

MANU/DE/1842/2009

**Equivalent Citation:** ILR(2009)Supp.(.)Delhi781, 2009(41)PTC1(Del)**IN THE HIGH COURT OF DELHI**

I.A. No. 5670 /2009 and IA No. 8067/2009 in C.S. (OS) No. 769/2009

Decided On: 13.08.2009

Appellants: **Super Cassettes Industries Ltd.**  
**Vs.**Respondent: **Mr. Punit Goenka and Anr.****Hon'ble Judges/Coram:**

Manmohan Singh, J.

**Counsels:**

For Appellant/Petitioner/plaintiff: Dushyant Dave, Sr. Adv., Amit Sibal, Jagdish Sagar and K.K. Khetan, Advs

For Respondents/Defendant: Harish N. Salve, Rajiv Nayyar, Sr. Advs., Pratibha M. Singh, Sudeep Chatterjee and Archana Sahadeva, Advs.

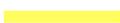
**Subject: Intellectual Property Rights****Acts/Rules/Orders:**

Copyright Act, 1957 - Section 2, Copyright Act, 1957 - Section 13, Copyright Act, 1957 - Section 14, Copyright Act, 1957 - Section 18, Copyright Act, 1957 - Section 19, Copyright Act, 1957 - Section 30, Copyright Act, 1957 - Section 31, Copyright Act, 1957 - Section 31(1), Copyright Act, 1957 - Section 31A, Copyright Act, 1957 - Section 31A(4), Copyright Act, 1957 - Section 32, Copyright Act, 1957 - Section 51, Copyright Act, 1957 - Section 55, Copyright Act, 1957 - Section 63, Copyright Act, 1957 - Section 135B(1); Code of Civil Procedure, 1908 (CPC) - Order 1 Rule 10, Code of Civil Procedure, 1908 (CPC) - Rule 1, Code of Civil Procedure, 1908 (CPC) - Rule 2

**Cases Referred:**

Micolube India Ltd v. Maggon Auto Center 2008 (36) PTC 231 (Del); Entertainment Network v. Super Cassettes Industries held by Apex Court cited as 2008 (37) PTC 353; Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia (2004) 3 SCC 90; Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel (2006) 8 SCC 726; Laxmikant v. Patel, v. Chetanbhai Shah (2002) 3 SCC 65; Pukhraj D. Jain v. G. Gopalakrishna (2004) 7 SCC 251; Ghaziabad Development Authority v. Balbir Singh (2004) 5 SCC 65; Phonographic Performance Limited v. Maitra and Ors. (1998) 2 All ER 638; Phonographic Performance Limited v. Retail Broadcast Services Limited of Chancery Division (1995) F.S.R. 813; Dalpat Kumar v. Prahlad Singh AIR 1993 SC 276; Gujarat Bottling Co. Ltd. and Ors. v. Coca Cola Company and Ors. AIR 1995 SC 2372; Wander Ltd. and Anr. v. Antox India P. Ltd. (1990) Supp. SCC 727

**Citing Reference:**

Discussed		6
Mentioned		4

**Case Note:**

**Intellectual Property Rights - Copyright in sound recordings — Infringement of - Section 51 of the Copyright Act, 1957 - plaintiff filed suit for permanent injunction against Defendants, ex-licensee to restrain the infringement of copyrights in the sound recordings (audio or visual), musical works and cinematograph works (which also include visual songs or sound recordings) owned by the plaintiff - Whether there is an infringement of copyright by the Defendants - Held, from bare reading of the Section 51 it is apparent that the infringement of copyright is made out once any person, not being the licensed user does any Act related to the exclusive rights of the owner of copyright without his/her permission - Use of the plaintiffs repertoire by the Defendant who was till recently an ex-licensee but did not continue the said agreement for the year 2009- 2010, are unlicensed acts and are therefore prima facie infringing acts within the meaning of the Copyright Act, 1957 - Ex-licensee cannot take a plea for justifying the said act done independently without permission**

**Intellectual Property Rights - Copyright in sound recordings — Infringement of - Matter pending before Copyright Board - Power of Civil Court - Section 31 of the Copyright Act, 1957 - Whether the**

mere filing of the application before the Copyright Board under Section 31 of the Act during the pendency of the proceedings takes away the powers of this Court to grant relief against infringement of copyright - Held, no where are the powers of the civil Court to grant relief against the infringement of the copyrighted works is taken away, even in circumstances where an application before the Copyright Board is pending - No implied ouster or implicit bar on present Court to grant relief against the infringement by the mere filing of the application for compulsory licensing before the Copyright Tribunal at the behest of the Defendants

**Civil - Grant of temporary injunction - Balance of convenience — Whether the plaintiff is entitled to the grant of temporary injunction — Held, while granting temporary relief Court must weigh the comparative hardship of one party as against the another and has to decide whether the injunctory relief is warranted or whether interim directions would suffice - Balance of convenience doctrine is of essence in cases for consideration of the issue of grant of injunction - In the present case, seeing the comparative hardship of the parties at this stage, the programme which is directly going to be affected by the use or non use of the repertoire is the commercially successful venture of the Defendants 'SA RE GA MA PA' - Hence, eventhough plaintiff has made out a prima facie case of infringement of copyright in its favour but the injunction being an equitable remedy, the Court has to exercise its discretion from various facets which arise in particular set of circumstances in each matter - Hardship of the Defendants' side will be massive if they are restrained not to use the repertoire which may lead to failure of the successful programmes of the Defendants — Therefore, injunction cannot be granted restraining the Defendants — However, plaintiffs should be adequately compensated by the Defendants and should pay all the outstanding dues - Application disposed of**

#### **Ratio Decidendi:**

*“Infringement of copyright is made out, once any person, not being the licensed user, does any act related to the exclusive rights of the owner of copyright without his/her permission.”*

*“Where an application before the Copyright Board is pending, powers of the civil Court to grant relief against the infringement of the copyrighted works is not taken away.”*

### **JUDGMENT**

#### **Manmohan Singh, J.**

1. By this order, I shall dispose of plaintiff's application under Order XXXIX Rules 1 & 2 of Code of Civil Procedure, 1908 being I.A. No. 5670/2009 and IA No. 8067/2009 filed by the defendants under Order I Rule 10 of Code of Civil Procedure, 1908 for deletion of the name of defendant No. 1 from the array of the parties.

2. The plaintiff has filed the present suit for permanent injunction restraining the infringement of copyrights in the sound recordings (audio or visual), musical works and cinematograph works (which also include visual songs or sound recordings) owned by the plaintiff. The brief factual matrix can be summarized in the following manner:

3. The plaintiff claims to have built up a repository of copyrighted works which are collectively licensed to the broadcasting channels.

4. The plaintiff supports its claims of having built up a repertoire of music and its contribution towards the music industry by boasting of several music artists who have been introduced by it in the industry. The said names have been given in paragraph 5 of the plaint which are as follows:

Anuradha Paudwal, Sonu Nigam, Udit Narayan, Kumar Sanu, Abhijit, Hans Raj Hans, Harbhajan Mann, Adnan Sami, Sadhana Sargam, Bela Sulakhe, Surjit Bindrakhiya, Satvinder Bitti, Bhagwant Mann, Shankar Sahani, Kumar Nishu, guddu Rangila, Manoj Tiwari, Bharat Sharma Vyas, Madan Rai, Kalpana, Radheshyam Rasia, Amrita Virk and Babbu Mann.

5. The plaintiff thereafter in the plaint contends that the entire business of the plaintiff and its investments, prospects of developing new talents, making of new music videos are primarily funded by the exploitation of its copyrighted works which form part of the repertoire.

6. The plaintiff then explains that the practice followed in the present television industry is that the channels are mainly governed by TRPS (Television Rating Points) which are measured by independent agencies. The said copyrighted works are used by the television channels on licensing basis and in turn royalty is accorded to the plaintiff by which the plaintiff earns substantial revenue and further encourages the development of creativity.

7. The plaintiff has named several leading television channels who have entered into the licensing

manupatra arrangement with the plaintiff besides the present defendants qua the usage of the copyrighted works. The same can be enlisted as under:

- (i) TV Today Network Ltd. for the Channels "AAJ TAK", "HEADLINES TODAY" and "TEZ";
- (ii) Global Broadcast News Ltd. for the channels "CNN IBN", "IBN 7", "CNBC- TV 18" and "Awaaz";
- (iii) New Delhi Television Ltd. for the channels "NDTV INDIA" "NDTV 24 X 7" and "NDTV Profit";
- (iv) Times Global Broadcasting Ltd. for the "TIMES NOW" Channel;
- (v) Star India Pvt. Ltd.;
- (vi) Multi Screen Media Pvt. Ltd.;
- (vii) INX Media Pvt. Ltd.; and
- (viii) Viacom 18 Media Pvt. Ltd.

8. The grievance of the plaintiff arises out of the unhealthy licensing arrangements (with respect to the copyrights) which the plaintiff had with the defendants from the period commencing 2007 onwards and even after the second arrangement dated 2nd April, 2008 was entered into. The plaintiff states that the defendants were infringing the works of the plaintiff prior to the year 2007 consequent to which the first Licensing agreement dated 29th March, 2007 was entered into between the plaintiffs and the defendants.

9. It is pertinent to refer to the relevant terms of the first agreement at this stage:

LICENSEE intend to obtain rights of sound recordings and audio visuals songs, the copyright of which are owned by the LICENSOR for using the same across its Network of Channels.

In lieu of the License Fees agreed to be paid by the Licensee the Licensor hereby also grants the Rights of Audio Visual Songs or any part thereof for using the same in programmes/serials/events only as a background material for a duration not exceeding 120 seconds.

This Licensing agreement shall be deemed to come into effect on 1st April 2006 and the term of this agreement shall expire on 31st March 2008 unless terminated earlier in accordance with the terms hereof or otherwise by law.

The License Fees of Rs. 99 lacs plus applicable taxes pertaining to the period 1st April, 2006 to 31st March, 2007 shall be paid in its entirety on or before 7th April, 2007, in the absence of which this agreement shall not come into effect.

10. From the abovesaid terms of the first agreement, it becomes clear that the defendants have not merely taken license but is also the ex-licensee of the plaintiff by virtue of acknowledging the copyrighted works of the plaintiff for the last three years. It is further clear that the defendants have in the first agreement agreed to enter into the agreement containing the royalty clause of Rs. 99,00,000/- (Rupees Ninety Nine Lac only) yearly plus taxes for a continuous period of two years.

11. There is further the settlement/MOU between the plaintiff and one M/s ETC Networks Ltd, the subsidiary of the defendants which is annexed with first main agreement between the plaintiff and the defendant No. 2 as regards settling their disputes by way of payment of a certain amount to ETC.

12. Thereafter for the years 2008 to 2009, the plaintiff and defendant No. 2 again entered into a second agreement dated 2nd April, 2008. The relevant terms of the second agreement which are noteworthy are:

Clause 2.2 : The Licensee shall have the right to use the master(s) of the Audio and Audio Visual songs and to use the same in music-based programmes like Sa Re Ga Ma, Little Champs, Rock n Roll Family, etc. where the Licensee shall be authorized to use the audio for a maximum duration of 180 seconds only and the audio visual songs for a maximum duration of 120 seconds only and such use only shall be in the background of such programmes only.

Clause 2.3 : The Licensee shall have the right to use the master(s) of the Audio songs in the serials like Betiyaan, Dulhaan, Saat Phere and Kasam Se etc. where the Licensee shall be authorized to use the audio for a maximum duration of 120 second only and such use shall only be in the background of such programmes only.

'Term' means a period for which the license herein is being granted to the licensee shall be for a period of one calendar year starting 1-4-2008 and 31-3-2009

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In consideration of the rights licensed herein, the licensee shall pay to the Licensor license fees aggregating Rs. 4,00,00,000 (Rs. Four crores only) payable in advance in equal monthly instalments

13. The main grievance of the plaintiff begins with the defendants' failure to comply with their obligation by non-payment of monthly installments of Rs. 69,33,336/- (Rupees Sixty Nine Lac Thirty Three Thousand Three Hundred Thirty Six Only) for the month of February, 2009 in the form of royalty. The defendants thus not only caused an infringement of plaintiff's copyright in the said works but continued the said infringement by not entering into any further agreement and illegally using the works of the plaintiff thereafter in their various programs and not merely to talent hunt programmes on television.

14. The plaintiff contends that it has tried to put the controversy to rest by writing letter dated 19th March, 2009 calling upon the defendants to pay the outstanding royalty of Rs. 69,33,336/- inclusive of VAT for the period of February - March, 2009 and further to enter into fresh broadcast licensing agreement not later than 28th March, 2009. The plaintiff also enclosed with the said letter the revised rates of royalty which were more than three times of those in the last agreement executed between the parties which expired on 31st March, 2009. Further, reminders were issued to the defendants on 26th March, 2009 reiterating the same.

15. The defendants replied to the said letter of the plaintiff in a cryptic manner by their letter dated April 2, 2009 wherein the defendants chose to remain silent on the payment of outstanding royalty in the second agreement and in fact counter proposed the meager sum of Rs. 60,00,000/- (Rupees Sixty Lac Only) on its own for the renewal of the agreement for years 2009- 10 giving some justifications mentioned in the letter which are reproduced hereinafter:

You are aware, in view of the increased competition and due to global recession we could not generate anticipated realty programmes during FY 2008-09 which has resulted in very poor usage by us in our network the songs from your repertoire and by such usage we could not even recover our costs of license taken from you. Meanwhile, we also understand that you have become a member of the IPRS/PPL societies with whom we already have licensing arrangement for the financial year 2009-10. Under the circumstances and in view of the current environment, since we do not expect to use the songs from your repertoire extensively, we will be willing to pay maximum of Rs. 60,00,000/- (Rupees Sixty Lakhs only) for the entire usage in FY 2009-10 by the Zee Network.

However, at the end of the year if our usage exceeds the internal estimates, we agree to compensate for such additional songs usage at mutually acceptable rates considering the current environment.

16. The plaintiff immediately responded to the defendants' letter on 4th April, 2009 by clarifying the following:

- (a) That PPL or IPRS are not responsible for the repertoire of the plaintiffs;
- (b) That the justifications regarding global recession are not acceptable to the plaintiffs;
- (c) If the rates proposed for the year 2009-2010 are not acceptable, then the defendants may discontinue using the works of the plaintiff;
- (d) That the amount of Rs. 60,00,000/- (Rupees Sixty Lac) proposed by the defendants is not acceptable; and
- (e) The usage of the plaintiffs work will amount to infringement of copyright.

17. Feeling aggrieved on the one hand by the reluctant conduct of the defendants in paying the outstanding amount due as per second agreement and on the other hand, by their continuous use of the plaintiff's works on their channels, the plaintiff filed the present suit.

18. The matter came up for hearing on 29th April, 2009 and on the said date, the matter was adjourned for one day at the request of the defendants.

19. The matter again came up for hearing on 30th April, 2009 when the plaintiffs pressed for an ex-parte injunction and the same was orally opposed by the defendants' counsel. Taking the prima facie view of the matter and to strike the balance between the parties, this Court has passed the following interim directions in consonance with the previous agreement :

- (a) the defendant No. 2 shall deposit the outstanding amount of royalty as mentioned hereinabove as agreed to deposit the said amount by the learned Counsel for the defendant No. 2 during the course of the hearing.
- (b) the defendant No. 2 shall also deposit the sum of Rs. 4 crores as a security amount against the continuation of usage of the copyrighted works on account. The exact amount shall be considered and assessed while deciding the interim application.

(c) the defendant shall maintain accounts separating the usage of the works involved in the present proceedings and shall file it before the court from 1.4.2009 on monthly basis.

20. The said order of this Court was confirmed by Hon'ble Division bench of this Court in appeal with a direction to decide the interim application. Taking notice of the urgent nature of the matter, this Court posted the same for 2nd July, 2009, i.e. immediately on reopening of the courts. The defendants filed the written statement belatedly and when the matter was listed on 2nd July, 2009, this delay in filing the written statement was condoned and the replication of the plaintiff was also taken on record. The matter was heard accordingly.

21. In the written statement, the defendants have raised defences which are similar to those argued by them on 30th April, 2009 and the same can be encapsulated as under:

(a) That the defendant No. 1 has been wrongly arrayed as a party in view of the Judgment of Micolube India Ltd v. Maggon Auto Center MANU/DE/0180/2008 : 2008 (36) PTC 231 (Del).

(b) That the defendants prides itself on its identity and its commercial success as a TV Channel and types of programmes offered by them on their network which includes television serials, talent hunt programmes, Competitive Shows, General Entertainment, Cookeries, Travel Shows Etc.

(c) That the defendants have attempted to narrow the controversy by explaining its talent hunt programme SA RE GA MA PA by stating the extent of usage of sound recording in the said programme.

It is worth mentioning that the present controversy between the parties is not confined to usage of the sound recording merely in one programme but rather simultaneous infringements caused by the defendants on their network of channels by using the plaintiff's sound recordings in one program or the other.

(d) That the defendants has also raised the defence of bona fide use or use Constituting imparting information or talent by way of running the talent hunt show and thus pleaded to escape the liability on this front.

(e) The defendants have also highlighted the previous debts of the plaintiff to one M/s ETC Network Ltd which is claimed to be subsidiary of the defendants. The defendants have stated that the plaintiff has availed the promotional spots on ETC and for programmes has referred to MOU arrived between plaintiff and ETC which is annexed with the first agreement. The defendants have explained the entire story between ETC and plaintiffs and pleaded that the plaintiff has failed to disclose the facts and background of the same. Further, the defendants have pleaded while citing Clause 4(b) of the MOU above that as regards the words "to Compensate the past usage", the defendants subsidiary ETC has given promotional space to the plaintiff and the same is thus not guilty of any infringement. The defendant asserts that the plaintiff in fact owes Rs. 5.73 crores to ETC.

(f) The defendants further raised a defence relating to reasonableness of the royalty .

(g) The defendants have pleaded that this Court's jurisdiction is ousted as the 'Fixation of Royalty' is the exclusive domain of the Copyright Board and heavily relied upon the dicta of Entertainment Network v. Super Cassettes Industries held by Apex Court cited as 2008 (37) PTC 353. During the pendency of this suit, the defendant No. 2 filed the relevant application on 15th May, 2009 before the Copyright Board.

(h) The defendants have raised additional defences of absence of itemized songs, non compliance of provisions of assignment of Section 18 and 19 of the Copyright Act, 1957 and the maintainability of the suit in the absence of the original owners and have also denied any infringement of copyright on their part.

#### Submissions of the Parties

22. Learned Senior Counsel Mr. Dushyant Dave appearing on behalf of the plaintiffs has made the following submissions:

(a) The Learned Counsel has referred to the last license agreement wherein the defendants have acknowledged the copyrights of the plaintiff which has ended on 31st March 2009. Mr. Dave argued that indisputably, there is no further agreement between the parties after the expiry of the second agreement and that therefore, the defendants are in continuous infringement of the plaintiff's repertoire by extensive use in many programmes, the chart of which has already been placed on record. The said user of the copyright by the defendants clearly amounts to infringement under Copyright Act, 1957. The learned Counsel states that Section 51 of the Copyright Act, 1957 is a deeming provision and in case the defendants infringes the copyright

without any license, the infringement is ipso facto. He further argued that in fact the entire scheme of the Copyright Act, 1957 is based on the premise that in case the defendants infringes the copyright without the license, it amounts to infringement without any further proof. He has referred Sections 2(m), 13, 14, 51, 55 and 63 of the Copyright Act, 1957. Thus, according to Learned Senior Counsel, in the present case, the infringement cannot be denied and thus warrants this Court to grant an injunction. In support of his submissions he has referred to *Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia* MANU/SC/0186/2004 : (2004) 3 SCC 90 at page 91; *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel* MANU/SC/3725/2006 : (2006) 8 SCC 726, at page 753; *Laxmikant v. Patel, v. Chetanbhai Shah* MANU/SC/0763/2001 : (2002) 3 SCC 65, at page 75. Relevant paragraphs of *Midas Hygiene's* case (supra) and *Laxmikant's* case (supra) read as under:

(i) *Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia* MANU/SC/0186/2004 : (2004) 3 SCC 90 at page 91

5. The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.

(ii) *Laxmikant v. Patel, v. Chetanbhai Shah* MANU/SC/0763/2001 : (2002) 3 SCC 65, at page 75

17. ...A refusal to grant an injunction in spite of the availability of facts, which are prima facie established by overwhelming evidence and material available on record justifying the grant thereof, occasion a failure of justice and such injury to the plaintiff as would not be capable of being undone at a later stage. The discretion exercised by the trial court and the High Court against the plaintiff, is neither reasonable nor judicious. The grant of interlocutory injunction to the plaintiff could not have been refused, therefore, it becomes obligatory on the part of this Court to interfere.

(b) The next submission of Mr. Dave, Learned Senior Counsel is dependent upon the previous one in the sense that once it is clear that there is a case of infringement of copyright, then, mere pendency of application at the behest of the defendants under Section 31 of the Copyright Act, 1957 seeking compulsory licensing cannot take away the jurisdiction of this Court to determine the infringement and to restrain the infringement.

In the alternative, Mr. Dave submits that once there is an infringement, mere pendency of such application before the Copyright Board and refusal to grant injunction on the said assumption amounts to prejudging the factum that the Board is likely to decide the application in favour of the defendants. According to the learned Counsel for the plaintiff, the Board may take its time to decide the said application as per procedure and till that time, this Court should take some preventive measures to restrain the infringement already caused or to be caused in the interregnum period till this time, the defendants can not presume that their application will be allowed by the Copyright Board. He has referred to the cases of *Pukhraj D. Jain v. G. Gopalakrishna* MANU/SC/0364/2004 : (2004) 7 SCC 251, at page 255 and *Ghaziabad Development Authority v. Balbir Singh* MANU/SC/0282/2004 : (2004) 5 SCC 65 at page 87.

(c) Mr. Dave strenuously argued the defence raised with respect to imparting knowledge and upbringing talent by stating that the defendants are not doing any business free of cost. The defendants are earning immense profits from advertisements and other sources when there are broadcasts of the sound recordings of the plaintiffs work. Once the defendants are an instrument to communicate the work to the public without the licence for commercial purposes, then, the defendants cannot say that such instrument is merely for cultivating young talent. According to the plaintiff, the argument of social service or imparting training is forceless.

(d) In answer to the defendants' strong reliance on the decision of the Dicta of Entertainment Network ( Supra) of Apex Court, Mr. Dave submitted that no doubt that the Copyright Tribunal can determine the issue as to the royalty and that it may even refuse to grant the prayer made by the defendant No. 2. According to Mr. Dave, the Apex Court in the entire judgment nowhere states that civil courts in appropriate cases will not prevent the infringement. To buttress his argument, Mr. Dave relied upon the case of *Phonographic Performance Limited v. Maitra and Ors.* cited as (1998) 2 All ER 638 which defines the duty of the court in the cases like the present one in the

Although the terms upon which PPL license their copyright are subject to the control of the Copyright Tribunal, Parliament did not see fit to restrict the way that they enforced their copyright against infringers. Parliament provided them with the same rights as ordinary copyright owners and prima facie they should be granted the same relief.

We accept that when a person established infringement of copyright and a threat to continue infringement, an injunction will in the ordinary case be granted without restriction. This is especially true when the defendant takes no part in the proceedings. But the court, when granting an injunction, is still required to exercise a discretion and in so doing there could be circumstances where restriction or refusal of an injunction would be warranted. We do not believe that such circumstances arise in this case or would normally do so in similar cases.

At the heart of the judge's decision to limit the injunction in time was his view that the injunctions obtained by PPL were used as a lever to extract license fees—a practice that he regarded as an abuse. Although PPL have, since the judge first expressed his views, modified the letters they write, it remains their objective to make sure that all users of their rights pay the appropriate license fee or stop infringing. The purpose of the injunction is to prevent unlicensed use. Inevitably it is an incentive to the enjoined person to obtain a license or, when threatened with committal, to pay the fee which he should have paid or stop.

We do not take the same view as the judge. A person who exploits his property right by licensing is entitled, unless there are special circumstances, to prevent another from using that property right without his license and to refuse to grant a license save on his terms and conditions as to payment and use. In a case, such as the present, where the defendant did not contest the allegation in PPL's statement of claim, was well aware of PPL's rights and that he was infringing and shows an intention to continue to infringe, we can see no reason why the use of an injunction in the normal form to prevent further infringement could be an abuse." No doubt the consequence is that a defendant is forced to pay if he wishes to use the repertoire, but PPL are entitled to use the rights assigned to them for the purpose of requiring payment of fees in return for a license to do what would, in the absence of a license, be an infringement of the rights. On the admitted facts of the 1997 cases, there were no grounds for suspending the injunction for 28 days which the judge said was 'intended to provide time for negotiation'. The admitted facts were that the defendant was a person who had, with full knowledge of the position, disregarded the proprietary rights of PPL. Whether or not the defendant would be in a position to pay any damages or costs was not known:" To allow him a further 28 days of infringement (which is also a criminal offence under Section 107(3)(b) of the 1988 Act, if the offender knew or had reason to believe that copyright would be infringed) was, in our view, wrong.

The second limb of the proviso to the injunction was intended to ensure that the injunction did not continue for a period longer than was necessary to protect PPL's rights. That was considered to be, at most, seven months. The purpose of such a limitation in time was to prevent PPL using the threat of committal to make the defendant pay further license fees.

Use of an injunction by PPL to obtain money to which they are not entitled would be an abuse, but there is no evidence that that ever occurs. Where unauthorized use of PPL's copyright is taking place, we do not believe it is an abuse to refuse to license that copyright without an appropriate payment for past use and an agreement for future use. Nor do we consider it an abuse for PPL to require compliance with an injunction either by the person refraining from using the repertoire or by paying for such use that has taken place and will take place.

In view of the aforementioned observations by Court of Appeal, Mr. Dave submitted that there is no implied ouster on the power of the court to grant an injunction in appropriate cases and it cannot be stated that such a process is an abuse of the court's time.

(e) Mr. Dave submitted that the justifications given by the defendants on global recession are meritless. The new tariff rates sought by the plaintiff are reasonable as various other channels are paying the license fee on the basis of the new tariff and in fact the defendants have also paid a sum of Rs. 4,00,00,000/- (Rupees Four Crores Only) for the last license agreement which ended on 31st March, 2009. Therefore, the defendant's contention that they will only pay Rs. 60,00,000/- (Rupees Sixty Lac Only) due to the recession reflects lack of bonafide intention to

settle the matter with any further arrangement with the plaintiff. Moreover, if this contention of the defendants is accepted, the other channels shall also reconsider the arrangement arrived at between the parties. He states that the said money received from the channels are not the earnings of the plaintiff as the plaintiff has to spend a huge amount for acquiring those rights from various producers and artists. The license fee paid to Super Cassettes Industries Ltd. by other broadcasters is reproduced hereunder:

NAME OF LICENSEE 2008-2009	NAME/NATURE OF PROGRAMME		PERMITTED USE		PERMITTED USE	
	Category- I	Category-II	Category-I	Category -II	Category- I	Category-II
Multi Screen Media Pvt. Ltd. Channel - SONY	7 Non- Fiction Shows namely Indian Idol, Jhalam Dikhhkaja, Antakshar i (SONY TV) AntakMr. (SAB TV), BOOGIE WOOGIE and two other such nonfiction shows etc.	N.A.	Unlimited usage of Sound Recordings, unlimited broadcast of episodes on Satellite Channel during the term of the Agreement.	N.A.	Rs. 7.0 Crores( Consolidated)	N.A.
INX Media Pvt. Ltd. Channel - 9X	Two Music Based Shows of 40 (forty) episodes each at the sole discretion of the Licensee. Each episode of duration one (1) hour approximately .  The first one being chak behshaher di kudiyan.	Any and all fiction Programme s being telecast or to be telecast on the Satellite Channel during the Term.	N.A.	Licensee shall be permitted d to use 120-180 seconds AT THE SOLE DISCRET ION OF THE Licensee of Sound Recordings gs by way of synchronizing the same with the sound track of the program me.	N.A.	Rs. 8.5 Crores

NAME OF LICENSEE 2008-2009	NAME/NATURE OF PROGRAMME		PERMITTED USE		LICENSE FEE	
	Category-IV	Category-II	Category-IV	Category -II	Category-IV	Category-II
	Reality Shows/M music based Shows etc.	Te l e Serials etc.	IV	-II	IV	
S t a r India Pvt. Ltd. Channel - STAR	A n y two series of music based/ dance based show (for eg. Nach Baliye or Voice of India etc.)	Fiction based show, soap operas, serial like Bhabhi, India Calling, Jodi Hamari excluding Music and Dance Shows where music is an integral part of such show,	Use of Licensed Contents for durations not exceeding 240 seconds in Programme by way of performance of the licensed Contents and Programme s containing Licensed	Use of Licensed Contents for durations not exceeding 90 seconds per song in Programme by way of synchronization of master of Licensed Contents with the dramatic work of the Program mes.	Rs. 1.25 Crores per programme Rs. 2.5 Crores minimum guarantee	R s . 40,000 per such clip Rs. 80 Lacs minimum guarantee

			Contents for durations not exceeding 60 seconds may be used for promotion of such Programmes.			
	Category- III Broadcast on other channel	Category- VI Programme s on regional channels	Category- III	Category -VI	Category- III	Category- VI
Repeat Broadcast of fiction – non fiction based programme s originally telecast on any star channel thereafter repeated on STAR UTSAV	Broadcast on regional channels of Star Bouquet	Permitted for programmes that were broadcast during the period 1.01.08 to 31.12.2008	Use of licensed contents not exceeding 120 seconds in duration in programmes by way of public performance.	Minimum Guarantee Rs. 1.50 Crores plus VAT.	Rs . 1.50 Crores plus VAT.	

NAME OF LICENSEE	NAME/NATURE OF PROGRAMME		PERMITTED USE		LICENSE FEE	
	Programme-I	Programme-II	Programme-I	Programme-II	Programme-I	Programme-II
2008- 2009	Programme-I Dance Show	Programme-II Fear Factor	Programme-I	Programme-II	Programme-I	Programme-II
Viacom 18 Media Pvt. Ltd.	Only 25 sound recordings to be used	Only 15 sound recordings to be used	Duration not exceeding 240 seconds in programmes for max. of 10 episodes	Duration not exceeding 60 seconds in programme s for max. of 20 episodes.	Rs. 25 Lacs plus VAT	Rs. 7.5 Lacs plus VAT
	Programme-III Big Boss	Programme -VI Serials				
	Only 100 sound recordings to be used	Only 100 sound recordings to be used	Duration not exceeding 120 seconds in programmes for max. of 86 episodes.	Duration not exceeding 120 seconds. If the no. of episodes increase, the addl. License fee @ Rs. 25,000/- per song per episode	Rs. 75 Lacs plus VAT	Rs. 25 Lacs plus VAT.

Mr. Dave further submitted that in case the defendants' contention is accepted, the entire business of the plaintiff will get disturbed and therefore, the demand of the plaintiff is reasonable. He has also referred to various documents and tried to persuade the court that defendant No. 2 is not losing any business due to the recession as alleged. In fact, he has stated that the defendants are making huge business by exploiting the copyrights of the plaintiff and so they should not have any objection to pay the reasonable license agreement fees to the plaintiff.

(f) Lastly, Mr. Dave replied to the arguments of the defendants on the ground that the controversy is not confined to misuse of the plaintiffs repertoire on one talent show SA RE GA MA PA as projected by the defendant but rather the ambit of controversy is much wider. The defendants are using or is likely to misuse the said repertoire on its entire network of channels.

manupatra 23. Per Contra Mr. Harish Salve, Learned Senior Counsel appearing for the defendants has replied and forcefully countered the submissions of the plaintiff which can be encapsulated in the following manner:

(a) Firstly, Mr. Salve began by stating that the present case is covered by the dicta of Entertainment Network (Supra) and this debate is put to rest by the Hon'ble Supreme Court. Relying heavily on the decision of the Apex court, Mr. Salve argued that the Copyright Tribunal is competent to determine the extent of the royalty based on the application made at the instance of the defendants and thus the Copyright Board is the competent authority to examine this aspect and therefore this Court should await the outcome of the decision of the Copyright Board. In support of his submission, Mr. Salve has read the judgment of the Apex court to show the relevant provisions of the Copyright Act and its interpretation by the Supreme Court.

b) Further, Mr. Salve has extensively argued that the compulsory license can be an intervening circumstance for non grant of injunction and relied upon extracts from Copinger and Skone James in order to further make his point:

#### COMPULSORY LICENCES

29-02 Although copyright is a property right, in certain limited circumstances the law permits uses of works without the consent of the copyright owner if the user complies with specific conditions, including the payment of a fee. In such circumstances, the copyright owner is compelled to license the particular use of the work and the license is referred to as a "compulsory license" or "license of right". Although the conceptual distinction is sometimes blurred, such licenses differ from permitted acts in that payment is required. The effect of a compulsory license is not dissimilar to the refusal by a court of injunctive relief or to a statutory right of "equitable remuneration" in that the right owner is left with the possibility of financial compensation for uses of the work rather than control over such uses. A further useful distinction can be drawn between statutory licenses and compulsory licenses properly so called. In the case of a statutory license the rate is fixed by law, in the case of a compulsory license the rate is left to be negotiated, but in neither case can use be refused or prevented. Collectively these licenses can be referred to as non-voluntary licenses.

(c) Thirdly, Mr. Salve countered the submissions of Mr. Dave by stating that once an application is pending before the Copyright Board under Section 31, the Court may then leave the question of royalty open and must also consider the same as a circumstance for non grant of injunction. To support this submission, Mr. Salve relied upon the judgment of Phonographic Performance Limited v. Retail Broadcast Services Limited of Chancery Division (1995) F.S.R. 813 wherein the Single Judge ( Justice Jacob) has observed in similar circumstances in the following words:

In the result I propose to strike out paragraph 22 of the existing defence and refuse leave to amend it as sought. I would only add that I have considerable doubts as to whether the continuance of this litigation is a worthwhile exercise. I was told that the defendant is likely to have a third try to send a Section 135B(1) notice. It is likely to get this right. The Copyright Tribunal will shortly be seized of a reference. That will be resolved by consent or a decision, eight of which will set terms for the future. As regards damages up until that point, it is not easy to see how they could be different from the rate set by the Tribunal. The defendants have in effect made it clear that they are willing to pay whatever is the appropriate amount determined by the Tribunal in default of agreement. So all PPL would get out of the litigation is what is on offer now. I may be wrong in this analysis. But if it were right then, even if PPL ultimately succeeds in its claim here, they would not in practice get more than is now on offer. That could have substantial implications as to costs. I say no more that this stage.

Hence, according to Mr. Salve as per the aforementioned observations, the plaintiff is not entitled to the injunction.

(d) Mr. Salve argued that the defendants are disputing the revised rates proposed by the plaintiff and the same cannot be equated with the rates which were agreed at the time of second agreement dated 2nd April, 2008. The main show likely to use these works is SA RE GA MA PA which is a show for encouraging new talent and therefore is not direct infringement. All these circumstances are mitigating factors which must be taken into consideration in addition to the parameters of Entertainment Network's case (supra) by Supreme Court while deciding the injunction application. In support of his submission he has referred to page 383 of Entertainment Network's case (supra) which reads as under:

The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee. The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful. The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2(j). But, that does not mean, as would be noticed from the discussions made hereinafter, that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.

(e) The next submission of the defendants is that there is a misconduct on the part of the plaintiff. It is stated that one such arrangement existed between ETC Network Ltd (which is the subsidiary of the defendants) and the plaintiff, who had availed the promotional spots in ETC network and thus owes a sum of Rs. 7,26,00,000/- (Rupees Seven Crore Twenty Six Lac Only) to defendant No. 2. Instead of making the said payment to the ETC, the plaintiff has fabricated certain documents claiming that the amount has already been paid. A criminal complaint was lodged by ETC Network Ltd in the year 2006 against the plaintiff and its provider which was ultimately settled by the plaintiff's acknowledgment of the said liability. Due to this reason two agreements were entered into between the parties and thereafter the agreement of the year i.e. 1st April, 2008 to 31st March, 2009 for a sum of Rs. 4 crores was entered between the plaintiff and defendant No. 2 and according to the defendants, the said agreement constituted back to back arrangement which was amicably settled between the parties. The said agreement with the plaintiff expired on 31st March 2009.

24. The plaintiff contends that the agreements with ETC dated 15th September, 2005 and 9th October, 2006 are completely irrelevant to the present case. The inclusion of the counter guarantee reciprocal promise in the license agreement dated 29th March, 2007 is not relevant to the present suit. The plaintiff has also denied the allegation of forging any document as alleged by the defendants. The contention of the plaintiff is that the defendants have filed false criminal complaint in order to put pressure on the plaintiff.

25. Learned Counsel for the defendants has further made submissions as regards wrong arraying of Defendant No. 1 as a party and other submissions which have been discussed above.

26. Firstly, I shall discuss the law relating to infringement of copyright. Section 51 of the Copyright Act defines the infringement in the following words:

51. When copyright infringed. --Copyright in a work shall be deemed to be infringed-

(a) When any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person -

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work:

Provided that nothing in Sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation. -- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy."

27. From bare reading of the Section and the decision referred by the learned Counsel for the plaintiff, it is apparent that the infringement of copyright is made out once any person, not being the licensed user does any act related to the exclusive rights of the owner of copyright without his/her permission, the said acts are of course defined under Section 13 and 14 of the Act. The use of the plaintiffs repertoire by the defendant who was till recently an ex-licensee but did not continue the said agreement for the year 2009- 2010, are unlicensed acts and are therefore prima facie infringing acts within the meaning of the Copyright Act, 1957.

28. Now, it is pertinent to further discuss the law on Compulsory license as referred in the case of Entertainment Network's case (supra).

### COMPULSORY LICENCE

The scheme of the Act affirms the freedom to contract as being the primary machinery by which the copyright owner publishes his work through a voluntary license regime in terms of Section 30. Compulsory licenses are an exception to the general freedom of the copyright owner to contract. Section 31 deals with compulsory license in works withheld from the public and the submissions relating to this provisions are set out in detail in the next section of this outline of submissions.

Section 31A empowers the Copyright Board to issue a compulsory license in respect of an unpublished Indian work or a translation thereof in any language, whose author is dead or unknown or cannot be traced or the owner of copyright in such work cannot be found. Section 31A(4) empowers the Board to hold an enquiry and direct the Registrar of Copyrights to grant to the applicant a license to publish the work or translation, subject to the payment of such royalty and subject to such other terms and conditions as the Copyright Board may determine.

Section 32 empowers the Copyright Board to issue a compulsory license to produce and publish a translation of literary or a dramatic work in any language after a period of 7 years from the first publication of the work.

29. The Law of Copyright is meant to encourage the authors and to reward creativity. The exploitation of creativity has to encourage further creativity in the sense that the ultimately when put to commerce, a person entering into the contract with the right holder must give him his rightful reward but not an unnecessary higher amount. Thus, the act balances two interests or aims, one, to reward the creators, authors and at the same time, the compulsory licensing puts an embargo upon the right holder from exercising a complete monopoly over the copyright subject matter. The Copyright Board as an intervening authority can fix up reasonable royalty and issue the license in appropriate cases where the work is shown to be withheld from the public once the ingredients of Section 31 are satisfied.

30. The law on the subject has been succinctly put forth by the Hon'ble Supreme Court in Entertainment Network ( Supra) wherein the Hon'ble Court had an occasion to discuss and interpret Section 31 of the Act. The Apex court held "that the Copyright Board can fix the compulsory license as an authority and also determine reasonable royalty. Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of license are unreasonable. No doubt, it provides for a mechanism but the mechanism is for the purpose of determination of his right. When a claim is made in terms of the provisions of a statute, the same has to be determined. All cases may not involve narrow commercial interest. For the purpose of interpretation of a statute, the court must take into consideration all situations including the interest of the person who intends to have a licence for replay of the sound recording in respect whereof another person has a copyright. This however, would not mean that all and sundry can file applications. The mechanism to be adopted by the Board for determining the right of a complainant has been provided under the Act. Explanation appended to Section 31 also plays an important role as it seeks to make a distinction between an artistic work on the one hand and a cinematographic films or sound recording on the other. Admittedly, in terms thereof the principles of natural justice are required to be complied with and an enquiry has to be held. The extent of such enquiry will depend upon the facts and circumstances of the case. A finding has to be arrived at that the grounds of refusal by an owner of a copyright holder is not reasonable. Only upon arriving at the said finding can the Registrar of copyright be directed to grant a license for the said purpose. The amount of compensation

manupatra payable to the owner of the copyright must also be determined. The Board would also be entitled to determine such other terms and conditions as the Board may think fit and proper. Registration is granted only on payment of such fees and subject to compliance of the other directions.

31. The question that now arises for consideration in this case is as to whether the mere filing of the application before the Copyright Board under Section 31 of the Act during the pendency of the proceedings takes away the powers of this Court to grant relief against infringement of copyright.

32. In this respect, the submissions of the counsels have already been noted. The decision of PPL v. Maitra (Supra) of Court of Appeal defines the correct position of the law on the subject. The decision of Apex Court in Entertainment Network's case (supra) is an umbrella judgment on the subject and is the guiding light on the law of compulsory licensing. However, in the entire judgment, nowhere are the powers of the civil court to grant relief against the infringement of the copyrighted works taken away, even in circumstances where an application before the Copyright Board is pending.

33. Thus, I find that there is no implied ouster or implicit bar on this Court to grant relief against the infringement by the mere filing of the application for compulsory licensing before the Copyright Tribunal at the behest of the defendants. Further, the decision of Entertainment Network's case (supra) given by Apex Court also does not discuss/lay down this proposition in the manner relied upon by the defendants. It is however another matter whether this Court considers the mitigating factors as contended by the defendants while granting the interim relief.

34. I shall now deal with the submissions of the parties:

(i) As, I have already come to the conclusion that the acts of defendants which are unlicensed for the year 2009-2010 and earlier licensed for the last three years are prima facie infringing acts within the meaning of the Copyright Act, 1957. At this stage, it cannot be said that these acts constitute any fair dealing or that the same are for the promotion of talent or imparting training as contended by the defendants. Hence, I do not find any force in the argument of the defendants that these acts are justified. For the earlier years, these acts were licensed till recently, when the defendants avoided to enter the contract. The ex-licensee cannot take a plea for justifying the said act done independently without permission. The defendants are thus not allowed to approbate and reprobate at the same time. Another reason is that once the defendants file the application before the Copyright Board, the defendants are again making clear their intention to seek a license and then, the acts done without license cannot in the meantime be held as fair dealing against the defendants.

The dispute is also not confined to infringement done in one programme as contended by the defendants. It is the defendants' apprehension that the show which is going to be affected is merely SARE GAMAPA, however the infringement which is sought to be restrained includes the entire network of channels of the defendants.

(ii) Secondly, as regards the pleas regarding ETC and the plaintiff, it is a matter of the fact that there is no counter claim filed by the defendants. Further, ETC is not a party to the present proceeding, neither is the agreement between the parties tri lateral wherein ETC is party. It is further incomprehensible to understand as to how in the proceedings relating to infringement of copyright, the defendants are pleading to settle the amount which is owed by plaintiffs to another entity of the defendants in a separate contract. The defendants and their subsidiary are separate legal entities under the law. It is neither the contention of the plaintiff nor the defendants to lift the corporate veil to see the relation between the two entities. Even if the two entities are subsidiaries, the MOU undertaken by ETC cannot be settled or binding upon ZEE which has its persona independent to that of ETC in all legal senses. The defendants are not even privy to the contract between the plaintiff and ETC. Thus, the pleas regarding ETC and the plaintiff as to the amount recoverable between the parties do not help the case of the defendants. Even otherwise, the said pleas cannot satisfy this Court to assume that the royalty is not payable.

(iii) Thirdly, with respect to the wrong arraying of defendant No. 1 as a party, I find that there is no advantage taken by the plaintiff in arraying the defendant No. 1 as a party. This is more so when the said defendant itself appeared on the very first date without caveat and sought time. Without going into the merits of IA No. 8076/2009, the same is hereby allowed and the defendant No. 1 is therefore deleted from the array of the parties.

(iv) Fourthly, the submission of Mr. Salve is that the grant of compulsory licensing is equivalent to the non grant of injunction. There is no res integra to that proposition and the same submission is correct. However, it cannot be lost sight of that in present case, the application for compulsory licensing is filed on 15th May, 2009. The mere factum of filing of application cannot be equated with the grant of compulsory license. If that is so, then it is obvious that the submission howsoever meritorious is not applicable to the present case.

(v) Fifthly, I do not agree with the submissions of the learned Counsel for the defendants that the

plaintiff does not have any valid rights of works, therefore no case of infringement of copyright has been made out. The following are the circumstances which establish that the submissions of the defendants are not correct:

(a) that in the agreements dated 29th March, 2007 and 2nd April, 2008, the defendants have acknowledged the rights of the plaintiff.

(b) in the letter dated 2nd April, 2009 issued by defendant No. 2 to the plaintiff, it is clearly mentioned that copyright with regard to broadcast of the sound recordings and audio visual songs are owned by the plaintiff.

(c) by paying the license fees aggregating Rs. 4,00,00,000/- (Rupees Four Crores Only) as per Clause 3(a) of the second agreement dated 2nd April, 2008 for a period of one calendar year starting from 1st April, 2008 to 31st March, 2009.

(d) by filing an application before the Copyright Board on 15th May, 2009 during the pendency of the present suit and praying for grant of compulsory license.

All these acts on the part of the defendants speak contrary to the submissions of the defendants and therefore, the said plea is rejected.

35. The plaintiff in this case is pressing for injunction against the defendants to restrain use of its entire repertoire of the music, sound recordings for its entire network of channels. It is noticeable that for the last three years, the defendants were under the licensing arrangement and even till recently, when the disputes in relation to entering into fresh agreement and payment of outstanding royalty of Rs. 69,33,336/- (Rupees Sixty Nine Lac Thirty Three Thousand Three Hundred Thirty Six Only) for the month of February to March, 2009 arose.

36. Once I have found that there is no implied ouster upon this Court to grant relief against the infringement of the copyright, the discussion is now narrowed to the mitigating factors, if any which entitle or disentitle the plaintiff to the injunction or interim relief.

37. It is further required to be considered that the parties tried to negotiate a settlement but the same could not be materialized. It cannot also be lost sight of that the plaintiffs have offered revised rates for the year 2009 - 2010 which were not acceptable to the defendants being higher than the previous ones. Furthermore, the defendants intention to become licensee is not bonafide when they offered Rs. 60,00,000/- (Rupees Sixty Lac Only) as royalty for the current year when they have agreed to pay Rs. 4,00,00,000/- (Rupees Four Crores Only) for the year 2008-2009 and this is fortified by the fact that though the defendants have filed an application seeking compulsory license to use the said repertoire, but at the same time they continued to use the plaintiff's work without license and then try to give the justification that they are agreeable to pay royalty.

38. The grant or non grant of injunction has to be measured within the parameters of three tests laid down by this Court. However, the court must weigh the comparative hardship of one party as against the another and has to decide whether the injunctory relief is warranted or whether interim directions would suffice. Injunctions should not result in extreme prejudice to the defendants. The balance of convenience doctrine is of essence in cases for consideration of the issue of grant of injunction.

39. The principle of law relating to temporary injunction during pendency of the suit is well recognized in the decision of the Supreme Court in the case of Dalpat Kumar v. Prahlad Singh MANU/SC/0056/1993 : AIR 1993 SC 276. The relevant portion of the observations of the Supreme Court in the said case states as under:

...It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that:

(1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant.

(2) The court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and

(3) That the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

The Supreme Court further held:

...Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial

question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in 'irreparable injury' to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequence of apprehended injury or dispossession of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that 'the balance of convenience' must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibility or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

40. In *Gujarat Bottling Co. Ltd. and Ors. v. Coca Cola Company and Ors.* MANU/SC/0472/1995 : AIR 1995 SC 2372, it was observed as under:

46...The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. See : *Wander Ltd. and Anr. v. Antox India P. Ltd.* MANU/SC/0595/1990 : (1990) Supp. SCC 727 at pp. 731-32. In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.

41. In the present case, when I see the comparative hardship of the parties at this stage, the programme which is directly going to be affected by the use or non use of the repertoire is the commercially successful venture of the defendants 'SA RE GA MA PA'. I am of the view that this factor is relevant for consideration of the grant or non grant of the injunction.

42. No doubt, the plaintiff has made out a prima facie case of infringement of copyright in its favour but the injunction being an equitable remedy, the court has to exercise its discretion from various facets which arise in particular set of circumstances in each matter. There may be cases in which grant of an injunction will only meet the ends of justice and an alternative safeguard for the preservation of rights of the challenging party cannot at all be thought of.

43. In the present case, the defendants have continued to use the copyright works owned by the plaintiff for more than four months despite expiry of the licensing period. I feel that the present case is the appropriate case wherein the orders of interim measures are required to be passed in view of the peculiar facts and circumstances of the matter as the court is of the view that the hardship of the defendants' side is massive if they are at this juncture restrained not to use the repertoire which may lead to failure of the successful programmes of the defendants and it might be difficult to revive the same incase, the application for compulsory licensing is allowed.

44. Keeping in mind the submissions of the parties, mitigating factor as well as the circumstances wherein the plaintiff can be adequately compensated at this stage, the interim directions are passed by disposing of the interim application and it is hereby ordered:

(a) To release the amount of Rs. 4,00,00,000/- (Rupees Four Crore Only) and Rs. 69,33,336/- (Rupees Sixty Nine Lac Thirty Three Thousand Three Hundred Thirty Six Only) which has been deposited by the defendants as per order dated 30th April, 2009 in favour of the plaintiff in consonance with the admitted previous year's royalty and outstanding for the months of February-March, 2009 respectively. The said amount as referred would cover upto 31st March,

2010. However, it is made clear that the plaintiff is at liberty to file the fresh application of injunction after the expiry of the aforesaid period which would be considered by the Court as per its own merit. Similarly, the defendants are also entitled to file any fresh application for modification of the orders, if necessary in case of change of circumstances.

(b) the defendants shall furnish the accounts pertaining to the usage of the works in question and shall file it before the court from the period 1st April, 2009 till 1st August, 2009 within two weeks from today and shall continue to file the same on monthly basis.

(c) as regards the plaintiff's claim of license fee as per recent rate- card applicable for the year 2009-2010 is concerned, the same shall be considered at the time of final stage of the suit after the trial, if situation arises at that time.

45. In view of the above, the interim applications being I.A. No. 5670/2009 and I.A. No. 8067/2009 are disposed of. It is made clear that any finding arrived in these applications are tentative and shall have no bearing before the Copyright Board who shall decide the defendants' application for obtaining the compulsory license at its own merit and as per law.

No costs.