

MANU/DE/2669/2009

Equivalent Citation: 2009(41)PTC515(Del)**IN THE HIGH COURT OF DELHI**

IA No. 10000/2008 in CS(OS) 1456/2008

Decided On: 20.10.2009

Appellants: **Tandav Films Entertainment P. Ltd.**
Vs.Respondent: **Four Frames Pictures and Ors.**
[Alongwith IA No. 10408/2009 in CS(OS) 1913/2008]**Hon'ble Judges/Coram:**

S. Muralidhar, J.

Counsels:

For Appellant/Petitioner/plaintiff: Jagdish Sagar and Geetanjali Visvanathan, Advs

For Respondents/Defendant: Pratibha M. Singh, Kunal Tandon, Kapil Wadhwa, Advs. for D-2 in IA No. 10000/2008 in CS(OS) 1456/2008, IA No. 10408/2009 in CS(OS) 1913/2008, Pallavi Gangoor, Amrita Bhattacharya, Advs. for D-4 in IA No. 10000/2008 in CS(OS) 1456/2008, IA No. 10408/2009 in CS(OS) 1913/2008 and Bihu Sharma, Adv. for D-3 in IA No. 10408/2009 in CS(OS) 1913/2008

Subject: Arbitration**Acts/Rules/Orders:**

Arbitration and Conciliation Act, 1996 - Section 8; Copyright Act, 1957 - Section 2, Copyright Act, 1957 - Section 8, Copyright Act, 1957 - Section 11, Copyright Act, 1957 - Section 13(1), Copyright Act, 1957 - Section 13(4), Copyright Act, 1957 - Section 14, Copyright Act, 1957 - Section 14(1), Copyright Act, 1957 - Section 16, Copyright Act, 1957 - Section 16(1), Copyright Act, 1957 - Section 52(1), Copyright Act, 1957 - Section 57; Code of Civil Procedure (CPC) - Order 39 Rules 1, Code of Civil Procedure (CPC) - Order 39 Rules 2

Cases Referred:

Radha Sundar Dutta v. Mohd Jahadur Rahim AIR 1959 SC 24; DDA v. Durga Chand Kaushish (1973) 2 SCC 825; Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya AIR 2003 SC 2252; Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums (2003) 6 SCC 503; W.P.I.L. v. NTPC Ltd. CS(OS) No. 1363/2005; Delhi Express Travels Pvt. Ltd. v. International Air Transport Association IA No. 13094/2007 in CS (OS) No. 1044/2007; Renusagar Power Co. Ltd. v. General Electric Company (1984) 4 SCC 679

Citing Reference:

Discussed		2
Mentioned		5

Disposition:

Appeal by Assessee dismissed

Case Note:**Arbitration - Appointment of Arbitrator - Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 - Present applications filed under Section 8 of Act for seeking reference of disputes between the parties to arbitration - Held, as per the arbitration clause present in contract entered between parties, in case of any dispute between parties, they have to appoint an arbitrator each and those two arbitrators have to choose the third arbitrator - Upon the failure of parties to appoint arbitrator each or those two arbitrators to appoint a third arbitrator, it will be open to applicant to apply to High Court under Section 11 of Act for appointment of arbitrator or arbitrators in accordance with law - Resultantly, present applications allowed and arbitrator appointed****JUDGMENT****S. Muralidhar, J.**

1. Both these applications by Defendant No. 2 UTV Software Communications Limited (UTV Software.) under

2. CS(OS) No. 1456 of 2008 has been filed by Tandav Films Entertainment P. Ltd. (Tandav Films.) against M/s Four Frames Pictures (Defendant No. 1) (Four Frames.), UTV Software (Defendant No. 2), M/s Big Music and Home Entertainment (Defendant No. 3) ('Big Music.') and M/s Living Media India Ltd. (Defendant No. 4) (Living Media.) for a decree of permanent injunction restraining Defendants 1 to 3 and their agents and others acting on their behalf from reproducing, making a film or sound recording of, issuing copies of, publicly performing, communicating to the public, adapting or in any other manner infringing the plaintiff's copyright in the music of the song Chak De Phathey or any other music from the plaintiff's Hindi film Khosla Ka Ghosla. The other prayers are for a decree for damages in the sum of Rs. 20,05,000 and for rendition of accounts and profits of the Defendants.

3. The connected suit, CS(OS) No. 1913 of 2008, has been filed jointly by Tandav Films and Padmalaya Telefilms Ltd. (Padmalaya Telefilms.) against Four Frames (Defendant No. 1), UTV Software (Defendant No. 2) and Mr. Jaideep Sahni (Defendant No. 3) seeking a permanent injunction against the Defendants from marketing, exhibiting, distributing or communicating to the public the rights of the Tamil film Poi Solla Porom which according to the plaintiff infringes its copyright in the literature and dramatic works created by Mr. Jaideep Sahni for plaintiff No. 1 Tandav Films. In the said suit, a permanent injunction is also sought to restrain the Defendants from making any sequels or prequels of the film 'Khosla Ka Ghosla. and from releasing, exhibiting, distributing the said film 'Poi Solla Porom. which infringes Tandav Film's special rights as author of the film 'Khosla Ka Ghosla.. A further prayer is for decree of damages in the sum of Rs. 23,00,000.

4. It is not in dispute that on 10th June 2002 an exclusive licence agreement was entered into between Tandav Films and Mr. Jaideep Sahni in terms of which scripts of certain songs and the writer's rights were exclusively licenced to Tandav Films. Consequent thereto, Tandav Films signed several licence agreements for underlying works including dialogues, screenplay, music etc. The shooting of the film 'Khosla ka Ghosla. commenced on 8th April 2003. On 5th May 2003, a memorandum of understanding (MoU) was entered into between Tandav Films and Padmalaya Telefilms for a joint venture for the making of the Hindi film 'Khosla ka Ghosla..

5. On 3rd September 2003, a MoU was entered into between Tandav Films, Padmalaya Telefilms and Zee Telefilms Ltd. (Zee) whereby all the rights in the Hindi film 'Khosla ka Ghosla. were assigned to Zee.

6. On 11th November 2003, an exclusive licence agreement was entered into between Tandav Films on the one hand and Mr. Sudipto Bhattacharya and Mr. Sumanto Bhattacharya on the other whereby their rights as music directors for the film Khosla Ka Ghosla were exclusively licensed to Tandav Films. On 16th August 2004 an exclusive licence agreement was entered into between Tandav Film and Living Media whereby exclusive and irrevocable rights in the musical works and accompanying lyrics as well as the sound recordings embodied in the sound track film were assigned to Living Media for a period of five years expiring as on 15th August 2009.

7. On 27th January 2005, a MoU was entered into between Zee and Padmalaya Telefilms whereby all the rights earlier assigned to Zee by the MoU dated 3rd September 2003 stood cancelled and all the rights reverted to Padmalaya Telefilms.

8. On 11th August 2005, a Deal Memo was executed between Tandav Films and UTV Software for help from the latter in getting the film released and distributed.

9. On 15th November 2005, an agreement was entered into between Tandav Films and Padmalaya Telefilms and UTV Software whereby the exclusive rights, excluding music rights in the Hindi film 'Khosla ka Ghosla. worldwide were transferred to UTV Software for a period of fifteen years. This agreement contained an arbitration clause and another clause concerning jurisdiction of courts. On 30th May 2006 an addendum agreement was entered into between Tandav Films, Padmalaya Films and UTV Software.

10. On 22nd September 2006, the Hindi film 'Khosla ka Ghosla. was released. It turned out to be a successful film and its collections far exceeded the expectations. It is supposed to have grossed a revenue of nearly Rs. 4.5 crores.

11. On 11th October 2007, the composing of the musical work for the Tamil film 'Poi Solla Porom. commenced. The shooting of the said Tamil film commenced on 21st October 2007. The music of the film 'Poi Solla Porom. was released on CD on 11th July 2008. On 10th July 2008, an assignment agreement was entered into between UTV Software and Big Music whereby the musical works in 'Poi Solla Porom. were assigned to Big Music.

12. On 29th July 2008, CS(OS) No. 1456 of 2008 was filed and on 11th September 2008, CS(OS) No. 1913 of 2008 was filed. Pursuant to the summons issued in the suits, written statements were filed in both suits by UTV Software. Notice was issued in the applications filed by the plaintiff under Order XXXIX Rules 1 & 2 CPC. Replies were thereafter filed by the Defendants. Along with its written statement, UTV Software filed the

manupatra present applications under Section 8 of the Act in each of the two suits contending that in terms of the arbitration clause of the agreement dated 15th November 2005 the disputes forming subject matter of the suits should be referred to arbitration. The two applications have been heard finally with the consent of the parties.

13. The submissions of Mr. Jagdish Sagar, the learned Counsel for the plaintiff, were as follows:

(1) Since in each of the suits, the relief sought by the plaintiff is beyond the scope of the agreement dated 15th November 2005, the arbitration clause contained in the said agreement cannot be pressed into service by UTV Software.

(2) In order to determine the tenability of UTV Software's contention, the Court has to necessarily examine the relevant clauses of the agreement.

(3) Although all negative rights in the Hindi film `Khosla ka Ghosla. excluding music rights have been transferred to UTV Software, the expression `music rights. occurring in Clause 2.1.1 has to be interpreted harmoniously with the expression `musical work. attached to the film, sound recording etc., occurring in Clause 2.1.2 and Clause 6.2.5. Since the former Clause 2.1.1 has the effect of overriding Clause 6.2.5, it is the earlier clause that must prevail and not vice-versa. Reliance is placed on the judgment in Radha Sundar Dutta v. Mohd Jahadur Rahim MANU/SC/0122/1958 : AIR 1959 SC 24 and DDA v. Durga Chand Kaushish MANU/SC/0329/1973 : (1973) 2 SCC 825.

(4) The expression `musical work. defined under Section 2(p) of the Copyright Act, 1957 (CR Act) includes an arrangement of sounds, melody and harmony and would include `tune. as well. Under Section 13(1)(a) CR Act, copyright subsists in musical works. Under Section 14(a)(iv), the owner of the copyright has a right to make a sound recording or a cinematograph film in respect of the musical work. It is submitted that separate copyright subsists in cinematograph films and sound recordings under Section 13(1) (b) and (c) respectively and that the owners of such copyrights enjoy different rights which are defined under Section 14(e) and 14(d) respectively. However, musical work used in a sound recording or film retains its separate identity as a copyright work, as made clear by Section 13(4) CR Act.

(5) Section 13(4) CR Act makes it clear that copyright in a cinematograph film shall not affect the separate copyrights in the underlying works. The expression `film. in Section 2(f) CR Act refers to a film as a composite whole and includes the music which is heard when the film is shown. This means that the synchronized version of the music is part of the film even though the music by itself is not. Therefore, when the negative rights in the film are transferred these do not include the underlying works.

(6) It is further submitted that it is Mr. Dhruv Dhalla who composed the relevant musical work as the first owner of the copyright and in terms of Section 14(1) (a) CR Act assigned those rights to Tandav Films. Mr. Dhalla has filed an affidavit dated 30th July 2008 to that effect. Consequently it is Tandav Films, which now owns the said rights including the right to make a sound recording of the film in respect of the musical work.

(7) Therefore, Tandav Films has exercised its right first by making a sound recording of the music and thereafter granting an exclusive licence to Living Media (Defendant No. 4) by the agreement dated 16th August 2004. It is submitted that the exclusive licence of the music in Hindi film in favour of Defendant No. 4 did not extend to the music itself but only the sound recording. This is evident from the payments made by Living Media to Tandav Films in terms of Section 52(1)(j) CR Act when it intended to make further and separate recordings of the same work. It is maintained that by the agreement dated 15th November 2005, Tandav Films may have assigned rights in the film referable to Sections 13(1)(b) and 14(d) CR Act which would include the literary and dramatic works of the film except the songs but did not extend to musical works. It is contended that the terms musical motion picture rights and musical work attached to the film, sound recordings etc. occurring in the said Clause 2.1.2 of the said agreement can only refer to synchronized music and, therefore, no other meaning can be ascribed to the said clause.

(8) It is contended that as regards the other Defendants, Four Frames is the main infringer since it is the apparent author/producer of the Tamil film `Poi Solla Porom.. Four Frames is not a party to the arbitration clause and is, therefore, not bound by it. Likewise, Defendants 3 and 4 in CS (OS) No. 1456 of 2008 and Defendants 1 and 3 in CS (OS) No. 1913 of 2008 are not parties to the arbitration agreement. They are however both proper and necessary parties to the suit. Therefore, the disputes cannot be referred to the arbitration. Reliance is placed on the judgment of the Supreme Court in Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya MANU/SC/0310/2003 : AIR 2003 SC 2252. It is further submitted that relief of damages in terms of Section 57 CR Act cannot and does not form the subject matter of the agreement since the author's special rights have not been assigned. The disputes relating to such right cannot be referred to arbitration.

(1) The other parties to the suit have all derived their rights from UTV Software itself. M/s Four Frames is in fact represented by Mr. Priyadarshan who happens to be the Director of 'Poi Solla Porom. which is the Tamil version of 'Khosla ka Ghosla.. It is submitted that the Defendant No. 3 Big Music has been assigned the music rights in the Tamil film. It also derives its rights only from UTV Software. Therefore, no other party is in fact a proper and necessary party to the dispute. Admittedly, as far as Mr. Jaideep Sahni is concerned, even according to the plaintiff he is a proforma party since no relief is sought against him.

(2) Apart from the music rights which are given to Living Media by the agreement dated 16th August 2004, the entire residuary rights which are the negative rights in the film 'Khosla ka Ghosla. as further explained by Clause 2.1.2 of the agreement dated 15th November 2005 have been transferred to UTV Software. Besides the rights contained in these two agreements, i.e., the agreement dated 16th August 2004 with Living Media and the agreement dated 15th November 2005 with UTV Software, there are no other rights left with Tandav Films. Therefore, any dispute arising between the parties which is outside the music rights given to Living Media has to be referred to arbitration in terms of the agreement dated 15th November 2005. Reliance is placed on the judgment of Supreme Court in Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums MANU/SC/0482/2003 : (2003) 6 SCC 503 to contend that once an arbitration clause exists, the court has a mandatory duty to refer the dispute arising between the parties to arbitration.

(3) The expression music rights is distinct and different from the expression musical work embodied in the film. There is no ambiguity that the rights in the musical works have been transferred to UTV Software.

(4) Referring to the judgment in W.P.I.L. v. NTPC Ltd. passed in CS(OS) No. 1363/2005 dated 16th January 2009 it is submitted that it is not necessary to make Four Frames a party to the dispute. It is submitted that UTV Software is bound to bear the liability arising out of the assignment of the music rights to M/s Big Music. Reliance is placed on the judgment in Delhi Express Travels Pvt. Ltd. v. International Air Transport Association passed in IA No. 13094/2007 in CS (OS) No. 1044/2007 dated 28th May 2009.

15. The submissions of the learned Counsel for the parties have been considered. In Renusagar Power Co. Ltd. v. General Electric Company MANU/SC/0001/1984 : (1984) 4 SCC 679 the Supreme Court had the occasion to consider the expressions 'arising out of.', 'in connection with.', 'in relation to. on 'in respect of. the disputes between the parties and held that these expressions are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement. Therefore, whether a certain dispute is within the scope of the arbitration agreement is a question that can definitely be gone into by the arbitral tribunal itself. This is plain from Section 16(1)(b) of the Act which states that the Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose arbitration agreement which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. It is plain, therefore, that the contention raised by the plaintiff here that the subject matter of the present dispute falls outside the scope of the agreement dated 15th November 2005 and therefore outside the scope of the arbitration clause is also a point that can be considered by the arbitral tribunal itself.

16. Be that as it may, it appears that the principal contention of the plaintiff revolves around the interpretation to be placed on the expression musical works occurring in Clause 2.1.2 of the agreement dated 15th November 2005. The plaintiff does not dispute that music rights stand excluded from the settlement and that these music rights have in fact been assigned to Living Media by the agreement dated 16th August 2004. It is now sought to be contended that the expression musical works occurring in Clause 2.1.2 is different from the meaning given to those words in Section 2 (1)(b) of the CR Act. It is sought to be contended that the said right is limited to the musical work in Hindi film 'Khosla ka Ghosla. and that copyright in the underlying work still remains with the plaintiff. It is further contended that the expression 'negative rights. occurring in the agreement dated 15th November 2005 somehow excludes the copyright in the musical works.

17. To this Court it appears that the submissions made involve the interpretation of the clauses in the agreement in order to determine whether the arbitration clause covers the present dispute. This Court is persuaded to hold that prima facie Clause 2.1.2 does appear to cover the expression 'musical works. contemplated under Section 2(p) CR Act. This is, however, only a prima facie view taken for the purposes of determining whether the present applications under Section 8 should be entertained and the parties to be referred to arbitration. The court is at this stage not required to express a final view on this aspect. Given the scheme of the Act and the scope of the powers of the arbitral tribunal under Section 16 it is for the arbitral tribunal to decide this question. The better course is that the parties should be referred to arbitration and all the points urged by the plaintiff concerning the scope and ambit of the arbitration clause can be urged before the arbitral tribunal.

18. As regards the applicability of the judgment in Sukanya Holdings Pvt. Ltd. (supra), it is seen that the

manupatra Supreme Court was concerned with the question whether the claims could be split up into arbitrable and non-arbitrable ones. The said decision is distinguishable in its application to the present case. Here, both suits arise out of the claims by Tandav Films as to its copyright in the underlying work of the Hindi film `Khosla ka Ghosla.. Even the claim for damages stems from the alleged infringement of the aforementioned copyright of the plaintiff in the underlying work. Therefore, it cannot be said that the subject matter of the dispute in both the suits has nothing to do with the agreement dated 15th November 2005. It is clarified that this is only a tentative view formed by this Court for examining if the parties should be referred to arbitration in terms of the arbitration clause in the said agreement. The final view on this aspect will be taken by the arbitral tribunal. In arriving at this conclusion, this Court has also taken note of the judgment in W.P.I.L. v. NTPC Ltd.

19. The question that next arises for consideration is whether disputes involving entities who are not the parties to the agreement dated 15th November 2005 can be referred to arbitration. It is seen that as far as Four Frames are concerned, it is represented by the Director of the Tamil film `Poi Solla Porom who has himself no independent rights. His rights are only derived from UTV Software. Whatever happens in the arbitral tribunal between UTV Software and Tandav Films would bind Four Frames as well. Therefore, in the considered view of this Court, neither Four Frames nor Big Music are necessary parties to the present disputes and therefore there is no difficulty in referring the disputes to the arbitral tribunal. The plaintiff has itself stated unequivocally that it is not claiming relief either against Jaideep Sahni or Living Media. In that view of the matter, these two parties need not be referred to arbitration at all. The disputes are essentially between Tandav Films and Padmalaya Telefilms on the one hand and UTV Software on the other. Since these three are parties to the agreement dated 15th November 2005, there should not be any difficulty in referring them to the arbitration.

20. The arbitration clause in the present case reads as under:

13. Arbitration

13.1. The parties to this Agreement hereby agree that they intend to discharge their obligations in utmost good faith. The parties therefore agree that they shall at all times act in good faith, and make all attempts to resolve all differences howsoever arising out of or in connection with this agreement by discussion failing which, by arbitration.

13.2. The parties shall be bound to submit all disputes and differences howsoever arising out of or in connection with this to arbitration by one arbitrator mutually appointed, failing which by three arbitrators; one each nominated by UTV and First Party and the other chosen by the two (2) arbitrators so nominated by the parties. The parties agree that until the arbitration proceedings are complete, they shall not take their disputes to a court of law. The Arbitration shall be in all matters be governed by the Arbitration and Conciliation Act, 1996.

13.3. The Arbitrators shall be persons of professional repute who are not directly or indirectly connected with any of the parties to this Agreement. They shall have prior experience as arbitrators,

13.4. The place of arbitration shall be at Mumbai, India. The language to be used shall be English.

13.5. The award of the arbitration proceedings will be final and binding on both the parties to the Agreement.

21. In terms of the above clause, Tandav Films and Padmalaya Telefilms on the one hand and UTV Software on the other will have to appoint an arbitrator each and those two arbitrators have to choose the third arbitrator. This will be done by each of the parties within a period of two weeks from today. The place of arbitration shall be in Mumbai. Upon the failure of the parties to appoint an arbitrator each or those two arbitrators to appoint a third arbitrator, it will be open to the Defendant No. 2 to apply to the High Court of Judicature at Mumbai under Section 11 of the Act for appointment of an arbitrator or arbitrators in accordance with law.

22. Resultantly, both the applications under Section 8 of the Act are allowed with the above directions and with costs of Rs. 20,000 which will be paid by the plaintiffs to the Defendant No. 2/applicant (UTV Software) within four weeks from today.

CS(OS) No. 1456/2008 & IA 8904/2008 with CS(OS) No. 1913/2007 & IA No. 11087/20089

23. In view of the above order, the suits stand dismissed as not maintainable. Applications also do not survive and are accordingly dismissed.