

**IN THE COURT OF SH. SUMIT DASS, ADDITIONAL DISTRICT JUDGE -
01, PATIALA HOUSE COURTS, NEW DELHI DISTRICT, NEW DELHI**

CS No. 426/18

Sushila

W/o Sh. Chander Pal
R/o S-2, NDMC Flats,
Type – 2, Kaka Nagar,
Delhi

..... Plaintiff

Versus

1. M/s Hungama Digital Media Entertainment Pvt Ltd

SF-B-07, Art Guild House,
Phoenix Market City, LBS Marg,
Kurla (West), Mumbai – 40070
Through its Director

Also at:-

Trinity Tower, B-2, Sector 7,
Noida – 201 302

2. M/s Super Cassettes Industries Pvt. Ltd.

E-2/16, White House, Ansari Road,
Darya Ganj, New Delhi
Through its Director

..... Defendant

Suit presented On : 04.05.2018
Arguments Concluded On : 05.06.2018
Judgment Pronounced On : 08.06.2018

ORDER

1. A short but interesting point has come up for consideration in the context of performer's right as defined under Section 2(q), 2(qq) r/w the provisions of Chapter VIII of the Copyright Act, 1957, same is being adjudicated by this present order.

1.1 Parties have extensively argued referring to the provisions of Copyright Act, 1957 particularly the amendments introduced in the Act by virtue of the Copyrights [Amendment] Act 1994 as well as the subsequent amendments inserted later on in year 2012 vide The Copyright [Amendment] Act 2012.

2. Now before dealing with the contentions raised on behalf of either side a small resume of facts is required for. 'Small', the word which I have used is because of the fact that controversy lies in a very narrow compass.

3. The plaintiff is claiming her rights on the assertion that there exist or enures, as per her a 'performance rights' insofar with respect to any song to which the plaintiff has lent her voice, while recording the same in a studio under contract with defendant no. 2. Delving on the factual background, plaintiff avers as under :

(i) Instant suit was filed alleging that there has been infringement of her performer's right and as a consequence she is entitled for damages, rendition of accounts and injunction u/s 38A r/w 51, 55 of the Copyright Act, 1957.

(ii) Plaintiff claims that she is a singer by profession and defendant no. 1 is a music app / website company. Defendant no. 2 is a commercial entity of T-series. Plaintiff had signed various legal agreements in respect of the songs rendered by her as mentioned para no. 5 of plaint. It was stated that the rights were sold to T-series – defendant no. 2. These rights included recording rights as well as performance rights in said vocal songs.

(iii) It is further stated that these songs were recorded by T-series and released through CDs and VCDs in the market. It is further stated that defendant no. 1 operates an internet platform and had been broadcasting the songs of the plaintiff without taking any permission from the plaintiff or paying performance right to the plaintiff which is violation of Section 38 of Copyright Act. In this regard legal notice was also sent to defendant no.1 asking to cease & desist. Defendant no.1 refused to comply and stated that they had acquired the rights from the company. It is further stated that whenever a singer performs he receives 50% royalty under the law. It was further stated non payment of such a royalty results in infringement of performer's right to receive royalty which is sacrosanct under the Copyright Act, 1957. This right has been given to the lyricists, music composers and singers of a song under Section 18 third and fourth provisos of the said Act. All are entitled to an equal share whenever their song is commercialized.

(iv) On the said premise recovery of Rs. 5,00,000/- was sought for alongwith a decree of rendition of accounts besides perpetual injunction.

4. I am not quoting from the written statement filed by either side. Points mentioned therein have been argued / made the basis of the argument – suffice to directly deal with legal contentions.

5. Further, in order to appreciate the contentions raised and to have an over view of the Act certain statutory provisions needs to be noted, I am extracting the same hereunder :

“ 2. Interpretation.—In this Act, unless the context otherwise requires,

—

(d) "author" means,—

(i) in relation to a literary or dramatic work, the author of the work;

(ii) in relation to a musical work, the composer;

(iii) in relation to an artistic work other than a photograph, the artist;

(iv) in relation to a photograph, the person taking the photograph, the artist;

[(v) in relation to the cinematograph film or sound recording, the producer; and

(vi) in relation to any literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created;]

[(dd) "broadcast" means communication to the public—

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast;]

(f) "cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films;]

(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and time chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work of performance so made available.

[(q) "performance", in relation to performer's right, means any visual or acoustic presentation made live by one or more performers;]

[(qq) "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;]

13. Works in which copyright subsists. - (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, -

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) [sound recording];

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless, -

(i) in the case of a published work, the work is first published in India,

or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than [work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case [work of architecture], the work is located in India.

Explanation – In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist -

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any [sound recording] made in respect of a literary, dramatic or musical work, if in making the [sound recording], copyright in such work has been infringed.

14. *Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

18. *Assignment of copyright.—*

(1) *The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof:*

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence:

[Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or

was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void :

Provided also that that author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except ot he legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

38. Performer's right.—

(1) Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.(2) The performer's right shall subsist until 2[fifty years] from the beginning of the calendar year next following the year in which the performance is made.

(3) During the continuance of a performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely:—

(a) makes a sound recording or visual recording of the performance; or
(b) reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was—

(i) made without the performer's consent; or

(ii) made for purposes different from those for which the performer gave his consent; or

(iii) made for purposes different from those referred to in section 39

from a sound recording or visual recording which was made in accordance with section 39; or

(c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with section 39, or is a re-broadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right; or

38A. Exclusive right of performers. - (1) without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of this Act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely :-

(a) to make a sound recording or a visual recording of the performance, including:-

(i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;

(ii) issuance of copies of it to the public not being copies already in circulation ;

(iii) communication of it to the public;

(iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;

(b) to broadcast or communicate the performance to the public except where the performance is already broadcast.

(2) Once the performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:

Provided that, notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial use.]

39A Certain provisions to apply in case of broadcast reproduction right and performer's right. — (1) Sections 18, 19, 30, 30A, 33, 33A, 34, 35, 36, 53, 55, 58, 63, 64, 65, 65A, 65B and 66 shall, with necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work."

6. Insofar as the questions / propositions to which I am concerned or required to deal, I am quoting the same as hereunder so that the

arguments can also be properly appreciated:

(i) What is the extent of performance right – whether the same includes recording made in studio / renditions given by a vocal performer / artist in a studio / recording?

(ii) What is the effect of contract which has been entered into between defendant no. 2 and plaintiff whereby plaintiff had entrusted / assigned all her rights in her recordings including performance rights?

(iii) Whether plaintiff can otherwise make out a case on the basis of proviso(s) to S 18(1) r/w Section 38 A of the Act and / or u/s 39A as amended by the Act of 2012?

7. Heard either side. Point-wise findings are as under :

Point no. (i)

7.1 Let me again have a re-look on the definition of 'performance' as defined u/s 2(q). Now, the same as evident from the definition is in relation to a performer's rights – any visual or acoustic presentation made live by any of the performer.

7.2 Section 2(qq) defines a performer obviously plaintiff otherwise being a 'singer' *prima facie* is a 'performer' or comes within the sweep of a 'Performer'.

7.3 Dealing with the definition in slight detail what is most important or the crux of the section or the distinguishing feature is the use of the word 'made live'. The word 'made' denotes a process / the way or manner in which the performance is rendered or it can be said to have been originated. The other

word 'live' in the context of performance is more important and the most obvious reason of placing the same, which I could decode is that it restricts the ambit of performer's rights to only those performances which are played / made 'live' before an audience or viewers.

7.4 Coming to the dictionary meaning of the word 'live'. The Oxford dictionary describes the same as under:

Relating to a musical performance given in concert, not on a recording.

Example: 'there is traditional live music played most nights'
'a live album'

2.1 (of a broadcast) transmitted at the time of occurrence, not from a recording.

Example: 'live coverage of the match'

7.5 The said definition / words also implies that the performance is instantaneous, immediate and directly emanating from the 'performers' skills or efforts in a form of a vocal or acoustic presentation. The word 'live' as mentioned herein above also defines the scope of performance right. In the context of the controversy herein by no means a performance given in a studio or a recording done in a studio can be said to be a performance 'made live'. To put it otherwise the word 'live' connotes that there is a direct connect with the audience / viewers without there being any break or any intervention through any other medium – it should be performed directly in front of them. The skills or unique efforts being displayed by the performer should be directly seen or heard by the audience.

7.6 That being the situation the plaintiff's premise or claim herein that there exists the performance rights in the songs recorded by her in studio

is completely untenable or a misconceived argument. Accepting such a contention would be playing *havoc* with the entire scheme of the Copyright Act which has different conclaves or defines rights of various persons / stake holders. The suit *per se* fails on this short ground alone and is straightaway liable to be dismissed.

7.7 *Dehors* the aforesaid, Id counsel for plaintiff contended that the performance insofar given / rendered under studio conditions are concerned, the same also comes within the ambit of a performance rights as referred to one u/s 38A of the Copyright Act. I shall deal with the said contention holistically at one place while I shall discuss the point no. (iii) as culled out hereinabove. Suffice to note and reiterate unless and until there is a live performance, the question of performance right as defined u/s 2(q) and section 38 of the Act does not arise at all.

7.8 Another argument which was raised by Id counsel for defendant that insofar as studio performance(s) are concerned the same *per se* are not one continuous performance or rendition. Rather songs are recorded in bits and pieces, mixed with music and instruments, improved with technology so on and so forth which signifies that there are various independent processes or components which put together constitutes one song. This process continues for many days / there are many sittings. Thus, under studio conditions the question of there being a 'live' performance otherwise also does not arise.

7.9 I need not go into that question for the purpose of disposal of the present suit inasmuch as irrespective of the fact whether a song is recorded at one go or it is divided or sub-divided into various processes which

subsequently are collated or organized / edited leads to the birth of a song or a sound recording, the moot point still remains that the same is not a 'live' performance as it is being done in a closed controlled environment and not in front of a live audience.

7.10 In this regard I may also rely upon the observations made by the Hon'ble High Court in the leading judgment of ***Indian Performing Right Society Ltd vs. Aditya Pandey 2012 SCC Online Del 2645*** :

“19. Whereas IPRS contends that by virtue of Section 17 of the Copyright Act 1957, the authors of literary and musical works; “work” as defined in Section 2(y) of the Act, are the first owners of the copyright therein i.e. the lyrics and the musical score respectively and by virtue of Section 18 of the Act can assign the copyright, as per mode of assignment contemplated by Section 19 of the Act, the rights vested in them under Section 14 of the Act. The licensing provisions as per Section 30, Section 30A, and Section 31 of the Act being the source of the power of IPRS to prevent infringement of the copyright in the lyrics and the musical score of its members, who have assigned the copyright to IPRS in the lyrics and the musical score. It is the assertion of IPRS that these authors, being the original owners of the works, are entitled to exploit their works, to the exclusion of all others, on the subjects enumerated in sub-clauses (i) to (vii) of clause (a) of Section 14 of the Copyright Act 1957. Highlighting sub-clause (iii) and sub-clause (iv), IPRS argues that the authors of the lyrics and the musical scores have the exclusive right to perform the work in public or communicated to the public and also to make a sound recording in respect of the work, and dove-tail the twin rights, to sub-section 4 of Section 13 of the Act by highlighting that if the author of the musical score and the lyric exploit their right under sub-clause (iv) of clause (a) of Section 14 of the Act by permitting a third party to make a sound recording, the copyright in the sound recording (as per sub-section 4 of Section 13) shall not affect the separate copyright in their works; and thus IPRS highlights that the creation of a sound recording i.e. a derivative copyrightable work does not affect, in any manner, the right in the underlying (lyric and musical score) works. IPRS urges that the right of the owners of the underlying works to perform the work in public or communicate the work to the public (a right conferred by Section 14(a)(iii) of the Act) is distinct from and not a sub-set of the right to make a sound recording (a right under Section 14(a)(iv) of the Act) and enlist the effect of the argument to

mean that once the owners of the lyrics and the musical scores exploit their right to permit a sound recording, it would not mean that their works have become a sub-set of the sound recording, in that, he who obtains a permission or a license from the owner of the copyright in the sound recording, can either perform in public by an acoustic presentation or a live performance or by broadcasting the sound recording, without obtaining a parallel permission from the owner of the copyright holders of the underlying works i.e. the lyricist and he who set the musical score, and for which IPRS highlights the definition of the word "broadcast" as per [Section 2\(dd\)](#) of the Act, the definition of the expression "communication to the public" as per [Section 2\(ff\)](#) of the Act, the definition of the word "performance" as per [Section 2\(q\)](#) and the definition of the word "performer" as per [Section 2\(qq\)](#) of the Act. IPRS highlights that broadcast has been defined in the broadest term to mean any mode of communication of a sign, sound or a visual image by wire or wireless diffusion and linking the broadcast to the expression "communication to the public" highlights that if a work is made available for being seen or heard or otherwise enjoyed by the public directly by means of display or diffusion, logic demands to infer that, pertaining to a song, when a sound recording is communicated to the public the underlying musical score and the lyrics are simultaneously communicated and thus an acoustic or a visual presentation of a lyric and the musical score as also a sound recording, makes available to the public each of the three works and there is a communication to the public of each such work. IPRS asserts that with respect to performing a work in public or communicating it to the public, the [Copyright \(Amendment\) Act 1994](#) has not changed the legal position. It asserts that the amendment brought into the statute book in the year 1994 introduced Performers Rights in the context of performance which was live [Section 2\(q\)](#) and in the context of communication by display or diffusion [2\(ff\)](#), which hitherto-fore found themselves integrated in the definition of the word "performance" in [Section 2\(q\)](#) of the Act, when brought in force in the year 1957, and for which IPRS places reliance upon the Notes on Clauses to the 1994 Amendment which undisputably bring out that the Performers "Rights introduced by the 1994 Amendments, required a division of the subject pertaining to live performances while communicating the work to the public and when the communication was by way of diffusion." (emphasis mine)

7.11 The underlined portion defines the intent of the legislature to segregate / restrict such performance rights by the usage of the word 'live'. Thus, point no.(i) is decided accordingly.

Point no. ii

8. Now coming to the second point what is the effect of contractual obligations entered into between the parties and as manifested in the agreements. Plaintiff herself has admitted that she had parted with all such rights and had executed various agreements with defendant no. 2. She had further in her plaint has categorically admitted the same. Obviously there is no element of fraud or any question of coercion or duress. Defendant no. 2 alongwith the written statement has placed on record various agreements which have been signed by the plaintiff in respect to the songs to which she had lent her voice during the process of recording in studio. Agreements are undisputed. There has been an assignments of rights. I am only quoting some part of the agreement as all are proforma agreements :

“ 2. *Assignment :*

2.1 In the consideration of the sum hereinafter paid / or agreed to be paid, the Producers as beneficial owners hereby transfer and assign wholly and without any limitation all the Copyright including all Performing Rights, Neighbouring and Mechanical Rights of all the Literary, Dramatic and Musical Works as well as that of Sound Recordings and Audio Visual Songs of the said Album in all respect in favour of Company for the territories of entire universe for full term of copyright with exclusive rights inter-alia to do or authorise the doing of any of the following acts in respect of the above said works or substantial part thereof namely:

(a) In the case of a Literary, Dramatic or Musical work:-

To reproduce the work in any material form including the storing of it in any medium by electronic means; to issue copies of the work to the public; to perform the work in public or communicate it to the public; to broadcast, to make any cinematograph film or sound recording in respect of the work; to synchronize the works in any form; to make or authorize the making of any translation and any adaptation or version (s) of the work or Mobile and Digital Content in relation to the work, and to do in relation to the translation or an adaptation of the work of version(s) of the work or Mobile and Digital Content, any of the acts specified in relation to the work as stated above.

(b) In the case of the Artistic Work:

To reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work; to communicate the work and to issue copies of the work to the public; to include the work in any cinematograph film; to make any adaptation of the work or any Mobile and Digital Content in relation to the work, and to do in relation to an adaptation of the work or to such Mobile and Digital Content any of the acts specified in relation to the works as stated above together with any other work.

(c) In case of a Sound Recording -

To make any other sound recordings or Mobile or Digital content embodying it either alone or together with any other work; to sell or give on hire, or offer for sale or hire, any copy of the sound recording or such mobile and digital content regardless of whether such copy has been old or given on hire on earlier occasions; to communicate the sound recording or such mobile and digital content to the public; to make any cinematographic film in respect of the sound recording; to synchronize the sound recording in any form; to make or authorise the making of any version of any sound recording or such mobile and digital content including that of the musical, literary and dramatic works embodied in the sound recording or mobile and digital content, and to perform, broadcast, communicate and /or transmit them including through internet broadband or through any other medium or device now known or hereafter invented.

(d) In case of audio visual songs -

to make copy of audio visual songs on any present or future format including a photograph of any image forming part thereof;; to sell or give on hire or offer for sale or hire any copy of the audio visual songs; to communicate/ transmit the audio visual songs to the public including but not limited to through internet, broadband, satellite, all kind of television, cable or through any other medium or device now known or hereafter invented and / or to authorise others to do the aforesaid acts. The producers agree to provide necessary software at their own expense for the above purposes to the company failing which the company shall have the right to obtain the same from any available source.

(e) In case of performances -

(A) to make a sound recording or a visual recording of the performance, including (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other

means; (ii) issuance of copies of it to the public not being copies already in circulation ; (iii) communication of it to the public; (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording; (B) to broadcast or communicate the performance to the public except where the performance is already broadcast.”

8.1 Plaintiff having exhaustively assigned her rights insofar as the songs are concerned to defendant company and taken valuable consideration cannot now resile or claim to the contrary *moreso* without challenging those agreements. Needless to state that adequacy or inadequacy of consideration as reflected in the said agreements is not the issue in present case neither qua the same any arguments addressed. Point no. ii is decided accordingly

Point no. iii

9. Now coming to the third point, plaintiff had contended that by virtue of the proviso(s) to Section 18(1) r/w Section 38 A and Section 39 A which are recent additions in the Copyright Act makes her / equates or puts her similarly to the position of authors of literary or musical works. Particularly it was argued that the proviso(s) to Section 18 (1) are *ipso facto* grafted under section 39A in reference to performance right or have to be otherwise accordingly read.

9.1 In my opinion this contention though on the face of it appears to be attractive, however upon a slight probe is also misconceived. Now proviso(s) to Section 18(1) were added by virtue of the amendments carried out in the year 2012 when section 39A was also accordingly modified / amended. Had the intention of the legislature to equate the 'author' of the literary or musical work and the 'singer' then in such a scenario the name of the singer would have been mentioned in the proviso itself and not left it for interpretation as sought to be done by the plaintiff herein. The difference

between the rights of singers (performer) and authors of literary and musical works has been retained and the proviso only takes within its sweep the authors of musical or literary work only. This distinction is made more prominent or apparently decipherable by the use of the words “*without prejudice to the rights conferred on the authors*” in Section 38A. Thus, the contention of the plaintiff herein that she is entitled or should be equated with authors of literary and musical work is also an untenable contention. Needless to state that even in Section 39A the words used are “*with necessary adaptations and modifications*” which also points to the intent of the legislature that the authors of literary and musical works as well as performers are treated differently. Thus, this contention of seeking parity and claiming on the same footing as authors of musical and literary work is also without any substance.

9.2 Though not in the context of the controversy in the present case but I feel that the observations in the case of ***Indian Performing Right Society Ltd vs. Aditya Pandey 2012 SCC Online Del 2645*** are salubrious and enlightening inasmuch as the conflict between various stake holders in the context of provision of Copyright Act has been dealt with. The controversy or the point involved was summed up in para no. 15 of the judgment – same is as under :

“The complex issues which arises for consideration before us is: Whether the Communication to the Public, including by way of Broadcasting of a Sound Recording also amounts to Communication to the Public of Literary and Musical Works embodied in the Sound Recording under the Copyright Act 1957 post the said Act being amended by the Copyright (Amendment) Act 1994: If yes: Whether a separate license in respect of such Literary and Musical Works can be asserted by the owner of copyright in such works in addition to the license secured from the copyright holder in the Sound Recording?”

9.3 This question was in the context of the litigating parties – one

being IPRS a Copyright society comprising of lyricist or composer of musical scores. Now in the said context the judgment paragraph no. 51 in judgment of **Eastern India Motion Picture Association** case was relied upon. I am extracting certain portions particularly paragraph no. 51 and 52.

“15.Section 13 recognises 'cinematograph film' as a distinct and separate class of 'work' and declares that copyright shall subsist therein throughout India. Section 14 which enumerates the rights that subsist in various classes of works mentioned in section 13 provides that copyright in case of a literary or musical work means inter alia (a) the right to perform or cause the performance of the work in public and (b) to make or authorise the making of a cinematograph film or a record in respect of the work. It also provides that copyright in case of cinematograph film means. among other rights, the right of exhibiting or causing the exhibition public of the cinematograph film i.e. of causing the film in so far as it consists of visual images to be seen in public and in so far as it consists of sounds to be heard in public. Section 13(4) on which Mr. Ashok Sen has leaned heavily in support of his contentions lays down that the copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made. Though a conflict may at first sight seem to exist between section 13(4) and section 14(1) (a) (iii) on the one hand and section 14(1) (c) (ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have, his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of section 14(1)(e) of the Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public. In other words, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound

track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric or musical work recorded on the sound track of the film to be heard in public and nothing contained in [section 13\(4\)](#) of the Act on which Mr. Ashok Sen has strongly relied can operate to affect the rights acquired by the author (owner) of the film by virtue of [section 14\(1\)\(c\)](#) of the Act. The composer of a lyric or a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as [section 14\(1\)\(c\)](#) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the express provisions of clauses (f), (m), (y) of [section 2](#), [section 13\(1\)\(b\)](#) and [Section 14\(1\)\(c\)](#) of the Act otiose but would also defeat the intention of the Legislature, which in view of the growing importance of the cinematograph film as a powerful media of expression, and the highly complex technical and scientific process and heavy capital outlay involved in its production, has sought to recognise it as a separate entity and to treat a record embodying the recording in any part of the sound track associated with the film by utilising such sound track as something distinct from a record as ordinarily understood.

52. The aforesaid observations relating to [Section 13\(4\)](#) of the unamended Copyright Act, 1957 made by the Supreme Court may be obiter, but we remind ourselves that an obiter dicata, more so when it is with reasons, in a decision of a court having higher position in the pyramidal structure must ordinarily be followed by a court lower in the pyramidal structure, unless there are very good reasons for not doing so. No good reasons have been shown to us by the learned senior counsel appearing for IPRS which would lead us to not to follow the interpretation given by the Supreme Court to [Section 13\(4\)](#) of the Copyright Act, 1957."

9.4 The said observations are very pertinent inasmuch as the rights of different stake holders are being harmoniously constructed without there being any dispute or overlap or there being any conflict. Taking cue from the said observations and in view of the facts and circumstances of the case, in my considered opinion the real import or scope of the performance right is guided / restricted by the word 'made live', which I had stated earlier thus, these rights are a sort of secondary / residuary rights or it can be said to be neighbouring rights. Primary rights in sound recordings remains / is retained by the defendant no. 2 by virtue of the fact that it had engaged the plaintiff contractually for the said specific purposes coupled with the fact that the act recognizes sound recording as a distinct right.

9.5 The upshot of the aforesaid discussion is that the contention of the plaintiff that the performer's right enables or vests with her rights wherein she can claim parity to authors by virtue of the proviso(s) to Section 18(1) of the Act is also an untenable contention. Point no. iii is also decided accordingly.

10. The suit of the plaintiff is totally without any cause of action. Nonetheless the submissions made in the written statement have been taken into consideration at the time of passing of the order. Obviously the threshold point / confines of order 7 rule 11 of CPC have been crossed over thus, plaint cannot be rejected. However, in such a scenario the suit has to be dismissed *in toto* by taking recourse to the provisions of Order XII CPC. I am fortified in my reasoning by the observations made by Hon'ble High court in the case of ***Gaurav Monga vs. Premier Inn India Pvt Ltd & ors in CS(OS) 548/2016 & IAs No. 13285/2016 & 13286/2016, decided on 06.01.2017*** :

"34. I have wondered whether to reject the plaint under Order VII Rule 11

of CPC or to dismiss the suit under Order XII Rule 6 of CPC. A rejection of the plaint under Order VII Rule 11 of CPC does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order XII Rule 6 of CPC empowers the Court to pass judgment —at any stage of the suit—on its own motion, where on admissions made either in pleading or otherwise no determination is required. The reasons aforesaid would also qualify for the suit to be dismissed at the threshold only under Order XII Rule 6 CPC. Supreme Court in Pearlite Liners (P) Ltd. Vs. Manorama Sirsi (2004) 3 SCC 172 was concerned with a suit for specific performance of a contract of personal service. The same was dismissed by the trial court and the first appellate court on a preliminary issue as to the maintainability thereof but was in second appeal restored by the High Court and remanded for trial. Supreme Court held that once the reliefs claimed of, declaration that the transfer order was illegal and void and of declaration that the plaintiff continued to be in service of the defendant could not be granted by the Court, such a suit should not be allowed to continue and go for trial and should be thrown out at the threshold on the ground of want of jurisdiction of a Court to grant the reliefs prayed for. Accordingly, the orders of the trial court and the first appellate court were upheld and restored and the order of the High Court of restoring the suit and remanding it for trial was set aside. Though in the facts of that case, the suit was dismissed after notice to the defendant and after framing a preliminary issue but the fact remains that in holding the suit to be barred, no notice of any plea of the defendant was taken. If that is so, then, in my opinion, the suit can also be dismissed without notice to the defendant, if the Court finds that it has no jurisdiction to grant the reliefs claimed. The same is the position here. Thus, the suit has to be dismissed.

35. No purpose will be served in entertaining the suit which is doomed to fail. A suit cannot be entertained to allow the plaintiff to, as it proceeds, keep on developing its case. If the plaintiff, on the date of institution of the suit, fails to disclose a cause of action and a right to the relief claimed, the suit has to be dismissed at the threshold.

36. This suit has to suffer the same fate and is dismissed. However, no order as to costs.”

10.1 The suit having being filed without there being any substantive right infringed upon / infringed it can be said to be a suit which is devoid of cause of action or bereft of any merits.

10.2 Accordingly taking into consideration the observations made by Hon'ble High Court in case ***Gaurav Monga vs. Premier Inn India Pvt Ltd & ors*** (supra) the present suit in a manner is nipped in bud and I am dismissing the same outrightly.

10.2 Keeping in view the brevity of arguments and the way parties made out the case I am of the view that it is not a case wherein cost requires to be imposed.

Decree sheet be prepared accordingly.

File be consigned to record room.

**Pronounced in open Court
on 08.06.2018**

**(Sumit Dass)
Additional District Judge-01,
NDD/PHC/New Delhi/08.06.2018**