

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

IN ITS COMMERCIAL DIVISION

**NOTICE OF MOTION (L) NO.515 OF 2017
IN
COMMERCIAL SUIT (L) NO.459 OF 2017**

Trimurti Films Pvt. Ltd.)....Applicant

IN THE MATTER BETWEEN :

Trimurti Films Pvt. Ltd.)....Plaintiff

V/s.

Super Cassettes Industries Pvt. Ltd. & Ors.)....Defendants

Mr.Virag Tulzapurkar, senior Advocate a/w Mr.Adeesh Nargolkar, Mr.Nishad Nadkarni, Mr.Amey Nargolkar and Mr.Vaibhav Keni i/by Khaitan & Co. for plaintiff/applicant.

Dr.Abhinav Chandrachud a/w Mr.Ameet Naik, Mr.Madhu Gadodia and Mr.Ravi Suryawanshi i/by Naik Naik & Co. for defendant nos.1 to 5.

CORAM : K.R.SHRIRAM,J

DATE : 22.8.2017

P.C.:-

1 Plaintiff had produced and released a film by name "Deewar" way back in the year 1975. The film was super hit in those days. Plaintiff had engaged the services of well known composer late Mr.R.D.Burman for the purposes of composing the underlying musical works/tunes for the songs/sound recordings of the film "Deewar" which included the song titled "Keh Doon Tumhe".

2 All the copy rights for the entire World for the music, tunes for all songs composed for the film Deewar including the song “Keh Doon Tumhe” vested with and came to be owned by plaintiff pursuant to the contract of service dated 3.4.1974 between plaintiff and late Mr.R.D.Burman.

3 Plaintiff had also engaged the services of a well known lyricist Sahir Ludhianvi for the purposes of composing the underlying lyrics for the songs/sound recordings of the film Deewar which included the song titled “Keh Doon Tumhe”. All copyrights of Lyrics of all songs of the film Deewar including the song “Keh Doon Tumhe” came to be owned and vested in the plaintiff pursuant to a contract of service dated 3.4.1974 executed between the plaintiff and Mr.Sahir Ludhianvi.

Thus plaintiffs became the owner of the copy rights of the underlying lyrics and musical work i.e., the tune of the song “Keh Doon Tumhe” and is alone entitled to exploit the same or authorize the exploitation of the same in any manner. This was not disputed by defendants' counsel.

4 On 2.1.1974, plaintiff had entered into an agreement with Polydor of India Limited (now called Universal Music India Pvt. Ltd.) and hereinafter referred to as Polydor or Universal both being the

same, whereby, it is the case of plaintiff, that they granted to Polydor the right to make and sell gramophone records of the songs of the film Deewar and the mechanical reproduction rights for the limited purpose of making and selling gramophone records. According to plaintiff the right to use the sound recordings or the underlying works including lyrics and the tune for any other purpose whatsoever continue to vests with plaintiff.

5 Plaintiff state that in `Mumbai Mirror' edition of 7.8.2017 there was an article in which it was reported that defendants/actors are reviving yesteryear hit "Keh Doon Tumhe" in the film "Baadshaho" being made by defendants. Hence Plaintiff has approached this Court for an injunction restraining the defendants from releasing the film "Baadshaho" with the infringing song, "Keh Doon Tumhe".

6 It should be noted that the original song "Keh Doon Tumhe" from film Deewar and the song from "Baadshaho" was played in the Court and both sounded similar and the lyrics was also the same. Counsel for defendants did not dispute the fact that the song "Keh Doon Tumhe" from the film Baadshaho is the same song as it was in the film Deewar but said it was with slight modification. Counsel for defendants also did not dispute the fact that plaintiff was

the owner of the copy right of the song "Keh Doon Tumhe" in all respects i.e., lyrics and background score but according to defendants' counsel those rights were sold to Polydor as per the agreement dated 2.1.1974, copy whereof was annexed to the plaint and defendants procured the rights to use sound recordings to the film 'Baadshaho' from Universal. I must note copy of the stated agreement between Universal and defendants was not produced.

7 The short point therefore to be considered is what was the right that plaintiff sold to Universal.

8 It is the case of defendants that pursuant to the said agreement dated 2.1.1974 Universal became owners of the original plate under Copy Right Act 1957 (pre 1994 amendment), and as mentioned in clause-8 of the said agreement, Universal was entitled to sole right of production, reproduction, sale, use and performance (including broad casting) throughout the World by any and every means whatsoever of the records of the works performed by the artists and musicians etc. under the agreement and Universal has the absolute discretion to authorize any other person, firm or Corporations in any part of the World to manufacture, sell and/or catalogue records of all or any of the titles recorded or re-recorded. According to counsel when the plaintiff has sold the sound recording

rights to Universal, Universal had the right to sell to defendants. Counsel also submitted that sale of copy right in sound recording would cover the copy right to the lyrics and song as well.

9 Under Section 13 (1) of the Copy Right Act 1957 (the Act) copy right shall subsist in (a) original literary, dramatic, musical and artistic work ; (b) in cinematograph films ; and (c) in sound recording. The lyrics of the song and the music work/tunes would be covered under Section 13(1)(a) (literary and musical) and sound recording is separate under section 13(1)(c). Therefore, two separate and distinct sets of copy right can subsist. This is also confirmed by Section 13(4) of the Act. Sub-section 4 of Section 13 provides that copy right in sound recordings shall not affect the separate copy right in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recordings is made. Therefore, it is clear that separate copy rights exist for sound recordings and also for literary and musical work. If we have to accept what counsel for defendants submitted that sound recordings would include literary and musical work, i.e., lyrics and music, then section 13(1)(a) would appear to be redundant. At the same time, counsel for defendants also accepted that the original literary rights and musical rights remain with the plaintiff because according to the counsel if defendants had published a book using the lyrics of the

song “Keh Doon Tumhe” that would amount to infringement or if the song is sung in a different tune, that would amount to infringement. But in this case as sound recording rights were given to Universal with freedom to do what they pleased, using of the song “Keh Doon Tumhe” in defendants' film `Baadshaho' would not amount to infringement.

10 A lot of time was spent on going through the various provisions of the Act, but in my view, what we have to see is only section 13 of the Act and the agreement dated 2.1.1974 between plaintiff and Universal to ascertain what was transferred to Universal.

11 Having heard the counsel and having gone through the agreement dated 2.1.1974, in my view, what has been sold to Universal by plaintiff can be found from the recitals itself of the agreement which read as under :- (In the agreement `Company' means Polydor and `Client' means plaintiff)

“WHEREAS the Company for the purpose of manufacturing and selling gramophone records, is interested to record with the clients, artists work from the clients' motion pictures and/or to exploit the sound-tracks of some of these motion pictures”
(emphasis supplied)

Clause 2 of the said agreement reads as under :-

“The Clients shall during the period of five year(s) computed from the 2nd January, 1974 supply only and exclusively to the company at their own expense with artists and musicians etc., to perform musical and/or other works from their films for the purpose of making gramophone records, and the artists and musicians etc.,

shall attend at the Company's studio or such other place as may be appointed by the Company and shall at such place and time record at Clients' costs such works as the Company shall select, in which the Mechanical Reproduction Rights, including the right to make gramophone records, belong to the Clients, for the release of records under POLYDOR or any other label and mark as the Company shall determine. (emphasis supplied)

Even clause 4 of the agreement provides “ the company shall utilize such sound tracks or recorded tapes for the purpose of re-recording therefrom and the subsequent manufacture of gramophone records”

Clause-7 provides that plaintiff has transferred and assigned to Universal all recordings rights and all mechanical reproduction rights in all works to be recorded or re-recorded under the provisions of the said agreement.

Clause-8 provides that the company i.e., Universal shall be owner of the original plate within the meaning of the Copyright Act 1957. The definition of 'plate' as prevailing in 1974 under section 2(t) reads as under :-

“Plate” includes any stereotype or other plate, stone, block, mould, matrix, transfer, negative or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records for the acoustic presentation of the work are or are intended to be made”

Further under clause-8 it only permits Universal the sole right of production, reproduction, sale, use and performance (including broad-casting) throughout the world by any and every means whatsoever of the records of the works performed by the

artists and musicians under the said agreement. Universal was also entitled to authorize any one else to manufacture, sell and/or catalogue records of all or any of the titles recorded or re-recorded under the agreement.

12 Therefore, what has been sold are the rights in the song "Keh Doon Tumhe" only for the purpose of making and selling gramophone records with plaintiff's artistic work in the plaintiff's motion picture Deewar and to exploit sound track of Deewar. In addition Universal has also been given exclusive rights for mechanical reproduction including the right to make gramophone records, for the release of records. Universal has also been authorized to utilize such sound tracks for the purpose of re-recording and subsequent manufacture issue and sale of gramophone records as referred to in the agreement. It can at the most be termed as sound recording rights which is distinct from literary or musical rights. This by no stretch of imagination would permit Universal to allow the defendants to use the lyrics and musical or score or song in the film 'Baadshaho'.

13 This view of this Court is fortified by a letter dated 15.5.2008 from Universal to plaintiff in which 6th paragraph reads as under :-

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“You are entitled to use the lyrics of the song (partially or fully) and re-record the version of Deewar and Johny Mera Naam Films and you may use the same in your future production for which we shall neither have any objection nor we shall have any claim for the same.”

14 If we have to accept what defendants' counsel submitted that all rights in the song or sound track including literary and musical rights have been transferred or sold to Universal, then the question of Universal inserting above quoted para in its letter dated 15.5.2008 would not have arisen.

15 In the circumstances, I am satisfied that a strong prima facie case is made out by plaintiff for grant of injunction as prayed for. Following order is passed :-

ORDER

(a) Defendants are hereby restrained from releasing the film “Baadshaho” containing the song “Keh Doon Tumhe” as in Exhibit-H to the plaint and as described in paragraph-10 of the plaint. It is clarified that defendants may release the film “Baadshaho” by removing the infringing song from the film ;

(b) Defendants are also restrained by an injunction from selling or otherwise distributing copies of CDs, cassettes or any other media containing the infringing song “Keh Doon Tumhe” through any physical or non physical medium including without limitation in cinema halls, the internet, satellites, DVDs, blue ray discs, removable or embedded drives, ring tones, MP3, CDs, caller tunes or any soft/digital method of defraying the said infringing material

either on visual medium or an audio medium.

16 Defendants to file affidavit in reply within 3 weeks.
Rejoinder if any, to be filed within 2 weeks thereafter. Notice of
Motion made returnable after six weeks.

(K.R.SHRIRAM,J)

