

# **Eastern India Motion Pictures And Ors. vs Performing Right Society Ltd. And Ors. on 25 April, 1978**

**Equivalent citations: AIR1978CAL477, AIR 1978 CALCUTTA 477**

**Author: A.N. Sen**

**Bench: A.N. Sen**

## **JUDGMENT**

B.C. Basak, J.

1. This appeal under Section 72 of the Copyright Act, 1957 (hereinafter referred to as the said Act) is directed against an order of the Copyright Board constituted under the said Act (hereinafter referred to as the Board) passed under Section 35 of the said Act. The facts of this case are shortly as follows:

The Performing Right Society Ltd., London, the respondent No. 1, herein, is a Performing Right Society within the meaning of the said Act (hereinafter referred to as the Society). The Society is an association of Composers, authors and publishers of Music having its Head Office in London. On the 13th of Feb. 1971 an advertisement was published in the Gazette of India dated 13th of Feb. 1971 the relevant portion of which is to the following effect.

"Tariffs For India The following is notified for general information :--

Revision of Tariff.

The Performing Right Society's Tariff (Statement of Fees, Charges or Royalties) relating to item No. 2 (Cinema) has been revised.

The revised tariff erroneously published in the Statesman Calcutta and Indian Express Bombay dated the 9th Jan. 1971 and the Gazette of India Part IV dated 23rd Jan. 1971 is hereby withdrawn and substituted by the revised tariff and hereby published as required by Sub-section (1) of Section 33 of the Copyright Act, 1957. The said revised tariff will be effective as from 1st March 1972.

Accordingly, the performing Right Society proposes to collect, until further notice fees, charges or royalties for the grant of licences for performances in public in India of the copyright musical works in its repertoire, in accordance with the

undermentioned revised tariff as from 1st March 1971.

Cinemas :

Tariff C for Cinemas published in the Gazette of India dated 28th June 1969 is withdrawn, and the following is substituted :

Tariff C for Cinemas.

For the annual licence the royalty shall be calculated by taking one-half per centum (0.5%) of the total monetary seating capacity of the Cinema at full evening prices (less only entertainment tax) multiplied by the number of performances during the year of the feature film or films (Excluding Indian films) plus the supporting programme (if any). Minimum annual charge 100 rupees."

The position prior to publication of the said notification would appear from the order of the Board dated 30th of Jan. 1973 in the case No. 14 of 1969. From the same it appears that from 1947 to 1959 the Society was recovering the minimum annual license fee for a cinema at Rs. 40/- in accordance with the Tariff published by it in 1947. In 1958 the Society revised the scale which was challenged in Case No. 2 of 1958. The parties, however, arrived at a compromise in 1959 whereby the Society gave up the revised scale and therefore the objectors withdrew their objections. As a result the Original Tariff of 1947 was allowed to go on till 31st of March 1969. On 28th of June 1969 a fresh Tariff was published whereby the minimum annual licence fee for a cinema was raised from Rs. 40/- to Rs. 100/-. Against the fresh Tariff objections were filed. The Tariff and objections covered Case No. 14 of 1969. While this case was pending the Society appears to have published a fresh Tariff changing the basis. The new basis was published in various newspapers and also in the Gazette of India. On Feb. 7, 1971 the Society withdrew the fresh Tariff and had the revised Tariff published in official Gazette dated the 13th of Feb. 1971. On 22nd Dec. 1970 the Performing Right Society Ltd. London addressed a letter to the Secretary, Copyright Board, New Delhi stating therein that the Board had been notified of the amendments of two tariffs, one of which was the tariff for cinemas which is the subject of Case No. 14 of 1969. It was stated that in view of the fact that the Society had promulgated a revised tariff for cinemas, it would be pointless to pursue the proceedings in Case No. 14 of 1969. The Society's letter came up before the Board at its meeting held on 12th of May 1971 and was considered by the Board. By an order dated the 2nd June 1971 the Board directed that in as much as changes have been effected in the Tariff and some of those changes are material in nature, it was necessary that an opportunity be given to the objectors to file a further objection which they should consider necessary in view of the amendments. Thereafter the Board directed that Case No. 14 of 1969 should stand withdrawn. It was further directed that the case which would then start will be numbered as 5 of 1973. Objections were filed by various associations in India including the appellants herein. Reply was filed against the same by the Society and counter-reply by the objectors. By its decision dated 1st April 1974 the Board passed the following order :--

"For all the above reasons we are not inclined to revise the tariff as published in the Gazette of India dated 13th of Feb. 1971. In view of the partial success and failure of

both the parties, the costs have to be borne by the parties themselves. Counsel fee for each party was Rs. 1,000/- (Rupees one thousand only)."

2. Regarding the first preliminary point raised by the objectors that the Society had no standing to require objectors to obtain licence, it was pointed out by the Board that the issue is whether the musical work that automatically is exhibited and performed in public when the Soundtrack and cinematograph film is exhibited requires licensing as there is copyright on such musical work. It was pointed out that the question before the Board was whether it can be said that when the Soundtrack or Cinematograph film was exhibited in the public, there should be a taxation because of the exhibition of the music incorporated in it, i.e. whether a musician who has undoubtedly a copyright in his work can claim that his copyright is being infringed when a cinematograph film or soundtrack is exhibited with his music, that is whether the cinema owners who have also a copyright in the cinematograph or the Soundtrack can ignore the copyright in the musical works.

3. In this context it was observed by the Board as follows:

"Once a film is exhibited, along with it the music is also played, whether it forms an integral part, is not very material. The question is when the whole is being shown. Whether the owner of the copyright of a part of the whole can say that his copyright is being infringed."

"The only question that is in dispute is, whether the composer of the music who has got a copyright undoubtedly in the musical work, can say that the owner of a cinematograph film cannot show his film unless the licence fee is paid to the composer or the Performing Right Society who is acting on behalf of the composer (for the (sic) being we are taking that the Performing Right Society is a representative of the composer of the music and has been duly authorized) for the music incorporated in the film-track or whether the owner of a film can exhibit the film without caring for the composers of music incorporated in the film."

4. The Board came to the conclusion that the Society had authority in fact and in law to grant licence in respect of the music contained in the Soundtrack of a cinematograph film.

5. On the question of the reasonableness of the rates, though the Board observed that there was no cause for enhancement of tariff, it recorded that it was not inclined to revise the tariff as published in 1971.

6. Mr. B.K. Bachawat, learned counsel appearing in support of the appeal, has made three-fold submissions before us -- Firstly, he has submitted that the composers, lyricists and musicians have no copyright in the soundtrack of the film. Mr. Bachawat has submitted that this matter now stands concluded having regard to the decision of the Supreme Court in the case of Indian Performing Right Society, Ltd. v. Eastern India Motion Pictures Association . In this context Mr. Bachawat has submitted that the Society is representing only the Composers and not the producers in this case. Mr. Bachawat has drawn our attention to the various portions of the objections and replies filed

before the Board and the Board's decision. His second submission was that the Board had jurisdiction to determine the reasonableness of the rate when the right of the Society to grant licence or collect fee is admitted but not where the alleged copyright of the Society and the authority of the Society to grant licence or to fix rates itself was disputed. Accordingly in the present case the Board should not have further proceeded in the matter. The exercise of power by the Board in the present case was without jurisdiction. The third submission of Mr. Bachawat was directed against the final order of the Board to the effect that the Board was "not inclined to revise the tariff as published in the Gazette of India dated the 13th of Feb. 1971. Mr. Bachawat has drawn our attention to the earlier part of the Board's decision in which the Board itself had said that "there was no case for enhancement of tariff". Accordingly the final order of the Board, according to Mr. Bachawat must be held to be perverse.

7. Mr. S.C. Sen, appearing on behalf of the respondents has submitted that the Supreme Court's decision was on the basis that there was no contract to the contrary between the producers and the artists. He has submitted that in the case of foreign films, in respect of which his clients are concerned, there is a contract to the contrary reserving the rights of the Society who are the assignees of the musicians, composers etc. He submitted that this question was not in issue in the facts of the case before the Supreme Court.

8. In support of his contention Mr. Sen has drawn our attention to the following averments made on behalf of the Society in their reply :

"PRS asserts, from its own experience acquired throughout the 59 years of its existence, that it is not the practice and custom within the film production industry for its composer members to enter into contracts of service with film producers whereby the producers become the owners of the musical works created by the composers and incorporated on the soundtracks of the films. In any case, the exercise of creative talent required from a composer engaged upon the scoring of a film would be incompatible with the degree of control which characterises the relationship of master and servant created by a contract of service."

"When a composer is commissioned to write music for a film he fulfils his contract by submitting to the film producer a score of the music he has devised for the film. A score is a series of sheets of special lined paper on which is written in musical notation the music for the film. Thus a musical work in the sense of Section 2(p) of the Act is brought into being and, even if it is subsequently incorporated in the soundtrack of the film that work will enjoy its own separate copyright in accordance with Section 14(1)(a) of the Act."

"The composer of music incorporated in the soundtrack of a film is the first owner of the copyright in that music and, as already explained in previous replies the composers of all film music controlled by PRS reserve, when entering into contracts with the film producers, the public performance elements of the copyrights in their music. These performing rights are assigned to their respective societies and are not

available to the film producer."

"The comprehensive nature of the repertoire controlled by PRS in India may be judged from the following facts. There is no British composer whose music is in copyright and is in use to any significant extent who is not a member of PRS. Every member of PRS vests, by executing a formal instrument of assignment, the public performance right in all his music to PRS. It is true to say, therefore, that the rights of public performance in virtually all British copyright music are controlled by PRS. Further in the particular case of music composed for incorporation in the soundtrack of a cinematograph film, the position and rights of PRS have been fully recognised by the film industry, and as long ago as 1959 PRS in agreement from the British Film Producers' Association the Federation of British Film Makers and the Association, Specialised Film Producers that the following clause would be inserted in all contracts between composers and film producers for the purpose of recognising the right of PRS to control the public performance of any music written for films (sic) :

"The composer being a member of the Performing Right Society Ltd. (hereinafter called the PRS) the performing right in the said music in all parts of the world shall be subject to the rights of the PRS. In this clause "performing right" means the right of (a) performing the said music in public (b) broadcasting the said music (c) causing the said music to be transmitted to subscribers to a diffusion service, and (d) authorising other person to do any of the said acts in relation to the said music."

9. Regarding the jurisdiction of the Board, Mr. Sen submitted that the scope of enquiry under Sections 33, 34 and 35 of the Act was normally limited only to the reasonableness of fees, charges and royalties. But if the collateral question is put merely for the purpose of stalling the enquiry, the Board was entitled, only for the purpose of proceeding, to deal with them. He has submitted that in respect of such an enquiry, the Board should not go into the question of the authority of the Society and the Board had no jurisdiction to do so. The Board's decision is only confined to the question of reasonableness.

10. On the question of reasonableness Of the rates Mr. Sen has drawn our attention to the reply of the Society before the Board placing on record all the materials justifying such a revision of the rates. Mr. Sen has submitted that accordingly the Board's ultimate order is justified. Mr. Sen has frankly admitted before us that some portion of the decision of the Board is confusing. Mr. Sen submitted that we have ample jurisdiction to go into the matter and in any event the Court should remand this matter to the Board for a fresh hearing limited on this point.

11. On the question of jurisdiction of the Board, we are of the opinion that the contentions of the respective counsel appearing for the parties before us represent two extreme views of the matter. We are unable to accept the contention of Mr. Bachawat that merely because the question of authority of the society was raised, the Board had no jurisdiction to go into the matter any further. In our opinion that would make the provisions of the said Act infructuous and unworkable. In any case if the authority of the society concerned is questioned by any objector, that would be the end of the

matter. In our opinion that was not the intention of the Legislature. On the other hand we are also not in a position to accept the extreme contention of Mr. Sen that the question of the authority of the society cannot be agitated or gone into at all in a proceeding before the Board. That would entitle a complete outsider to maintain such a proceeding before the Board even if it is found that such a Society had no authority at all to initiate any such proceeding. It has to be pointed out that Sub-section (1) of Section 33 of the Act specifically uses the expression "in respect of which it has authority to grant such licence". If in a given case it is shown that the society has no authority to grant such licence that would be the end of the matter. Accordingly if the authority of the society is challenged the Board has the jurisdiction to go into the same. As a matter of fact in view of the decision of the Supreme Court referred to above, it is no longer an open question. The Supreme Court's decision was on an appeal from the Board's decision and it was held by Supreme Court that the Society therein had no authority. Accordingly we hold that the Board had jurisdiction to decide the question of authority of the society concerned.

12. On the merits of the case, the interpretation of the law so far as the said Act is concerned, now stands concluded by the decision of the Supreme Court in the case of Eastern India Motion Pictures Association, (supra). In that case it was held as follows :

The composer of a lyric of a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the soundtrack of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound-track associated with the film by utilising such sound-track or from communicating or authorising the communication of the film by radio-diffusion as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work."

"On a conspectus of the scheme of the Act as disclosed in the provisions reproduced above particularly Clauses (d) (v), (f) (m) and (y) of Section 2, Sections 13(1) and 14(1)(c), provisos (b) and (c) to Section 17 and Sections 22 and 26 of the Act, it is therefore abundantly clear that a protectable copyright (comprising a bundle of exclusive rights mentioned in Section 14(1)(c) of the Act comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronized."

"This takes us to the core of the question namely, whether the producer of a cinematograph film can defeat the right of the composer of music .....

or lyricist by engaging him. The key to the solution of this question lies in provisos (b) and (c), to Section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos viz. proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric therefor i. e. the sounds for incorporation or absorption in the sound-track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid proviso (c) if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. It is, therefore, crystal clear that the rights of a music ..... composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of Section 17 of the Act."

13. The Society in the present case is an association of composers, authors and publishers of music. Composers, authors etc. have no copyright in the sound-track and accordingly their association cannot have a better right in spite of any alleged assignment. Whether in the facts of a case there is a contract to the contrary or not cannot be gone into in the absence of proper materials. In the present case the materials relied on by Mr. Sen referred to above are not in our opinion, sufficient to support the contention of Mr. Sen.

14. On the question of the reasonableness of the rates, we must point out that the Board's final order in the matter is contrary to the observations made by it earlier. By its final order the Board has held that the Board was not inclined to revise the tariff as published in the Gazette of 13 of Feb. 1971. On the other hand, just few sentences before that it has been observed by the Board that the Board was of the view that there is no case for enhancement of tariff. This, in our opinion, shows non-application of mind on the part of the Board. The society had placed various materials in support of its case for enhancement of tariff as proposed in the 1971 notification. This was challenged by the objectors. The Board did not properly consider the materials but made inconsistent observations and orders.

15. Accordingly, I would pass the following order. The appeal is allowed The Board's decision is set aside. There would be no order as to costs.

A.N. SEN, J.

16. I have had the benefit of reading in advance the judgment to be delivered by my learned brother. My learned brother has set out in his judgment the relevant facts and he has also considered the various contentions which were urged before us on behalf of the parties. I do not therefore consider it necessary to reproduce the same.

17. The present case is clearly covered by the judgment of the Supreme Court in the case of Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association . The distinction sought

to be made on the basis that the Supreme Court in that case was concerned with the claim of copyright of Indian Performing Society in the exhibition of Indian films and the present case relates to the claim of copyright of the Performing Right Society Ltd., of London in respect of exhibition of foreign films in India, is clearly without any substance. The law of copyright prevailing in India is applicable. The legal position is clearly concluded by the decision of the Supreme Court in the above mentioned case of the Indian Performing Right Society Ltd. v. Eastern India Motion Pictures, . The Supreme Court has clearly laid down that when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film or composing music or lyric therefor i. e. the sounds for incorporation or absorption in the sound track associated with the film, which are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other.

18. The materials on record in the instant case do not indicate or establish any such contract to the contrary.

19. Following the decision of the Supreme Court this appeal must be allowed. This appeal is, therefore, allowed. The order under appeal is set aside. There will be no order as to costs.