

Mathrubhumi Printing And Publisihing vs The Indian Performing Rights Society on 8 February, 2011

Author: M.N.Krishnan

Bench: M.N.Krishnan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

FAO.No. 82 of 2009()

1. MATHRUBHUMI PRINTING AND PUBLISIHING
... Petitioner

Vs

1. THE INDIAN PERFORMING RIGHTS SOCIETY
... Respondent

For Petitioner :SRI.R.D.SHENOY (SR.)

For Respondent :SRI.V.CHITAMBARESH (SR.)

The Hon'ble MR. Justice M.N.KRISHNAN

Dated :08/02/2011

O R D E R

M.N.KRISHNAN, J
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FAO Nos.82, 83/2009 & 38/2010

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Dated this the 8th day of February 2011

JUDGMENT

Since common question arises in all these cases, they are disposed of together. FAO Nos.82 and 83 of 2009 are filed by Mathrubhumi Printing and Publishing Co.Ltd against the orders in I.A.No8983

of 2008 in O.S.No.48 of 2008 and in I.A.No.442 of 2009 in O.S.No.3 of 2009. The suit O.S.No.48 of 2008 is filed with a petition for injunction. The brief facts necessary for the disposal of the cases are stated as follows:

2. The plaintiff company is a limited company. The plaintiff is operating FM Radio Stations in Thrissur, Ernakulam Kannur and Thiruvananthapuram under the name and style "Club FM 94.3" after obtaining due licence from the Government of India. The defendant company, viz., the Indian Performing Rights Society Limited (for short 'IPRS') and they are engaged in the business of granting licences in relation to musical work. The plaintiff, by virtue of being a licensed broadcaster, communicates 'sound recordings' to the public by means of the aforesaid FM stations. The plaintiff has purchased all the rights of 'sound recordings' of Malayalam and other cinematograph films from its copyright owners, Phonographic Performance Limited (for short 'PPL'). The plaintiff is broadcasting the recorded sound and it is no longer a musical work. It is contended that once the owner of the sound recording permits the plaintiff to broadcast the sound recording, the defendant cannot complain that their copyright over musical work has been violated. Now the defendant is threatening the plaintiff by communicating that unless the plaintiff enters into an agreement with them, they will take steps to injunct the broadcasting of the sound recordings.

Hence the suit as well as interlocutory applications filed seeking temporary injunction to the same effect.

3. The respondent, viz., the defendant-IPRS has filed a detailed counter. According to them, it is a society registered under Section 33(3) of the Copyright Act and is permitted to carry copyright business in "Musical and Literary Works" by the Ministry of Human Resources Development, Government of India. The respondent issues licenses to users of music and literary work and collect royalties from them for and on behalf of the members and are distributed among them after deducting administrative costs. There are 1797 members in the respondent society, who are all luminaries in the field of music. The averment that the petitioner has obtained licence to broadcast music through FM Radio Station is misleading. It is true that PPL is also a registered one. But, in order to broadcast the music licence from IPRS is compulsory and therefore the suit to injunct IPRS from initiating action cannot be sustained.

4. A reply affidavit has been filed contending that there is no necessity to obtain a licence for doing musical work. The other suit, O.S.No.3/2009 is filed by IPRS and it is filed with a prayer to injunct Club FM 94.3 and others be restrained by means of injunction from continuing the broadcasting. This is resisted by the plaintiff in the other suit with the very same line of contentions raised in the suit O.S.No.48 of 2008.

5. FAO No.38 of 2010 is a suit instituted by the Malayala Manorama Co.Ltd., who are also the broadcasting sound recordings through FM Radio stations and the prayer is the same as that in the other suits. Therefore IPRS would contend that the plaintiff is not entitled to any relief in the suits.

6. In the trial court the injunction applications in O.S.No.48/2008 and O.S.No.3 of 2009 were disposed of by a common judgment in which Exts.A1 to A28 and Exts.B1 to B14 were marked. The trial court granted injunction in favour of the IPRS society, the plaintiff in O.S.No.3/2009 and dismissed the injunction application filed by Mathrubhumi Printing and Publishing Co.Ltd. So also in O.S.No.66 of 2007 filed by Malayala Manorama Co.Ltd. the petition was dismissed by a separate judgment by another Judge. Aggrieved by the said decision, the Mathrubhumi Printing and Publishing Co.Ltd. and Malayala Manorama Co.Ltd. had come up in appeals against these decisions.

7. The point that arises for determination is whether broadcasting can be had without a licence from IPRS or whether no licence is required from IPRS for broadcasting. The crux of the contention between the parties lies on the question whether a cinematograph film from which a sound recording is taken out and broadcasted in FM Radio amounts to any breach of copyright of the composer, lyricists, etc. The contention of the FM broadcasting company is to the effect that the definition of cinematograph film under the Copyright Act takes in the sound recording also and when a cinematograph film is made after the right of lyricist or composer is purchased it is contended that the producer of the cinematograph film, who is the author becomes the absolute owner of the entire work contained in the film and therefore broadcasting and sound tracking do not require any special permission since the society, viz. PPL has granted the licence. On the other hand, IPRS would contend that by virtue of the provisions of the Copyright Act the right of the composer or the lyricist does not end and the owner of the movie does not become the copy right holder with respect to the extractions from the sound recording and broadcasting through FM Stations.

8. The matter requires consideration first in the light of the decision of the Hon'ble Supreme Court reported in IPR Society v. EIMP Association(AIR 1977 SC 1443). It was a case wherein the Indian Performing Rights Society Ltd., that is the present defendant in the case which had been registered and had purchased the rights of the composers and lyricists had prescribed licence fee for the purpose of broadcasting the same. The film owners' association and others resisted the whole issue and contended that the owner or the producer becomes the absolute rightful person and therefore he can exhibit or broadcast the sound recording and so no right will remain with the composer or the lyricist. Or, in other words, the contention is when the lyricist or composer who makes a song which is composed and permits to be part of a cinematograph film then it becomes the property of the owner of the movie and therefore IPRS has no right. The matter was considered by the Board under the Act and held in favour of IPRS. The matter was taken before the High Court of Calcutta which held it otherwise and aggrieved by that decision, the matter had gone up to the Supreme Court. The Hon'ble Supreme Court had exhaustively dealt with all the points in the matter and had taken into consideration the definitions of the various terms and decided the case in paragraph 17 of the judgment which reads as follows: "On a conspectus of the scheme of the Act as disclosed in the provisions reproduced above particularly Cls.(d), (v), (f), (m),

(v) and (v) of S.2. Ss.13(1) and 14(1)(c) provisos (b) and (c) to S.17 and Ss.22 and 26 of the Act, it is therefore abundantly clear that a protectable copyright (comprising a bundle of exclusive rights mentioned in S.14(1)(c) of the Act) comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronized". Learned counsel appearing in that case had elaborately brought to the notice of the Supreme Court the impact of

Sections 13 and 14 of the Copyright Act. Section 13 (1) of the Copyright Act of 1957 states about the works in which the copy right subsists. That is to say :-(a) original literary, dramatic, musical and artistic works, (b) cinematograph films; and) sound recording. Section 13(4) states that "the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made. Section 14(1)(a)

(iii) of the 1957 Act describes about the meaning of copyright. Under Section 14(1)(a)(iii) of the Copyright Act gives the exclusive right to perform the work in public. Section 14(1)(c)

(ii) states in the case of a cinematograph film to cause the film, in so far as it consists of visual images, to be seen in public and in so far as it consists of sounds, to be heard in public. It was argued before the Hon'ble Supreme Court that Section 13(4) preserves the right of the lyricist or composer and therefore merely because a cinematograph film is taken and the owner becomes the author it does not take away the right of these persons. The Hon'ble Supreme Court exhaustively considered these arguments in paragraph 16 of the judgment. It is stated therein that "the interpretation of cl.(f) of Section 2 reproduced above, which is not exhaustive, leaves no room for doubt when read in conjunction with S.14(1)(c)(iii) that the term "cinematograph film" includes a sound track associated with the film. In the light of these provisions, it cannot be disputed that a 'cinematograph film' is to be taken to include the sounds embodied in a sound track which is associated with the film. Section 13 recognizes 'cinematograph film' as a distinct and separate class of 'work' and declares that copyright shall subsist therein throughout India . Then the Court specifically referred to the argument based on Section 13(4). The Hon'ble Supreme Court held that "though a conflict may at first sight seem to exist between S.13(4) and S.14(1)(a)(iii) on the one hand and S.14(1)(c)(ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of S.14(1)(c) of the Act on completion of the cinematograph film, a copyright which gives him the exclusive right inter alia of performing the work in public. Therefore the Hon'ble Supreme Court held that by virtue of these provisions, the owner of the film or the producer of the film becomes the author absolutely entitled to copyright and therefore there cannot remain any right with the composer or the lyricist. But, it was made clear that if there is a contract to the contrary, then certainly the provisions of the contract will prevail and they will get a right. So, the long and short of the decision of the Hon'ble Supreme Court with respect to the sound recording in a cinematograph was to the effect that the author or the producer becomes the author entitled to absolute copyright and the composer or the lyricist do not retain any right with them unless there is a contract to the contrary. So, it was held that the IPRS cannot get any relief and the appeal was dismissed. The Hon'ble Judges also quoted that "we are fortified in this view by the decision in Wallerstein v. Herbert (1867) 16 L.T.453 relied upon by Mr.Sachin Chaudhary where it was held that the music composed for reward by the plaintiff in pursuance of his engagement to give effect to certain situations in the drama entitled "Lady Andley's Secret", which was to be put on the stage was not an independent composition but was merely an accessory to and a part and parcel of the drama and the plaintiff did not have any right in the

music". Though the case of the IPRS society was dismissed by the Hon'ble Supreme Court, a footnote was added by His Lordship Justice V.R.Krishna Iyer making it very clear that the judgment just delivered is on behalf of the Court which makes this footnote, in a sense otiose. The learned Judge thought about the injustice that is being carried to the persons including musicians and ultimately held that it is for the parliament to enact on that point.

9. The learned trial Judge in these cases had given expressions to the great thoughts of the Judge given in the footnote. But, it has to be remembered that the judgment is rendered upholding the right of the producer and footnote only demonstrates the necessity to have a proper legislation for the purpose of helping the composers, lyricists, musicians, etc. So the approach made by the learned trial Judge on the basis of the footnote is not correct.

10. Now the next point to be considered is that whether there has been some changes brought out by some amendments in 1994 to the Copyright Act and whether those amendments had given any particular right to the people who are represented by IPRS. The definition of cinematograph film under Section 2(f) also takes in sound recording. The definition 'communication to the public' means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies. The word 'performance' is defined as in relation to the performer's right, means any visual or acoustic presentation made live by one or more performers. The word 'performer' includes an actor, etc. who makes the performance. So far as Section 13 of the said Act is concerned, the difference between 1957 Act and 1994 amendment is that instead of the word 'record' used in Section 13(1)(c) it is used as 'sound recording'. Under Section 13(4) of the Act wherever the word 'record' was there it is substituted with the words 'sound recording'. When one reads the definition of cinematograph film and Section 13 of the Copyright Act since the definition of cinematograph film also includes sound recording the copyright with respect to sound recording will also come within the ambit of the word 'cinematograph film'. So far as Section 13(4) is concerned, we do not find any material change altering the right conferred at all.

11. Section 17 states about the first owner of copyright. As held by the Supreme Court in AIR 1977 SC 1443 by virtue of the consideration of the different aspects mentioned therein so far as the cinematograph film is concerned, the producer becomes the first author entitled to absolute right unless there is a contract to the contrary. It is true that IPRS is claiming right by virtue of the assignment on copyright. Really the other side is disputing the same. But whatever it may be, the assignment on copyright must relate to a right which is in subsistence. Going by the decision of the Hon'ble Supreme Court in the 1977 case the entire right had vested in the author, viz., the owner and therefore so far as a composer is concerned, no further right remains for assignment of the copyright and therefore the mere assignment even if proved, will not confer any right which is not there. Therefore it will not also confer any right. So far as the question of maintainability of the suit under Section 60 is concerned, it is a matter which requires detailed consideration at the trial stage. It has to be stated with great appreciation that the learned senior counsel for the appellants as well as the respondents had taken me through various development of law and also the decision of the Calcutta High Court reported in EIMP Assn. v. IPR Society (AIR 1974 Cal.257). It has to be stated that it was a decision rendered by the Calcutta High Court prior to the decision of the Hon'ble Supreme Court

in AIR 1977 SC 1443. The other decisions relied on and cited do not deal with the question that is the subject matter and crux between the parties in this case. So, I am not elaborately referring to those decisions.

12. It has to be stated that broadcasting takes in communication to the public as well. Now the spirit behind the view expressed by Justice V.R.Krishna Iyer in AIR 1977 SC 1443 is attempted to be given a life by a proposed amendment which is pending before the parliament. In that, the proposal is to incorporate performance as also as a communication to the public which when comes through may cover or serve the purpose. So as the law stands today and in the light of the authoritative pronouncement of the Supreme Court in AIR 1977 SC 1443 it has to be held that in a cinematograph film which takes in sound recording as well, the owner or the producer of the film becomes the absolute owner unless there is a contract to the contrary with a composer or lyricist and there remains no right with the composer or lyricist for assignment and therefore even if an assignment is taken, it will not confer a right on IPRS. There is no case for the party that there is a contract to the contrary in the agreement. Therefore, I find that the decisions rendered by the trial court in both the cases are not in order and the prayer of injunction refused to the plaintiffs in O.S.No.48/2008 and O.S.No.66/2007 are not in order which are liable to be set aside and the prayer for injunction in I.A.No.8983/2008 in O.S.No.48/2008 and I.A.No.5254/2007 in O.S.66/2007 are allowed and the injunction granted as per I.A.No.442/2009 in O.S.No.3/2009 is set aside and dismissed. Appeals are allowed accordingly.

M.N.KRISHNAN, JUDGE Cdp/-