

The Indian Performing Right Society Ltd vs Entertainment Network (India) Ltd on 31 August, 2016

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.341 OF 2012

The Indian Performing Right Society Ltd.)
A Company incorporated under the provisions)

of the Companies Act, 1956, having its Registered)
Office at 208, Golden Chambers, 2nd Floor,)
Andheri (West), Mumbai - 400 053.) .. Petitioner

Versus

Entertainment Network (India) Ltd.)
A Company incorporated under the provisions)

of the Companies Act, 1956, having its Registered)
office and carrying on business inter alia at 4th Floor)
'A' wing, Matulya Center, Senapati Bapat Marg,)

Lower Parel (West), Mumbai - 400 013,) .. Respondent

ALONG WITH

ARBITRATION PETITION NO.1017 OF 2012

Entertainment Network (India) Ltd.)
A Company incorporated under the provisions)

of the Companies Act, 1956, having its Registered)
office and carrying on business inter alia at 4th Floor)
'A' wing, Matulya Center, Senapati Bapat Marg,)
Lower Parel (West), Mumbai - 400 013,) .. Petitioner

Versus

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The Indian Performing Right Society Ltd.)

A Company incorporated under the provisions)
of the Companies Act, 1956, having its Registered)

Office at 208, Golden Chambers, 2nd Floor,)
Andheri (West), Mumbai - 400 053.) .. Respondent

Mr.Ravi Kadam, Senior Advocate a/w Mr.Rohan Kadam i/by Mr.Sandeep V. Marne for the petitioner in Arbitration Petition No.341 of 2012 and for the respondent in Arbitration Petition No.1017 of 2012.

Mr.Pradeep Sancheti a/w Mr.Ashish Kamat a/w Ms.Smriti Jha a/w

Mr.Subhradeep Banerjee i/by M/s.Mulla & Mulla & Craigie Blunt & Caroe for the respondent in Arbitration Petition No.341 of 2012 and for the petitioner in Arbitration Petition No.1017 of 2012.

CORAM

: R.D. DHANUKA, J.

RESERVED ON : 20th July 2016 PRONOUNCED ON : 31st August 2016 Judgment :-

. By these two petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Act"), both the petitioners have impugned part of the arbitral award dated 6 th December 2011. By consent of the parties, both the arbitration petitions were heard together and are being disposed of by a common judgment. Some of the relevant facts for the purpose of deciding these arbitration petitions are under:-

2. The petitioner in Arbitration Petition No.341 of 2012 was the original respondent in the arbitral proceedings whereas the petitioner in Arbitration Petition No.1017 of 2012 was the original claimant. For ppn 3 arbp-341.12 wt 1017.12 (j).doc the sake of convenience, the parties to the aforesaid proceedings are described as they were described in the arbitral proceedings in the later part of this judgment as "the claimant" or "the original respondent" as the case may be.

3. The claimant is engaged in the business inter alia of operating private FM Radio Stations in various cities in pursuance of the license granted in its favour by the Government of India from time to time. The original respondent is a Copyright Society registered under Section 33 of the Copyright Act, 1957 and is a non-profit making body established on 23rd August 1969 to monitor, protect and enforce the rights, interests and privileges of its members comprising of Authors, Composers, Film Producers and Publishers/Music Companies. After the amendment to the Copyright Act, 1957 effected by the Amendment Act of 1994, the claimant-Society was registered as a Copyright Society under Section 33(3) of the Amended Act. On 27 th March 1996, the Registrar of Copyrights (Government of India) granted Certificate of Registration to the original respondent authorising it to carry out copyright business in Literary and Musical works. The original respondent has 2500 members

comprising of Authors, Composers, Film Producers and Publishers/Music Companies and owners of literary and musical works to the claimant.

4. It is the case of the original respondent that the Members of the original respondent had Copyrights in respect of more than 95% of the Indian works. The original respondent has International Reciprocal agreements with several International Copyright Societies of various ppn 4 arbp-341.12 wt 1017.12 (j).doc countries like U.K., U.S., Malaysia, Australia, Germany, Singapore etc. It is the case of the original respondent that by virtue of such reciprocal agreement, the original respondent is authorised to control and administer the performing rights in respect of International/Foreign Musical and Literary works within India.

5. On or about 18th October 2000, the Government of India granted license to the claimant on non-exclusive basis for a period of 10 years to establish, maintain and operate FM Radio Stations within the municipal limits of 7 cities viz. Mumbai, Chennai, Kolkata, Delhi, Indore, Pune and Ahmedabad.

6. By the license agreement dated 3rd July 2001, the original respondent granted non-exclusive license to the claimant to communicate to the public/publicly perform the works from the repertoire of the original respondent from the said 7 FM Radio Stations. Under clause 6.5 of the license agreement, the claimant agreed to announce the names of Composers and Authors/Writers of each work at least once after the broadcast of such work or wherever possible. The term of the license granted by the original respondent to the claimant was for 10 years from the date of commencement of FM Radio Stations. The license was granted only for the territories of each of the 7 cities.

7. It is the case of the original respondent that pursuant to the said license agreement dated 3rd July 2001, the claimant publicly performed/communicated to the public Musical and Literary works from the repertoire of the original respondent on the said 7 Radio Stations by ppn 5 arbp-341.12 wt 1017.12 (j).doc making advance payments of license fees before expiry of every 6 months period in regard to the terms of the License Agreement.

8. On 8th November 2004, the claimant addressed a letter to the original respondent forwarding the play lists of the works performed/ communicated to the public on its Radio Stations and requested the original respondent to refund the alleged excess amount paid by the claimant to the original respondent.

9. By its letter dated 15th December 2004 to claimant, the original respondent pointed out clause 1 of Schedule A of the license agreement which provided for adjustment of payment within 60 days at the end of each 6 monthly period. The original respondent pointed out that several discounts were already provided to the claimant and no claim for refund at that stage could be accepted.

10. By their letter dated 3rd February 2005 to the claimant, the original respondent called upon the claimant to send advance payment for various FM Radio Stations as per the said license agreement. The claimant sent another letter dated 1st March 2005 to the original respondent and demanded refund of the alleged excess royalty alleged to have been paid by the claimant to the original respondent. It is the case of the original respondent that the original respondent had granted infancy discount to the claimant after considering the representation of the claimant that the private FM Radio Industry was at infant stage and therefore, had agreed to charge the license fees at mere 33% of the agreed basic rate for a period of first 6 years. It is the case of the original ppn 6 arbp-341.12 wt 1017.12 (j).doc respondent that by the year 2005, since the Private FM Radio Industry was no longer in its infant stage, the original respondent vide letter dated 23rd March 2005 withdrew the infancy discount for the financial year 2005-06.

11. The claimant vide its letter dated 30th March 2005 replied to the said letter dated 23rd March 2005 and contended that the infancy discount was agreed in the License Agreement and that the same could not be modified without consent of the claimant. The original respondent vide its letter dated 13th May 2005 reiterated its demand for withdrawal of infancy discount. The claimant vide its letter dated 26 th June 2005 once again reiterated its earlier stand raised in the letter dated 30 th March 2005.

12. It is the case of the original respondent that since the claimant had committed various breaches of the license agreement including the breach of clause 6.5 of the license agreement dated 3 rd July 2001 by not announcing the names of Composers and Authors/riters after broadcast of each work from its Radio Stations, the original respondent issued a legal notice on 1st March 2006 and called upon the claimant to provide complete list of areas where the Radio Stations of the claimant were being broadcast. The original respondent also called upon the claimant to comply with the requirement of clause 6.5 of the license agreement. The original respondent reserved its rights to claim damages for breach of license agreement.

13. The claimant vide its letter dated 24 th March 2006 contended that the broadcast of sound recording embodying the literary and ppn 7 arbp-341.12 wt 1017.12 (j).doc musical works did not amount to use or exploitation of the copyright in Musical and Literary works and also demanded refund of various amounts paid by the claimant to the original respondent under the license agreement.

14. M/s. Radio Today Broadcasting Ltd. had filed a Suit before the Calcutta High Court against the original respondent. The claimant thereafter filed an intervention application in the said suit before the Calcutta High Court inter alia praying for its impleadment as a party to the said suit. By an order dated 26 th April 2006, the Calcutta High Court recorded a statement made on behalf of the claimant that it would continue to pay license fees to the original respondent without prejudice to its rights and contentions.

15. The claimant filed Arbitration Petitions bearing Nos.234 to 239 of 2006 before this Court inter alia praying for appointment of an arbitrator. The said arbitration proceedings were withdrawn by the claimant on 6th November 2006 after making a statement that the claimant would continue to pay royalty to the original respondent at the same rate that was being paid earlier.

16. The claimant, thereafter, issued a notice on 16 th September 2006 to the original respondent thereby invoking arbitration clause recorded in the license agreement dated 3 rd July 2001 and contended that the broadcast of sound recording embodying the literary and musical works by the claimant did not amount to use or exploitation of copyright in Musical and Literary works. The claimant contended that as per the advice sought by them in March/April 2006, the royalty paid ppn 8 arbp-341.12 wt 1017.12 (j).doc by the claimant was under mistake and misrepresentation by the original respondent.

17. By its notice dated 8th January 2007, the original respondent terminated all 7 license agreements in respect of the cities of Delhi, Mumbai, Pune, Kolkata, Indore, Pune and Ahmedabad alleging breach of license agreements inter alia on account of broadcast beyond the city limits, non-announcement of names of authors and Composers and non-payment of full license fees after withdrawal of infancy discount.

18.

The claimant vide its letter dated 11 th January 2007 called upon the original respondent to refer the disputes to arbitration. It is the case of the original respondent that the claimant sent one more reply on 22nd January 2007 to the original respondent in which the claimant virtually admitted the breach of clause 6.5 of the license agreement claiming that the claimant was not obliged to announce the names of the Authors and Composers. The claimant, thereafter, filed Arbitration Petitions bearing Nos.34 to 39 of 2007 for appointment of an arbitrator.

The learned designate of the Chief Justice passed an order on 14th September 2007 appointing a former Judge of the Supreme Court as a sole arbitrator by consent of the parties. The parties filed consent terms in the said proceedings and agreed that all disputes and differences between the parties arising out of the said license agreement dated 3 rd July 2001 were referred to the sole arbitrator-Retired Judge of the Supreme Court.

19. Pursuant to the said liberty granted by the learned arbitrator, the claimant herein filed its claim before the learned arbitrator in the ppn 9 arbp-341.12 wt 1017.12 (j).doc month of February 2008 inter alia praying for a declaration that broadcast of sound recording by the claimant embodying the literary and musical works belonging to the repertoire of the original respondent herein did not infringe any copyright of the original respondent and/or its members, applied for perpetual injunction restraining the original respondent from rendering any threats and/or making any demands or initiating any proceedings against the claimant in relation to the broadcast of sound recordings by the claimant and prayed for various monetary reliefs. The claimant also made an

alternative prayer for a declaration that the license agreement was valid, subsisting and binding. The said claim was filed by the claimant in respect of 6 cities of Kolkata, Chennai, Mumbai, Indore, Pune and Ahmedabad.

20. By an order dated 26th March 2008, the Delhi High Court referred the dispute to arbitration of the same arbitrator with regard to Delhi FM Radio Station. The claimant accordingly filed a separate claim in respect of the Delhi FM Radio Station before the learned arbitrator on 26th July 2008 and filed similar claims. The claims made by the claimant were resisted by the original respondent by filing written statement. The original respondent had also filed its counter-claim before the learned arbitrator inter alia praying for a declaration that the claimant had committed a breach of license agreement and that the original respondent had validly terminated the license agreement on 8th January 2007 and also made monetary claim against the claimant towards additional royalty payable for broadcast of Musical and Literary works beyond the city limits. The original respondent, however, restricted its claim only in respect of towns having population in excess of one lac.

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21. The claimant led evidence of four witnesses before the learned arbitrator whereas the original respondent led evidence of three witnesses. Both the parties filed written submissions before the learned arbitrator.

22. On 6th December 2011, the learned arbitrator rendered an award and declared that the claimant was not required to obtain a license from the original respondent for sound recordings broadcast by it from its FM Radio Stations in the cities of Mumbai, Chennai, Kolkata, Delhi, Indore, Pune and Ahmedabad as the claimant had valid license from the owners of the copyright in those sound recordings to broadcast those sound recordings to the public.

23. Mr.Kadam, learned senior counsel for the original respondent (petitioner in Arbitration Petition No.341 of 2012) invited my attention to various provisions of the license agreement entered into between the parties, correspondence annexed to the compilation and to the arbitration petition and various paragraphs of the impugned award rendered by the learned arbitrator. Reliance is also placed on various provisions of the Copyright Act, 1957, provisions of Copyright Act, 1914 and also a copy of the report of the Copyright Committee.

24. My attention is also invited to the issues/points for determination framed by the learned arbitrator in paragraph 13 of the impugned award and more particularly issue no.2 which reads as under :-

"(2) Whether the use/broadcast of a sound recording as such/ with the permission of the owner of the copyright in ppn 11 arbp-341.12 wt 1017.12 (j).doc sound recording but without the permission of the owner of the copyright in literary work and/or musical work infringes the copyright in literary work and/or musical work."

25. It is submitted by the learned senior counsel that the learned arbitrator had no jurisdiction to adjudicate on the issue as to whether the broadcast of a sound recording without the permission of the owner of the copyright in the literary work and/or musical work infringes the copyright in literary work and/or musical work, since a declaration of that nature would necessarily entail a determination of the rights of his client in rem. It is submitted that in the impugned award, the learned arbitrator has rendered a finding on the issue no.2 in favour of the claimant which finding would be binding not only on the parties to the agreement but also to the entire world and thus the said award would be an award in rem. It is submitted that the powers of the learned arbitrator are derived from a private agreement between the parties and the learned arbitrator thus has no jurisdiction to bind a third party or world at large by rendering a decision on the issue as to whether licensor had a right to grant licenses for communication to the public of sound recordings which embody the lyrics and/or musical works belonging to the original original respondent's repertoire. He submits that such issue decided by the learned arbitrator could be decided only by the Court having exclusive jurisdiction and not by an arbitral tribunal even if both the parties had given their consent for such adjudication by the arbitral tribunal.

26. It is submitted by the learned senior counsel that the learned arbitrator in the impugned award has determined a dispute which was not contemplated and/or not falling within the terms of the reference ppn 12 arbp-341.12 wt 1017.12 (j).doc of the arbitration clause in the license agreement. He submits that the issue raised by the claimant in its claim about existence of Copyright in musical and literary works on their incorporation in a sound recording was not a dispute under the license agreement and was beyond the terms of the reference of the arbitration clause. It is submitted that only disputes which were referable to arbitration under the license agreement were related to the "execution, interpretation, performance or non- performance" of the license agreement. It is submitted that a determination of a pure legal issue about existence of copyright in musical and literary work did not tantamount to, or could be construed as disputes in connection with the execution, interpretation, performance or non-performance of the license agreement.

27. It is submitted by the learned senior counsel that the copyright is a right exercisable against the world at large and thus it is a right in rem. The existence of such right cannot be arbitrated upon and cannot be determined by the private arbitration. He submits that the impugned award is contrary to the principles of law laid down by the Supreme Court in the case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors., reported in (2011) 5 SCC 532 and in particular paragraphs 22, 32 and 45 to 47 thereof.

28. It is submitted by the learned senior counsel that the adjudication of the dispute and more particularly the finding rendered on issue no.2 is not specific to the facts of this case, but the adjudication is upon the validity of the rights claimed by the original respondent in the license. It is submitted that if such arbitral award attains finality, it would partake of a judgment/decision of right in rem which is incapable ppn 13 arbp-341.12 wt 1017.12 (j).doc of adjudication in arbitration. It is submitted that issue of existence, validity and infringement of a copyright is not capable of settlement through arbitration under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. It is submitted that the Indian Copyright Act, 1957 gives right in rem against the world at large and is a statutory right and gives right in exclusion of others. It is submitted that since

determination of a right is in thing in extract sense, such determination would be a determination in rem and not in personam.

29. It is submitted by the learned senior counsel that though the petitioner did not raise an issue that the subject matter of dispute was not being capable of settlement through arbitration before the learned arbitrator, the petitioner is entitled to raise such issue in the present petition since the same being a question of law and goes to the root of the matter. It is submitted that the parties cannot confer jurisdiction over a Court or arbitral tribunal by consent. Since the learned arbitrator had inherent lack of jurisdiction to adjudicate the issue of existence of copyright, such jurisdiction could not have been exercised by the learned arbitrator. The original respondent is thus entitled to raise such issue of lack of jurisdiction in the petition filed under Section 34 of the said Act though the same was not raised by his client before the learned arbitrator. In support of this submission, learned senior counsel placed reliance on the judgment of this Court in the case of Veena wd/o Naresh Seth and Anr. Vs. Seth Industries Ltd., Mumbai & Ors., reported in 2011 (2) Mh.L.J. 226 and in particular paragraphs 51 to 57 thereof.

30. Learned senior counsel placed reliance on paragraph 49 of the impugned award in which the learned arbitrator has held that such ppn 14 arbp-341.12 wt 1017.12 (j).doc disputes can also be decided in arbitration since these were neither disputes regarding status nor pertain to rights in rem, nor they were disputes which public policy requires to be determined only by the Court. He submits that the learned arbitrator failed to decide as to whether the dispute pertaining to existence of copyright in musical and literary works on their incorporation in a sound recording is a dispute in rem or not.

31. Learned senior counsel for the original respondent placed reliance on the judgment of the Supreme Court in the case of Vikas Sales Corporation and Anr. Vs. Commissioner of Commercial Taxes and Anr., reported in (1996) 4 SCC 433 and in particular paragraphs 19 to 23 in support of the submission that copyright action is an action in rem.

32. Reliance is placed on the judgment of the Supreme Court in the case of Common Cause, A Registered Society Vs. Union of India & Ors., reported in (1999) 6 SCC 667 and in particular paragraph 84.

It is submitted that the judgment on a patent, trade mark or copyright is a judgment in rem which includes infringement of a patent or trademark or copyright etc. He submits that infringement of right is jus in rem. If copyright in rem is violated, remedy against violation of such right in rem would be a remedy only before a Civil Court and not before an arbitrator.

33. Learned senior counsel for the original respondent has placed reliance on an unreported order delivered by the learned Single ppn 15 arbp-341.12 wt 1017.12 (j).doc Judge of this Court on 21st November 2014 in the case of Steel Authority of India Ltd. Vs. SKS Ispat and Power Ltd. & Ors. in Notice of Motion (L) No.2097 of 2014 in Suit No.673 of 2014 and in particular paragraph 4 in support of the submission that the rights to trademark and remedies in connection therewith are matters in rem and not amenable to the jurisdiction of a private forum chosen by the parties. It is

submitted that this Court in the said judgment has held that the dispute concerning infringement and passing off does not arise out of the contract between the parties which contains the arbitration agreement.

34. Learned senior counsel for the original respondent placed reliance on the judgment of the Madras High Court in the case of R.K. Production Pvt. Ltd. Vs. M/s.N.K. Theatres Pvt. Ltd., reported in 2014 (1) Arb.L.R. 34 (Madras) and in particular paragraphs 16 to 19 thereof. He submits that the principles laid down by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) has been followed by the Madras High Court in the said judgment and has held that if the issues in arbitration are inextricably mixed and those issues cannot be split up, no part of such dispute can be referred to arbitration at all.

35. Learned senior counsel for the original respondent distinguishes the judgment delivered by the learned Single Judge of this Court on 12th April 2016 in the case of Eros International Media Limited Vs. Telemex Links India Pvt. Ltd. & Ors. in Notice of Motion 886 of 2013 in Suit No.331 of 2013 and submits that even in that judgment, this Court has carved out various exceptions in the case of trademark or copyright which disputes can be referred to arbitration or ppn 16 arbp-341.12 wt 1017.12 (j).doc not. It is submitted that this Court in the said judgment has decided that if the right to claim ownership in a trademark is decided by the registering authority thereby deciding the title in the trademark, such decision would be a decision in rem. He submits that in the claim in copyright, whether still exists or not, decision thereon would be a decision in rem.

36. It is submitted that the decision of the learned arbitrator that once licensor had given license, his ownership in the copyright subsumes in the copyright of the underlying works, would be a decision in rem and would apply not only against all parties to the proceedings but world at large. It is submitted that the learned arbitrator had decided that the original respondent was not entitled to claim that parties were not liable to take its permission and thereby deciding entitlement of the original respondent to grant license and thus this adjudication of the learned arbitrator would be an action in rem and not in personam. He submits that his client has lost right in copyright and thus such decision cannot be construed as a decision in personam. The Copyright Act, 1957 gives exclusive rights to the owner of the copyright in sound recording. He submits that the learned arbitrator has not considered the principles of law laid down by the Supreme Court in the cases of Booz Allen and Hamilton Inc. (supra) and Mustill and Boyd in their Law and Practice of Commercial Arbitration in England [2 nd-1989 Edition], in correct perspective in the impugned award.

37. It is submitted that the learned Single Judge of this Court in the case of Eros International Media Limited (supra) has not noticed the judgment of the Supreme Court in the case of Vikas Sales ppn 17 arbp-341.12 wt 1017.12 (j).doc Corporation and Anr. (supra) in which, it has been held by the Supreme Court that the right in rem includes right in patent and copyright. Similar view has also been taken by the Supreme Court in the case of Common Cause, A Registered Society (supra). It is submitted that the right in rem and action in rem are different. It is submitted that the judgment of this Court in the case of Eros International Media Limited (supra) is thus per incurium and is not binding on this Court.

38. Learned senior counsel submits that in any event, even if learned Single Judge of this Court while deciding the matter in the case of Eros International Media Limited (supra) was not in agreement with the views expressed by another learned Single Judge of this Court in the case of Steel Authority of India Ltd. (supra), learned Single Judge in the case of Eros International Media Limited (supra) could not have taken the different view and the judicial proprietary demanded that the issue was required to be referred to a larger bench under Rule 28 of the Bombay High Court (Original Side) Rules.

39. In support of this submission, reliance is placed on the judgment of the Supreme Court in the case of Bhudan Singh and Anr. Vs. Nabi Bux and Anr., reported in 1969 (2) SCC 481 and in particular paragraph 7 thereof and also the judgment of the Supreme Court in the case of K. Balakrishnan Rao and Ors. Vs. Haji Abdulla Sait and Ors., reported in (1980) 1 SCC 321 and in particular paragraph 20 thereof. Reliance is also placed on the judgment of this Court delivered on 13th April 1994 in the case of Ahmedmiya Ahmedji Vs. The Indian Hume Pipe Co. Ltd. & Ors. in Writ Petition No. 2211 of 1990 and in particular paragraphs 5 and 8 thereof.

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40. In so far as the judgment of the Supreme Court in the case of V.H. Patel & Company and Ors. Vs. Hirubhai Himabhai Patel & Ors., reported in (2000) 4 SCC 368 referred by the learned Single Judge in the case of Eros International Media Limited (supra) is concerned, it is submitted by the learned senior counsel that the issue before the Supreme Court in the said judgment in the case of V.H. Patel & Company and Ors. (supra) was whether the issue of dissolution of partnership firm could be referred to arbitration. There was no issue before the Supreme Court in the said judgment that whether the action in rem or in personam could be referred to arbitration.

41. Reliance is also placed on the judgment of the Supreme Court in the case of Chiranjilal Shrilal Goenka (deceased) through LRs. Vs. Jasjit Singh & Ors., reported in (1993) 2 SCC 507 and in particular paragraphs 16, 17, 18 and 20 in support of the submission that the action in rem could not be referred to arbitration even by consent of the parties.

42. It is submitted by the learned senior counsel for the original respondent that though the issue regarding infringement of copyright may arise in a proceeding in personam, but if the issue decided would affect the parties at large i.e. class of persons, it would be a decision in rem. He submits that since the locus of the original respondent itself was under challenge and has been decided by the learned arbitrator, such a decision on locus would affect the ownership right in the copyright of the sound recording of the original respondent against the world at large and thus the decision of the learned arbitrator would be a decision in rem.

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43. It is submitted by the learned senior counsel for the original respondent that there are different species of copyright and each of such species is a copyright and they do not arise out of such copyright but they are copyrights itself. He submits that the learned arbitrator has rendered a

finding that the original respondent has lost right to communicate the sound recordings to the members of public which finding affects the locus of the original respondent. He submits that the right of the original respondent in the copyright is decided by the learned arbitrator not on the basis of the interpretation of the agreement, but a personal right of the original respondent in the copyright in sound recording is decided by the learned arbitrator. He submits that the decision of the learned arbitrator has affected the original respondent-

Society and all its members who are owners of the different underlying works in sound recording. He submits that the impugned award has a force of decree. It is submitted that by virtue of the impugned award, the original respondent has lost its locus in the ownership of copyright in sound recording.

44. Learned senior counsel for the original respondent placed reliance on Section 35 of the said Act and would submit that the impugned award would be binding not only on the parties, but also on the persons claiming through them. He submits that members of the original respondent-Society who were owners of the copyright in underlying works are also bound by the arbitral award. Reliance is placed on the judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. Vs. Eastern Indian Motion Pictures Association and Ors., reported in (1977) 2 SCC 820 and in particular ppn 20 arbp-341.12 wt 1017.12 (j).doc paragraph 37 thereof. Reliance is also placed on the judgment of the Delhi High Court in the case of Mundipharma AG Vs. Wockhardt Ltd., reported in ILR (1991) 1 Delhi 606 and more particularly paragraphs 12 and 14 thereof. It is submitted that the claim arising out of a statutory right and statutory remedy cannot be referred to arbitration. He submits that the question of infringement of copyright could not have been decided by the learned arbitrator.

45. The next submission of the learned senior counsel for the original respondent is that right to communicate the sound recordings to the members of public is not a subordinate right, but is a right in copyright by itself.

46. Learned senior counsel for the original respondent has also addressed this Court on the issue whether the claimant was required under the Copyright Act, 1957 to obtain a license from the original respondent whose members hold a copyright in lyrics and music in question, for broadcasting to the public the sound recordings containing these lyrics and music, when the claimant has a separate license for broadcasting those sound recordings from the holders of copyright in those sound recordings, from another PPL which is a Society holding the rights of the owners of copyright in sound recordings.

47. Learned senior counsel for the original respondent invited my attention to some of the provisions of the Imperial Copyright Act, 1911 and the Copyright Act, 1914 and would submit that some of the provisions of those two Acts were *pari materia* with the provisions of the Copyright Act, 1957. Reliance is placed on the judgment of the ppn 21 arbp-341.12 wt 1017.12 (j).doc Supreme Court in the case of Indian Performing Right Society Ltd.

(supra) and more particularly on paragraphs 8,12, 13 and 15 thereof.

48. Learned senior counsel placed reliance on Section 17 (b) of the Copyright Act, 1957 and would submit that the said provision does not refer to sound recording. Reliance is placed on Section 2(xx) of the Copyright Act, 1957. He submits that the Supreme Court in the said judgment in the case of Indian Performing Right Society Ltd. (supra) had decided the issue qua "film" and the issue decided in the said matter was confined only to the film and not to the sound recording. He submits that the learned arbitrator, however, applied the principles of law decided by the Supreme Court in the said judgment in case of sound recording which stood on a different footing. He submits that the said judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. (supra) thus could not apply to the facts of this case.

Learned senior counsel for the original original respondent laid emphasis on the separate judgment of Shri Justice Krishna Iyer recorded in paragraph 19 of the said judgment. He submits that the provisions of Sections 17(b) and 17(c) are special provisions. He submits that the Indian Copyright Act, 1914 has reproduced in entirety the provisions of the Imperial Copyright Act, 1911. He submits that both these Acts are *pari materia*.

49. Learned senior counsel for the original respondent has placed reliance on the judgment of Chancery Division in the case of Gramophone Company, Limited Vs. Stephen Cawardine and Company, reported in 1934 (1) Ch. 450 and more particularly on relevant pages 459 to 461 thereof. He submits that Chancery Division has interpreted ppn 22 arbp-341.12 wt 1017.12 (j).doc the provisions of the Imperial Copyright Act, 1911 in its judgment in the case of Gramophone Company, Limited (supra). He submits that under the said provisions, a permission was required to be obtained from both the parties i.e. from the original respondent-Society as well as PPL Society before communication of sound recordings to the members of public.

50. Learned senior counsel for the original respondent placed reliance on the judgment of this Court in the case of The Wellington Cinema Vs. The Performing Right Society, Ltd., reported in 1937 Vol.XXXIX Bombay Law Reporter 654. He submits that in the said judgment, this Court has applied provisions of the Copyright Act, 1914.

It is submitted that the right of the original respondent to communicate the sound recordings to the members of public was not assigned to the claimant. The claimant has claimed right of communication under the statute which right is conferred on both the parties. He submits that the judgment of the Supreme Court was not considered in the case of Indian Performing Right Society Ltd. (supra).

51. Learned senior counsel for the original respondent placed reliance on the judgment of this Court in the case of The Performing Right Society, Limited Vs. The Indian Morning Post Restaurant, reported in 1938 Vol.XLI Bombay Law Reporter 530 and would submit that the provisions of Copyright Act, 1957 does not radically depart from the scheme of the Imperial Copyright Act, 1911 except to the extent that provisions specified in the Notes on clauses. It is submitted by the learned senior counsel that the Supreme Court in the case of Indian ppn 23 arbp-341.12 wt 1017.12 (j).doc Performing Right Society Ltd. (supra) has relied upon the Report of the Copyright Committee, 1951. He relied upon pages 116, 119, 120 and 121 of the said report to show the recommendations made by

the Committee in the said report. Reliance is also placed on treatise of "Copinger and Skone James on Copyright." Learned senior counsel also placed reliance on the Statement of Objects and Reasons of the Copyright Act, 1957. My attention is invited to Section 31 (b) of the Copyright Act, 1957 which provides for definition of "Communication" and it is submitted that underlying work merges with the sound recordings. Reliance is also placed on Sections 13, 14, 38 (4), 39, 40, 41, 52 and 52A of the Copyright Act, 1957.

52. It is submitted by the learned senior counsel that Section 13(4) provides that copyright in a cinematographic film or a sound recording shall not affect 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. Reliance is also placed on Sections 2(xx), 2(y), 13, 14 and 17 of the Copyright Act, 1957. It is submitted that under the provisions of the Copyright Act, 1957, two different and distinct rights by owners of two separate classes of works can be simultaneously exercised. The owner of the Copyright in sound recording may have exclusive right to communicate his work to the public under Section 14(1)(e) (iii) of the Copyright Act, 1957 and at the same time, such exclusive right vested in the owner of copyright in sound recording cannot and does not destroy mutually existing separate right of owner of underlying musical and literary works to communicate his works under Section 14(1)(a)(iii) of the Copyright Act, 1957. It is ppn 24 arbp-341.12 wt 1017.12 (j).doc submitted that the learned arbitrator has not appreciated aforesaid provisions of the Copyright Act, 1957 in the impugned award.

53. It is submitted by the learned senior counsel that the provision of Section 13 (4) of the Copyright Act, 1957 is an explicit provision which saves the existence of copyright in underlying musical and literary works though such works get incorporated in a sound recording. He submits that the learned arbitrator has totally overlooked the said provision of the Copyright Act, 1957 which clearly provided that the copyright in a cinematographic 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. Learned senior counsel placed reliance on Section 13(1)(b) of the Copyright Act, 1957 and would submit that copyright in respect of musical and literary works survives even after their incorporation into a sound recording qua the sound recording.

54. Mr. Sancheti, learned senior counsel for the claimant, on the other hand, invited my attention to the definition of "work" under Section 2(y), definition of "sound recording" under Section 2(xx), definition of "literary work" under Section 2(o), definition of "musical work" under Section 2(p), definition of "broadcast" under Section 2(dd), definition of "work of joint authorship under Section 2(z) and Sections 13, 14 and 17 of the Copyright Act, 1957.

55. It is submitted that there was no dispute before the learned arbitrator relating to copyright per se. He submits that the original ppn 25 arbp-341.12 wt 1017.12 (j).doc respondent was not claiming any copyright in sound recording at all.

It is submitted that monetary claim arising out of sound recording at the most is a subsidiary right in copyright in sound recording and such subsidiary rights are arbitrable. Without prejudice to the

aforesaid submission, it is submitted that an action in rem depends upon the nature of dispute raised by the parties. My attention is invited to the affidavit-in-reply filed by the original respondent before the learned arbitrator. He submits that ownership in sound recording was never in dispute in the arbitral proceedings. No right is claimed by the original respondent in lyrics and sound recording. He submits that at the most, the question in the arbitration could be whether royalty amount could be recovered by the original respondent from the claimant in accordance with law. He submits that no parties were disputing the copyright of each other in the sound recording.

56. It is submitted by the learned senior counsel that the original respondent never made submission before the learned arbitrator that the claim filed by the claimant was an action in rem. Oral evidence was led by both the parties. Learned senior counsel invited my attention to paragraphs 34, 39 and 41 of the impugned award. He submits that ownership of the copyright in sound recording or whether the claim was an action in rem was not an issue before the learned arbitrator. The question before the learned arbitrator was how to exploit the copyright. It is submitted that since neither any right is created in favour of any party under the impugned award nor any right is destructed, it could not be construed as an action in rem. Learned arbitrator has only interpreted the agreement/ law about entitlement of the original respondent herein.

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57. In his alternate submission, it is submitted that the rights of the original respondent were subsidiary rights which could be referred to arbitration. Learned senior counsel placed reliance on paragraphs 22 to 25 of the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra). He submits that since the dispute between the parties was relating to subsidiary right, the same could be referred to arbitration being an action in personam and not an action in rem. Emphasis is laid on categories of matters carved out in paragraphs 26.2, 27 and 29 on the question as to what could be referred to arbitration.

58. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Olympus Superstructures Pvt. Ltd.

Vs. Meena Vijay Khetan and Ors., reported in (1999) 5 SCC 651 and in particular paragraphs 35 to 37 thereof. He submits that if the parties could compromise mutually, such matter could be referred to arbitration. Learned senior counsel placed reliance on an unreported judgment of this Court in the case of HSBC PI Holdings (Mauritius) Limited Vs. Avitel Post Studioz Limited & Ors. delivered on 22nd January 2014 in Arbitration Petition No.1062 of 2012 and more particularly paragraphs 28, 39 to 41, 88 and 99 and submits that since there is no express bar for referring the dispute filed by the claimant against the original respondent in the facts of this case, these claims were arbitrable.

59. Learned senior counsel placed reliance on an unreported judgment of this Court in the case of Prakash Cotton Mills Pvt. Ltd. & Anr. Vs. Vinod Tejraj Gowani & Ors. delivered on 28th August 2014 in Arbitration Application No.107 of 2012 and more particularly ppn 27 arbp-341.12 wt 1017.12 (j).doc paragraphs 32, 41, 52 and 53 thereof. Reliance is also placed on the commentary of Shri O.P. Malhotra in Arbitration and Conciliation Act, 1996 on the topic of "Intellectual Property." He

submits that the dispute about entitlement of the original respondent to recover license fees from the claimant under the agreement entered into between the parties is a subsidiary right.

60. In so far as the unreported judgment of this Court in the case of Steel Authority of India Ltd. (supra) is concerned, he submits that the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) was not noticed by the learned Single Judge of this Court. He submits that the issue whether the rights claimed by the parties in the arbitration were subsidiary rights or not, was decided in the case of Booz Allen and Hamilton Inc. (supra), which was not an issue before this Court in the case of Steel Authority of India Ltd.

(supra). He submits that the said judgment delivered by the learned Single Judge of this Court in the case of Steel Authority of India Ltd. (supra) is thus per incurium.

61. Learned senior counsel for the claimant distinguishes the unreported judgment delivered by the learned Single Judge in the case of Eros International Media Limited (supra). He submits that since the dispute between the parties hereto could be compromised between them, the same could be referred to arbitration. Reliance is placed on paragraphs 16, 17 and 19 of the said judgment in the case of Eros International Media Limited (supra). He submits that since the judgment of the learned Single Judge of this Court in the case of Steel ppn 28 arbp-341.12 wt 1017.12 (j).doc Authority of India Ltd. (supra) is per incurium, this Court is not required to refer the issue to the larger bench. Learned senior counsel distinguishes the judgment of the Supreme Court in the case of K.Balakrishnan Rao and Ors.(supra).

62. Mr.Sancheti, learned senior counsel for the claimant on this issue invited my attention to Sections 13(1), 13(4), 14(1) (a), 14(1)(d)

(iii), 14 (1) (e), definition of "broadcast" under Section 2(dd), definition of "cinematograph film" under Section 2(f) and definition of "communication to the public" under Section 2(ff) of the Copyright Act, 1957. He submits that the sound recording was recognised as work only till 1994. Reliance is placed on the judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. (supra) and more particularly paragraphs 11 and 15 thereof. He submits that the definition of "work" was amended in the year 1994 only after the judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. (supra). By virtue of such amendment, sound recording came to be recognised as works under the provisions of the Copyright Act, 1957.

63. It is submitted that Sections 14(1)(d) and 14(1)(e) of the Copyright Act, 1957 are in pari materia. He submits that a film is an amalgam of lyrics, music and sound recording which are subsumed in a film. He submits that the sound recording is an amalgam of lyrics and musical works. Reliance is placed on paragraphs 20 to 22 of the judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. (supra).

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64.

Learned senior counsel for the claimant

submits that

reliance placed by the original respondent on Section 19 of th

Imperial Copyright Act, 1911 is totally misplaced since the provisions of the said Act are totally different and there was no comparison of those provisions with the provisions of Indian Copyright Act, 1957. He also distinguishes the judgment of the Chancery Division in the case of Gramophone Company, Limited (*supra*).

65. In so far as the reliance placed by the learned senior counsel for the original respondent on the Copyright Committee Report is concerned, it is submitted that since the interpretation of the provisions of the Indian Copyright Act, 1957 is clear, no reliance can be placed on the Copyright Committee Report to ascertain different meanings of the provisions of the Copyright Act, 1957. He submits that the English Imperial Copyright Act was not comparable with the provisions of the Indian Copyright Act, 1957 and thus no reliance can be placed on such Copyright Committee Report to ascertain the true and correct interpretation or legislative intent for enactment of the provisions of the Copyright Act, 1957.

66. It is submitted that no such argument based on Sections 51 and 52 could be advanced before the learned arbitrator by the original respondent. It is submitted by the learned senior counsel for the claimant that since the judgment delivered by the Indian Court would apply only to the parties and Courts in India, the impugned award rendered by the learned arbitrator in India cannot be construed as a decision in rem. In support of this submission, learned senior counsel for the original respondent placed reliance on the judgment of the Supreme Court in *Entertainment Network (India) Limited Vs. Super Cassette Industries Limited* and other connected matters, reported in (2008) 13 SCC 30 and more particularly paragraph 80 thereof.

67. Reliance is placed by the learned senior counsel for the claimants on sections 41 and 43 of the Indian Evidence Act, 1872 and submits that the award cannot be tendered in evidence in any subsequent proceedings. He submits that the award is binding between the parties inter-se and not the world at large and thus the award delivered by the learned arbitrator cannot be executed in rem. It is submitted that even if the impugned award becomes executable, it would only determine the rights inter parte and will not bind the third parties. He submits that section 41 of the Indian Evidence Act, 1872 cannot be extended to the adjudication even on the issues in relation to the copyright and cannot be termed as a judgment in rem. He submits that such a judgment will not and cannot bind the persons outside India having different Copyright Act/Law governing them.

68. In support of this submission, the learned senior counsel placed reliance on the judgment of the Supreme Court in case of *R. Viswanathan and Ors. Vs. Rukn-ul-Mulk Syed Abdul Wajid* (since deceased) and Ors. reported in AIR 1963 SC 1 and in particular paragraphs 19, 20 and 132 to 148. He submits that under sections 41 and 42 of the Indian Evidence Act, 1872 it is clear that unless there is

final adjudication and the judgment by a Competent Court in exercise of its matrimonial, admiralty, probate or insolvency jurisdictions, there is no question of such a judgment being treated as conclusive qua third parties. He submits that in this case adjudication is done by the learned arbitrator ppn 31 arbp-341.12 wt 1017.12 (j).doc and not by the Court and the same is not in exercise of admiralty, probate, matrimonial or insolvency jurisdiction and does not concern the matter of public nature and thus is not conclusive against the third parties. He submits that an arbitral award cannot be cited as a binding or admitted in evidence against the third parties and in any event as a judgment in rem outside India.

69. It is submitted by the learned senior counsel that by a mutual consent of the parties, by an order dated 14 th September 2007, the disputes between the parties were referred to arbitration. He submits that the original respondent in the arbitration proceedings not only had filed their reply to the statement of claim filed by the claimant but had also filed a counter claim. He submits that the Delhi High Court also had referred to the same issue to this learned arbitrator by consent of parties on 26th March 2008. He submits that by interim order dated 6 th November 2006 passed by this Court, the claimants were directed to pay and have paid the royalty to the original respondent on without prejudice basis.

70. It is submitted by the learned senior counsel for the claimants that the parties in this case did not have copyright license agreement. The copyright agreement contains an arbitration clause. He submits that the main issue before the learned arbitrator was whether for the broadcast of the sound recording, the original respondent could claim any royalty. He submits that the copyright does not require any registration and Indian Copyright Act does not require any registration of any copyright work nor there is any mechanism, statutory or otherwise, set up for the same.

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71. In his alternate submission learned senior counsel for the claimants submits that even if the issue is treated as being connected with the right in rem it is the case of consideration of Subsidiary Rights which is well recognized exception insofar as jurisdiction of the arbitral tribunal is concerned. He placed reliance on paragraphs 38, 41, 44 and 45 of the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. (supra).

72. Insofar as the judgment delivered by the learned Single Judge of this Court in case of Steel Authority of India Limited (supra) is concerned, it is submitted that the said judgment does not deal with the remedy in connection with copyright but only deals with the rights in trademark. He submits that the said judgment is per-incuriam since the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. (supra) as well as Olympus Superstructures Private Limited (supra) have not been relied upon and considered in the said judgment by the learned Single Judge. He placed reliance on the judgment of the learned single Judge delivered on 12th April, 2016 in case of Eros International Media Limited (supra). He submits that there is no conflict of opinion with regard to the interpretation of section 62 of the Copyright Act, 1957 as the same is not dealt with at all in the judgment of the learned Single Judge of this Court in case of Steel Authority of India Limited (supra).

He submits that this Court thus did not refer the dispute to a Larger Bench as canvassed by the learned senior counsel for the original respondent.

73. Insofar as the issue as to whether the original respondent had any claim of copyright in sound recording is concerned, it is submitted ppn 33 arbp-341.12 wt 1017.12 (j).doc that the original respondent did not seek any copyright in the sound recording. He submits that the sound recording is a separate copyright work. The first owner of the sound recording is its author i.e. its producer in view of section 17 of the Copyright Act, 1957. He submits that there is only one owner of the copyright work "sound recording" i.e. its producer. Neither lyricist nor the music composer holds any copyright in sound recording. He submits that the owner of the copyright in sound recording alone has exclusive rights therein including the right to communicate the work to the public. He submits that exclusive authority to grant license to communicate sound recording to public is with the first owner or his assignee.

74. It is submitted that the original respondent claimed to administer the copyright only in literary work or musical work belonging to its members and not any sound recording work. He submits that the members of the Phonographic Performance Limited are the authors of sound recordings or their assignees and have exclusive license to administer the copyright in sound recording. He submits that the original respondent did not have and cannot have authority to license the communication of the work sound recording to public. He submits that the claimant had taken a license from the said Phonographic Performance Limited for broadcasting of the sound recording and has been paying separate royalty for the said license to the said Phonographic Performance Limited.

75. Reliance is placed on section 51(a) of the Copyright Act, 1957 and it is submitted that since the claimant had done broadcasting ppn 34 arbp-341.12 wt 1017.12 (j).doc under the license from the owner of the copyright work i.e. sound recording in accordance with the terms of such license, there was no infringement of copyright under section 51(a) of the Copyright Act, 1957.

He submits that the original respondent themselves in their statement of defence had admitted that the original respondent or its members had never claim copyright in respect of sound recording. The licenses were sought by the claimant from the original respondent only in respect of literary and musical works. A separate, different and distinct copyright exists in respect of literary, musical work and sound recording. The original respondent had never used, exploited or demanded any license fees or royalty in respect of sound recording. He submits that the copyright in relation to sound recording is distinct and different from the copyright in respect of musical work and literary work.

76. Learned senior counsel for the claimant invited my attention to some of the answers given by the witness examined by the original respondent in his cross-examination. It is submitted by the learned senior counsel for the claimant that when cinematographic film is exhibited, the owner of the copyright in that cinematography film exercises his copyright as provided in section 14(1)(d)(iii) i.e. communicating the film to the public. He submits that when the owner of the copyright in sound recording is broadcasting the sound recording, he is exercising right under section 14(1)(e)(iii) of the Copyright Act, 1957. He submits that communication of the underlying work in the process of communicating the film or sound recording to the public does not and cannot amount to

communicating to the public of the underlying works per-se. He submits that the communication of cinematography and sound recording are ppn 35 arbp-341.12 wt 1017.12 (j).doc separate independent work and the same is recognized by the Copyright Act, 1957.

77. It is submitted by the learned senior counsel for the claimant that in a sound recording and cinematography, literary and/ or musical work gets incorporated and upon such incorporation, independent works that is sound recording has exclusive right of communicating sound recording to the public and while exercising this right, underlying works, that is literary work and musical incorporated in sound recording also gets communicated to the public. It is submitted that the copyright in the underlying work is not infringed so long as such communication is a part of sound recording. It is submitted that the owner of the musical or literary work has parted with his right under section 14(1)(a)(iv) to the producer of that sound recording and thus cannot seek to interfere with absolute right of the producer of the sound recording to exploit the same independently by communicating it to the public which right they had under section 14(1)(e)(iii) of the Copyright Act, 1957.

78. It is submitted that the owner of the sound recording has absolute right of communication with the sound recording to the public. The owner of the copyright in the underlying works i.e. literary work and musical work is not entitled to demand any royalty in view of the fact that the broadcast or communication to the public is made in the legitimate exercise of its copyright under section 14(1)(e)(iii) by the owner of the copyright in sound recording. He placed reliance on the judgment of the Supreme Court in case of Indian Performing Rights Society vs. East India Motion Pictures Association & Ors. (supra) and in particular paragraphs 9 and 15 to 17 thereof.

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79. Learned senior counsel for the claimants placed reliance on the judgment of the Division Bench of the Delhi High Court in case of Indian Performing Right Society Ltd. Vs. Aditya Pandey & Ors., delivered on 8th May 2012 in FAO(OS) No.423-424 of 2011 in which it is held that during a time when the copyright in the sound recording did not independently exist and were perceived as part of the copyright in a film, the author of the said cinematographic film is not required to seek authorization or separate license from the music composer or the lyricist for communicating the work to the public i.e. integral part of the film.

80. It is submitted by the learned senior counsel that a trial of an infringement action involves the adjudication of the question whether a right exists and whether that right has been affected or infringed by the defendants. He submits that before trying a case where a party claims that another party has infringed its copyright in a work, the Court will first assess whether copyright actually inheres in that work and the entitlement of the plaintiff to the said copyright. He submits that pursuant to answering of that question in the affirmative, the Court will embark upon the exercise of determining whether that rights has been affected. He submits that declarations of validity and ownership of in rem rights is exclusively reserved for public fora such as Courts and thus the arbitral tribunals are incapable of arbitrate there upon. Learned senior counsel placed reliance upon the paragraphs 34 to 41 of the judgment of the Supreme Court in the case of Booz Allen and Hamilton

Inc. (supra). He submits that the findings rendered by the learned arbitrator are totally contrary to the principles of law laid down by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra).

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81. It is submitted by the learned senior counsel for the original respondent that Division Bench of the Madras High Court in the case of R.K. Production Pvt. Ltd. (supra) has held that as per the arbitration agreement recorded between the parties, all the disputes had to be referred to arbitration and if payment of the balance amount payable to the plaintiff was made, the issue of infringement of a copyright would automatically come to an end. He submits that though Division Bench of the Madras High Court accepted the plaintiff's arguments based on the decision of the Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Anr., reported in (2003) 5 SCC 531, the Division Bench held that the learned Single Judge was not right in holding that the only issue involved was with regard to non-payment of the amount and that if the issue of payment of balance amount was decided by the learned arbitrator, the issue of infringement of copyright would automatically come to an end. However, in view of the fact that the subject matter of the suit could not be bifurcated to refer the parties to the arbitration, the order passed by the learned Single Judge came to be set aside by the Division Bench.

82. Learned senior counsel for the original respondent placed reliance on the judgment of Delhi High Court in the case of Mundipharma AG Vs. Wockhardt Ltd. (supra) in support of the submission that issue of infringement of copyright could not be referred to arbitration and the exclusive remedy for such infringement is available in Chapter XII of the Copyright Act, 1957. He submits that Chapter XII of the Copyright Act, 1957 specifically prescribed civil remedies for enforcing copyright. He submits that the learned arbitrator thus inherently lacked the jurisdiction to render a declaration on the ppn 38 arbp-341.12 wt 1017.12 (j).doc copyright of his client vis-a-vis its right to communicate its work to the public.

83. It is submitted by the learned senior counsel that though the original respondent had not raised the issue of jurisdiction to adjudicate upon the title in respect of the copyright of the original respondent and to grant any reliefs in favour of the claimant, since the learned arbitrator inherently lacked the jurisdiction to adjudicate upon the said issue, it would not amount to waiver. He placed reliance on the judgment of this Court in the case of Veena wd/o Naresh Seth and Anr. (supra) and in particular paragraphs 51 to 57 thereof.

84. In so far as the submission of the learned senior counsel for the claimant that the right of the original respondent to communicate its work to the public is a subsidiary right and underlies the copyright and is thus not a right in rem but in personam is concerned, it is submitted that the right of the original respondent of communicating its work to the public is neither a subsidiary right nor a right underlying the copyright. It is not a right in personam capable of enforcement against only specific individuals nor it derived from an agreement between the parties. He submits that it was an assertion of a statutory right exercisable against the world at large. He submits that it was a right that comprises the copyright itself. Reliance is placed on Sections 14 and 18(1) of the Copyright Act,

1957. He submits that the learned arbitrator has rendered the finding that the copyright of his client was not affected since it did not enjoy copyright in musical/literary works embodied in sound recordings. He submits that the learned arbitrator has not determined any right under the agreement, but has gone further and ppn 39 arbp-341.12 wt 1017.12 (j).doc rendered a finding on the entitlement of the original respondent to the right of communication sought to be licensed under the License Agreement. It is submitted that the learned arbitrator has thus clearly opined on the rem rights of the original respondent and thus her finding is contrary to the principles of law laid down by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) and also Section 34(2)(b)(ii) of the Arbitration Act.

85. Learned senior counsel for the original respondent distinguishes the judgment of the Supreme Court in the case of Olympus Superstructures Pvt. Ltd.(supra) relied upon by the learned senior counsel for the claimant and would submit that in the said judgment, Supreme Court had considered the issue whether the claim for specific performance of an Agreement of Sale could be arbitrated upon by the learned arbitrator. The Supreme Court held that the right to specific performance of an Agreement of Sale deals with the contractual rights and it was open to the parties to agree with a view to shorten the litigation in regular courts to refer the issues relating to specific performance to arbitration.

86. The next submission of the learned senior counsel for the original respondent is that the decision of the learned arbitrator binds the entire class of authors under the Copyright Act i.e. authors of musical/ literary works. He submits that though a majority of those authors had authorised his client to administer their right, a significant number was not before the Court. He submits that the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) has laid down a clear bar on the arbitrability in rem rights. He submits that title of a licensor cannot ppn 40 arbp-341.12 wt 1017.12 (j).doc be arbitrated upon, but the rights created under the license can be arbitrated upon. Learned senior counsel submits that once the arbitral award is merged with the judgment of the executing Court, the award takes a form of a decree and since the said arbitration award renders a declaration on the rights of the entire class of authors under the Copyright Act, the award having merged with that judgment of this Court, it would operate in rem.

87. Learned senior counsel for the original respondent also placed reliance upon the treatise of O.P.Malhotra on Arbitration and Conciliation Act in support of his submission that according to the learned author, the subject matter of the dispute under the Copyright Act is clearly inarbitrable. He placed reliance on pages 1328 and 1329 of the said treatise. Reliance is also placed on the treatise of Russell on Arbitration [22nd Edition] and Mustill and Boyd's 2011 in the companion Volume to second edition to the commercial arbitration on the issue what can be decided in arbitration and what can be decided by the Court and that the dispute arising out of a copyright action cannot be decided by the arbitral tribunal but has to be decided only by a Civil Court.

88. In so far as the unreported judgment delivered by the learned Single Judge of this Court relied upon by the learned senior counsel for the original claimant in the case of Eros International Media Limited (supra) is concerned, it is submitted by the learned senior counsel for the original respondent that the said decision rendered by the learned Single Judge of this Court is not a good

law in view of the same being in conflict with the view taken by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) and being in conflict ppn 41 arbp-341.12 wt 1017.12 (j).doc with the view taken by the learned Single Judge of this Court in the case of Steel Authority of India Ltd. (supra). He submits that the alleged conflict between the judgments of this Court in the cases of Eros International Media Limited (supra) and Steel Authority of India Ltd. (supra) need not be referred to a larger bench in the present case. He submits that the facts before this Court in the case of Eros International Media Limited (supra) are clearly distinguishable and not applicable to the case at hand.

89. Learned senior counsel also distinguishes the judgment of the Supreme Court in the case of V.H. Patel & Company and Ors. Vs. Hirubhai Himabhai Patel & Ors. (supra) referred by the learned Single Judge in the judgment in the case of Eros International Media Limited (supra) and would submit that the issue before the Supreme Court was whether the arbitrator had power to dissolve the partnership firm or not. He submits that only inter se dispute between the partners was to the entitlement of the respective parties to the firm's trademarks under the partnership deed. The principal question in that matter was whether the learned arbitrator was competent to entertain the counter claim for dissolution of the firm.

90. Learned senior counsel for the original respondent invited my attention to the findings recorded by the learned arbitrator that once the owner of a copyright in a literary work and/or musical work permits another to make a sound recording, he parts with the entirety of his copyright in respect of the performance of the sound recording. It is held by the learned arbitrator that the musical and/or literary works were said to have merged with sound recording and all rights in the literary and/or ppn 42 arbp-341.12 wt 1017.12 (j).doc musical work qua that sound recording are said to be exhausted. He submits that the performance of a sound recording also entails a concurrent and simultaneous performance of the underlying musical/ literary work and an exercise of copyright in the latter. In support of this submission, learned senior counsel placed reliance on the judgment in the case of Indian Performing Right Society Ltd. Vs. Eastern Indian Motion Pictures Association and Ors. (supra).

91. Learned senior counsel for the original respondent also placed reliance on various provisions of the Copyright Act, 1911, British Copyright Committee Report, 1952, various provisions of the Copyright Act, 1957 and several judgments.

92. Learned senior counsel for the original respondent submits that reliance placed by the learned senior counsel for the claimant on Sections 41 and 42 of the Evidence Act, 1872 in support of the submission that an arbitral award rendered by the arbitrator in India or a judgment rendered by this Court cannot apply to a third party outside India is completely misconceived and irrelevant in view of the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) but the dispute relating to right in rem is inarbitrable. He also distinguishes the judgment of this Court in the case of Prakash Cotton Mills Pvt. Ltd. & Anr.(supra) relied upon by the learned senior counsel for the claimant on the ground that the facts in that case were totally different.

93. In so far as the reliance placed by the learned senior counsel for the claimant on some of the portions of the cross-examination of the ppn 43 arbp-341.12 wt 1017.12 (j).doc witnesses examined by the original respondent is concerned, the learned senior counsel for the original respondent submits that the evidence of a witness is only relevant to determine the issues of fact in a proceeding and cannot be the basis for determination of a pure question of law by this Court. He submits that understanding of the witness about the law cannot constitute estoppel.

94. Learned senior counsel distinguishes the judgment of Delhi High Court in the case of Indian Performing Right Society Ltd. Vs. Aditya Pandey & Ors. (supra) on the ground that the issue before the Delhi High Court in the said judgment is totally different. He submits that the Division Bench of the Delhi High Court in the said judgment had proceeded on the incorrect legal basis that the sound recordings came to be recognised as an independent copyrighted work when the Copyright Act was amended in 1994. He also distinguishes the judgment of the Supreme Court in the case of Entertainment Network (India) Limited Vs. Super Cassette Industries Limited (supra) relied upon by the learned senior counsel for the claimant on the ground that the issue before the Supreme Court in that case was totally different.

The facts and Submissions in Arbitration Petition No.1017 of 2012

95. The claimant had obtained several licenses from the original respondent under the License Agreement dated 3rd July 2001 of their FM Radio Stations within the municipal limits of 7 cities viz. Mumbai, Chennai, Kolkata, Delhi, Indore, Pune and Ahmedabad. Under the said licenses, the original respondent had permitted the claimant to perform publicly by broadcasting at or from FM radio stations or any works ppn 44 arbp-341.12 wt 1017.12 (j).doc which were or which might be included in repertoire of the original respondent on payment of royalty on the terms and conditions recorded therein.

96. It was the case of the claimant that the claimant was led to believe by the original respondent that broadcasting of sound recordings involved use/exploitation of performers copyright and that they had necessary and requisite rights to collect royalty and based on such representation made by the original respondent, the claimant paid royalty in advance every six months in two installments subject to the adjustment in the subsequent payments. It was the case of the claimant that the advance paid by the claimant was to be adjusted against the actual royalty payable and the balance, if any, was to be refunded to the claimant. The case of the claimant was that it was however not liable to pay any royalty to the original respondent under the said license agreement entered into between the parties. The claimant accordingly made a claim for refund of the royalty paid against the original respondent before the learned arbitrator.

97. The learned arbitrator rendered a common award on 6 th December 2011 and directed that since the claim of the claimant for refund of royalty or in the alternative for refund of excess royalty was covered under Section 30A read with Section 19A of the Copyright Act 1957, the same should be decided by the Copyright Board. It is held by the learned arbitrator that the Copyright Board has exclusive jurisdiction to decide those questions and quantify the amount of royalty, if found payable.

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98. It was the case of the claimant that the claimant had paid royalty amount to the respondent in view of the interim orders passed by the Calcutta High Court on 26 th April 2006, the Delhi High Court on 26th March 2008 and the interim order passed by the learned arbitrator on 5th February 2008 under Section 17 of the Arbitration Act. Mr.Sancheti, learned counsel for the claimant invited my attention to the interim orders passed by the Calcutta High Court, Delhi High Court and by the learned arbitrator as referred to aforesaid and would submit that since the learned arbitrator in the impugned award has ultimately held that the claimant was not required to obtain license from the original respondent for broadcasting the sound recordings to the public, the claimant was not liable to pay any royalty to the respondent for broadcasting the sound recordings. He submits that the learned arbitrator had jurisdiction to consider and adjudicate upon the claim for refund of royalty paid by the claimant to the original respondent under various interim orders referred to aforesaid.

99. Learned senior counsel placed reliance on the judgment of the Supreme Court in the cases of South Eastern Coalfields Ltd. Vs. State of M.P. and Ors., reported in AIR 2003 SC 4482 and in particular paragraphs 26 to 29, the judgment of the Amarjeet Singh and Ors. Vs. Devi Ratan and Ors., reported in (2010) 1 SCC 417 and in particular paragraphs 17 to 34 and the judgment of the Madras High Court in the case of Sri Krishnasamy Reddiar Educational Trust Vs. Official Liquidator, High Court, Madras reported in (2011) 167 Comp Cas 153 (Mad) and in particular paragraphs 23 to 26 thereof. Reliance is also placed on the judgment of the Kerala High Court in the case ppn 46 arbp-341.12 wt 1017.12 (j).doc Mathrubhumi Printing and Publishing Vs. the Indian Performing Rights Society decided on 8th February 2011 in FAO No.82 of 2009.

100. Learned senior counsel for the claimant invited my attention to the proceedings filed by the claimant on 5th June 2012 before the Copyright Board at New Delhi against the original respondent inter alia praying for refund of the amount of Rs.8,14,94,323/- paid to the original respondent towards royalty and would submit that the said proceedings filed by the claimant are without prejudice to the rights and contentions of the claimant and by way of abundant caution. He submits that the Arbitration Petition No.1017 of 2012 is thus rightly pursued by the claimant and is maintainable.

101. Mr.Kadam, learned senior counsel for the original respondent, on the other hand, submits that Section 30A read with Section 19A of the Copyright Act vests exclusive jurisdiction in the Copyright Board to decide any dispute relating to a license of copyright executed between a Licensor and a Licensee. He submits that the present dispute pertaining to the refund of amount alleged to be due to the claimant thus will have to be referred to the Copyright Board. He submits that the learned arbitrator has rightly rejected the claim of refund of royalty on the ground of lack of jurisdiction. It is submitted that even the amount of royalty paid without prejudice to the rights and contentions of the claimant pursuant to the interim orders passed by the two High Courts and pursuant to an interim order passed by the learned arbitrator under Section 17 of the Arbitration Act is also the subject matter of the proceedings before the Copyright Board under Sections 30A and 19A of the Copyright Act, 1957.

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102. Learned counsel for the original respondent distinguishes the judgments relied upon by the learned senior counsel for the claimant on the ground that in none of the judgments relied upon by the claimant, the Court had considered a scenario where the exclusive jurisdiction qua a dispute has been vested in a particular tribunal. He submits that none of the judgments relied upon by the claimant would assist the case of the claimant.

103. It is lastly submitted that since the learned arbitrator had acted beyond her jurisdiction to adjudicate upon the issue of copyright, the same being an action in rem, the learned arbitrator even otherwise could not have entertained the claim for refund of the royalty even if paid in view of the interim orders passed by the two High Courts and under an interim order passed by the learned arbitrator.

104. Mr.Kadam, learned senior counsel for the original respondent in rejoinder on the issue whether the action initiated by the claimant was in rem or was in personam submits that if the dispute based on subsidiary rights does not touch upon the ownership rights of a party in the copyright, the same can be referred to arbitration. He submits that however, the question as to whether right in copyright exists or not or ceases to exist or not is an action in rem. Determination of right in the copyright is an action in rem. Reliance is placed on Section 37 of the Copyright Act, 1957 and it is submitted that the original respondent being a Society, class of persons who are members of the Society fall under Section 31. He submits that the learned arbitrator has not decided the question under the agreement but has determined the rights in the ownership of the copyright against the public at large. He ppn 48 arbp-341.12 wt 1017.12 (j).doc submits that the learned arbitrator has not decided the lis between the parties but has decided the status and right of class of persons i.e. ownership of copyright in literary and musical works and thus the decision of the learned arbitrator was in rem.

REASONS AND CONCLUSIONS :-

105. Learned arbitrator framed separate issues/points for determination in respect of the claim and counter-claim. The relevant issues on which both the parties had addressed this Court are the issue nos.2 and 3 which are extracted as under :-

(2) Whether the use/broadcast of a sound recording as such/with the permission of the owner of the copyright in sound recording but without the permission of the owner of the copyright in literary work and/or musical work infringes the copyright in literary work and/or musical work.

(3) Whether the claimant is entitled to the refund of the royalty paid to the respondent in the sum of Rs.3,84,76,650/- (Rupees Three Crores Eighty Four Lakhs Seventy Six Thousand Six Hundred and Fifty only) as per Exhibit "S" to the Statement of Claim.

106. Learned senior counsel appearing for the parties have also made various submissions before this Court as to whether the disputes raised by the claimant before the learned arbitrator were arbitrable or not and whether the award is liable to be set aside under Section 34(2)(b)(i). Learned senior counsel also addressed this Court on the issue whether the petitioner or its members could claim any royalty for use or broadcast of a separate copyright work 'Sound Recording' in relation to the respondent in the arbitratral proceedings or its members did not have or could claim any copyright.

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107. For dealing with the aforesaid issues, the reference to the relevant part of the statement of claim and the written statement would be necessary.

108. A perusal of the statement of claim filed by the claimant indicates that it was the case of the claimant that the respondent had no copyright in relation to pre-recorded sound recordings and had no right to collect any license fee or royalty in respect thereof. The licensor being a copyright society is authorised to and could only collect royalties on behalf of its members if the concerned members had a copyright which was being used or exploited. It was pleaded by the claimant that the respondent had wrongly represented and claimed that they had copyright in pre-recorded sound recordings. It was pleaded that the copyright in sound recording vests in the producers as the lyricists and/or composers were commissioned to execute such work for valuable consideration and/or under contracts of service.

109. It was pleaded that the lyricists and composers had no right over the lyrics and musical composition when it was a part of a sound recording and the same vests in the producers thereof and/or music companies to whom the rights are assigned by the producers. The respondent had no copyright in respect of any work comprising of the sound recordings in relation to which licenses were granted by Phonographic Performance Limited (PPL) or the respective music companies where they were not members of PPL.

110. It was pleaded by the claimant that once the sound track was generated by the producers and/or music companies by hiring and/or ppn 50 arbp-341.12 wt 1017.12 (j).doc employing the musician, lyric writers, etc., the copyright in such sound track/sound recording vests in the producers and/or the music companies alone. It was averred that since the claimant only broadcasts the sound recording, no copyright belonging to the composers and lyricists, if any, were exploited and thus the respondent could not claim any royalty from the claimant. It is averred that the respondent had no right to prevent the claimant from broadcasting the sound recording, even though it may produce a result of the performance done by the Artists, lyricists etc. who were the members of the respondent nor can the respondent claim any payment of royalty in relation to sound recording as the same would not be a public performance within the meaning of the Copyright Act, 1957.

111. The prayers in the statement of claim are extracted as under :-

(a) For a Declaration that

(i) The respondent and/or its members have no right to claim any license fees or royalty in relation to the broadcasting of sound recording administered by PPL and/or other music companies;

(ii) The respondent and/or its members have no right to claim any license fees or royalty in relation to the broadcasting of sound recording administered by PPL and/or the other music companies;

(iii) Broadcast of sound recording by the claimant does not infringe any copyright of the respondent and/or its members.

(b) Perpetual injunction restraining the respondent and/or its members from restraining any threats and/or making any wrongful demand and/or initiating proceedings against the claimant in relation to broadcast of sound recording by the claimant.

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112. The respondent had filed a written statement before the learned arbitrator and had denied the claims made by the claimant and also made a counter-claim. Learned arbitrator framed various issues/ points for determination. Admittedly, the respondent did not raise an issue of jurisdiction or issue of arbitrability of the claims made by the claimant touching the issue of copyright before the learned arbitrator under Section 16 of the Arbitration Act.

113. In addition to the aforesaid issues, the learned senior counsel for the parties have also addressed this Court on the issues (i) whether in view of the respondent not having raised an issue of jurisdiction before the learned arbitrator to adjudicate upon the issue of title and infringement of copyright would confer jurisdiction on the learned arbitrator to adjudicate upon the claims touching those issues or not, and can be allowed to be raised for the first time in this petition (ii) whether the learned arbitrator inherently lacked jurisdiction to entertain and try such dispute relating to copyright.

114. A perusal of the record indicates that the learned arbitrator has interpreted Section 13 of the Copyright Act, 1957 and has held that a sound recording may include in it a literary, dramatic or musical work but such work should be included in the sound recording with the permission of the copyright holder in such work, and/or without infringing the copyright in such work. It is held that if a sound recording complies with Sub-section (b) of Section 3, it is entitled to a distinct copyright in its own right. It is held that while the copyright of the owner in music and lyrics remains an independent right, a portion of ppn 52 arbp-341.12 wt 1017.12 (j).doc this right,

namely to make a sound recording, can be granted by assignment or license, by the owner of the copyright in music or lyrics to a third party who makes a sound recording.

115. It is held that pursuant to such permission, a fresh copyright in the sound recording comes into existence conferring rights on the owner of the copyright in a sound recording as specified in Section 14(e). To the extent, these rights under Section 14(e) are exercised by the owner of the copyright in the sound recording, and therefore there is no infringement of the rights by the owner of the copyright in literary, dramatic or musical work so embodied in the sound recording.

116. It is held by the learned arbitrator that the owner of the copyright under Section 14 (a), by parting with the right to make a sound recording or conferring it on another, has parted with its rights in respect of the activities covered by Section 14(e). These include communicating the sound recording to the public. It is held that if communicating the sound recording to the public involves communicating any literary, dramatic or musical work embodied in it, the copyright holder in the sound recording is entitled to do so, and the right of the copyright holder in literary, dramatic or musical work is not, to that extent, violated. It is held that a copyright in a sound recording confers specific rights on the owner of the copyright in the sound recording as set out in Section 14(e) whereas, in the case of the owner of a copyright in literary, dramatic or musical work, the owner of the copyright has rights as set out in Section 14(a).

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117. It is held by the learned arbitrator that a new copyright in sound recording comes into being which gives rights to the owner of the copyright in sound recording as set out in Section 14(e). These rights are independent rights not fettered by the rights of the owner of the copyright in literary or musical works under Section 14(a).

118. It is held by the learned arbitrator that a distinct copyright comes to vest in the cinematographic film as a whole and the composer of lyric or musical work who has authorised the cinematographic film of his composition by recording it on the sound track of a cinematographic film cannot complain of infringement of his copyright if the owner of the cinematographic film causes lyrics or the musical works recorded on the sound track of the film to be heard in public.

The learned arbitrator had rendered a finding that the owner of the copyright in sound recording does not need a license or authorisation from the owner of the copyright in literary or musical work to the extent that such literary or musical work legitimately forms a part of and is incorporated in the sound recording. He has the independent right to broadcast a sound recording or communicate it to the public as a sound recording.

119. Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) has interpreted the term "arbitrability" and has carved out different facets of arbitrability relating to the jurisdiction of the arbitral tribunal. It is held that the issue as to whether the disputes having regard to their nature could be resolved by a private forum chosen by the parties i.e. arbitral tribunal or whether they would exclusively fall within the domain of public fora (Courts) is one of the three facets of ppn 54 arbp-341.12 wt 1017.12 (j).doc arbitrability. It is held that the arbitral tribunals are private fora chosen voluntarily by the parties to the dispute to adjudicate upon their disputes in place of Courts and tribunals which are public fora constituted under the laws of country. Adjudication of certain categories of proceedings is reserved by the public fora (Courts and tribunals) may be by necessary implication stand excluded from the purview of private fora. Paragraphs 36 to 41 of the said judgment read thus :-

36. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary).

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38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

40. Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007] :

"Not all matter are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give."

The subsequent edition of Russell [23rd Edition, page 470, para 8.043] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England [2nd-1989 Edition], have observed thus :

"In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for ppn 56 arbp-341.12 wt 1017.12 (j).doc distinguishing those disputes which may be settled by arbitration from those which may not."

Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena;

nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order...."

120. Supreme Court in the case of Vikas Sales Corporation and Anr. (supra) has held that patents, copyrights and other rights in rem which are not rights over land are also included within the meaning of movable property.

121. Delhi High Court in the case of Mundipharma AG Vs. Wockhardt Ltd. (supra) has interpreted the provisions of Chapter XII of the Copyright Act, 1957 relating to civil remedies in case of infringement of copyright; every suit or other civil proceedings arising under that Chapter in respect of Infringement of copyright in any work or the infringement of any other right conferred by the said Copyright Act shall be instituted in the district Court having jurisdiction and has held that in case where copyright in any work is infringed, the remedies by way of injunction, damages, account and

otherwise as are or may be conferred by law for the infringement of such a right, cannot be subject-matter of arbitration.

122. Section 62(1) of the Copyright Act, 1957 provides that every suit or other civil proceeding arising under Chapter XII in respect of the ppn 57 arbp-341.12 wt 1017.12 (j).doc infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction. In my view, the said provision makes it mandatory for institution of every suit or civil proceeding arising under Chapter XII in respect of infringement of the copyright in any work or infringement of any other right conferred by the said Act which is very wide in nature.

I am respectfully in agreement with the views expressed by the Delhi High Court in the case of Mundipharma AG Vs. Wockhardt Ltd.

(supra) which applies to the facts of this case. I am also bound by the judgment of the Supreme Court in the case of Vikas Sales Corporation and Anr. (supra) which applies to the facts of this case.

123. This Court in the case of Steel Authority of India Ltd. (supra) has considered the application of the defendants in an infringement suit filed by the plaintiff who had claimed a permanent injunction against the defendants from infringing the registered trade marks of the plaintiff. The plaintiff had also claimed for damages against the defendants. The defendants had filed a notice of motion under Section 8 of the Arbitration Act relying upon the arbitration agreement admittedly entered into between the parties in that matter. This Court held that the said suit was for the reliefs against infringement and passing off, which by their very nature do not fall within the jurisdiction of the arbitrator. It is held that the rights to a trademark and remedies in connection therewith are matters in rem and by their very nature not amenable to the jurisdiction of a private forum chosen by the parties. This Court accordingly dismissed the said notice of motion filed under Section 8 of the Arbitration Act by referring the parties to the arbitration.

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124. In my view, the judgment of this Court in the case of Steel Authority of India Ltd. (supra) applies to the facts of this case. I am in agreement with the views expressed by the learned Single Judge of this Court in the said order. The view taken by the learned Single Judge of this Court in the said judgment is in conformity with the view taken by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra).

125. In so far as the judgment of the Supreme Court in the case of Chiranjilal Shrilal Goenka (deceased) through LRs. (supra) is concerned, the issue before the Supreme Court was whether the grant of Probate by a Court of competent jurisdiction is in the nature of a proceeding in rem. It binds not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. It is held by the Supreme Court that consent of the parties cannot confer jurisdiction nor an estoppel against statute. The jurisdiction could be conferred by statute and the Court cannot confer jurisdiction or authority

on the tribunal. It is held that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the root to its jurisdiction or lacks inherent jurisdiction is a *corum non judice*. Such decree passed by such a court is a nullity and is *non est*. It is held that its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings.

126. Merely because the respondent did not raise any specific plea before the learned arbitrator that prayer clause (a) in the statement of claim for various declarations in respect of the copyright of the parties ppn 59 arbp-341.12 wt 1017.12 (j).doc was an action in rem and was not arbitrable, in my view, since the learned arbitrator inherently lacked the jurisdiction to adjudicate upon such claim made by the claimant, it would not amount to a waiver under Section 4 of the Arbitration Act. A party even by consent cannot confer jurisdiction on the learned arbitrator in case of action in rem which jurisdiction the learned arbitrator did not have. In my view, the principles laid down in the judgment of the Supreme Court in the case of Chiranjilal Shrilal Goenka (deceased) through LRs. (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

127. This Court in the case of Veena Naresh Seth and Anr.

(supra) has held that there is nothing under Section 16 which indicates that a plea of inherent lack of jurisdiction cannot be raised in a petition under Section 34 of the Arbitration Act even if it was not raised before the learned arbitrator. It is held that the questions relating to inherent lack of jurisdiction may also be raised before the learned arbitrator. However, that does not imply that if not raised before the learned arbitrator, the questions relating to inherent lack of jurisdiction cannot be raised in a petition under Section 34 of the Arbitration Act.

128. This Court in the said judgment has interpreted Section 34(2)(b) of the Arbitration Act and has held that while scrutinizing an award under Sub-section 2(b), it is not necessary for the party making the application to furnish proof that the subject matter of the dispute is not capable of settlement by arbitration. The award may be set aside even if the Court itself finds that the subject matter of the dispute is not capable of settlement by arbitration. It is held that if the arbitral ppn 60 arbp-341.12 wt 1017.12 (j).doc tribunal lacks inherent jurisdiction which cannot be cured or waived, the arbitral award would also be in conflict with the public policy of India. I am therefore of the view that since the learned arbitrator inherently lacked the jurisdiction to decide an action in rem, merely because the respondent did not raise an issue of jurisdiction before the learned arbitrator under Section 16 or otherwise, that would not confer jurisdiction on the learned arbitrator. In my view, the said issue of inherent lack of jurisdiction is incapable of being waived.

129. In so far as the judgment of the Supreme Court in the case of Olympus Superstructures Pvt. Ltd. (supra) relied upon by the learned senior counsel for the claimant is concerned, Supreme Court in the said judgment had considered the issue whether the right of specific performance for agreement of sale could be referred to the arbitration or the said claim was incapable of being adjudicated upon by the arbitration.

The respondents were the purchasers of flats and had applied for the specific performance of the agreements and the obligations of the seller under the agreement to sell of the flats. It was their rights in personam under the said agreements which could be referred to arbitration. In my view, the learned senior counsel for the original respondent is right in his submission that in the said judgment, the learned arbitrator was not called upon to determine any rights in rem but was asked to determine the rights of the parties under the agreement to sell. In my view, the said judgment of the Supreme Court in the case of Olympus Superstructures Pvt. Ltd. (supra) would not assist the case of the claimant.

130. In so far as an unreported judgment of this Court in the case of Prakash Cotton Mills Pvt. Ltd. & Anr. (supra) relied upon by the ppn 61 arbp-341.12 wt 1017.12 (j).doc learned senior counsel for the claimant is concerned, the declarations sought by the applicants were that they were sole and absolute owners of and were in exclusive physical possession of the property. The learned designate of the Chief Justice rejected the arguments of the respondent that such reliefs would be in the nature of the reliefs in rem. In my view, the said judgment delivered by the learned designate of the Hon'ble Chief Justice under Section 11(6) of the Arbitration Act would not have a precedentiary value since the said proceedings were not before a Court.

Be that as it may, the facts before the learned designate of Chief Justice in that application were totally different. In my view, the said judgment in the case of Prakash Cotton Mills Pvt. Ltd. & Anr. (supra) thus would not assist the case of the claimant.

131. In so far as an unreported judgment of this Court in the case of HSBC PI Holdings (Mauritius) Limited (supra) relied upon by the learned senior counsel for the claimant is concerned, the issue before this Court was whether the allegations of fraud could be referred to arbitration or not. In that context, this Court had adverted to the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) which has carved out the categories of disputes which are not arbitrable and has rejected the submission of the respondent that the allegation of fraud could not be referred to arbitration. In my view, the said judgment in the case of HSBC PI Holdings (Mauritius) Limited (supra) would not assist the case of the claimant.

132. In so far as an unreported judgment of this Court passed by a learned Single Judge of this Court on 12 th April 2016 in the case of Eros International Media Limited (supra) relied upon by the learned ppn 62 arbp-341.12 wt 1017.12 (j).doc senior counsel for the claimant is concerned, the defendant no.1 had filed an application under Section 8 of the Arbitration Act in a suit based on copyright action in which the plaintiff had also claimed for damages and for permanent injunction. A term sheet executed by and between the parties recorded an arbitration agreement. The term sheet had expired. None of the defendants were using any of the copyright protected material of the plaintiff. This Court observed in the said judgment that a claim for damages and a possible claim for relief in terms of a permanent injunction for the future would be survived in the plaint.

133. This Court referred to the judgment of the learned Single Judge in the case of Steel Authority of India Ltd. (supra) and has observed that in that matter, the defendant no.1 was accused of misusing the brand name and was guilty of infringement and passing off. This Court distinguished the said

judgment on the ground that it was also observed in the said judgment that the disputes in the matter before the learned Single Judge in the case of Steel Authority of India Ltd. (supra) concerning infringement and passing off did not arise out of the contract between the parties which contained an arbitration clause which was not the case before this Court in the case of Eros International Media Limited (supra).

134. Learned Single Judge in the said judgment gave an illustration that if A fails in his action against B, he may yet nonetheless succeed in his action against C which applies equally to copyright actions. It is held that what is in rem is the Plaintiff's or registrant's entitlement to bring that action. That entitlement is a result of having ppn 63 arbp-341.12 wt 1017.12 (j).doc obtained or acquired copyright (either by authorship or assignment) or having statutory or common law rights in a mark. In paragraphs 18 of the said judgment, this Court observed that the relief that the Plaintiff was seeking today, a decree in damages and injunction and both the reliefs could be granted by the learned arbitrator. It is held that those reliefs were routinely granted by the learned arbitrator on the findings of facts.

135. This Court in the said judgment held that where there are matters of commercial disputes and parties had consciously decided to refer those disputes arising from that contract to a private forum, no question arises of those disputes being non-arbitrable. Such actions are always actions in personam, one party seeking a specific particularized relief against a particular defined party, not against the world at large. In my view, the reliefs sought in the said suit which was subject-matter of the judgment in the case of Eros International Media Limited (supra) and the reliefs claimed in the statement of claim before the learned arbitrator by the claimant herein are totally different. The claimant in this case had prayed for various declarations which were in the nature of challenge to the right of the respondent to claim license or royalty in relation to broadcasting of the sound recording and for seeking injunction against the respondent and/or its members from restraining any threats and/or making any wrongful demand and/or initiating proceedings against the claimant in relation to broadcasting of sound recording by the claimant.

136. The learned arbitrator in this case had framed issue whether the use/broadcast of a sound recording as such/with the permission of the ppn 64 arbp-341.12 wt 1017.12 (j).doc owner of the copyright in sound recording but without permission of the owner of the copyright in literary work and/or musical work infringes the copyright in literary work and/or musical work. In my view, the judgments of the Supreme Court in the cases of Booz Allen and Hamilton Inc. (supra) and Vikas Sales Corporation and Anr. (supra) and the judgment of this Court in the case of Steel Authority of India Ltd. (supra) squarely apply to the facts of this case. I am respectfully bound by the said judgments. In my view, the judgment of the learned Single Judge of this Court in the case of Eros International Media Limited (supra) is clearly distinguishable in the facts of this case.

This Court thus need not refer the issue to larger bench for decision.

137. In so far as the judgment of the Supreme Court in the case of V.H. Patel & Company and Ors. Vs.Hirubhai Himabhai Patel & Ors. (supra) referred in the judgment of this Court in the case of Eros International Media Limited (supra) is concerned, the issue before the Supreme Court was whether

the claim for dissolution of the partnership could be decided by the learned arbitrator or not. Supreme Court in the said judgment has held that there is no principle of law or any provision which bars the arbitrator to examine such a question. In my view, the said judgment of the Supreme Court does not apply to the facts of this case at all and does not assist the case of the claimant.

138. Mr.Sancheti, learned senior counsel for the claimant placed reliance on the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) and more particularly paragraph 23 in which it was held that the disputes relating to sub-ordinate rights in personam arising from the rights in rem have always been considered ppn 65 arbp-341.12 wt 1017.12 (j).doc to be arbitrable. He submits that since there was no dispute before the learned arbitrator relating to copyright per se, the monetary claim arising out of sound recording could be considered at the most as a subsidiary right in copyright in sound recording and was thus arbitrable.

139. A perusal of the award indicates that the learned arbitrator has accepted the plea of the claimant that once the musical and/or literary works have merged with sound recording, the copyright owner in the literary work and/or musical work cannot exercise any right qua that sound recording when it is being performed in public in spite of the fact that the performance of a sound recording entails a simultaneous and concurrent performance of the underlying musical/literary work.

It is not in dispute that the learned arbitrator has held that the claimant did not require to obtain license from the respondent since the latter no longer enjoyed copyright in underlying work.

140. In my view, the learned arbitrator has rendered a finding on the legal character and validity of the ownership of the respondent in the copyright and thus the said award would be in the nature of an adjudication on an action in rem. In my view, the submission of Mr.Sancheti, learned senior counsel for the claimant that the dispute between the parties was relating to sub-ordinate right in personam and was thus arbitrable is contrary to the prayers made by the claimant in the statement of claim and the issues framed by the learned arbitrator and adjudication thereupon. The learned senior counsel could not distinguish the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) in the facts of this case. The said ppn 66 arbp-341.12 wt 1017.12 (j).doc judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) squarely applies to the facts of this case.

141. In so far as the submission of the learned senior counsel for the claimant that the learned arbitrator has not created or destructed any right of the parties in the impugned award is concerned, there is no merit in this submission of the learned senior counsel. The learned arbitrator has held that the claimant was not required to obtain any license from the respondent which itself shows that the rights of the respondent as a licensor are destructed in the impugned award not only against the claimant but also against the world at large. In my view, the claims made by the claimant were in the nature of an action in rem and the impugned award rendered by the learned arbitrator is a decision in an action in rem and thus would bind not only the parties to the arbitration but also third parties.

142. I am inclined to accept the submission of the learned senior counsel for the original respondent that if the said decision of the learned arbitrator which would act in rem is upheld, it would affect not only the respondent but also various other owners of the copyright in the underlying works who were not the members of the respondent society or otherwise. In my view, since the judgment is on an action in rem which was incapable of being settled by arbitration under the law for the time being in force and more particularly in this case under the provisions of the Copyright Act, 1957, the impugned award is in conflict with the public policy of India and is beyond the jurisdiction of the learned arbitrator. The impugned award shows patent illegality in so far as the adjudication of the claims made in respect of various ppn 67 arbp-341.12 wt 1017.12 (j).doc declarations sought pertaining to the copyright and the finding of the learned arbitrator that the claimant was not liable to obtain any license from the respondent for broadcasting the sound recording is concerned.

This part of the impugned award is thus liable to be set aside under Section 34(2)(b)(i) of the Arbitration Act.

143. Supreme Court in the case of Common Cause, A Registered Society Vs. Union of India & Ors. (supra) has relied upon the definition of 'tort' as defined in Jowitt's Dictionary of English law and has recognized that a tort qua copyright was an infringement of a right to rem. In this case, the learned arbitrator has held that the respondent did not enjoy the copyright in the underlying works in view of the same having been subsumed in the sound recording and thus the claimant was not liable to obtain any license from the respondent for broadcasting the sound recording. This decision of the learned arbitrator would bind not only the respondent but would be a declaration of the status of the respondent to the world at large.

144. In my view, there is thus no substance in the submission of the learned senior counsel for the claimant that the learned arbitrator has not decided any issue which would be in the nature of a decision on an alleged action in rem. In my view, the dispute of this nature can be decided only by a Court of law and not in the arbitration proceedings. The learned arbitrator has held that the 'in personam agreement' between the parties is void because the overlying property right in rem of the respondent did not exist and the right of the copyright holder in literary, dramatic or musical work is not to that extent violated. Such a declaration ppn 68 arbp-341.12 wt 1017.12 (j).doc made by the learned arbitrator clearly shows that it would bind not only the parties to the arbitration but to the world at large.

145. I am therefore of the view that the impugned award dated 6 th December 2011 in so far as it holds that the claimant was not liable to obtain any license from the respondent for broadcasting the sound recording and was not liable to pay any royalty to the respondent and answering the issue no.2 in negative was beyond the jurisdiction of the learned arbitrator for being adjudicated upon being an action in rem and that part of the impugned award thus deserves to be set aside.

146. In so far as the submission of Mr.Sancheti, learned senior counsel for the claimant that the arbitral award cannot be tendered in evidence and reliance placed on Sections 41 and 42 of the Indian Evidence Act, 1872 is concerned, the impugned award has been challenged by both the parties in the aforesaid arbitration petitions filed under Section 34 of the Arbitration Act and upon

disposal of the arbitration petitions, the said arbitral award would merge with the judgment of this Court and would be executable as if a decree of this Court. In this case, since the learned arbitrator had decided the issue on an action in rem which would not only bind the parties to the proceedings but also to the third parties, if the impugned award would have been upheld by this Court, the judgment of this Court would have become binding not only on the parties to the arbitration proceedings but also to the third parties. Reliance thus placed by the learned senior counsel for the claimant on Sections 41 and 42 of the Indian Evidence Act, 1872 is misplaced.

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147. In my view, the judgment of the Supreme Court in the case of R. Viswanathan and Ors. Vs. Rukn-ul-Mulk Syed Abdul Wajid (since deceased) and Ors. (supra) does not assist the case of the claimant. The issue before the Supreme Court in the said judgment was whether the foreign judgment is conclusive under Section 13 of the Code of Civil Procedure, 1908 in so far as the Courts of India or not is concerned.

148. In so far as the submission made by Mr.Sancheti, learned senior counsel for the claimant in Arbitration Petition No.1017 of 2012 thereby impugning the order passed by the learned arbitrator in paragraph 51 of the impugned award holding that the Copyright Board has exclusive jurisdiction to decide the question of refund of royalty or in the alternative, refund of excess royalty under Section 30A read with Section 19A of the Copyright Act, 1957 is concerned, the learned senior counsel invited my attention to the proceedings already filed by the claimant before the Copyright Board at New Delhi without prejudice to the rights and contentions of the claimant and raised the issue of jurisdiction in this arbitration petition.

149. It is urged by the learned senior counsel that even if the question of refund of excess royalty could be adjudicated upon exclusively by the Copyright Board under Section 30A read with Section 19A of the Copyright Act, 1957, at least the payment of the royalty made by the claimant under the three interim orders could be adjudicated upon by the learned arbitrator. Per contra, the submission of the learned senior counsel for the original respondent is that it is an exclusive jurisdiction of the Copyright Board to decide the issue of refund of ppn 70 arbp-341.12 wt 1017.12 (j).doc alleged excess payment of royalty made by the claimant and also the payment of royalty made by the claimant under the interim orders. It is urged that there cannot be any split of cause of action. He submits that the learned arbitrator was justified in rejecting the said claim on the ground of lack of jurisdiction. Learned senior counsel distinguishes the judgments relied upon by the claimant on the ground that in those judgments, there was no issue of exclusive jurisdiction of the Copyright Board to adjudicate upon the issue of refund of royalty.

150. There is no dispute that some payments of royalty have been made by the claimant to the original respondent under three interim orders. A perusal of the interim orders indicates that the claimant itself had agreed to pay royalty during the pendency of the arbitration petitions to the original respondent without prejudice to the rights and contentions of the claimant.

151. The question that arises for consideration of this Court is whether such claims made by the claimant without prejudice to their rights and contentions under the interim orders could still be decided in the arbitration proceedings though the jurisdiction to decide the claim for refund of payment of royalty would be covered under Section 30A read with Section 19A of the Copyright Act, 1957. In my view, whether the claim for refund of excess royalty or for payment of royalty paid under the interim orders, both the claims can be adjudicated upon only by the Copyright Board under Section 30A read with Section 19A of the Copyright Act, 1957. Be that as it may, there cannot be a split of claims made by the claimant i.e. a part claim to be decided in the ppn 71 arbp-341.12 wt 1017.12 (j).doc arbitration proceedings and the remaining part to be decided by the Copyright Board. In my view, the judgment of the Supreme Court in the case of Sukanya Holdings Pvt. Ltd.(supra) would apply to the facts of this case. I do not find any infirmity with the order passed by the learned arbitrator in so far as the view taken in paragraph 51 of the impugned award is concerned.

152. In view of the fact that this Court is of the view that the reliefs sought by the claimant in respect of the copyright was an action in rem and could not have been adjudicated upon by the learned arbitrator at all and could be decided only by a Civil Court, though both the parties have addressed this Court on several issues including the submission on the issue as to whether the claimant was required to obtain a license from the original respondent for broadcasting the sound recording by it from its FM Radio Stations in the 7 cities of Mumbai, Chennai, Indore, Kolkata, Pune, Ahmedabad and Delhi or as to whether the claimant had a valid license from the owners of the copyright in broadcasting those sound recordings which are already referred to aforesaid without prejudice to their contentions on the issue of arbitrability of the claims made by the claimant, it is made clear that this Court need not deal with those submissions though advanced by the parties through their respective learned senior counsel.

153. In so far as the judgments relied upon by the learned senior counsel for the claimant in support of his submission in respect of jurisdiction of the learned arbitrator in respect of refund of royalty are concerned, those judgments would not assist the case of the claimant. In view of this Court upholding the award in so far as claim for refund of ppn 72 arbp-341.12 wt 1017.12 (j).doc royalty is concerned, the interim orders relied upon by the claimant referred to aforesaid would be no significance. The impugned award in so far as rejection of the claim for refund of royalty on the ground of lack of jurisdiction is concerned is upheld.

154. I therefore pass the following order :-

(a) The impugned award dated 6th December 2011 passed by the learned arbitrator adjudicating upon the claims pertaining to the issue of copyright made by the claimant and finding on the issue no.2 in favour of the claimant declaring that the claimant was not required to obtain a license from the original respondent for broadcasting the sound recording by it from its FM Radio Stations in the 7 cities of Mumbai, Chennai, Indore, Kolkata, Pune, Ahmedabad and Delhi is set aside on the ground of want of jurisdiction of the learned arbitrator and being not arbitrable;

(b) Arbitration Petition No.341 of 2012 filed by the original respondent is allowed in aforesaid terms.

(c) Arbitration Petition No.1017 of 2012 filed by the claimant is dismissed;

(d) There shall be no order as to costs.

R.D. DHANUKA, J.

Mr.Sancheti, learned counsel for the original claimant seeks stay of the operation of this judgment which is vehemently opposed by the learned senior counsel for the original respondent. The operation of this judgment is stayed for a period of four weeks from today.

R.D. DHANUKA, J.

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