

MANU/DE/0530/2004

Equivalent Citation: AIR2004Delhi326, 112(2004)DLT549**IN THE HIGH COURT OF DELHI**

RFA No. 848 of 2003 and CM Nos. 2075 and 2076/2003 and Caveat No. 53/2003

Decided On: 30.06.2004

Appellants: **Super Cassette Industries Ltd.**
Vs.Respondent: **Entertainment Network (India) Ltd.****Hon'ble Judges/Coram:**

Dalveer Bhandari and H.R. Malhotra, JJ.

Counsels:

For Appellant/Petitioner/plaintiff: Kapil Sibbal, Sr Adv., Arjun Pant, Amit Sibbal and N.K. Bhardwaj, Advs

For Respondents/Defendant: Harish Salve, Dushyant Dave and Rajiv Nayar, Sr. Advs., Pratibha M. Singh, M. Singh, Krishnendu Dutta, Meenakshi Grover, Anusha and Ritika, Advs.

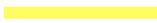
Subject: Media and Communication**Subject: Intellectual Property Rights****Acts/Rules/Orders:**

Copyrights Act, 1957 - Section 2, Copyrights Act, 1957 - Section 31(1), Copyrights Act, 1957 - Section 31(2), Copyrights Act, 1957 - Section 51, Copyrights Act, 1957 - Section 53; Medical Act, 1858 - Section 29

Cases Referred:

Union of India v. T.R. Varma, (1957) S.C.R 499; State of Orissa v. Dr.(Ms.) Bina Pani Dei, AIR 1967 SC 1269; State of Uttar Pradesh and Ors. v. Maharaja Dharmender Prasad Singh and Ors, 1989 (II) SCC 505; K.L. Tripathy v. State Bank of India, AIR 1984 SC 274; R.B. Shreeram Durga Prasad Fateh Chand Nursing Das v. Settlement Commission (IT & WT) and Anr., (1989) 1 SCC 628; Barium Chemicals Ltd and Anr. v. Company Law Board and Ors., AIR 1967 SC 295; Visakha and Ors. v. State of Rajasthan and Ors., (1997) 6 SCC 241; Secretary, Ministry of Information & Broadcasting, Government of India and Ors. v. Cricket Association of Bengal and Ors., 1995 (2) SCC 161; Phonographic Performance Limited v. Retail Broadcast Services Ltd., 1995 FSR 813; Phonographic Performance Limited v. Saibal Maitra and Ors., FSR (1998) 749; Fair Fitness Music Association v. Australian Performing Right Association Ltd., 43 IPR 67; General Tyre and Rubber Co. v. Firestone Tyre and Rubber Co., 1976 RPC 197; Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759; T.N. Godavarman Thirumalpad through K.M. Chinappa v. Union of India and Ors., (2002) 10 SCC 606

Citing Reference:

Discussed		8
Mentioned		6

Case Note:

(i) **Intellectual Property Rights – illegal broadcasting – Section 31 of Copyrights Act, 1957 – grant of compulsory licenses without stopping illegal broadcast of sound recording – one who does not have respect for law is not entitled for grant of compulsory license – person entitled for compulsory license if completely stops illegal broadcasting.**

(ii) **Natural justice – principle of natural justice applicable to quasi-judicial body – administrative Order which involves civil consequences must be made in consonance with rules of natural justice – principles of natural justice fully applicable to quasi judicial bodies.**

(iii) **licenses – grounds of refusal and acceptance of compulsory license – question of compulsory license arise only when artistic and musical work withheld from public - grant of license discretionary – Board has to maintain delicate balance between private right of copyright vis a vis public interest – grant of license depend upon facts and circumstances of each case.**

(iv) Interpretation – role of international convention in filling gaps of statute – if specific provision of law is silent gap may be filled by international convention to which India is party.

JUDGMENT

Dalveer Bhandari, J.

1. This appeal is directed against the order dated 20th October, 2003 passed by the Copyright Board at New Delhi in Case No. 10/2003. Appellant's main grievance is against the direction of the Copyright Board directing the Registrar of Copyrights to grant a compulsory license under Section 31(1)(b) of the Copyrights Act, 1957.

2. It is alleged that the appellant is one of the leading music companies engaged in the production and/or acquisition of rights in sound recordings. According to the appellant, through keen perception of ever changing consumer practices, infrastructural investment, technological upgradations and a skilled, cohesive work force, and an aggressive commitment towards quality, companies such as the appellant play a vital role in creating the music which then become available for the mass consumption.

3. According to the appellant its most valuable asset is the copyrights in cinematographic films and sound recordings. The music of the appellant is either produced by the appellant at its own studios, or is acquired by way of assignments. It is alleged by the appellant that the songs produced and/or acquired by the appellant are sound recordings within the meaning of Section 2(xx) of the Copyright Act, 1957. It is alleged that the appellant being the owner of the copyright in the aforesaid sound recordings is entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the Copyright Act, inter alias

a) to make any other sound recordings embodying the original sound recording.

b) to sell or hire, or offer for sale or hire, any copy of the sound recordings.

c) to communicate the sound recordings to the public by any means including broadcast by radio, internet or any other medium whatsoever.

4. According to the appellant under Section 51(a)(i) of the Copyright Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright,

i) does anything, the exclusive rights of which are granted to the owner of copyright, such as the ones enumerated above (the primary acts of infringement)

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 copyright in the work.

Under Section 51(b) of the Act, copyright in a work also is infringed, when any person, without a license from the owner of copyright,

i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire any infringing copies of the work, or

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

iii) by way of trade exhibits in public, or

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

5. It is alleged that the appellant has invested several crores of rupees in acquiring and developing technology and infrastructure, as well as recruiting musical talent, in order to produce sound recordings. They also spend significant amount of money in acquiring rights to sound recordings by assignment. They are, Therefore, an indispensable part of the process whereby music reaches consumers. The primary asset of the appellant's music division is its copyright in sound recordings, and its only source of revenue is from the sales of sound recordings in which it owns the copyright, in the form of audio cassettes and CDs. In the absence of such revenue, the music business of the appellant would be wholly unviable, and music would not be produced in the first place. It is further averred that the appellant's substantial part of the investment in his music division is on producing or otherwise acquiring rights in new Indian film music, for which the bulk of revenues come from the sales generated in the three months prior to and six months following the release of the film.

6. The respondent which broadcasts under the brand name "Radio Mirchi" is admittedly a leading FM radio broadcaster which has nationwide listenership. This broadcaster launched its Mumbai Station only in May, 2002 and its Delhi Station only in April, 2003. According to the appellant this phenomenon has in a very short time not only revolutionised the radio industry but had a significant impact on the music industry in general, and producers and owners of copyright in sound recordings in particular.

7. It is averred by the appellant that it commissioned a survey by IMRB International, an independent and

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reputed market research firm, and one of the leading sources for information on the FM radio industry, of the music consumption habits in Delhi and Mumbai after the advent of private FM radio stations. The survey concludes that the average number of cassettes bought in Mumbai post-FM radio, which had been operating in the city for more than a year at the time the survey was conducted, as well as the amount spent on such purchases, is reduced by more than 30% as compared to pre-FM radio. The same trend was observed for CDs as well.

8. It is incorporated that the quality of the FM broadcast is also at par with the quality of sound produced when audio cassettes and CDs are played, which is also a major change from the early 1990s when the sound quality of FM radio was extremely poor as compared to the quality of sound on audio cassettes and CDs. New Hindi film music and other new music is thus available twenty-four hours a day, seven days a week on FM radio, and the consumer either records the songs or has heard the same songs so many times that he/she no longer wishes to hear them. This obviates the need to purchase audio cassettes or CDs and leads to a decline in sales of its products.

9. The appellant also mentions that sales of audio cassettes and CDs of the latest Indian movies are maximum from three months before to six months following the release of the film. The songs of the said movies are exploited by FM radio stations during the crucial window, little or no interest in or demand for, such music remains, particularly when FM plays round the clock music. This has a serious adverse impact on the sale of audio cassettes and CDs of such music cassettes.

10. It is mentioned that it came to the appellant's attention that the respondent was regularly airing songs/sound recordings belonging to the repertoire of the appellant on its FM Radio Station. The respondent has not obtained any authorization or license to communicate songs/sound recordings of the appellant to the public either by means of radio or in any other manner whatsoever. It is also mentioned that the appellant gave several notices to the respondent asking it to desist immediately and when the respondent did not pay any attention to the notices sent by the appellant then the appellant filed a suit for damages for copyright infringement and sought a permanent injunction against respondent on 6.6.2002 in Suit No. 1069/2002. The respondent filed an affidavit on 17.7.2002 giving undertaking that the songs for which the copyright belonged to the appellant would not be played by the respondent pending the determination of the aforesaid suit and/or any settlement between the parties, whichever was earlier. The suit is still pending.

11. The appellant received notices from the Copyright Board on an application by the respondent for a compulsory license under Section 31(1)(b) of the Act. On July 22, 2003 the appellant filed an application for stay of compulsory license proceedings before the Copyright Board pending the disposal of the suit pending before this court. The appellant sent its notice on 2.4.2002 but no reply was received. In May, 2002 the respondent's Chief Manager-Legal, Aamod Gupta, contacted the appellant's representative, Mukesh Desai in Mumbai and sought a meeting to resolve the issue of infringement. Aamod Gupta clearly informed that all issues could be resolved only when the respondent first stopped illegal broadcasting of the sound recordings of the appellant. The respondent without taking any steps of stopping the illegal broadcast, proceeded to file a string of at least 9 caveats in 9 courts in anticipation of a suit for infringement by the appellant. The appellant on 28.5.2003 finally received a reply to the legal notice sent to the respondent it is notable that the fact of infringement has not been denied. It is mentioned that the respondent intend to negotiate with the appellant and as it was respondent's intention from the beginning, the respondent have approached the appellant and have offered payment of royalty. The appellant alleged that the respondent is continuing to broadcast appellant's sound recordings with impunity. Therefore, on 3rd June, 2002 the appellant once again addressed a letter to the advocates for the respondent to advise the respondent to stop all unlicensed broadcast of the appellant's sound recordings, however, the respondent refused to do so. In these circumstances, the appellant was left with no option but to approach this Court for the grant of injunction till such time as the respondent obtained a license from the appellant to broadcast its sound recordings.

12. The Copyright Board declined to grant stay and thereafter, the appellant in its letter dated 22.7.2003 indicated that the appellant wishes to produce witnesses and documents in support of the case. The respondent opposed the application for stay as well as request for production of witnesses. The appellant filed an application for producing witnesses on 22/23.7.2003 before the scheduled hearing on July 25, 2003 but the Board turned down the request of the appellant for inspection and producing the witnesses. According to the Board, it also rejected the proposal of counsel for the appellant to present oral testimony of just two witnesses.

13. According to the appellant, the compulsory license neither constitute a license nor a written permission obtained from the appellant nor does it constitute settlement between the parties. Therefore, the respondent is playing the appellant's sound recordings in violation of the order of this court dated 16.7.2002. The impugned order has been challenged on various grounds.

14. It is alleged that the Board's decision of not permitting the appellant to adduce evidence is contrary to the principles of natural justice. The grant of compulsory license pending decision of a previously instituted suit for infringement would, in fact, deprive the appellant of his statutory remedy of injunction, damages and rendition of account. It is further alleged that entertaining application for compulsory license by an admitted infringer would set a bad precedent by placing the respondent at par with other innocent applicants. This would also encourage others to first infringe and when the infringement was discovered then apply for a

manupatra compulsory license. This of course would set a bad precedent. The compulsory license cannot be issued under Section 31(1)(b) of the Act to every applicant as matter of routine. This would sound a death-knell not only for the appellant but for the entire music industry.

15. According to the appellant there was no reason, let alone any compelling reason, justifying the grant of compulsory license to the respondent. There is no compelling public interest relevant to Section 31 of the Copyright Act that would be served by the grant of a compulsory license to the respondent. The only interest that would be served is the narrow commercial interest of the respondent. The Copyright Board has failed to appreciate that the respondent has in any manner made out or even indicated how the grant of compulsory license to it would be in the interest of the public at large. In fact, the respondent is the leading private FM radio broadcaster in the country today, with the largest number of FM licenses, and the only one with a license in all four major metropolitan cities. The Board did not appreciate that the primary objective of the appellant and the respondent is to maximise their profits and the public interest is only incidental. The bogey of public interest is of no consequence. The fight is between competing commercial interest of two business groups.

16. It is alleged by the appellant that the infringer of the copyright cannot be allowed to take advantage of its own wrongs by asking for a compulsory license when a suit for infringement is pending. According to the appellant, the Copyright Board was in error in holding that it made no material difference whether the copyright owner/respondent in an application for compulsory license under Section 31(1)(b) is a copyright society or an individual for the purposes for grant of compulsory license. The Board failed to take into consideration that other operators of radio stations such as AIR and Radio City have been licensed to broadcast sound recordings by the appellant, and do so. Therefore, the sound recordings in question are accessible to the public.

17. The appellant also submitted that Section 31 is an exception to the provisions of Copyright Act and like all exceptions, it is to be read with care and circumspection. The discretion conferred on the Copyright Board under such Section should not be exercised in an arbitrary manner. According to the appellant the Board is not competent to adjudicate on issue which is central to whether the license had been refused by the respondent on reasonable terms. The Board ought to have considered pendency of suit for infringement in the High Court in correct perspective and should have stayed the proceedings. The grant of compulsory license has in fact rendered the suit of the appellant infructuous.

18. Mr. Kapil Sibal, learned Senior Advocate appearing for the appellant submitted that quasi judicial bodies also have to adhere to the basic principles of natural justice. He also submitted that while considering an application for a compulsory license under Section 31 of the Copyright Act, 1957 the Copyright Board acts in a quasi judicial capacity and must act in accordance with the principles of natural justice. He submitted that denying a party the opportunity to lead evidence particularly when the witnesses were present at the time of hearing constitutes violation of the principles of natural justice.

19. Mr. Sibal submitted that the appellant has already granted licenses to two other prominent broadcasters, namely, AIR and Radio City. They have substantial presence in the entire country. Under Section 31(2) of the Copyright Act the Board shall grant license to any one who would best serve the interests of general public. This clause would be applicable when the copyright owner is withholding the music and not making it public. This clause would not be applicable to a case where the copyright owner has already granted licenses to two other prominent broadcasters. It is alleged that the public interest has been fully taken care of. Therefore, no order for the grant of compulsory license can be made by the Copyright Board in that situation. According to him the Copyright Board was in error in granting compulsory license to the respondent in the facts and circumstances of this case. In order to appreciate the submission of Mr. Sibal it is desirable to reproduce Section 31 of the Copyright Act, 1957. The same reads as under:-

"31. Compulsory license in works withheld from public.-- (1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of the copyright in the work--

(a) has refused to re-publish or allow the re- publication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

(b) has refused to allow communication to the public by [broadcast], of such work or in the case of a [sound recording] the work recorded in such [sound recording], on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a license to re-publish the work, perform the work in public or communicate the work to the public by [broadcast], as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon

the Registrar of Copyrights shall grant the license to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

Explanation,-- In this sub-section, the expression 'Indian work' includes --

- (i) an artistic work, the author of which is a citizen of India; and
- (ii) a cinematograph film or a [sound recording] made or manufactured in India.

(2) Where two or more persons have made a complaint under sub-section (1), the license shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public."

20. Mr. Sibal submitted that the Legislature in its wisdom used the expression "may" and not "shall". He further submitted that it is not imperative for the Copyright Board to grant license in every case. Any other interpretation would be totally contrary to the very spirit of Section 31 of the Act. Mr. Sibal further submitted that this Section itself envisages that the decision to grant or refuse a license should be made only after holding such inquiry as it may deem necessary. According to him, the Legislature in its wisdom has envisaged that before such a vital decision or order is made by the Copyright Board it may hold such inquiry as it may be necessary in the facts and circumstances of each case. He submitted that the Copyright Board ought to have taken into consideration that while keeping the public interest in view the appellant itself had given licenses to other broadcasting agencies such as AIR and Radio City. He also submitted that admittedly the respondent without obtaining any license or permission started broadcasting music of the appellant. In other words, the respondent is guilty of infringing the copyright and only when a notice was sent by the appellant and he was caught that the respondent thought of getting the license/permission on his own terms. Mr. Sibal submitted that the respondent is a rank infringer of the copyright, who started broadcasting the appellant's music without any permission is, Therefore, not entitled to get a compulsory license only because of its conduct. He also submitted that looking to the conduct of the respondent the appellant was justified in declining any permission to the respondent.

21. According to Mr. Sibal, Section 31 itself envisages that a proper inquiry must be carried out by the Copyright Board before grant or refusal of the compulsory license which is absolutely imperative and not holding proper inquiry would be contrary to the basic spirit of Section 31 of the Copyright Act. He submitted that for determining the relevant factors for the grant or refusal of the license should include the following factors:-

- (1) Whether licenses have been granted to other broadcasters or agencies?
- (2) Whether the respondent is willing to reasonably compensate the appellant for the use of its music? While passing the order of compulsory license under Section 31, the public interest must be predominant and the public interest can be evaluated only after an inquiry.
- (3) The parties must be given full opportunity to adduce evidence, documents and submissions.

22. In the instant case the Board specifically declined the request of the appellant for producing evidence. According to Mr. Sibal, the Board ought to have granted permission to the appellant to adduce evidence in the facts and circumstances of this case. He further submitted that in arriving at the correct evaluation, relevant factors have to be taken into consideration and irrelevant factors have to be discarded and that is possible only when some kind of inquiry is carried out by the Copyright Board. Such an enquiry is clearly envisaged by the Act. The decision of the Board of not permitting the appellant to adduce evidence is clearly against the scheme and spirit of the Act.

23. In support of his submission Mr. Sibal placed reliance on a judgment delivered by the Copyright Tribunal reported as *British Sky Broadcasting Ltd and Another v. The Performing Right Society Ltd* (1998) R.P.C. 467 . He has particularly relied on para 1.4 which is reproduced as under:-

"1.4 . Given these stakes, it is not surprising that the issue has been hotly contested. We heard oral evidence from 18 witnesses, and we have read and taken account of evidence in the form of witness statements and affidavits from many more. We found all the witnesses to be honest and fair, doing their best to assist the Tribunal to arrive at a decision."

This judgment has been relied primarily for the purpose that in a case of similar nature evidence was recorded.

24. Mr. Sibal also placed reliance on the Supreme Court judgment reported as *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey and Others* MANU/SC/0187/1984 : 1984(2)ECC142 . In this case the Apex Court held as under:-

"A consignment of pre-recorded musical cassettes was dispatched by a company from Singapore to another concern in Nepal via Calcutta Port (India). Routing Nepal-bound consignments through Indian port in transit is an acceptable practice pursuant to pacts between India and Nepal. The appellant, which is the owner of copyright in several musical records and cassettes, having come to know that a substantial number of the consigned cassettes were 'pirated works'; sought intervention of the Registrar of Copyrights under Section 53 of the Copyright Act. However, the Registrar having failed to take expeditious action, the appellant filed a writ petition in the High Court seeking a writ of mandamus to compel the Registrar to pass an appropriate order under Section 53 and to prevent release of the cassettes from the custody of the customs authorities. The Single Judge of the High Court allowed the petition but the Division Bench dismissed the same holding that there was no importation when the goods entered India en route to Nepal."

25. The Apex Court allowing the appeal, setting aside the judgment of the Division Bench of the High Court and restoring that of the Single Judge, held that the word 'import' in Sections 51 and 53 of the Copyright Act means 'bringing into India from outside India'. It is not limited to importation for commerce only, but includes importation for transit across the country. In this case the Apex Court further observed as under:

"The Registrar is not bound to make an order under Section 53 of the Copyright Act so soon as an application is presented to him by the owner of the copyright. He has naturally to consider the context of the mischief sought to be prevented. He must consider whether the copies would infringe the copyright if the copies were made in India. He must consider whether the applicant owns the copyright or is the duly authorised agent of the copyright. He must hear those claiming to be affected if an order is made and contention that they may be put forward as an excuse for the import. He may consider any other relevant circumstance. Since all legitimate defenses are open and the enquiry is quasi-judicial, no one can seriously complain."

According to Mr. Sibal the aforesaid observations of the Supreme Court lead to the definite conclusion that all aspects can only be considered after a proper inquiry even by a quasi judicial body.

26. Mr. Sibal also placed reliance on a judgment of the House of Lords reported as *General Council of Medical Education and Registration of the United Kingdom v. Spackman* 1943) 2 A.E.R. 337 HL. In this case the House of Lords observed as under:-

"On the hearing of a petition for divorce S., a registered medical practitioner, was found to have committed adultery with a married woman. The General Medical Council, at a meeting at which the erasure of his name from the medical register was considered, found that he stood in a professional relationship to the married woman at all material times and adjudged him to have been guilty of infamous conduct in a professional respect. In accordance with the council's standing orders, S. was invited "to state his case and produce the evidence in support of it". S. sought to negative the court's finding of adultery by tendering evidence, which though available, was not called in the divorce proceedings. The council refused to hear fresh evidence on the subject, and directed the erasure of S's name from the register. S. contended that by reason of the council's refusal to hear the evidence, the due inquiry required by the Medical Act, 1858, s.29 had not been held and there had been a failure of natural justice."

It was held that the refusal to hear the fresh evidence prevented there being the due inquiry required by the Medical Act, 1858, s.29, and an order of certiorari should be granted."

27. Mr. Sibal also placed reliance on the Constitution Bench judgment of the Supreme Court reported as *Union of India vs. T. R. Varma* (1957) S.C.R 499. The Apex Court held as under:-

"...The law requires that such Tribunals should observe rules of natural justice in the conduct of the enquiry, and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law. Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act was not strictly followed."

manupatra 28. The Court consistently in a large number of cases have observed that even an administrative order which involves civil consequences, must be made consistently with the rules of natural justice. This principle of law was reiterated by the Supreme Court in the case of State of Orissa vs. Dr.(Ms.) Bina Pani Dei reported as MANU/SC/0332/1967 : (1967)ILLJ266SC .

29. The Apex Court in a number of cases has referred to the celebrated judgment delivered by the House of Lords in the matter of Ridge v. Baldwin and Ors. reported as (1964) AC 40. In the said case, the Chief Constable was dismissed by the Watch Committee in violation of the principles of natural justice. The House of Lords held that the power of dismissal in the Act of 1882 could not have been exercised and cannot now be exercised until the Watch Committee have informed the Chief Constable all the grounds on which they proposed to proceed and have given him a proper opportunity to present his case in defense. The Court observed that the dismissal of the appellant should not be regarded as an administrative act based upon a suggestion of neglect of duty before it could be decided that there had been neglect of duty. It would be a pre-requisite that the question should be considered in a judicial spirit. In order to give the appellant opportunity to defend himself against the charge of neglect of duty, he would have to be told what the alleged neglect of duty was.

30. The House of Lords in the said judgment also observed that even if there had been no applicable regulation, the decision to dismiss the appellant of neglect of duty ought only to have been taken in the exercise of a quasi judicial function which demanded an observation of the rules of natural justice. The Court observed the requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under the tribunal is acting, the subject matter under consideration and so forth. The House of Lords further observed in the said case that three features of natural justice stand out:

- (i) The right to be heard by an unbiased tribunal;
- (ii) Right to have notice of charges of misconduct; and
- (iii) The right to be heard and answer to those charges.

31. The House of Lords' judgment in Ridge v. Baldwin & Others has been approved and followed in a large number of cases decided by the Supreme Court and the other Courts. To strengthen his submission, the learned counsel for the appellant has referred following cases to demonstrate in what circumstances principles of natural justice have been made applicable by the Courts.

32. The Full Bench of Allahabad High Court in Kailash Nath v. State, MANU/UP/0179/1985 : AIR1985All291 observed that a person whose license to a firearm is to be cancelled has a right of hearing. Similarly in Shiv Shanker and another v. UOI reported as 1985 SC 514 the Supreme Court held that an order of forfeiture of past services of a Government Employee for participation in an illegal strike cannot be made without observing the principles of natural justice. Before passing an order to demolish a house, the concerned authority must give an opportunity to the owner and occupant of the house to show cause against such an order as such an order has a very drastic effect on these persons. This was observed in a judgment which arose from the Gujarat High Court reported as Pratap V. Soni v. Gandhidham Development Authority and others, MANU/GJ/0113/1985 : AIR1985Guj68 .

33. Their Lordships of the Supreme Court in Raghunath Thakur v. State of Bihar and others, MANU/SC/0392/1988 : AIR1989SC620 observed that before a government contractor is blacklisted he should be given a hearing. The Supreme Court observed:

"But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard...."

34. There should be hearing according to the natural justice whenever an employee of a statutory corporation is going to be subject to any diverse or penal consequences. This was observed by the Supreme Court in K.L. Tripathy v. State Bank of India AIR 1984 SC 274.

35. Their Lordships of the Supreme Court in number of cases observed that it is a fundamental rule of law that no decision must be taken which will affect the right of any person without first giving him an opportunity of putting forward his case.

36. Their Lordships of the Supreme Court in State of Uttar Pradesh & Ors. vs. Maharaja Dharmender Prasad Singh & Ors MANU/SC/0563/1989 : [1989]1SCR176 observed that cancellation of permission is akin to and partakes of a quasi-judicial complexion and this can Therefore, be done only after following natural justice and giving a hearing to the party concerned.

manupatra 37. In *K.L. Tripathy v. State Bank of India* AIR 1984 SC 274 the Apex Court observed that the basic requirement is that there must be a fair play in action and decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. The rules of natural justice are flexible and cannot be put in a rigid formula. The Apex Court in *R.B. Shreeram Durga Prasad Fateh Chand Nursing Das v. Settlement Commission (IT & WT)* and another MANU/SC/0429/1989 : [1989]176ITR169(SC) observed that order made in violation of the principle of natural justice is a nullity.

38. Mr. Sibal submitted that Section 31 of the Copyright Act had not been comprehensively drafted and whatever has been mentioned in Section 135B of the U.K. Copyright, Designs and Patents Act must be read into Section 31 of in order to give it a proper meaning. He submitted that there are no precedents to support his submission because no judgment perhaps had been delivered interpreting Section 31 of the Act.

39. Mr. Sibal has placed reliance on "Copinger and Skone James on Copyright" and drawn our attention to Section 135B of the U.K. Copyright, Designs and Patents Act, 1988, which reads as under:-

" 135B.--(1) A person intending to avail himself of the right conferred by Section 135C must --

(a) give notice to the licensing body of his intention to exercise the right, asking the body to propose terms of payment, and

(b) after receiving the proposal or the expiry of a reasonable period, give reasonable notice to the licensing body of the date on which he proposes to begin exercising that right, and the terms of payment in accordance with which he intends to do so."

40. According to Mr. Sibal this Section (135-B) must be read in conjunction with Section 31(1)(b) of the Copyright Act, 1957. He submitted that the court must lay down parameters which the Copyright Board must adhere in the case of grant or refusal of a compulsory license.

41. Mr. Sibal also placed reliance on the chapter on Compulsory licenses from the celebrated book of "Copinger and Skone James on Copyright", by Kevin Garnett (Sweet & Maxwell, 14th Edition, 1999). In the chapter which deals with Compulsory licenses, in the proposal of terms the relevant portion reads as under:-

29-34 "Before a broadcaster can avail itself of the statutory license, various steps must be taken. These involve at least three stages and they are mandatory and not directory. First, the broadcaster must give notice to the licensing body of its intention to use the right and ask the body to propose terms of payment. This gives the licensing body the opportunity to set the rate which the broadcaster will have to pay pending the determination by the Copyright Tribunal. Secondly, once the proposed terms have been received from the licensing body (or a reasonable period has passed), the broadcaster must give reasonable notice of the date on which it proposes to commence broadcasting of sound recordings under the right, and the terms of payment that the broadcaster intends to employ. At this time, a broadcaster must also give reasonable notice to the Copyright Tribunal of its intention to exercise the right, and of the date on which it proposes to begin to do so, and apply to the Tribunal under section 135D to settle the terms of payment."

42. Mr. Sibal submitted that it is necessary pre-condition to the grant of license under Section 31(1)(b) of the Copyright Act, 1957 that the owner of the copyright in the work has refused to allow communication to the public by broadcast, such that the work is withheld from the public. If a copyright owner has entered into license agreements with certain broadcasters other than the respondent thereby allowing communication to the public by broadcast, the respondent is not entitled to a compulsory license under Section 31(1)(b). In support of his contention, he placed reliance on the judgment of the Supreme Court titled *Gramophone Company of India Ltd. vs. Birendra Bahadur Pandey & Ors.* reported as MANU/SC/0187/1984 : 1984(2)ECC142 . The relevant portion reads as under:-

" The Registrar is not bound to make an order under Section 53 of the Copyright Act so soon as an application is presented to him by the owner of the copyright. He has naturally to consider the context of the mischief sought to be prevented. He must consider whether the copies would infringe the copyright if the copies were made in India. He must consider whether the applicant owns the copyright or is the duly authorised agent of the copyright. He must hear those claiming to be affected if an order is made and consider any contention that may be put forward as an excuse for the import. He may consider any other relevant circumstance. Since all legitimate defenses are open and the enquiry is quasi-judicial, no one can seriously complain."

43. Mr. Sibal submitted that the rate of royalty are periodically revised. The AIR license was granted on December 26, 1984 and license to Radio City was granted on March 24, 2002. Mr. Sibal has drawn our attention to Section 52 of the Copyright Act. In this Section, he relied on sub-Section (1)(j)(iii). The relevant

(1) The following acts shall not constitute an infringement of copyright, namely-

(a)

.....

(i)

(j) the making of sound recordings in respect of any literary, dramatic or musical work, if -

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first recording of the work was made; and

44. Mr. Sibal also made reference to the provisions of the English Law and submitted that under the English Law if an individual does not want to be subjected to compulsory license then it can do so. If he is not a member of any of the music companies then he cannot be subjected to compulsory licensing. He submitted that the American law is entirely different from English law. In USA, the copyright owners are entitled to lesser rights than available to their counterparts in India. Mr. Sibal submitted that the Board must act on relevant considerations and ignore the irrelevant considerations. He has drawn our attention to Issue No. 3. Issue No. 3 reads as under:-

"Whether the balance of convenience and possible loss of revenue to the respondent are factors to be taken into consideration by the Copyright Board."

While answering this issue, the Copyright Board observed " these factors are not relevant for granting compulsory license." According to the learned counsel, the Board has wrongly decided this issue. The possible loss of revenue to either party is a very relevant consideration in granting or refusing the license and the Board ought to have taken into consideration this factor. Mr. Sibal also attacked the observation of the Board in para 41 of the judgment in which it is observed that "it makes no material difference whether the respondent is a copyright society or an individual." According to him, this observation is entirely erroneous. He submitted that whether it is a collective licensing body or an individual should make all the difference in deciding the application of compulsory license. According to him, the approach adopted by the Board is totally erroneous."

45. On the other hand, Mr. Dushyant Dave, learned Senior Advocate appearing for the complainant Entertainment Network India Limited supported the impugned judgment and submitted that no interference is called for by this court. Mr. Dave submitted that the impugned judgment/order serves the public interest and order has been passed in consonance with the principles of natural justice. He submitted that once the music is in the public domain, then public at large has a right to listen to the music. He submitted that it would not be appropriate to allow some broadcasters to play that music and deny the same privilege to others. Mr. Dave also submitted that the Board had taken relevant factors into consideration and ignored irrelevant factors while passing the impugned order. He submitted that the complainant runs the well known FM channel under the brand "Radio Mirchi". The complainant is the successful bidder for running FM stations in various cities in India and also has licenses for other cities. The complainant in order to be able to play the songs and works for which Phonographic Performance Limited (PPL) holds the rights, the complainant had earlier filed a complaint before the Board and the same was decided on 19.11.2002. Super Cassettes Limited is not a member of PPL. The complainant made several attempts to obtain license from Super Cassettes Limited for its works. As per the website of Super Cassettes Limited, it owns approximately 18,000 titles in its repertoire. Thus, the works which are in the control of Super Cassettes Ltd are substantial and are essential for running a radio channel. The complainant wrote letters and has also orally notified Super Cassettes Ltd its intention to have a license for its works. However, despite repeated assurances orally and in writing Super Cassettes Ltd has refused to issue a license under one pretext or the other.

46. Mr. Dave submitted that Super Cassettes Ltd has already issued a license to one radio FM channel "Radio City". According to Mr. Dave refusal by Super Cassettes Ltd to grant license is unreasonable and violative of the provisions of the Copyright Act. The complainant made an attempt for a meeting in May, 2002 and thereafter wrote a letter on 6.6.2002 relying on a press release of Super Cassettes dated 4.6.2002 that it was ready and willing to give a license. A letter was again written on 11.6.2002. There were subsequent communications dated 23rd and 24th October, 2002.

47. Mr. Dave submitted that in the Suit filed before the Delhi High Court, it is clearly stated that it is more than willing to enter into a mutually beneficial agreement for a license. He referred to para 6 of the reply on merits in which it is stated that Super Cassettes Ltd has never refused to grant a license on reasonable terms but that the issue of damages for past infringement should be considered before granting of a license. Mr. Dave pointed out that the appellant, Super Cassettes Ltd has taken a contradictory stand because in the impugned order it is mentioned that the appellant refused to grant license and mentioned that it was its business decision to do so.

manupatra 48. Mr. Dave relied on a letter sent by the appellant on 21.5.2003 to demonstrate that no request for adducing evidence was in contemplation. He referred to a letter received from the Deputy Registrar of Copyrights dated 14.5.2003 in which a direction was given to the appellant and the respondent to appear on 16.6.2003 and in the fixed proforma it is also mentioned that the appellant was given liberty to adduce evidence in support of its case. He referred to another letter of 30.5.2003. Even in that letter nothing has been mentioned about adducing evidence. Similarly, he also referred to the proceedings of the Copyright Board fixing the case with the consent of the parties on 15.7.2003. He also referred to a letter of the appellant dated 24.6.2003. In this letter also there is no mention of adducing any evidence. First time on 22.7.2003 a request was made in which it is mentioned that the respondent wishes to produce witnesses and annexed a list of witnesses and a reply to that was sent by the respondent on 24.7.2003 indicating that leave to produce evidence was only a ploy to delay the proceedings and mentioned that the production of witnesses is a request which is procedurally unheard of. When the hearing commenced on 25.7.2003 the witnesses were present but the Board declined to permit the appellant from producing the witnesses.

49. Mr. Dave submitted that compulsory license is an absolute right and every broadcaster has right to get compulsory license. He even went to the extent of saying that compulsory license has to be granted to all those broadcasters who apply for license as a routine in case they comply with statutory terms and conditions.

50. Mr. Dave, learned counsel for the respondent submitted that the intention of the legislature was that in a case of this nature the appellant is entitled to compensation and not royalty. Mr. Dave placed reliance on L. Hridaya Narain vs. Income Tax Officer, Bareilly MANU/SC/0268/1970 : [1970]78ITR26(SC) and laid stress primarily on para 13 of the said judgment in order to emphasise that if a statute invests a public officer to do an act in any specific set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves on that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right - public or private - of a citizen. He also placed reliance on another leading judgment of the Supreme Court i.e. Barium Chemicals Ltd & Another vs. Company Law Board and Others (MANU/SC/0037/1966 : [1967]1SCR898)

51. Mr. Dave also placed reliance on a Division Bench judgment of Bombay High Court The Chief Controlling Revenue Authority, Bombay vs. Maharashtra Sugar Mills Ltd (AIR (35) 1948 Bom 254. He particularly laid stress on para 13 of the judgment in which it is mentioned that when an authority has discretion to decide a case in a particular manner, then that discretion invested by the legislature cannot be taken away.

52. Mr. Harish Salve, learned Senior Advocate appearing for the respondent adopted a more reasonable stand and submitted that this is the case where competing commercial interests are involved. The appellant is not really the owner of the trade mark. The rights from the owners have been purchased by the sound recording body or the organisation. He submitted that any music or song which is in public domain, then other broadcasting agencies have a right to broadcast the same on payment of reasonable compensation. If parties can arrive at some kind of financial arrangement, then they will be governed by that agreement and in case they are not able to arrive at any agreement, then the broadcasting agency can resort to Section 31 of the Act and obtain compulsory license.

53. Mr. Salve had drawn our attention to various provisions of the Copyright Act and submitted that intention of the legislature is to regulate commercial monopoly and competing interests of the parties. He submitted that in the instant case parallel commercial organisations have purchased the rights from another person. They are not original manufacturers or producers of the music.

54. Mr. Salve, also submitted that because of enormous advancement of science and technology the entire world has shrunken as a small village, Therefore, the intellectual property laws of various countries have to be in harmony with each other. He referred to Berne and Rome Conventions and submitted that India is party to these conventions and these Conventions have great relevance particularly when specific provisions of law are silent. He has drawn our attention to para 14 of Visakha & Others vs. State of Rajasthan & Others MANU/SC/0786/1997 : AIR1997SC3011 and submitted that where the domestic laws are silent then that gap can be filled by the international conventions. Mr. Salve submitted that once the copyright is taken in public domain, then it becomes commercial right and refusal to give license has to be on reasonable grounds. Reasonable grounds can be broadly classified into two categories:-

i) Compensation.

ii) Other than compensation.

55. Other than compensation would be where refusal is not on monetary considerations but other than monetary considerations such as the reputation of the broadcasting channel where he would not like his music to be broadcasted because of otherwise bad reputation of the broadcasting channel or other similar considerations in which larger public interest is involved in the refusal. The appellant would be justified in refusing a license to a broadcaster known to play pornographic or indecent music. The other category of

manupatra cases are those in which according to the copyright owner the compensation is not reasonable. In these cases, the reasonableness would be determined by the Board on a complaint filed by the complainant.

56. Mr. Salve submitted that once any artistic work or music is in public domain then the copyright owner cannot adopt a discriminatory policy to give license to one and deny to the other. All those who are willing to abide by the terms and conditions and are prepared to pay the reasonable compensation as decided by the Board, would be entitled to compulsory license under Section 31 of the Act. Any discrimination would attract the provisions of M.R.T.P.Act.

57. Mr. Salve submitted that the respondent is prepared to pay license fee even for that period when he aired songs of the appellant without permission. He submitted that the respondent has already given bank guarantee of Rs. 20 lakhs and if the Board decides that he has to pay more and he is even prepared to give any undertaking demanded by the Board. The reasonableness of the amount to be paid towards the period when he used the appellant's musical work unauthorisedly or further period be decided by the Board and the same would be paid.

58. Mr. Salve, further submitted that Section 31 of the Copyright Act, 1957 has to be understood in the context of the law of copyright of various countries and conventions. Mr.Salve also submitted that in order to decide the controversy involved in the present case it is imperative to comprehend the provisions of the Copyright Act, 1957. He referred to Section 13 in which the copyright subsists not only in original musical works but also in sound recording thereof. The dichotomy between copyright in a musical work and the copyright in the sound recording made of such musical work is rooted in Section 31 itself.

59. Section 14 of the Copyright Act clarifies that while in relation to a musical work, the ambit of a copyright includes the public performance thereof or the marking of a sound recording thereof. He emphasised that sound recording consists of three components:-

- (i) to make any other sound recording embodying it;
- (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the sound recording to the public.

He submitted that this dichotomy is really based on the creative element, i.e., " the original musical work" and its commercial manifestation i.e., "the sound recording". A sound recording is undoubtedly protected. It is, however, quantitatively different in that it is a piece of commercial intellectual property protected in its commercial use by way of re-recording, its sale or hire or its public communication. He submitted that broadcasting rights by themselves were introduced in India for the first time in 1994. However, the rights of free to air broadcasters are not dealt with in any specific legislation unlike certain other jurisdictions.

60. The concept of a copyright society itself was incorporated in the law to enable an author to commercially exploit his intellectual property by a widespread dispersal in a regulated manner. Copyright societies are established only after due approval is given by the Central Government. A copyright society cannot refuse license on discriminatory grounds to different users. Section 34(3) confers upon such copyright societies the power to issue licenses on payment of fees.

61. Mr. Salve also argued that while other jurisdiction on account of the growth of the music industry, legislative changes were made expressly in India because until recent times, the bulk of the copyright in musical works were owned by copyright societies, namely, IPRS and PPL. He submitted that the third person granting license on a prescribed fee of a musical work was contemplated even under the Copyright Act, 1957 other than Section 31 as a general rule for administering such copyrights.

62. Mr. Salve further submitted that the need for comprehensive code relating to broadcaster's right has arisen for the first time after private radio stations have been licensed in the last few years. However, it is submitted that in so far as it relates to rights of broadcasters to get a compulsory license, there is sufficient power under Section 31 itself to issue such compulsory licenses when need so arises. Mr. Salve submitted that in order to properly answer the questions raised in this appeal, we have to have comprehensive view of the entire law which is in existence in various parts of the world. He submitted that broadly speaking the law in other jurisdictions is in one of the following forms:-

- (a) free to air broadcasting does not require a copyright license;
- (b) a free to air broadcaster requires a license. However, to commence broadcast all that he has to do is to give an undertaking to pay a reasonable sum which is in the event of dispute will be decided by a competent tribunal.

63. Mr. Salve made reference to the relevant provisions of the copyrights of other countries.

Australian Law : Under Section 109 of the Australian Copyright Act, the form adopted is in the same form as in (b) above. The additional feature of the law is that the royalty for broadcasting of published sound recording

manupatra is frozen at a ceiling of 1% of the gross earnings of the broadcaster during the specified period. There are also provisions for compulsory licensing.

64. China : China has the form (a) above for domestic recordings. They, however, follow the Berne Convention for international recordings. These domestic recordings can be broadcasted on the radio or television without any license or payment. Even a commercial broadcast is in form (b) above.

65. Japan : Japan has form (b) above. The Director General of the Cultural Affairs Agency will determine the compensation required to be paid by a broadcaster. Non-profit transmission of works already made public is exempted from paying an royalty.

66. United Kingdom : In U.K. Statutory licensing and compulsory licensing exists. Copinger & Skone James clearly says:

"..... 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.."

The law in the United Kingdom has undergone changes over a period of time. Compulsory licensing in one form or the other, historically has existed since the first provisions in the Statute of Anne 1709. In the Copyright Act, 1842 Section 5 dealt with Compulsory Licensing. Under the Copyright Act 1911 Section 4 provided that if the work is withheld, the Judicial Committee of the Privy Council will grant a Compulsory License. Thereafter the Gregory Committee Report made a number of recommendations relating to amendments to the Copyright Law. Section 8 of the Copyright Act, 1956 provided that Copyright is not infringed if Royalty is paid. The licensing terms are determined by the Copyright Tribunal. The amendments were made in the Copyright Act, 1988 which abolished Version Recordings. The scheme of Compulsory Licensing for sound recording is primarily in Form (b) above. Any person who issues Licenses for its works is covered by the term "Licensing Scheme". Mr. Salve submitted that it is incorrect to state that individual companies are not governed by Compulsory Licenses. The definition of "Licensing Body" and "Licensing Scheme" covers any individual company though in practice it is observed that all the owners of sound recordings are part of the copyright societies. In India, however, Section 31 specifically mentions "owners of sound recordings" and hence there is no scope for ambiguity. Moreover, if any Company is found to be exercising monopolistic control, i.e., controlling large number of sound recordings, the Monopolies and Mergers Commission grants compulsory licenses.

67. United States of America : The American law is the strongest on the subject. Under the U.S. Law, free to air broadcasting is completely exempt from copyright requirement. Sound recordings do not enjoy a broad performance right. Thus if a disk jockey plays a record of a musical work, only the owner of the musical work is entitled to royalty and not the owner of the sound recording.

68. The Digital Performance Right in the Sound Recordings Act of 1995 brought in enormous changes on the extent of protection of sound recordings. The amendments in this law is described as an attempt to "strike a balance". The performance right is limited, in the present context only to Digital Broadcasting, thereby completely exempting AM and FM Radio Stations. In fact even digital free-to-air broadcasting is exempt and only subscription digital broadcasting is subject to compulsory licensing.

69. Mr. Salve while interpreting Section 31 of the Copyright Act, submitted that Intellectual Property Rights in every sphere involve a balance between creation of monopoly which is generally considered opposed to public interest and protecting Intellectual Property Rights as a measure to encourage creativity in the respective fields. Mr. Salve submitted that selective refusal to sell "goods" is considered under Indian law to be an unfair trade practice. Thus by definition, the appellant lays claims to carry on relentlessly what is to be described as unfair trade practice.

70. Mr. Salve submitted that Section 31 confers upon the Copyright Board the power to grant a license provided the following conditions are satisfied:-

(i) the work in question should have been published or performed in public;

(ii) the owner of the copyright/sound recording should have refused to re-publish or allow re-publication or the performance in public of the work by reason of which the work is withheld from the public;

(iii) has refused to allow a communication by a broadcaster of such work on terms which the complainant considers reasonable.

71. Mr. Salve also submitted that until recent times, broadcast of "sound recording" to the public was only by the Government owned corporations. It is, Therefore, obvious that Section 31(1)(b) was designed specifically to enable the Board to intervene where the owner, particularly of a sound recording did not allow its public broadcast. Therefore, the suggestion that clause (b) cannot apply so long as somebody is allowed to broadcast it to the public is misconceived. According to him, if this contention is correct, then theoretically the

manupatra permission to a pay channel to broadcast would afford to the owner of the copyright the right to refuse a license even to Government owned free to air channels which would be manifestly opposed to public interest. This is not the intention of Section 31(1)(b) of the Copyright Act. He submitted that the refusal to allow such communications on terms which the complainant considers reasonable is only the cause of action. A complete refusal would obviously fall within Section 31(1)(b) as much as a permission only on terms which are extortionist. He submitted that according to the scheme of Section 31 once the dispute is raised by the complainant then the jurisdiction shifts to the Copyright Board to determine the compensation. He further submitted that the Copyright Board must be satisfied that the grounds of such refusal are not reasonable. However, the fact that it affects the commercial rights of the owner of the sound recording is relevant for determining the compensation only. The refusal to allow broadcast of a sound recording cannot possibly be merely on the ground that it may affect the profits of the owner. It must be on the grounds which are entirely different grounds that would outweigh public interest and paramount in this respect. He has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Secretary, Ministry of Information & Broadcasting, Government of India & Others vs. Cricket Association of Bengal & Others reported as MANU/SC/0246/1995 : [1995]1SCR1036 .

72. Mr. Salve submitted that the submission of the appellant is misconceived that the appellant was denied opportunity to adduce evidence and consequently led to violation of the principles of natural justice. He submitted that Copyright Board had already taken a view on quantum in the first license case. He submitted that the appellant cannot in any way be treated differently from other similarly placed sound recording owners which consists of the entire sound recording industry barring a few like the appellant. Any opportunity to the appellant to adduce evidence would have led to unnecessary delay in disposal without really achieving any object. He submitted that the first license case and the impugned judgment are being reviewed by the Board in September/October, 2004. Thus only a few months are left before the entire judgment is going to be reviewed. He further submitted that there is a provision in the Copyright Board for suitably adjusting the future compensation, even to compensate for a shortfall in the past compensation if it is demonstrated that the compensation awarded so far has been less than what it should have been given.

73. In reply to the other submission of the appellant that infringers are not entitled to a license. The learned counsel for the respondent submitted that past conduct of the infringement does not dis-entitle the grant of statutory license. A contrary view is like barring a ticketless traveller from boarding a train ever again. He placed reliance on the illustrations from USA, UK and Australia to demonstrate that past infringement does not disentitle a person's right to get a license for future. The courts have even held that the damages for past infringement will be determined at the same rate as that of license fee. He placed reliance on the :

"Corpus Jurisdiction Secundum, A Complete Restatement of the Entire American Law Volume xviii states that effective notice for mechanical reproduction where not given earlier may be given notwithstanding the fact that a suit for infringement is pending.

" Under the statutory provision requiring any person who intends to use a copyrighted musical composition on the parts of instruments serving to reproduce the same mechanically, in the absence of a license, to serve such notice of intention, etc., it has been held that effective notice may be given notwithstanding a suit for infringement is pending and when so given defendant is estopped from denying plaintiff's title...."

74. He also placed reliance on the case of Phonographic Performance Limited vs. Retail Broadcast Services Ltd. reported as 1995 FSR 813. In this case the plaintiff, PPL sued the defendant, who operated a radio broadcast service for infringement. The court observed as under:-

" ... 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, either 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...."

75. In Phonographic Performance Limited vs. Saibal Maitra & Others reported as (1998) FSR 749 the defendant did not come forward to defend the case and showed intention to continue to infringe. The court while holding that there should be no limit on the period of injunction unless the defendant comes forward to defend his case gave the following observations:-

" A person who applies for a license before starting to use the repertoire pays at the standard tariff rate. To encourage that to happen juke box licenses who do not apply in advance are normally required to pay a slightly higher royalty rate for the first year and to pay that rate from the first day of use. That has been accepted by the Copyright Tribunal to be reasonable in principle."

76. He also placed reliance on an Australian case, Fair Fitness Music Association vs. Australian Performing

manupatra Right Association Ltd. reported as 43 IPR 67. In this case the license scheme was challenged by a Fitness Group, which used music of the Australian Performing Right Association. The Copyright Tribunal discussed the going rate and relied on the decision of House of Lords in *General Tyre and Rubber Co. vs. Firestone Tyre and Rubber Co.* 1976 RPC 197 and held that appropriate damages may be ascertained by looking at what the infringer would have had to pay, if instead of infringing, he had come to the licensed for the same purpose.

77. Mr. Salve also referred to Berne Convention and Rome Convention in which there are specific provisions of compulsory license and equitable remuneration to performers or producers of phonograms. Mr. Salve to strengthen his submission that international convention and norms are relevant in considering domestic law has placed reliance on three leading judgments of the Supreme Court. The Hon'ble Supreme Court in *Vishaka vs. State of Rajasthan* reported as MANU/SC/0786/1997 : AIR1997SC3011 (supra) has observed:-

" The international conventions and norms are to be read into them in the absence of enacted domestic law occupying in the field where there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law... "

78. Reliance has also been placed on *Apparel Export Promotion Council vs. A.K.Chopra* reported as MANU/SC/0014/1999 : (1999)ILLJ962SC . The court observed:-

" These international instruments cast an obligation on the Indian State to gender sensitize its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.... The Courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. "

79. Reliance has also been placed on *T.N. Godavarman Thirumalpad through K.M. Chinappa vs. Union of India & Ors.* reported as MANU/SC/1317/2002 : (2002)10SCC606 . Their Lordships of the Supreme Court reiterated the principles which have been laid down in *Vishaka's* case and observed that in the absence of any inconsistency between the domestic law and the International Conventions the rule of judicial construction is that regard must be had of International Conventions and norms even in construing the domestic law.

80. Mr. Salve submitted that India is a signatory to the international copyright treaties and hence the provisions have to be read in consonance with the treaty obligations. While interpreting Section 31, he submitted that in India, owners are covered by compulsory licensing provisions and there is no ambiguity in this Section. Mr. Salve submitted that the owners are part of the copyright societies and those that are not cannot be treated differently. Analogy can be drawn from the European Council Directive 93/83/EEC of the Council of the European Communities, Article 9 provides that where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights.

81. On the basis of aforesaid submissions, Mr. Salve submitted that on consideration of the totality of the facts and circumstances of the case, the impugned order passed by the Copyright Board is just and proper and no interference is called for.

82. We have carefully considered the submissions advanced by the learned counsel for the parties. On the basis of the pleadings, documents on record and the submissions of the learned counsel the following important questions which arise for adjudication in this appeal are recapitulated as under:-

- (1) Whether an infringer is entitled to be considered for grant of compulsory licenses under Section 31 of the Act without stopping the illegal broadcast of sound recording of the appellant?
- (2) Whether principles of natural justice are applicable to quasi judicial bodies?
- (3) Under Section 31 of the Copyright Act, 1957 every complainant has to be granted a compulsory license or the license can be refused on valid grounds.
- (4) While interpreting the statute, gap, if any, can be filled by the international conventions (Rome and Berne) to which India is a signatory.
- (5) Once the copyright is taken in Public Domain then it becomes a commercial right and refusal to give license has to be on reasonable grounds.

83. Our well considered answer to those aforesaid issues are as under:-

84. (1) Whether an infringer is entitled to be considered for the grant of compulsory licenses under Section 31 of the Act without stopping the illegal broadcast of sound recording of the appellant?

manupatra We would like to elaborate the main issue which arises for adjudication in this appeal. Admittedly, the respondent was regularly airing songs/sound recording belonging to the repertoire of the appellant on FM Radio Station without permission. The respondent has not obtained any authorisation, license to communicate songs/sound recordings to the public from the appellant. The respondent did not desist despite sending several notices and continued to air songs and sound recording belonging to the repertoire of the appellant with impunity. Admittedly, the respondent is a rank infringer. If rank infringers like the respondent have to be granted compulsory licenses under Section 31 of the Act, then it would really be putting premium on their defaults. This would also encourage others to first infringe and when the infringement is discovered then apply for a compulsory license. That can never be the intention of the legislature. In our considered opinion, one who does not have any respect for law is really not entitled to be considered for grant of license under Section 31 of the Copyright Act. At the same time we would not like to take a very harsh view of barring a ticketless traveller from boarding the train for ever. But at the same time we are clearly of the opinion that until the respondent completely stops illegal broadcasting of songs and sound recording belonging to the repertoire of the appellant, its (respondent's) application for compulsory license shall not to be considered. It is really for the Copyright Board to impose restrictions and conditions according to facts and circumstances of each case.

1. (2) Whether principles of natural justice are applicable to quasi judicial bodies?

In the instant case the appellant had filed an application for producing witnesses. It is also an admitted position that the entire evidence of the appellant was available before the hearing of this case was concluded. Even then the appellant's request to produce evidence was rejected. This is also not the case in which the appellant has failed to produce evidence despite many opportunities. In case the Board was of the opinion that there has been delay in filing application, then they would be justified in imposing costs or other terms. But to deny the appellant an opportunity to adduce evidence, when all the witnesses were present before conclusion of the hearing was not justified. In a large number of cases the Courts consistently and repeatedly have held that even an administrative order which involves civil consequences, must be made in consonance with the rules of natural justice. To deny opportunity to a party to lead evidence particularly when the witnesses were present at the hearing constitutes violation of principles of natural justice. According to the settled position of law, principles of natural justice are fully applicable to quasi judicial bodies.

2.(3) Under Section 31 of the Copyright Act, 1957 every complainant has to be granted license or license can be refused on valid grounds.

We have carefully analysed Section 31 of the Copyright Act 1957. According to the language of the section question of compulsory license would arise only when the artistic work or music has been withheld from the public. In the instant case, admittedly licenses have already been granted to other broadcasters like AIR and Radio City, who have substantial presence, in that event, whether the appellant can be compelled to grant compulsory license to others, would really be decided on the facts and circumstances of each case. When the licenses have already been granted to other broadcasters, who have substantial presence, then perhaps the application for grant of compulsory license will be treated differently, than in a situation where the artistic work has been totally withheld from the public. The legislature in its wisdom has used the expression "may" in Section 31(1). According to Section 31 it is not imperative for the Board to grant license to each and every complainant. In our considered view the license can be granted or denied on valid grounds. Section 31 itself envisages that the decision to grant or refuse a license should be made after holding such inquiry as it may deem necessary. While granting compulsory licenses the Board must take into consideration whether the work has been totally withheld from public or licenses have been granted to other broadcasters and to what extent public interest is served. In the instant case licenses were granted to other broadcasting agencies such as AIR and Radio City. The Board ought to have taken into consideration this vital factor while arriving at a decision to grant compulsory license to the respondent.

3. On a careful consideration of this Section, it is abundantly clear that the Board did not take into consideration this vital and important factor that the appellant had already granted licenses to other broadcasting agencies, namely, AIR and Radio City. The Board in fact ought to have considered the impact of two licenses already granted by the appellant as far as public interest is concerned. In our considered opinion, we find no merit in the submission of Mr. Dave that compulsory licenses have to be granted to all those who have applied and are prepared to pay the license fee and there is no discretion left with the Board. This interpretation is clearly against the spirit of Section 31 of the Copyright Act. In case compulsory licenses have to be granted to all, then there was no need of any inquiry as envisaged by this Section. Apart from that the legislature in its wisdom has incorporated expression 'may' and not 'shall'. That is also indicative of the fact that the Board has been given discretion. According to the language of this Section, the case for grant of compulsory license can be considered only after the Board gives reasonable opportunity of being heard to the owner and after holding such inquiry is satisfied that the grounds for such refusal are not reasonable, then only the question of the grant of compulsory license is considered. Further according to Section 31(2) of the Act it is abundantly clear that when two more persons have made a complaint under sub section 1(1), the licenses shall be granted to the complainant, who in the opinion of the Copyright Board would best serve the interest of the general public. A plain reading of this language clearly reveals that while granting licenses the Board has a discretion to grant or to refuse licenses on valid grounds.

manupatra 4. (4) While interpreting the statute gap, if any, can be filled by international conventions (Rome and Berne) to which India is a party.

It is well settled that while interpreting the statute, these conventions have great relevance particularly when specific provisions are silent. In *Visakha's case* (supra) it has been observed by their Lordships of the Apex Court that when the specific provisions of law are silent then, that gap can be filled by these international conventions.

5. (5) Once the copyright is taken in the public domain then it becomes a commercial right and refusal to grant license has to be on reasonable grounds.

We have carefully considered this aspect and we are in agreement with the respondent that once a copyright is taken in public domain then it becomes commercial right and refusal to grant license has to be on reasonable grounds. The reply to this proposition is inherent in the language of 31 of the Act. It is clearly incorporated in the language of this Section that the case of the complainant for grant of compulsory license can be considered if the work has been withheld from public and after giving reasonable opportunity to the owner of the copyright holds inquiry and comes to the conclusion that grounds of refusal are not reasonable. Once the copyright is in the public domain, refusal has to be on reasonable and valid grounds.

6. While making an order under Section 31(1) of the Act the Board has to maintain a delicate balance between private rights of the copyright vis a vis public interest. We are afraid that while making the order of grant of compulsory license to the respondent the Board has not taken into consideration the aforesaid parameters.

7. In our considered view the Copyright Board must take into consideration the following parameters while deciding application for compulsory license:

(i) The work in question should have been published or performed in public;

(ii) The owner of the copyright/sound recordings should have refused to republish or allowed republication or the performance in public of the work by the reasons of which the work is withheld from the public;

(iii) Has refused to allow communication by a broadcaster of such work on terms which the board must consider reasonable.

8. The most important task of the Board is to maintain balance between compensation demanded and compensation to be paid by the complainant. For deciding this objectively, proper opportunities to the parties for adducing leading documentary/oral evidence is imperative.

9. The Copyright Board in consonance with the principles of natural justice must give full opportunities to the parties including opportunity of filing pleadings, documents and adducing oral evidence. The other side may also be given an opportunity of cross-examination of witnesses.

10. The Board must also take into consideration, whether the licenses have already been granted to the other broadcasters? Whether by the grant of these licenses, public interest has been fully served? If the public interest has not been served, then the board would be justified in granting further compulsory licenses to the complainant.

11. The Board while adjudicating the application for compulsory license must also determine that the parties before the Board have their competing commercial interest. The public interest can only be safeguarded by the Board. This indeed is the main duty and obligation of the Board. Any decision which is taken by the Board must be taken while keeping larger public interest in view.

12. The Board has to carefully maintain balance between creation of monopoly which is generally considered opposed to public interest and protecting intellectual property rights as a measure to encourage creativity in the respective fields.

13. The Board must also take into consideration, whether the appellant is really the owner of the trademark or the rights of the owner have been purchased by the sound recording body or by the organiser.

14. The Board must also take into consideration that once the copyright is taken in public domain, then it becomes a commercial right and refusal of license has to be on reasonable grounds.

15. On consideration of the totality of facts and circumstances the impugned order, granting compulsory license to the respondent has to be set aside. We order accordingly. Consequently the respondent is restrained from infringing the copyright of the appellant. The respondent is directed to give an undertaking to this Court within one week that songs/sound recording belonging to the repertoire of the appellant would not be played by the respondent. We remit this case back to the Copyright Board directing the Board to reconsider the application of the respondent for grant of compulsory license under Section 31 of the Act after giving adequate opportunity to the parties to adduce evidence. Of course, the parties have to adduce

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evidence within the time frame fixed by the Board. In view of the facts and circumstances of this case, we direct the Board to decide the application of the respondent for grant of compulsory license u/s. 31 of the Act by a reasoned order as expeditiously as possible and in any event within three months. The parties are directed to appear before the concerned Copyright Board on 12.7.2004.

16. Before we part with this case we would like to place on record our appreciation for very able assistance provided to us by the learned counsel appearing for the parties.

17. In the facts and circumstances of this case, this appeal is allowed in terms indicated above with costs. The applications and the caveat are also accordingly disposed of.

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