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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 2247 OF 2014
IN
SUIT (L) NO. 934 FO 2014

Shemaroo Entertainment Ltd. ...Plaintiffs
Versus
Suryaveer Singh Bhullar & 3 ors. ...Defendants

Dr. Veerendra Tulzapurkar, Senior Advocate, with Mr. Venkatesh Dhond, Senior Advocate, Mr. Mahesh Mahadgut, Ms. Ankita Kanojia, Ms. Milonee Gala, for the Plaintiffs.
Mr. Ravi Kadam, Senior Advocate, with Mr. Ashish Kamat, i/b Kartikeyan & Associates, for the Defendant No. 1.
Mr. Janak Dwarkadas, Senior Advocate, with Mr. Chirag Mody, Mr. Karthik Somasundram, Mr. Ashish Pyasi, Priti Deshpande, i/b Krishnamurthy & Co., for the Defendant No. 4.

CORAM: G.S. PATEL, J
DATED: 30th September 2014

PC:-

1. This is an action in copyright infringement. It has been moved in urgency. The Plaintiff claims to hold copyright in a 1983 film called *Mahaan*. The allegation in the plaint is that the 4th Defendant to whom certain rights were assigned in 1981 has illicitly

allowed the use of one of the songs from the film *Mahaan* in a *Tamanchey*, a new film to be released on 10th October 2014.

2. I have heard Dr. Tulzapurkar, learned Senior Counsel for the Plaintiffs, Mr. Dwarkadas, learned Senior Counsel for Defendant No. 4 and Mr. Kadam, learned Senior Counsel for Defendants Nos. 1 to 3 at some length today.

3. For the reasons that follow, I am not persuaded that this is a appropriate case for the grant of ad-interim reliefs sought. The reliefs sought are extensive. They extend to an injunction restraining the Defendants from using or incorporating any part of the song in question from the film *Mahaan* in *Tamanchey*; from releasing *Tamanchey* with this song; from exploiting the audio rights of the new film; and from posting the song on the internet.

4. These are the facts: *Mahaan* was a 1983 film produced by one M/s Satya Chitra International (“**Satya Chitra**”). By an agreement dated 22nd February 2007, Satya Chitra assigned in perpetuity all the negative rights and copyright in that film to M/s. S. S. Communications, a proprietary concern of one V. Ramakrishna. On 1st March 2007, V. Ramakrishna, as the proprietor of M/s. S. S. Communications, assigned all the negative rights and all copyright in *Mahaan* to the Plaintiff, and the Plaintiff thus became the sole and absolute owner of all copyright in that film.

5. Prior to these two agreements, on 24th March 1981, Satya Chitra, the original producer of *Mahaan*, executed an assignment deed in favour of the 4th Defendant. This assignment deed is at the

centre of controversy before me today. According to the Plaintiff, what was assigned was a very limited and restricted right, i.e., a right to make records from recordings. This is disputed by the Defendants, who claimed that what was assigned by the 1981 assignment deed was all rights in respect of the music and soundtrack of *Mahaan*, including the dialogue of the film.

6. According to the Plaintiff, some time in early August 2014 it learned that a portion of the lyrics of one particular song from the film *Mahaan*, namely, the song “*Pyar Mein Dil Pe Maar De Goli Le Le Meri Jaan*” along with its singularly striking or catchy tune were being used in a new film *Tamanchey* being produced by Defendants Nos. 1 to 3. Promos and trailers appeared in relation to this featuring the song. Websites contain trailers and also featured the song.

7. On 11th August 2014, the Plaintiff through its advocates sent a notice to the Defendants asserting its rights and copyright in the original song and saying that it had granted no rights to any person to utilise or any part of it. There was no reply from Defendants Nos. 1 to 3. A second notice followed on 10th September 2014. The producers were asked to refrain from using the song. They did not reply. The 4th Defendant replied saying that it had granted to the Defendants Nos. 1 to 3 a limited license to use that particular song. In its undated response following 10th September 2014, the 4th Defendant asserted that it had unrestricted and complete rights in the song, and, indeed in all songs from the film from the original producer and holder of copyright Satya Chitra. There followed

inspection and some exchange of documents. This suit was then filed on 26th September 2014.

8. I have, in this assessment, not addressed the question of delay on the part of the Plaintiffs, although both Mr. Dwarkadas and Mr. Kadam have made much of the fact that the Plaintiff knew of the new film in August and yet chose to wait till the eve of its release before moving. Indeed, Mr. Kadam points out that there is material to indicate that the Plaintiff knew of the new film as long ago as February or March 2014. I have assumed, for the purposes of this order, that there is no delay such as would, in itself, defeat the Plaintiff's application for ad-interim reliefs and proceeded on that basis.

9. Dr. Tulzapurkar refers to the agreement of assignment between Satya Chitra and the 4th Defendant. This is dated 24th March 1981, and is at Exhibit "C" to the plaint. The operative portion of this is Clause (2), which is set out below:

"2. The Producer hereby assigns and/or agrees to assign and transfer to the Company, absolutely, free from all encumbrance without any limitation for the entire world the copyright in so far as it extends to the exclusive right to **make records from recordings embodied in-**

- i) the cinematograph film[s] entitled, or identified as *Mahaan*
- ii) the original recordings of any music or musical, literary, dramatic and/or artistic work[s] which may have been recorded by, or for, the PRODUCER or the purpose of and/or with the intent of, incorporating the same in the

above cinematograph film[s] irrespective whether or not the same is are so incorporated in the final version[s] of the cinematograph[s].”

10. On this basis, the submission is that the only rights that the 4th Defendant acquired were the right to make records from the original recording, i.e., to reproduce the physical artefact on which the soundtrack and songs were first recorded.

11. The response from both Mr. Dwarkadas, learned Senior Counsel for the 4th Defendant, and Mr. Kadam, learned senior Counsel for Defendants Nos. 1 to 3, is that while the assignment is undoubtedly under Clause 2, the Plaintiffs have not referred in the plaint to Clause 5. This is material because it fully explains the ambit of what was assigned. That clause makes it clear beyond any doubt that all rights in the songs were assigned and were not restricted in the manner that Dr. Tulzapurkar suggests. Clause 5 reads thus:

“5. The copyright assigned and/or agreed to be assigned and transferred to the Company hereunder shall vest in the Company the exclusive rights which may be vested in the owner of copyright by virtue of and subject to the provisions of the Copyright Act, 1957, or the statutory modification thereof for the time being in force, as also those recognised by the relevant International Conventions and shall include, but not be limited to the exclusive right to do, or authorise the doing of, any of the following acts:

i) to make any other record embodying the same recording.

- ii) To reproduce any or all recording[s] covered by this Agreement on record together with any other work[s];
- iii) to cause or permit performance of the recording[s] embodied in the records in public, and/or to publish the musical, literary dramatic and/or artistic works(s) embodied in the recording[s];
- iv) to communicate the recording[s] embodied in the record by radio diffusion;
- v) to manufacture, market, sell lease, licence, distribute, advertise, promote or otherwise exploit in any manner in any fields of use, records produced hereunder, and allow others to do so, at such prices and upon such terms and conditions and under such trade mark[s] or label[s] or name[s], as the Company shall desire;
- vi) to control the physical property of the original recording[s].

Reference to the doing of any act referred to above, or to refraining therefrom, shall include a reference to the doing of or refraining from, the act in relation to either the whole or part of the recording[s]/record[s].

12. In addition, Mr. Kadam and Mr. Dwarkadas draw attention to the interpretation clause and in particular to the definitions of the words 'record', 'recording', 'performance' and 'original recording' as set out in the agreement. These are reproduced below:

"b. "record" includes any disc, tape perforated roll and all other devices (now or hereafter known) in which sounds and/or visual images are embodied for reproduction therefrom by any means whatsoever,

including, electrical, mechanical or magnetic means, or by devices commonly known as audiovisual devices (with the exception of cinematograph films of any gauge as used in movie theatres.

“recording” means the aggregate of the sounds and/or visual images embodied in and capable of being reproduced by means of a record;

“performance” includes any mode of presentation by the use of record and shall include such presentation by means of radio diffusion;

“original recording” shall include stereotype, tape, film, soundtrack, original plate, block, mould, matrix, transfer, negative or any other device used or intended to be used for making records.”

13. It is to be noted that this agreement was entered into at the time when the Copyright Act, 1957 was yet unamended. Mr. Kadam points out that under Section 2(d) of the unamended Act, the ‘author’ in relation to a record is the owner of the original plate from which the record is made. Dr. Tulzapurkar says that no ownership in the plate has passed to the 4th Defendant. All that the Defendants have under Clause 5(vi) is the right “*to control the physical property of the original recording*”. The expression “original recording” is also defined and it includes a plate. Dr. Tulzapurkar’s submission that the limited right granted to the 4th Defendant is, therefore, only to have unrestricted access to the plate for making further recordings is not one that lends itself to easy acceptance. Read as a whole it seems to me clear that in 1981, the 4th Defendant, a music publishing company, acquired comprehensive rights to copyright in the soundtrack of the film. This was divorced from the copyright in the film itself. The Plaintiff and its

predecessors in title continue to have the right to exhibit, distribute and make copies of the film along with the soundtrack since the cinema film embodies the sound recording. But the sound recording itself, separated from the film, was assigned to the 4th Defendant. The Plaintiff had no independent right to exploit the sound recording except in conjunction with the original film *Mahaan*, whereas the 4th Defendant was entitled to exploit the sound recording in any way.

14. In particular, both Mr. Kadam and Mr. Dwarkadas are at pains to emphasize Clause 5(ii), 5(iii) and 5(vi), as also the note below Clause 5(vi) of the agreement. Mr. Dwarkadas also points out that the definition of the words “record” and “recording” in the agreement are somewhat wider than the statutory definitions under the unamended Act. The contractual definitions also include visual images. Presumably this would also, therefore, include the right to reproduce the music along with the accompanying dance performances, if any, or other visual material attendant or corresponding to the song in question.

15. Dr. Tulzapurkar’s submission is that if this submission is to be accepted, then the owner of the copyright in the film is left with nothing at all. The entirety of the film then vests in the 4th Defendant. I do not believe this to be correct. It is true that Clause 2 uses the words “the exclusive right to make records from recordings” but that has to be read in conjunction with the provisions of Clause 2(ii) and Clause 5. Although Clause 5 cannot possibly expand the licence granted under Clause 2, it nonetheless clarifies what was intended to be granted. Clause 5 appears to me to

assign to the 4th Defendant the complete panoply of rights in the sound recording. This would include the right to permit performances of the recording. I would understand this reasonably to include the right in respect of the underlying work as well. I find it difficult to accept the proposition that the 4th Defendant's rights were limited to the physical artefact of the recording and to nothing else.

16. Dr. Tulzapurkar points to Section 14 of the Copyright Act to say that a sound recording is a distinct work from a cinematograph film and, therefore, it is entirely possible to grant such a limited right. This is also apparent from the definition of the expression 'work' which distinctly defines a 'record' and a 'cinematograph film'. However, I believe Clause 5 of the agreement is a sufficient indicator of what was intended to be assigned by the 1981 deed. It seems to me unlikely that any recording company would want to acquire such a restricted right of only making copies of an original recording and nothing further.

17. Mr. Kadam draws my attention to a decision of a learned Single Judge of this Court in *Rupalli P. Shah vs. Adani Wilmer Ltd. & ors.*¹ This was a case that was remarkably close on facts to the one at hand. Substantially similar arguments were taken before that Court as well. There, too, it was argued that there was no assignment of the sound recording rights and that the agreement in question in that case would not enable the 2nd Defendant to incorporate the song or any part into a distinct work or a film: precisely the case before me today. These arguments were rejected

¹ 2012 (52) PTC 305 (Bom), per S.C. Dharmadhikari, J.

by Mr. Justice S.C. Dharmadhikari stating that the agreement must be read as a whole. All clauses should be read in their entirety so as to best understand and appreciate the nature of the rights conferred. He held that the agreement correctly read did not merely refer to the act or process of making a record or a recording but to a work independently capable of being recognised for the purposes of copyright. It appears that in the agreement before the Court in that case there was a reference to the ownership of the original plate within the meaning of the Copyright Act, 1957. There is also such a reference in the agreement at hand. I do not understand how the 4th Defendant could “control the physical property” of the plate (comprised in the original recording) unless it had some sort of proprietary rights over it. The 4th Defendant clearly acquired rights of performance, publication, reproduction and so forth. These are rights of a very wide sweep that include the right to communicate the recording or any part thereof to the public. How that communication is to be achieved is a matter left to the 4th Defendant. The agreement does not of and by itself curtail or restrict the manner of that communication. I think it would be entirely unreasonable to say that the right to communication is limited to the physical act of making further physical copies of the song.

18. Dr. Tulzapurkar’s argument, however, is that the right is restricted to communicating the recording. By this, he means by communicating the song itself or a part of that song but not the right to incorporate any part of that song in a wholly new work. This was exactly the case before the Mr. Justice S.C. Dharmadhikari and this argument was negatived. I am in respectful

agreement of that decision; indeed I am bound by it. Indeed, clause 5(iii) may well provide the clue in saying that the rights granted to the 4th Defendant include the right to publish the musical work embodied in the recording. This can only mean that the recording is merely the repository or container of the musical work, and the right granted is not relatable only to that physical medium or repository, but to the musical work itself. Similarly clause 2(ii) extends to the recordings of the musical work, and the license granted to the 4th Defendant is plenary. Now if the 4th Defendant allows a portion of one song in which it has these rights to be incorporated in a new film, it would, I believe be within its rights to do so. The alternative submission of Dr. Tulzapurkar, viz., that the 4th Defendant's rights are restricted to something more mundane and mechanical, i.e., to only making other physical recordings of the parent physical recording, seems to me to be the most unlikely sort of license that a music publishing company would want to take.

19. For all these reasons, ad-interim reliefs are refused.

20. Affidavit in reply to be filed and served on or before 31st October 2014. Affidavit in rejoinder, if any, to be filed and served on or before 24th November 2014.

21. List the notice of motion for hearing and final disposal in the week commencing from 24th November 2014.

(G. S. PATEL, J.)