

MANU/DE/0234/2010

Equivalent Citation: 2010(42)PTC621(Del)

IN THE HIGH COURT OF DELHI

I.A. No. 9558/2009 in C.S. (OS) 1216/2007

Decided On: 27.01.2010

Appellants: **The Indian Performing Right Society Ltd. and Anr.**
Vs.

Respondent: **Punit Goenka and Anr.**
[Alongwith I.A. No. 9551/2009 in C.S. (OS) 1356/2007]

Hon'ble Judges/Coram:

S. Ravindra Bhat, J.

Counsels:

For Appellant/Petitioner/plaintiff: Sudhir Chandra Aggarwal, Sr. Adv. Himanshu Bagai, Adv. for Plaintiff No. 1 Jagdish Sagar an Geetanjali Vishvanathan, Advs. for plaintiff No.

For Respondents/Defendant: V.P. Singh and Maninder Singh, Sr. Advs., Pratibha M. Singh, Sudeep Chatterjee and Nikhil Mehra, Advs.

Subject: Intellectual Property Rights

Acts/Rules/Orders:

Copyright Act, 1957 - Section 33, Copyright Act, 1957 - Section 33(3), Copyright Act, 1957 - Section 34; Copyright Rules - Rule 14I; Copyright (Amendment) Act, 1994 ;Code of Civil Procedure (CPC) - Order 12 Rule 6

Cases Referred:

Charanjit Lal Mehra v. Kamal Saroj Mahajan (2005) 11 SCC 279; Uttam Singh Duggal v. Union Bank of India AIR 2000 SC 2740; Raj Kumar Chawla v. Lucas Indian Services 129 (2006) DLT 755; Union Carbide Corporation v. Union of India 1991 (4) SCC 584; State of Punjab v. Amar Singh (1974) 2 SCC 70

Citing Reference:

Discussed		2
Mentioned		3

Case Note:

Intellectual Property Rights - Injunction - Section 33(3) of the Copyright Act, 1957 - Petitioner was copyright owners of literary and musical works enter into and agreement with PPRS Defendant - Defendants partly performed agreements - Petitioner restraining it from broadcasting, or publicly performing the sound recordings - Hence, this Appeal - Whether, plaintiff was entitled for Injunction - Held, agreements do reveal that Petitioner agreed to pay license fee, in return for permission to publicly perform the underlying works and sound recordings, as well as broadcast them - plaintiffs did not deny having received the letter, which was approved by Board of Directors - Agreements was void and containing stipulations which was contrary to law - Appeal dismissed.

Ratio Decidendi:

"Contract in which object was opposed to public policy was invalid."

JUDGMENT

S. Ravindra Bhat, J.

1. The plaintiffs in both the suits, CS(OS) 1216/07 and CS(OS) 1356/207 are common; the first plaintiff is the Indian Performing Arts Society (hereafter "IPRS") a company limited by guarantee, incorporated to protect and safeguard its members' rights. Its members are comprised of authors, composers and publishers of musical or literary works. The IPRS says that it is also committed to protect the rights of other overseas Sister societies, which are copyright owners in their literary and musical works. The IPRS claims to be the sole national copyright society of composers, authors and publishers of literary and musical works, from India, and other countries. IPRS also says that it was 're-registered' as a copyright society, in terms of

manupatra Section 33(3) of the Copyright Act, 1957 ("the Act") after its amendment in 1994, and relies on a certificate of registration, to such effect, dated 27th March, 1996.

2. It is stated that members of IPRS, comprising of authors, composers and publishers of Indian literary and musical works, have executed assignment deeds, in respect of their public performing rights, and rights to communicate their works to the public, under the Act, as well as works which they might produce in the future. The IPRS therefore claims to be owner of such rights.

3. The second defendant, (hereafter called PPRS) claims to be a society engaged in copyright business of licensing rights in respect of sound recordings, of its members; it too avers to being a copyright society under Section 33 of the Act, in respect of sound recording rights under the Act, of its members. PPRS states that it has the right to issue licenses in respect of sound recording and performance rights in relation to such sound recording, of its members, in India. It is alleged that the PPRS membership consists of some of the best known sound recording companies, in India, and abroad, and therefore, it has the exclusive right to administer one of the most extensive repertoire of musical works.

4. The plaintiffs say that though both are copyright societies, under Section 33 of the Act, the IPRS is authorised to administer rights of authors, composers, etc. in respect of underlying works and compositions, that are embodied in musical and literary works, that may (or may not) be embodied in sound recordings; the PPRS has exclusive rights to administer copyrights in relation to sound recordings. It is contended that licenses obtained from one plaintiff is not sufficient, if the public performance right license (in relation to sound recordings) is not secured from the other, having regard to the nature of copyrights, which are a bundle of separate, and concurrent rights.

5. It is contended that the first defendant is executive director of the second defendant (hereafter collectively referred to as "ZEE"). Zee was incorporated in 1992 as a broadcaster, and as on the date of filing of the suits, it has several channels, including those beaming regional language programmes, as well as those dealing with news, and general entertainment, such as music, films, etc. The predecessors of ZEE, i.e. Zee Telefilms Ltd., say the plaintiffs, had acquired license from them, in 2005, which expired in October, 2006, for performance and broadcasting rights in respect of sound recordings, to be used in their programmes. This, they allege, constitute its acknowledgement of the plaintiffs' copyrights. It is alleged, in these circumstances, that the use of such sound recordings in ZEE's programmes by ZEE Entertainment Ltd., led to filing of a suit, CS (OS) 1216/2007, in which an interim order was made. As an interim measure, parties agreed that the plaintiffs would be paid some amounts, in return for which the defendants were permitted to use their sound recordings in the entertainment programme Hero Honda SA RE GA MA PA. In the subsequent suit, it is alleged that the second defendant, ZEE NEWS LTD., (also part of the ZEE group) is indulging in copyright violation by unauthorized usage of the plaintiffs' sound recordings, which also violates IPRS's rights.

6. In the second suit, CS (OS) 1356/2007, this Court made an interim order, on 31.07.2007, to the following effect:

It is agreed by learned Counsel for the parties that without prejudice to their rights and contentions the following agreed interim order may be passed:

1. As an interim measure, this arrangement is only confined to "Idea Cellular Saregama Pa Bengali and Marathi".
2. The defendant shall deposit with plaintiff No. 1, a lump sum amount of Rs. 4.0 lacs within one week from today, subject to adjustment, if any.
3. The defendants will continue to telecast the above programmes till the date of hearing of the application No. 8438/2007),
4. Defendant No. 2 is not utilizing the sound tracks of defendant No. 2.
5. Both the parties agree that none of the parties will give any press release to this effect.
6. This amount is being paid subject to adjustment, if any, and without prejudice to the rights and contentions of the parties.

7. It is alleged, in the applications for decree on admission, by the plaintiffs that though the defendants had contested their (the plaintiffs) copyright and the claim for injunction and damages, subsequently, on 05.03.2009, they entered into agreements, which admitted the plaintiffs' right to demand license fee. The defendants rely on the following terms of the agreement:

3.1 In consideration of ZEE agreeing to pay the License Fee (as per clause hereinafter), the Societies agree to Issue license for usage of Works in all Zee Network Channels for the period from 01.04.2008 up to 31.03.2010 i.e. for a period of 2 (Two) years.

3.2 In consideration of Societies granting the said rights Zee shall pay:

i. License fees of Rs. 3.00 Crore (plus 4% VAT) for financial year commencing from 1.04.08 till 31.03.2009; and

ii. License fees of Rs. 3.60 Crore (plus 4% VAT) for the financial year from 1.04.09 till 31.03.2010.

The following further terms are also relied on:

2.2 The Licensee shall have the Rights of multiple telecast of die Licensed Works of which die rights are granted herein, within license period only for the territory as agreed herein. It is further clarified that the license work of the licensor used by the licensee in any particular one episode of a programme or serials shall be allowed for multiple telecast for a period of three years only i.e. in case sound recording used in any one episode of *Betiyaan*, *Saat Pher*, *Kasam Se*, etc which first telecast on 1st June 2008 then the right to telecast the Licensed Works in that particular episode shall be till 31st May 2011 i.e. for three years in total from the first telecast date.

2.3 For the removal doubts it is clarified that the license granted herein does not permit the licensee to use licensed works in any manner:

a) directly on Cable Television Network and Direct to Home (DTH), VOD, AOD and Pay Per new, except as Licensed Works include in Programmes and/or serials:

b) broadcast of sound recordings in isolation through any satellite channels except as agreed in this agreement, and

c) any other usage not specifically covered by this license agreement including Prohibited Use and exclude stand alone use nr broadcast by any means

d) in commercials or advertisement

8. The plaintiffs also rely on another agreement, dated 8th April, 2009, (hereafter "the April Agreement") which, they say, further re-iterated the terms of settlement. They rely on the following terms of the April agreement:

... In consideration of Societies waiving the past chums. regularizing the past usage up to 31.03.2008 ami sealing the disputes amongst the parties Zee shall pay license Fees of Rs. 6.85 Crores (plus 4% VAT) for such wage....

It is submitted that Zee is bound by the terms of the above agreements, which amount to an unequivocal admission of liability. The plaintiffs say that the two agreements admitted their respective copyrights, and further obligated the defendants to license the works which they intended to broadcast, or publicly perform. The parties' understanding was also that a joint application for recording compromise and drawing a decree would be moved before this Court; yet the defendants kept postponing doing so. In the meanwhile, say the plaintiffs, the defendants partly performed the agreements, by payments, agreed to be made in terms thereof; a letter dated 29th July, 2009, (in answer to IPRS and PPRS' letters of 21.07.2009) is referred to, enclosing a sum of Rs. 50 lakh, evidencing bona fides to perform the agreement (to license the plaintiffs works, thus further acknowledging their copyrights).

9. It is urged by the plaintiffs, in addition to the above, that the defendants are now seeking to resile from the binding terms, which not only obligate them to pay license fee, in clear terms, but also estop them from questioning the plaintiffs' rights as lawful copyright proprietors of the sound recording right owners, and the underlying rights towards literary and song rights of the authors, etc. Learned senior counsel submits that having regard to the circumstance that the agreements which are the best evidence of the transaction, and are not disputed documents; clearly state that Rs. 1 crore was paid towards ZEE's liability, and further the letter dated 29th July, 2009, mentioned about payment of Rs. 50 lakh, there are sufficient materials enabling the Court to conclude existence of a lawful settlement, which amounts to admission, and direct the suits to be decreed, under provisions of Order 12, Rule 6, Code of Civil Procedure (CPC). Learned senior counsel for the plaintiffs relies on the decision of the Supreme Court, reported as *Charanjit Lal Mehra v. Kamal Saroj Mahajan* MANU/SC/0191/2005 : (2005) 11 SCC 279 to say that Order 12 Rule 6 CPC is enacted for the purpose of and in order to expedite the trials if there is any admission on behalf of the defendants or an admission can be inferred from the facts and circumstances of the case without any dispute. In such a case, the Court, in order to expedite and dispose of the matter such admission can act upon the admission and make such decree as is feasible.

10. ZEE's stand is that the Agreements, relied on by the plaintiffs, and the letters annexed to the application, are not sufficient for the Court to infer an unqualified admission, since it did not agree to sign the application for having any compromise recorded, and that there are disputed elements in the whole transaction. It is submitted that ZEE had not admitted to the copyright ownership by the two plaintiffs, as is evident from the written statements filed in the two suits. ZEE argues that on account of interim orders made in the two proceedings, it paid amounts towards license fee, but without prejudice to its contentions and submissions on the merits. In this background, when the two agreements were executed, they were premised upon two

manupatra representations, i.e. that the plaintiffs had exclusive rights to what they claimed, and that they were copyright societies, which meant that the fees collected by them would be strictly dealt with, and disbursed in accordance with law.

11. It is submitted that even though ZEE's letters of 29th July, do show that the agreements were indeed executed, its position nevertheless was that on the basis of further oral discussion, there was a need to re-negotiate the terms. ZEE argues that these show that the Agreements were not a concluded contract, but required further action to be taken by the parties. At best, says ZEE, the documents amount to an intention to enter into an executory contract, the performance of which depended on further action by the parties.

12. ZEE submits that in any event, further debate or speculation by the plaintiffs or any contention on their part about alleged admission, is of no avail, since it (the ZEE Group) rescinded the said Agreements, relied upon by them, in a letter written on 3rd November, 2009. Extracts of the said letter read as follows:

Re: Rescission of Purported Agreements dated 5th March. 2009 and 8th April. 2009

Dear Sir,

This is to inform you of the decision of the Board of Directors of Zee Entertainment Enterprises Limited (hereinafter referred to as "ZEEL") to rescind, the purported agreement dated 5th March, 2009 and the purported agreement dated 8th April, 2009 (hereinafter collectively referred to as the "Agreements") which are otherwise void ab-initio for the reasons mentioned hereinafter. The decision was taken by a resolution at a duly constituted meeting of the Board of Directors of ZEEL dated 23 October, 2009. This letter is written jointly on behalf of both ZEEL and Zee News Ltd (hereinafter collectively referred to as the "Zee Group")

It further stated that:

Further, the Board was made aware that when there is a live performance of a song on television, no payment is required to be made to PPL, which is only the owner of the sound recordings. Most of the programmes broadcast on the Zee group's various channels fall under this category. These programmes include Sa Re Ga Ma Pa and other reality shows where the participants sing the songs to a live orchestra. In such shows, there is minimal no usage of sound recordings, which is the only work administered by PPL. Yet in the purported Agreements you have claimed ownership over such works and an amount in respect of the use of such works by the Zee Group, which constitutes a misrepresentation of fact and a misrepresentation of the legal position on your part.

Based on these contentions, ZEE communicated its decision to rescind the contract, claiming that it was "void ab-initio", in these terms:

It is the settled position as per statute that Copyright Societies cannot spend more than a certain percentage of their revenues towards administrative expenses and therefore, with illegal motives, you also coerced the operating management into agreeing to pay the amounts to third parties.

All the above mentioned facts have come to the knowledge of the management of the company after the agreements were signed and some payment was made. The said payment of Rs. 1 crore will now be adjusted towards the payments made under the interim orders of the Hon'ble High Court in the suits filed by you.

The Board has considered the entire legal and factual position and has taken a decision not to approve the same.

You are therefore advised to treat the purported Agreements as rescinded and consequently void and unenforceable.

Needless to add, that the above, is completely without prejudice to the rights of Zee to take all such pleas in law that the agreements, being contrary to the letter and spirit of the law were void ab-initio and unenforceable.

Yours Sincerely,

13. ZEE argues, in addition to the submission that in fact there is no enforceable agreement Constituting admission and that the scheme of Sections 33 and 34 of the Act is such that copyright and performing rights societies, are to exclusively engage in licensing and administering works for which they are set up. They cannot own copyrights, as is being claimed by the IPRS and PPRS. They cannot also, says ZEE, assign the proceeds of any license fees received by them, or any of them, or even a part thereof, to any individual or other entity, as the scheme of the Rules framed under the Act indicates that management of funds is

14H. Conditions subject to which a copyright society may issue licences, collect fees and distribute such fees.--

(1) A copyright society may issue licences and collect fees in accordance with its Scheme of Tariff in relation to only such works as it has been authorised to administer in writing by the owners of rights and for the period for which it has been so authorised.

(2) The distribution of fees collected shall be subject to a deduction not exceeding fifteen per cent of the collection on account of administrative expenses incurred by the copyright society.

14-I. Procedure for obtaining approval of owners of rights for collection and distribution of fees, etc. Every copyright society shall maintain the following registers at its registered or administrative office:

(i) A register of owners of copyright and other rights to be called the "Register of Owners" in respect of which the copyright society has been authorised by the owners to issue or grant licences. The register shall contain the names of the owners, their addresses, the nature of rights authorised to be administered by the copyright society, date of publication of the work, the date on which the copyright society becomes entitled to and the duration of such right.

(ii) A register to be called the "Register of Agreements" containing a copy of every agreement entered into by the copyright society with the owners for the purpose.

(iii) A register to be called the "Register of Fees" containing particulars of fees and mentioning the name of persons or organisations from whom the fees have been realised, the amount so realised and the date of realisation.

(iv) A register to be called the "Disbursement Register" containing details of disbursements made to each owner of copyright, category-wise, mentioning the name of the owner, nature of his copyright and the date and amount of disbursement made to him.

14J. Tariff Scheme.--

As soon as may be, but in no case later than three months from the date on which a copyright society has become entitled to commence its copyright business, it shall frame a scheme of tariff to be called the "Tariff Scheme" setting out the nature and quantum of fees or royalties which it proposes to collect in respect of such copyright or other rights administered by it.

14K. Distribution Scheme.--

(1) As soon as may be, but in no case later than three months from the date on which a copyright society has become entitled to commence its copyright business, it shall frame a scheme to be called the 'Distribution Scheme' setting out the procedure for collection and distribution of the fees or royalties specified in the Tariff Scheme among the owners of copyright or other rights whose names are borne on its Register of Owners [maintained under Clause (i) of Rule 14-I for the approval of such owners.

(2) Any distribution under the Distribution Scheme shall, as far as possible, be in proportion to the income of the copyright society from actual use of the work or works of each owner of rights.

14. ZEE lastly argues that the conditions, in the agreement dated 05.03.2009, enable the plaintiffs to divert the amounts received as license fee, entirely or substantially, to a third party, which is contrary to the Act and Rules. Since the plaintiffs are created solely for the benefit of copyright owners and cannot even spend more than 15% of the receipts for administering and enforcing such rights, enabling provisions in agreements, which can authorize diversion of entire license fees received from some parties, is contrary to law, and contrary to public policy. The following stipulation in the said agreement of 05.03.2009 is relied on:

B. Above License Fees specified in Clause 3.2 shall include all payment to be made to the two societies IPRS and PPL. The split or share between the Societies, if any, shall be specified and

communicated in writing separately and Zee shall pay the same accordingly, subject to the condition that in the aggregate, the license Fee shall not exceed the amount indicated In clause 3.2(1) and (ii) for any specified period.

The societies may, at their option, subsequently instruct ZEE to make any part of the payment to be made to one of the societies or its licensee Select Media Holdings Pvt. Ltd., Mumbai.

Zee may, at their option, instruct the Societies to raise invoices for the usages on either Zee Entertainment Enterprises Ltd or Zee News Limited as per the split agreed between them and upon receipt of such bills/invoices, ZEEL or ZNL shall make the payments to the Societies accordingly.

It is, therefore, submitted that there is no material on the record, establishing an unambiguous or clear admission, which is a pre-requisite, if the Court has to exercise its powers of rendering summary judgment, under Order 12, Rule 6, CPC. ZEE therefore, urges that the applications moved by the plaintiffs, have to be rejected.

15. The suits seek permanent injunction against ZEE restraining it from broadcasting, or publicly performing the sound recordings, in which the plaintiffs claim copyrights. This Court had granted ex-parte relief. During the pendency of both the suits, the parties entered into two agreements, dated 05.03.2009 and 08.04.2009. In those agreements, the effect of which, facially, is that ZEE agreed to secure licenses from the plaintiffs; the consideration too was indicated, and some amount was even paid. The plaintiffs later felt that ZEE was not fulfilling its part of the bargain; it therefore wrote to the latter, on 21.07.2009. ZEE, in its reply dated 29th July, 2009 mentioned about the need to renegotiate the whole agreement, and alluded to some conversation with the plaintiffs. It also enclosed a sum of Rs. 50 lakhs. The plaintiffs' position about an unambiguous and clear admission would be justified, if the facts were to be only thus far, and no further, since the stipulations mention about the defendant's wishing to license the works and sound recordings, of which the plaintiffs have rights to administer copyrights. ZEE, however, now says that it intimated to the plaintiffs about rescission of the said two contracts; it also avers that the plaintiffs' stipulation in the March Agreement with the defendant, which states that the license fee for usage of copyrighted works could be paid to Select Media Holdings Ltd., said to be the plaintiff societies' subsidiary, is contrary to the mandate for which the plaintiffs have been constituted in the first place. The argument here is that copyright societies' mandate is only to administer the rights of their members; they cannot carry on any business activity, and are entrusted with the responsibility of managing the monies received, which are to be passed on to authors, and copyright owners.

16. The Code of Civil Procedure, designed over a century ago, has been subjected to major amendments over the years. Yet, in certain essentials, it continues unchanged. The law relating to admissions, and decrees or orders that can be made on the basis of admissions of one or other of the parties stems from Order 12, Rule 6, which enables courts to render summary judgments, based on admissions in pleadings "or otherwise". The ruling in *Uttam Singh Duggal v. Union Bank of India* MANU/SC/0485/2000 : AIR 2000 SC 2740, sufficiently clarifies the parameters within which courts are to exercise their powers. It is now established that to qualify for an order or decree which concludes one or another issue, in a suit, the averment should be unconditional and unambiguous. *Raj Kumar Chawla v. Lucas Indian Services* MANU/DE/8564/2006 : 129 (2006) DLT 755, of the Division Bench states that there cannot be an inferential admission it has to be unambiguous. In other words, the Court should not deduce an admission, as the result of an interpretive exercise.

17. The Court's approach while considering whether any averment, or omission to traverse any material allegation amounts to an admission cannot be subjective or one side. It has to necessarily, take into consideration the implications which may arise from a party urging one contention or another, on the basis of what is on record. The reason for this is obvious. A plaintiff, in order to be non-suited, should have disclosed materials, or pleaded something that would render the whole claim untenable either in the facts or in law. Similarly, the defendants' pleas should be clear and unambiguous. If these well settled approaches are ignored, there is a possibility of the litigant being denied a fair trial.

18. The plaintiff's perspective about the defendants' admissions, thus is understandable. The two agreements do reveal that ZEE agreed to pay license fee, in return for permission to publicly perform the underlying works and sound recordings, as well as broadcast them. It is also a matter of the record that the agreements, and the letter dated 29th July, 2009 record that ZEE paid the amounts indicated, towards its obligations. Yet, the same letter also alludes to the terms requiring to be re-negotiated, and some re thinking on ZEE's part. The latter also relies on a letter dated 3rd November, 2009, by which it sought to put an end to the two agreements, on various allegations. The plaintiffs do not deny having received the said letter, which was approved by ZEE's Board of Directors. In these proceedings, the Court cannot enter into the issue as to the legality of such a position, and decide whether the rescission of contract, put forward is sound or justified. That would be a matter of further inquiry. All that the Court can do is to decide whether taken together, the materials indicate unambiguous or unqualified admissions which enable it to draw a decree to such extent. The other aspect which cannot be ignored, at this stage is that ZEE disputes the agreements, as void and containing stipulations which are contrary to law. This contention pertains to the payments (made by ZEE) to be received by the plaintiffs' subsidiary. As to the status of such subsidiary is not known; what the defendant

manupatra here urges is that diverting such payments is contrary to provisions of the Copyright Act. Again, the correctness of such plea cannot be examined here; all that can be commented is that the argument is not insubstantial. It would be relevant here to recollect that even a decree based on consent or agreement can be successfully challenged as void, if the underlying contract is vitiated by any factors known in law; in Union Carbide Corporation v. Union of India 1991 (4) SCC 584, the Supreme Court, quoting an older English authority which stated that according greater sanctity to a court order than the void contract on which it is based, would amount to "giving the branch an existence which is independent of the tree", held that:

It is, indeed, trite proposition that a contract whose object is opposed to public policy is invalid and it is not any the less so by reason alone of the fact that the unlawful terms are embodied in a consensual decree. In State of Punjab v. Amar Singh (1974) 2 SCC 70, this Court said:

After all, by consent or agreement, parties cannot achieve what is contrary to law and a decree merely based on such agreement cannot furnish a judicial amulet against statutory violation .. The true rule is that 'the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge.

19. In view of the above discussion, it is held that the plaintiffs' contention that the materials on record reveal clear admissions by the defendants, cannot be accepted. IA 9557/2009; IA 9558/2009 are therefore dismissed. IA 14866/2009 filed by the defendant therefore succeeds. IA 9551/2009 (in Suit No. 1356/2007) is, for the same reasons, dismissed. In IA 9550/2009, the plaintiffs have requested for replacement of their Constituted Attorney.

20. There is no opposition to the request; the Court is also of the opinion that the same requires to be allowed, in the interests of justice. IA 9550/2009 (in Suit No. 1356/2007) is allowed, subject to just exceptions.

21. All the applications are disposed in the manner indicated above.

CS (OS) 1216/2007, CS (OS) 1356/2007

List on 16th April, 2010 before Joint Registrar for further proceedings.