

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO. OF 2006
IN
SUIT (L) NO.2993 OF 2006

Anandji Virji Shah & Ors. ..Plaintiffs.

Vs.

Ritesh Sidhwani & Ors. ..Defendants.

Mr.Virag Tulzapurkar, Senior Advocate with Mr.Vineet Naik i/b.Mr.Ameet Naik of Naik, Naik, Iyer & Co. for the Plaintiffs.

Mr.I.M.Chagla, Senior Advocate with Mr.Ajay Vazirani with Ms.Christabel Afonso i/b. M/s.Hariani & Co. for Defendant Nos.1, 2 and 4.

Mr.Rahul Chitnis with Mr.Basant Trilokani i/b.Basant Trilokani & Co. for Defendant No.3.

Mr.D.J.Khambatta with Mr.H.N.Thakore & Ms.Agnes Bareda i/b.M/s.Thakore Jariwala & Associates for Defendant No.5.

**CORAM : S.J. VAZIFDAR, J.
CORAM : 17TH OCTOBER, 2006**

P.C. :

The suit is filed for a declaration that the Plaintiffs are the owners of all rights, including copyright in respect of the musical works, including theme music/score and music including for two songs, "Yeh Mera Dil' and 'Khaike Pan Banaraswala'. The Plaintiffs have also sought a declaration that they

are entitled to special rights in respect of the said musical work. By the present application the Plaintiffs seek inter-alia an injunction restraining the Defendants from releasing a film 'Don' which contains the said two songs and the theme music/score. The film is a remake of an earlier film by the same name which was released in 1978.

2. The Plaintiffs contend that Plaintiff No.1 and one Kalyanji were the authors and owners of the copyright in respect of the music in the film 'Don' which was produced and released in 1978, by M/s.Nariman Films. Plaintiff Nos.2 to 6 are the heirs of one Kalyanji. For convenience, I will refer to Plaintiff No.1 and Kalyanji as the Plaintiffs.

3. Separate but similar undated contracts were entered into by M/s.Nariman Films with Plaintiff No.1 and the said Kalyanji. The undated agreements, obviously entered into sometime in 1978, are important and read as under :-

"Dear Sir:

With reference to the talk the undersigned had with you, we have to record the following arrangements :

1. That you have agreed to work as a Music Director for our entire picture tentatively titled as DON Starring Amitabh Bachchan, Zeenat Aman & Pran directed by Chandra Barot.

2. That we have agreed to pay to you a sum of Rs.20,000/- (Rupees Twenty Thousand only) as lumpsum remuneration for your work in our entire picture. The amount will be paid to you in suitable instalments according to the progress of the picture.

3. That you will be paid Royalty of 1 1/4% on the earnings of the records.

4. That you have agreed to pay your Income-Tax and other Taxes on your total income including the above remuneration direct to the Government Authorities concerned.

5. All other Terms and Conditions will be as prevailing as the Film Trade.

Please confirm the above by signing hereunder."

4. Mr.Tulzapurkar, the learned Senior counsel, appearing on behalf of the Plaintiffs contended that the Plaintiffs were the joint authors of the said musical works and that they continued to be the owner of all rights including the copyright inter-alia in the said two songs.

5. I am not inclined to grant any ad-interim relief

for more than one reason.

6. Firstly, there has been gross delay and laches on the part of the Plaintiffs. I hasten to add that it is not merely on the ground of delay that this application is rejected. The delay has, in fact, lead to the Defendants altering their position to their detriment. The grant of any interim reliefs today, would undoubtedly cause them irreparable loss and injury.

7. The film is scheduled to be released within three days. It has been produced at a cost of about Rs.100 Crores. All the usual arrangements preparatory to its release are in place.

8. Defendant No.2 caused prominent public notices to be issued on 19.3.2005 and 30.4.2005 in a trade magazine. The public notice dated 19.3.2005 expressly stated the subject to be the acquisition of the copyrights and related rights, inter-alia, in the musical works, including songs, in and to the Hindi Film DON, meaning thereby, the original film 'Don'. This is clear from a reference to the actors in the film. The operative part of the public notice further states that Defendant No.2 was in the

process of finalising the acquisition on an unencumbered, unfettered and unrestricted basis an exclusive license, without any limitation, inter-alia, in respect of the musical and artistic work, including the songs recorded in the original film.

The notice further states that M/s.Nariman Films claims to be the first and original owners, authors and sole producers. Similarly, Defendant No.2 also acquired various rights in respect of the original film from various other parties, including Defendant No.5 and one M/s.Baba Arts Ltd. for the purpose of using the film.

9. Mr.Tulzapurkar stated that the Plaintiffs had not seen the aforesaid public notices. It is difficult to accept this contention. Firstly, the two notices were expressly referred to in the Defendant's Advocate's reply dated 13.10.2006 to the Plaintiff's notice dated 10.10.2006. There is not a word in the plaint that the Plaintiff's attention had not been invited to the said public notices. The public notices were issued over a year and a half ago. The Plaintiffs chose not to take any action to date. To grant any ad-interim orders

today, would inter-alia, in view of the fact that the film is due to be released in three days, cause irreparable harm and injury to the Defendants.

10. It also appears the release of the film has been extensively advertised. The Plaintiff's case itself is that the new film is nothing but the remake of the old film. They ought therefore to have been aware of the fact that the music in the old film would be used in the new film.

11. Mr.Tulzapurkar stated that Defendant No.1 may have missed the public notice and the advertisements. He stated that Plaintiff No.1 has not been involved in the profession for about 10 years. The submission however is contrary to the very first instance in the plaint to the effect that Plaintiff No.1 carries on his profession as a music composer and is a renowned music composer.

12. On the other hand, a refusal of ad-interim reliefs will cause the Plaintiffs no harm or injury. The Plaintiff's only concern even prior to the filing of the suit was to recover royalty. This appears to be so from the documents tendered by Mr.Khambatta, on behalf of Defendant No.5 (Sare Gama

India Ltd.). Plaintiff No.1 complained about not being informed by Defendant No.5 on an earlier occasion in respect of another incident regarding royalty alone.

13. Mr.Tulzapurkar submitted that the said agreement between M/s.Nariman Films and the Plaintiffs were contracts for services and not contracts of service. The Defendants would not therefore be entitled to rely upon section 17(c) of the Copyright Act.

14. To say the least, the Plaintiff's case is not as clear as the Plaintiff makes it out to be. Firstly, in view of the agreements entered into by the Plaintiffs with M/s.Nariman Films, it cannot be said with any degree of certainty that the contracts were not contracts of service but were only contract for services. The Plaintiffs were required to work as Music Directors for the entire picture. They were remunerated for the same. It is difficult to state at this stage that upon affidavits being filed, the Defendants will not be able to establish the other ingredients necessary to indicate the contract to be one of service. It would be hardly fair to expect them to do so three days before the

release of the film.

15. Secondly, Mr.Chagla, the learned Senior Counsel appearing on behalf of Defendant Nos.1, 2 and 4 submitted that the Plaintiff's case would also be covered by section 17(b) of the Copyright Act. He relied upon the judgment of the Supreme Court which was also relied upon by Mr.Tulzapurkar, in the case of *Indian Performing Right Society Ltd. v. Eastern India Motion Picture Association & Ors.*, AIR 1977 Supreme Court, 1443. It would be convenient here to set out the paragraphs 15 and 17 of the judgment which are as under :

"15. The interpretation clause (f) of Section 2 reproduced above, which is not exhaustive, leaves no room for doubt when read in continuation with Section 14(1)(c)(iii) that the term "cinematograph film" includes a sound track associated with the film. In the light of these provisions, it cannot be disputed that a "cinematograph film" is to be taken to include the sounds embodied in a sound track which is associated with the film. 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 in public of the cinematograph film i.e. of causing the film insofar as it consists of visual images to be seen in public and insofar as it consists of sounds to be heard in public. Section 13(4) in 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)(c) 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 insofar as it consists of visual images to be seen in public and insofar as it consists of the acoustic portion including a lyric or a musical work to be heard

in public without securing an further permission of the author (composer) of the lyric or 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 a 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 of 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 wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the expresses provisions of clauses (f), (m), (y) of Section 2, Section 13(1)(b) and Section 14(1)(c) of t (owner) of the cinematograph film cannot be said to e 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."

"17. This takes us to the core of the question, namely, whether the producer of a cinematograph film can defeat the right of the composer of music ... or lyricist by engaging him. The key to the solution of this question lies in provisos (b) and (c) to Section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos viz. proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric

therefor i.e. the sounds for incorporation or absorption in the sound track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid proviso (c) if the composer of music or lyric is employed, under a contract of service or apprenticeship to compose the work. It is, therefore, crystal clear that or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of Section 17 of the Act. We are fortified in this view by the decision in Wallerstein v. Herbert¹ relied upon by Mr Sachin Chaudhary where it was held that the music composed for reward by the plaintiff in pursuance of his engagement to give effect to certain situations in the drama entitled "Lady Andley's Secret", which was to be put on the stage was not an independent composition but was merely an accessory to and a part and parcel of the drama and the plaintiff did not have any right in the music." (emphasis supplied)

16. Prima-facie, it appears that Mr.Chagla's reliance upon paragraph 17 of the judgment is well founded. It is admitted that the songs were not composed independently of the film. They were composed only for the film and, at the instance of

the producer M/s.Nariman Films. M/s.Nariman Films commissioned the Plaintiffs as Music Directors, who, in turn, composed the music for valuable consideration. M/s.Nariman Films therefore became the first owners of the copyright therein and no copyright subsisted in the Plaintiffs. This, therefore, is a case in which the observations in paragraph 16 of the judgment apply. Paragraph 15 deals with the right of a music composer who has authorised the producer of the film to make a film of his work. This is not the case here.

17. The Plaintiffs have not contended that there was any agreement to the contrary. Even if they did, the onus of establishing the same would be on them.

18. This is not a case where the songs were composed by the Plaintiffs earlier or independently of the film and the contracts were entered into by the Plaintiffs with the producers of the film to use their songs for the film.

19. Paragraphs 21 and 23 of the concurring judgment of Krishna Iyer, J. are of no assistance to the Plaintiffs. They expressly recognised the right of

the composer except where there is a special provision "such as" in section 17, proviso (c). I do not read the judgment as suggesting that section 17, proviso (c) is the only exception. Indeed, it cannot be so. For apart from the use of the expression "such as", the learned Judge has, at the outset, made it clear that the judgment of Jaswant Singh, J. is on behalf of the Court. As stated earlier, in paragraph 17, Jaswant Singh, J. has expressly dealt with the rights of the cinematograph film producer under section 17(b).

20. The judgment in the case of *Gee Pee Films Pvt. Ltd. v. Pratik Chowdhury*, AIR 2002, Calcutta, 33, is of no assistance to the Plaintiffs either. The case dealt with non-film songs and the Court came to the conclusion that there was no contract of employment between the parties.

21. That the Plaintiffs did not retain the copyright is also clear from clause 3 of the undated letters viz. the contracts between M/s.Nariman Films and the Plaintiffs. Under clause 3, the Plaintiffs are entitled to royalty of one and a quarter per cent each.

Mr.Khambatta has produced a compilation of documents, which indicate that the royalty has, in fact, been paid from time to time. What is of crucial importance is the fact that not only were the Plaintiffs paid royalty in respect of the earnings of the records consisting of the music used in the film but also in respect of the utilisation of the said musical works in other forms, including ring tones for mobile telephones. The Plaintiffs have, accepted payment thereof, forwarded under cover of detailed statements indicating the same. Indeed, these are facts which ought to have been disclosed by the Plaintiffs in the plaint.

22. It is not necessary for me to deal with all the other documents which Mr.Khambatta has produced. Suffice it to state, that Defendant No.5 had also asserted its rights a few months ago.

23. In view of the aforesaid facts, the balance of convenience is also clearly in the Defendant's favour. The Plaintiffs can always be compensated by way of damages.

24. Especially at the ad-interim stage, there is nothing to indicate that the ingredients of section

57 exist.

25. In the circumstances, ad-interim order refused.

Notice of Motion is made returnable in normal course.