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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 1451 OF 2014
IN
SUIT (L) NO. 603 OF 2014

M/s. Leopold Cafe & Stores & Anr. ... Plaintiffs
/Applicants
Versus
Novex Communications Pvt. Ltd. ... Defendants

Dr. Veerendra Tulzapurkar, Senior Advocate, with Mr. R.D. Soni, Mr. Ankit Virmani, Ms. Aakanksha Saxena i/b M/s. Wadia Ghandy & Co., for the Plaintiffs.

Mr. J.J. Bhatt, Senior Advocate, with Ms. Anjali Chandurkar, Mr. Prakash Shah, Mr. Durgaprasad Poojari, i/b M/s. PDS & Associates, for the Defendants.

CORAM: G.S. PATEL, J
DATED: July 17, 2014

PC:-

1. By an order dated 26th June 2014 (corrected on 8th July 2014), I granted an ad-interim injunction in terms of prayer clause (b) of the present Notice of Motion.

2. Since then, the Defendant has filed an affidavit in reply and two supporting affidavits on behalf of the Yash Raj Films Private Limited and Shemaroo Entertainment Limited.

3. The controversy between the parties is narrow. The only question is whether the Defendant (“Novex”) is entitled to grant licenses in the fashion that it does on behalf of owners of copyright in various works.

4. At an earlier stage, there was also an issue about the showing of special events such as World Cup soccer broadcasts and other television programs etc. on behalf of the MSM Discovery Pvt. Ltd (“MSMD”) and Big Net Communications. In paragraph 24 of its affidavit in reply Novex says that it is no longer authorised to represent MSMD and Big Net Communications and that it will not, without such authorisation, make any representation on their behalf. This statement is accepted as an undertaking to the Court.

5. The issue that survives is in respect of various sound recordings and the public performance of these. Novex claims that it continues to be an agent on behalf other copyright owners, principally Yash Raj Films Pvt. Ltd. (“YRF”) and Shemaroo Entertainment Limited (“Shemaroo”). Novex claims to be able to collect license fees and grant licenses on behalf of YRF and Shemaroo under Section 30 of the Copyright Act, 1957. That Section reads thus:

30. Licences by owners of copyright.—

The owner of the copyright in any existing work or the prospective owner of the copyright

in any future work may grant any interest in the right by license in writing by him or by his duly authorised agent:

Provided that in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation: Where a person to whom a licence relating to copyright in any future work is granted under this section dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

(Emphasis supplied)

6. Mr. Bhatt, learned senior counsel for Novex, submits that Novex is only authorised as an agent on behalf of owners of copyright (except in those cases where it is itself the holder of the copyright). This, he submits, Novex is entitled to do, for Section 30 says that every owner of copyright in any existing work can grant *any* interest in the right by a written license either directly or through a duly authorised agent. Novex is, he submits, such a duly authorised agent. Novex is not, in contrast, a society of the kind contemplated under Section 33 of the Copyright Act. The prohibition in Section 33(1) of the Act therefore does not apply to Novex. Sections 33(1) and (3) reads as thus:

33. Registration of copyright society.—

(1) No person or association of persons shall, after coming into force of the copyright (Amendment) Act, 1994 commence or, carry on

the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3):

Provided that an owner of copyright shall, in his individual capacity, continue to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered copyright society:

Provided further that the business of issuing or granting license in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under this Act;

Provided also that a performing rights society functioning in accordance with the provisions of section 33 on the date immediately before the coming into force of the Copyright (Amendment) Act, 1994 shall be deemed to be a copyright society for the purposes of this Chapter and every such society shall get itself registered within a period of one year from the date of commencement of the Copyright (Amendment) Act, 1994.

... ..

(3) The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the

interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the Applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed:

Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works.

7. In what manner precisely has Novex been conducting itself in the matter of the grant of copyright licenses and collection of license fees? Dr. Tulzapurkar, learned senior counsel for the Plaintiffs, submits that correctly read, the various documents annexed to the plaint and to the affidavit in reply indicate that Novex is "*carrying on the business of issuing or granting licenses in respect of*" works in which copyright subsists. The prohibitions in Section 33, therefore, clearly apply to Novex.

8. Exhibit "D" to the plaint consists of documents drawn from Novex's website where Novex claims that it has been authorised by certain copyright holders "grant on their behalf public performance rights" to third parties. Exhibit "E" to the plaint is a letter dated 14th May 2014 addressed to the Plaintiff which clearly says that public performance licenses from the copyright holders that Novex claims to represent must be obtained from Novex itself. There is another document at Exhibit "G" to the plaint that, in paragraph 2, makes clear that the public performance rights at least of the works in which YRF and Shemaroo have copyright are, *inter alia*, "granted" by Novex. If there was any doubt about this, I imagine it

is put to rest by the document at Exhibit "G2" to the plaint. The third page of this document (plaint page 44) is Novex's statement to one Fortune Park Galaxy at Vapi demanding that it apply for "mandatory public performance license from Novex Communication".

9. Annexed to the affidavit in reply are a number of sample licenses issued by Novex. Mr. Bhatt points to these to show that in every single case, Novex has, in fact, acted as an agent and in no other way. These licenses issued by Novex clearly show the names of the principals, he submits. This is in contrast to the licenses issued by a copyright society under Section 33 of the Act, such as Phonographic Performance Limited ("PPL"). A license from PPL does not disclose the names of the owners of copyright. It merely says that the licensee is authorised to perform all copyrighted works that are the subject matter of that licence and which are administered by PPL. Novex's licenses on the other hand clearly show the names of the copyright holders.

10. The licenses on which Mr. Bhatt relies do not actually indicate that Novex is functioning as an agent. Every one of these licenses says that the party to whom Novex has purportedly issued a license has "acquired a public performance licence **from Novex**". The next portion of each certificate says that the certificate's addressee is authorised to perform and utilise these sound recordings; and below this line are the names of various entities. Nothing in these documents indicates that Novex is acting as an agent of these entities. In fact Novex's own invoices, also annexed

to the plaintiff, indicate that it does not routinely disclose itself to be an agent of any of its principals.

11. Mr. Bhatt is correct in his submission that acting as an agent it would necessarily have to indicate so on its licenses. However, the licenses to which Mr. Bhatt do not indicate any such agency. There are, also, as I have noted earlier, several other documents to indicate that Novex has throughout demanded from various hotels, restaurants etc. that licenses be obtained from it directly. If Novex is carrying on business and issuing licenses in this manner, then, in my view, it is doing so directly in contravention of the prohibition in Section 33. I do not believe that Novex is entitled to continue to “carry on the business of issuing or granting licenses” in this manner. There is no doubt that this is precisely what Novex is doing.

12. The affidavits filed on behalf of Shemaroo and YRF are almost identical in terms. Paragraph 7 of each of these affidavits is a statement that Novex has represented to its principals that it is not “in the business of granting and issuing any licence.” Both these entities claim that Novex is only their authorized agent. I do not see how these affidavits assist the Defendants in any way. Whatever may be the impression of the parties, ultimately it is the documented agreement between them that will speak for itself. This has not been disclosed. The only other materials produced are the various communications issued by Novex and the licenses that it has granted. None of these indicate clearly and unequivocally that it is functioning as an agent and in no other capacity.

13. It is not, I believe, the mere “carrying on of business” that is interdicted by Section 33. It is the carrying on of the business of issuing or granting licenses in its own name, but in which others hold copyright. Every agent also “carries on business”, but that is the business of agency, with the agent functioning as such, i.e., clearly indicating that it is acting on behalf of another, one who holds the copyright. This is the only manner in which both Section 33 and Section 30 can be harmonized. An absolute bar even on an agency, invoking Section 33, would undoubtedly run afoul of the plain language of Section 30 and render the words “or by his duly authorised agent” entirely otiose. I very much doubt it could have been the legislative intent of Section 33 to compel every copyright owner to set up a separate division to monitor the use of its works. Entities like YRF and Shemaroo typically hold copyright in a very large number of works. It is perhaps more efficient for them to appoint an agency to ensure that those who use their works have valid licenses and have paid the license fees. These licenses are, however, to be issued in the name of the copyright owner and license fees to be collected for and on behalf of the copyright owner. A society like PPL, on the other hand, can issue license fees in its own name. It need not disclose the names of the original holders of the copyright. The distinction Mr. Bhatt draws is, I think, material; one without which Sections 33 and 30 cannot both co-exist.

14. There is also the seemingly nice distinction between “issuing” and “granting” a license. Both words must be read together with their conjunctive. “Issuing” speaks possibly to the physical act of generating a license. “Granting” is the legal effect of that issuance. What Section 33 forbids is an engagement in the

“business of issuing and granting” licenses in works in which copyright subsists. This cannot mean that a copyright owner cannot appoint an agent to grant any interest on behalf of the copyright owner. That is something that Section 30 in terms permits. The express permission in Section 30 cannot be occluded by an extension of the express prohibition in Section 33. All that the two sections, read together, require is that the factum of agency must be disclosed so that the licensee knows that it has a valid license from the copyright owner; i.e., that it is made known by the agent that it is acting on behalf of the holder of copyright in the works in question, even though the licensee may throughout deal only with the agent and never directly with its principal. The minute the principal is undisclosed and the license is issued and granted in the agent’s own name, the prohibition in Section 33 comes into play.

15. In this matter, Novex seems not to have clearly disclosed its agency if indeed there is one. We have no evidence of the terms of that agency. What, instead, is apparent is that Novex has consistently been demanding that persons obtain licenses from Novex itself. It has invoiced parties in its own name. Licenses are issued in its own name. The mere mention of the license being of the works of others does not sufficiently indicate any agency to take Novex out of the mischief forbidden by Section 33 and into the permissive regime of Section 30.

16. In this view of the matter, the Notice of Motion is made partly absolute in the following terms: pending the hearing and disposal of the present Suit, the Defendant, its employees, servants, agents and others acting for it, are restrained:

- (a) From in any manner carrying on the business of issuing and granting licenses and collecting license fees in respect of any copyrighted works (including without limitation the works of Yash Raj Films Pvt. Ltd., UTV Software Communications Ltd., and Shemaroo Entertainment Pvt. Ltd.) under the Copyright Act, 1957, in its (i.e., the Defendant's) own name;
- (b) From making any demands on the Plaintiffs to obtain a license from and pay any license fee to the Defendant in its own name in respect of any copyrighted works (including without limitation the works of Yash Raj Films Pvt. Ltd., UTV Software Communications Ltd., and Shemaroo Entertainment Pvt. Ltd.);
- (c) From taking any steps or making any threats against the Plaintiffs in furtherance of the notice dated 14th May 2014 (Exh. E to the Plaintiff).

17. The injunction granted will not, it is clarified, prevent the Defendant from acting as an authorised agent (and only as an authorised agent) of any copyright holder under Section 30 of the Copyright Act.

18. The Notice of Motion is disposed of in these terms with no order as to costs.

(G. S. PATEL, J.)