

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT LOD.NO.721 OF 2012

Idream Production Pvt. Ltd. .. Plaintiffs
Versus
Hathway Cable and Data Com Pvt.
Ltd. And Ors. .. Defendants

Mr.V.R.Dhond with Rashmin Khandekar i/b. A.I.Kayser &
K.S.Pachoo for plaintiffs
Mr.Rahul Chitnis with Vikram Sathye i/b. Thakore Jariwala &
Associates for defendant No.1.

CORAM : S.C.DHARMADHIKARI, J.
10th April 2012.

P.C.:

1] Heard Mr.Dhond, learned Senior Counsel for plaintiffs. He assures the Court that the plaint and proceedings would be duly numbered.

2] This is a suit filed by the plaintiff which is in the business of film production and distribution. It claims to be assignee of copyright in respect of feature film entitled "Fired".

3] First defendant is a company incorporated under the Companies Act, 1956 and is engaged in the business of cable and data communications. It is stated to be broadcasting films on the cable channel Utsav and has allegedly infringed copyright of the plaintiffs by broadcasting feature film “Fired” on the said cable network on 4th March 2012. There is no consent or permission of the plaintiffs or its licensee.

4] Second defendant has been impleaded on the basis that presently its identity is unknown but the injunction is claimed on the principle “John Doe”. It is stated by the plaintiffs that how pirated version of the film including compact discs and digital video discs entered the market, how it came in the possession of several persons and ultimately it was telecast on TV Channel cannot be ascertained with certainty at this stage. However, what has been done is to implead defendant No.3. He is sole proprietor of M/s.Ocean Entertainment Channel which owns and operates

Utsav Channel and is guilty of infringement of copyright of the plaintiffs.

5] Mr.Dhond would submit that after the details have been ascertained with regard to ownership of this channel that the third defendant has been impleaded and the plaint is amended accordingly.

6] Relying upon the averments in the plaint, what has been urged by Mr.Dhond is that if the film has been made by the producer and he is owner in terms of the Copyright Act, 1957, the rights of the first owner came to be assigned in plaintiff's favour under the Deed of Assignment on 9th September 2010, then, the plaintiffs' title and ownership cannot be prima facie disputed and when even copy of the said deed of assignment has been duly annexed.

7] In turn it is the case of the plaintiffs that on 10th December 2010 a film licence agreement with one M/s.Bigs B.

Entertainment, proprietaryship concern of Sunil Khanna was executed under which the plaintiffs agreed to grant licence of cinematic right, video rights, pay tv rights etc. and pay per view rates. Annexure C is a copy of the same and that is an agreement which is in force in the territory of India and South Asian Association for Regional Cooperation (SAARC) Countries. It is stated that save and except this entity which may be claiming some rights, plaintiffs cannot be said to be a person suing on the basis of no title. That apart, other than the necessary averments what has been pointed out is a complaint made by the plaintiff when the film was first noticed on the computer net-work. It is stated that “You-tube” informed the plaintiffs that the film is now no longer available as it was removed by them on 1st March 2012. However, thereafter, the film was unauthorisedly and illegally shown on Utsav channel and in such circumstances and when the pirated copy of the DVD available in the market is also produced, then, the injunction as prayed be granted. The principle on which such injunction is granted even against unknown person is that if

no steps are taken to protect and preserve the rights particularly copy rights in the work which is “literary”, then, the pirated or unauthorised version thereof may not just be made but circulated and communicated to the public. It is to control such unauthorised and illegal acts, the courts are empowered to grant injunction against unknown persons. Merely because some apprehension is raised as to how the orders would be implemented is no ground not to grant such an order, because, that is a stage which is subsequent to the making of the order. As far as enforcement is concerned, the plaintiffs have filed an affidavit indicating that how they procured a copy of the pirated version of their vilm which is available freely. The affidavit would satisfy the court's query that the injunction is claimed not only on some hypothetical basis but there is corroboration of the statements made in the plaint by the deponent of the affidavit. The film is freely available and hawkers and unauthorised distributors and sellers who have no permanent or fixed place of business, indulge in making and circulating orders. For all these reasons this Court should grant protective

copies. Mr.Dhond places strong reliance on the following decisions:-

- (I) Tej Television Ltd. Vs. Rajan Mandal (2003) F.S.R. 22 407;
- (II) I.A.No.11242 of 2011 decided on 20/7/2011
- (III) CS(OS) 384 of 2011 dated 18th February 2011 (M/s.ESPN Software India Pvt. Ltd. Vs. Tudu Enterprise & Ors.)MANU/DE/1061/2011
- (IV) CS(OS) No.821 of 2011 decided on 4/4/2011 (UTV Software Communications Limited Vs. Home Cable Network Ltd. & Ors.)
- (V) 2009 (39) PTC 208 (Del) (Ardath Tobacco Company Ltd. Vs. Munna Bhai & Ors) decided on 9/1/2009 (2009 (1) MIPR 165)

(All Delhi High Courts – No further details are provided)

8] On the other hand Mr.Chitnis, learned Counsel appearing for defendant No.1 has invited my attention to the affidavit that has been filed by Mr.Vispi Bharucha, Dy.General Manager of

defendant No.1. Mr.Chitnis would submit that in para 6 of this affidavit, what the defendant No.1 has clarified is that the plaintiff is not producing before the Court the details of persons/manufacturers of the DVD. The John Doe principle therefore, cannot be invoked. Defendant No.1 is multi-system operator as known in the cable TV trade. If no enquiries are made and the first defendant is dragged in the suit, then, on this ground alone and even otherwise in the absence of requisite details blanket injunction should not be granted.

9] Secondly, it is false to suggest that defendant No.1 has any association with the said Utsav Channel. The defendant No.1 is neither an owner or the operator of the Utsav Cable Channel. That is a channel owned and operated by Mr. Mihir Wadkhalkar. The said Mr.Wadkhalkar is carrying on business in the name and style of "Ocean Entertainment". The said "Ocean Entertainment" through its proprietor Mr.Wadkhalkar has been permitted by the defendant No.1 to use a frequency which was available to

defendant No.1, for transmission of programmes in the channel “Utsav”.

10] In such circumstances, there cannot be any injunction against the defendant No.1.

11] Mr.Chitnis even otherwise submits that this injunction as claimed is granted very sparingly and in exceptional cases. A very strong prima facie case has to be made out and it must be demonstrated that there are persons known and unknown who are violating rights, including, copyrights in a literary work or feature film. On the basis of some vague allegations and without identifying persons, the Court should not grant such reliefs. Mr.Chitnis has invited my attention to the guidelines which have been set out in several orders of this nature by the Courts abroad. He submits that firstly, the principle is that the machinery of the court cannot be used for collecting evidence. The Supreme Court has in the case of Padam Sen Vs. State of Uttar Pradesh reported

in A.I.R. 1961 S.C. 218 held that Commissioner cannot be appointed by civil court so as to collect evidence for the parties. No roving or fishing enquiry can be made. Secondly the principles which are made applicable abroad while granting such injunction have been enlisted in decisions to which Mr.Chitnis invites my attention and he submits that the identity of the persons is ascertainable by their act of infringement. The fact that persons cannot be identified at this stage is no bar to grant relief and they may be identified at an appropriate time, but at the same time, the Court must insist on certain guidelines or else the Court order would be used by parties like plaintiffs to prevent even legitimate, legal and authorised acts. He also relied upon a judgement of the Supreme Court reported in 1991 (3) SCC 114 (Surayya Begum (Mst) Vs. Mohd.Usman & Ors.) along with (Renu Sharma and Anr. Vs. Raghbir Kaur Bhatia (Mrs) and Ors) to submit that what is not permissible under specific powers of this Court cannot be done by taking recourse to inherent powers under section 151 of the Code of Civil Procedure, 1908.

12] With the assistance of Mr.Dhond and Mr.Chitnis I have perused the plaint and the annexures thereto. I have also perused the affidavit that has been placed on record by first defendant and the subsequent affidavits. From a reading of the subsequent affidavits and the last one tendered on 9th April 2012 I am satisfied that the plaintiffs have made out a case where pirated and unauthorised DVDs of the feature film “Fired” are available in the market. After the last hearing, the plaintiffs have placed on record the affidavits of 7th April 2012, where the deponent has stated that he visited several shops in different areas of Mumbai and enquired about availability of DVD of film “Fired” and on 4th April 2012 during his visit at different places as mentioned in the affidavit he found the DVDs were available from hawkers trading near Mulla House Fort, Andheri etc. He purchased one DVD and details are referred to in the said affidavit. Equally, Mr.Ashish Bhatnagar, Director and Authorised Signatory of the plaintiffs has filed an affidavit today in which he states that the source from where

pirated/ counterfeit CDs and DVDs of the film were available, has now been disclosed. Prior thereto also from such persons who have no fixed place of business, the said DVDs are fetched. He has filed an affidavit and undertaking where it is stated that the order passed eventually on this motion would be duly communicated to the Statutory Authorities and Bodies and also advertised in film and trade magazines and copies will be forwarded to Police Stations so that the same can be enforced.

13] The Principle on which such an injunction can be granted are now too well settled. While Mr.Chitnis may make an attempt to distinguish the order passed by the learned Single Judge of the Delhi High Court (Justice Dalveer Bhandari, as His Lordship then was) on 14th January 2002, what I find from a reading of the said order is that the menace of piracy is increasing day by day. The court has noted that the cable operators in India have long history of violating copyrights. They have a unique nature of piracy and the cable operators are encouraged, owing to the unique nature of

cable piracy and the unstructured nature of the cable industry, the speed with which any trace of infringement can be erased by the cable operators, the enforcement of rights in conservative manner, is unlikely to effectively redress the grievance of the parties like plaintiffs. Principles on which the John Doe injunction is granted has been referred to by the learned Judge in extenso and in great details. At the same time, His Lordship has cautioned that the Court is not powerless to pass John Doe orders in India but the directions given should suffice for protecting interest of the plaintiffs and meet the ends of justice.

14] The Court in that case therefore, appointed a Commissioner to carry out the directions. The Court conferred necessary powers in the Court Commissioner including of inspection, inventory and search. Thereafter, he was permitted to make a report. Therefore, it is not as if such an injunction cannot be granted in India. The order passed by Delhi High Court in that case is followed subsequently and in several instances including in the case of

feature film “Singham” an order of the nature passed in 2002 came to be passed.

15] I am not unmindful of the fact that the Court orders are ultimately meant to be enforced and implemented. The Court passes orders in litigation between parties with a view to render justice. The Courts' orders are not meant to remain on paper. They must be capable of being enforced and executed so that full and final reliefs on the basis of orders and directions can be obtained by parties. That is precisely the reason why substantive provisions are enacted in CPC and by amending them from time to time. However, when there are blatant acts of violation of copyrights and the acts complained of are not localised in the sense performed by persons residing in a city, town or district but through out the territorial jurisdiction of a court and people indulging in them cannot be traced and identified with such precision as it could be insisted upon in all cases, then, on appropriate identification from the plaintiffs and parties, the Court

can still grant an injunction against unnamed persons. Judicial notice had been taken in 2002 itself and now must be taken with the increasing population of such acts where the copyrighted material is circulated and communicated to the public not only through Radio and TV and Cable net work but also by latest Information Technology and other modes of communication that are available. The pirated versions and unauthorised copies get circulated in the market very easily and freely. They change hands on hour to hour basis. In such circumstances, to expect parties like plaintiffs to keep a watch and that too continuously on such activities which are not concentrated and restricted to a specified area but through out the city like Mumbai would be too much. Persons such as hawkers and trading on the streets or door to door or in trains or public transport do not possess any fixed place of business. They also do not trade in any particular name nor carry official licence and authorisation from local authorities. They may move from pavement to pavement and lane to lane and sell spurious products.

16] In such circumstances, it would be for the law enforcing machinery and statutory authorities to take charge of the situation and aided with the Court's orders come down heavily on such activities. That they may be negligent does not mean that the Court should not pass such orders. This is not a case where implementation and enforcement is an impossibility. The caution that the Court has exercised in such cases has been noted by me. It is, therefore, I called upon the plaintiffs to atleast disclose as to how they state in the plaint that pirated DVDs or unauthorised CDs of the feature film in which they claim rights are circulated and available in the market. They have now filed an affidavit and even disclosed the position as emerging today. In these circumstances to insist that the plaintiffs must satisfy the Court by identifying all parties in all areas indulging in such acts is a condition which cannot be fulfilled and the very purpose of approaching the court of law will be defeated

17] In the instant case rights of the plaintiffs are not in dispute. First defendant has in fact filed an affidavit clarifying its stand and has stated that it is not responsible for any DVDs of the film “Fired” being circulated in the market or coming in possession of unauthorised parties. The channel has no association with them. It is third defendant who has rights in the said channel and it is he who has committed an unauthorised and illegal act.

18] Defendant No.3 has been duly served but none appears on his behalf. Defendant No.3 has been served also after it was impleaded as a party defendant. It was impleaded as party on the basis of the statements in the affidavits filed by defendant No.1. Therefore, one such identifiable individual and entity is already before the Court. In such circumstances to now insist that the hawkers and traders or persons who are circulating or selling such copies or versions should be identified with the aid of the police and municipal machinery by plaintiffs would mean delaying the proceedings for an indefinite time. That would mean that Court

passes no restraint orders and the act continues even if strong prima facie case is made out and balance of convenience is in favour of the parties like plaintiffs. They cannot suffer injustice because the Court insist on absolute proof of identity. In a given case the court may insist but in all such cases that would not be proper.

19] After having perused the guidelines with the assistance of Mr.Chitnis I had called upon the plaintiffs to file an affidavit which they filed through their authorised signatory and they have stated on oath that if an order is passed on the John Doe principle, they would communicate the same to all the statutory authorities and even police machinery so that persons are on guard that any such acts are prohibited by the order of this Court and they would render themselves liable for all consequences including of breach or violation of these orders and for having committed offences by dealing in pirated versions and copies.

20] In the light of the above, this notice of motion succeeds and the same is made absolute in terms of prayer clauses (a) and (b).

21] However, this order will come into effect on the plaintiffs' filing an undertaking in this Court containing a specific statement that it would compensate any of the parties which eventually have suffered losses and damages on account of an order of blanket injunction of this nature.

22] In addition, the plaintiffs to deposit in this Court a sum of Rs.15,000/- subject to further and final orders in the proceedings. Plaintiffs also shall in terms of their statements and undertakings in the affidavit dated 9th April 2012 take steps to communicate this order to the functionaries who are statutory and otherwise as are stated in the said affidavit filed. Proof of such communication and service in the form of an affidavit be filed within a period of four weeks from the date the order is communicated to them.

23] It is only on being satisfied, in the given facts and circumstances that this order has been passed on the applicability of the principle which has been recognised in judicial decisions. Needless, therefore, to state that being an interim order, it would be subject to such variation as would be made during the course of passing final orders in the proceedings and nothing precludes the parties from raising appropriate contentions at that stage. None of the observations and findings can be said to be conclusive but are tentative and on being satisfied that strong prima facie case is made out.

(S.C.DHARMADHIKARI, J)