications are permissible under the Contract of Assignment the plaintiff had failed to prove the breach of Section 57."

In the case at hand, the defendants have sold the serial as made by the plaintiff to Doordarshan, Bhopal. What was aired was the exact reproduction of the episodes filmed by the plaintiff with the changes that the credits appearing in the impugned serial were modified to replace the plaintiffs name as the producer and director, with that of the other persons, including defendant no.2 herein. The names of the producer, director, camera man and editor were all changed. The executive producers of the impugned serial were credited to be defendant no.2 and defendant no.3 and the name of the serial was changed to "Ek Kadam Aur" from "Kasturi Kundal Bassey". However, the name of the author of the book as well as the cast was not changed. In the light of legal principles enunciated above, this court is of the considered view that the modifications made in the work of the plaintiff are covered within the ambit of section 57 of the act.

15. The principle underlying section 57 is that damage to the reputation of an author is something apart from infringement of work itself. Section 57 provides an exception to the rule that after an author has parted with his rights in favour of a publisher or other person, the latter alone is entitled to sue in respect of infringements. The publisher or other assignee of copyright can no doubt bring action but thus section provides that the author can approach the court for protecting the plaintiff from serious injury even in cases where there is assignment of copyright. Thus in the case of hand after perusal of the documents produced and the testimony of the witnesses, this court is of the considered view that the plaintiff is the author of the impugned work and that the defendants have modified the said work of the plaintiff without permission.

16. In the light of the aforesaid discussion, a decree of permanent injunction is passed in favour of the plaintiff and against the defendants restraining the defendants, their partners, affiliates, directors, officers, employees, representatives from exhibiting the impugned serial or any other film works that are identical or substantially similar to the plaintiff's serial/film works or parts thereof. The defendants are also restrained from distorting, mutilating, modifying, or committing any other act in relation to the said serial /film work which would be prejudicial to the plaintiff's honour or reputation. Though the plaintiff has claimed punitive damages and rendition of accounts, no evidence has been led by him to prove the same and hence the same cannot be awarded. Accordingly the suit is decreed in his favour alongwith costs of Rs.1 lac.

17. Decree sheet be drawn accordingly.

KAILASH GAMBHIR, J

July 05 , 2012