

Delhi High Court

St Art India Foundation & Anr. vs Acko General Insurance on 10 November, 2023

\$~11

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10th November

+ CS(COMM) 822/2023, I.As. 22638/2023, 22639/2023, 22640/2023, 22641/2023, 22642/2023 & 22643/2023

ST+ART INDIA FOUNDATION & ANR.

..... PL

Through: Mr. Pravin Anand, Mr. Dhruv Anand, Ms. Udit Patro, Ms. Sampurnaa Sanyal and Ms. Nimr Singh, Advocates (M: 93133998)

versus

ACKO GENERAL INSURANCE

..... De

Through: Mr. Peeyoosh Kalra, Ms V. Mohin and Ms. Aarti Aggarwal, Advocates (M: 9818386010).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode. I.A. 22641/2023 (for exemption)

2. This is an application filed by the Plaintiffs seeking exemption from filing originals/certified/cleared/typed or translated copies of documents, left side margins, electronic documents, etc. Original documents shall be produced/filed at the time of Admission/Denial, if sought, strictly as per the provisions of the Commercial Courts Act, 2015 and the DHC (Original Side) Rules, 2018.

3. Exemption is allowed, subject to all just exceptions.

4. Accordingly, the application is disposed of. I.A. 22640/2023 (for additional documents)

5. This is an application filed by the Plaintiffs seeking leave to file additional documents under the Commercial Courts, Commercial Division Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 and Commercial Appellate Division of High Courts Act, 2015 (hereinafter, 'Commercial Courts Act'). The Plaintiffs, if it wishes to file additional documents at a later stage, shall do so strictly as per the provisions of the Commercial Courts Act and the DHC (Original Side) Rules, 2018.

6. The application is disposed of.

I.A. 22642/2023 (extension of time for filing Court fee)

7. The Court fee is stated to be deposited. Let the stamp be filed within one week.

8. Application is disposed of.

I.A.22643/2023 (u/S 12A of the Commercial Courts Act)

9. This is an application filed by the Plaintiffs seeking exemption from instituting pre-litigation mediation, under Section 12A of the Commercial Courts Act.

10. Considering the facts and circumstances of the case, the Court is satisfied that in terms of the judgment of the Supreme Court in Yamini Manohar v. T.K.D Keerthi, [2023 LiveLaw (SC) 906] the suit contemplates urgent interim relief. In these facts, the exemption under Section 12A Commercial Courts Act is granted to the Plaintiff.

11. Accordingly, the application is disposed of. CS(COMM) 822/2023

12. Let the plaint be registered as a suit.

13. Issue summons to the Defendant through all modes upon filing of the Process Fee. Summons are accepted by Ms. V. Mohini, ld. counsel for Defendant.

14. The summons to the Defendant shall indicate that the written statement(s) to the plaint shall be positively filed within 30 days from date Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 of receipt of summons. Along with the written statement(s), the Defendant shall also file an affidavit of admission/denial of the documents of the Plaintiffs, without which the written statement(s) shall not be taken on record.

15. Liberty is given to the Plaintiffs to file the replication(s) within 15 days of the receipt of the written statement(s). Along with the replication(s), if any, filed by the Plaintiffs, an affidavit of admission/denial of documents of the Defendant, be filed by the Plaintiffs, without which the replication(s) shall not be taken on record. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

16. List before the Joint Registrar for marking of exhibits on 12th January, 2024. It is made clear that any party unjustifiably denying documents would be liable to be burdened with costs.

17. List before Court on 2nd February, 2024.

I.A. 22638/2023 (u/O XXXIX Rules 1 & 2 CPC)

18. Issue notice. Ms. V. Mohini, ld. Counsel accepts notice for the Defendant -Acko General Insurance.

19. The Plaintiff No. 1- St+Art India Foundation, and Plaintiff No. 2- Paola Delfin Gaytan (hereinafter, 'the Plaintiffs'), have filed the present suit against the Defendant - Acko General Insurance objecting to the Defendant's use of one of the Plaintiffs' artistic works in its advertisements.

20. The Plaintiffs' case is that they are involved in urban regeneration by incorporating artistic works to make urban cities and spaces more interesting and artistic. The Plaintiffs claims their name 'St+Art' suggests that they play an instrumental role in embedding artistic elements in the streets of Indian Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 urban centres, especially, in metropolitan cities such as Delhi, Mumbai, Hyderabad, and Bengaluru.

21. It is averred that the Plaintiffs aim to make public spaces more vibrant and interactive. Some of the urban regeneration activities undertaken by the Plaintiffs includes projects like Lodhi Public Art District in Delhi, Swachh Bharat Mural, projects in Bengaluru, Delhi Urban Shelter Board Project etc. The Plaintiffs also claim to have created India's largest mural on the MTNL building in Mumbai, known as 'Dadasaheb Phalke', and Gandhi Ji's tallest mural on the Delhi Police Headquarters in New Delhi. Plaintiff No. 2, a Mexican painter and muralist, has been engaged in various artistic and social activities. As per the plaint, she claims to have drawn murals in Belgium, St. Petersburg, Florida, Finland, New Delhi and Chennai.

22. The subject matter of the present suit is a mural titled 'Humanity' (hereinafter, 'the artistic work' or 'mural') which is set out below :-

23. As per the plaint, the above artwork was created by Plaintiff No.2 in collaboration with the Plaintiff No.1, under an Artist Agreement dated 3rd October, 2022. Under the said Agreement, the Plaintiffs jointly own the Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 copyright and all related IP rights of the Works of Art (hereinafter, 'WOA') created during the projects taken up by the Plaintiffs. It is averred that the said Agreement includes the artwork titled 'Humanity', for which admittedly no rights have been licensed to any third parties. Furthermore, it is stated that the said Agreement also provides that Plaintiff No. 1 has the right to take actions to protect against any infringement of copyright subsisting in the works created, while Plaintiff No. 2 is obligated to render to assistance.

24. The Plaintiffs assert two main rights regarding the artwork titled 'Humanity'. Firstly, they claim copyright of the artistic work under Section 2(c)(i) and Section 13(1)(a) of the Copyright Act, 1957. Secondly, Plaintiff No. 2 asserts moral rights over the work, as recognised in Section 57 of the Copyright Act, 1957.

25. The Defendant-Acko General Insurance Limited is a subsidiary of Acko Technology and Services Private Limited, collectively referred to as the 'Acko Group'. Acko Group is an insurance technology start-up that develops and licenses technology products specifically for the insurance sector.

26. In the present suit, the Plaintiffs allege that the said artwork was created in collaboration with the Mumbai Port Authority vide Memorandum of Understanding dated 9th June 2022. The case of the Plaintiffs is that the Plaintiffs are the holder of the copyright in the said mural. As per the plaint sometime in February 2023, the Defendant had published a hoarding as part of its advertisement campaign 'Welcome Change', set out below:-

Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32

27. According to the Plaintiffs, the Defendant has reproduced the entire mural for commercial benefit. On 14th February 2023 and 3rd March 2023, the Plaintiffs issued a legal notice calling upon the Defendant to remove the said hoarding. Additionally, they called upon the Defendant to take down the related Instagram posts and other online media posts. Some of the Instagram posts and stories incorporating the Plaintiffs' mural are as follows:

Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32

28. The same was replied to by the Defendant vide letter dated 3rd April, 2023 claiming that the act of the Defendant is exempt from infringement in view of Section 52(i)(t) and 52(i)(u) of the Copyright Act, 1957. The relevant extract of the Defendant's reply is as follows:

"(i) Under Section 52(1)(t) of the Copyright Act, 1957 (hereinafter, the Act), publishing or making of a painting, drawing, engraving or photograph of a sculpture or other artistic work falling under the definition of artistic work under the Act (which includes paintings, sculptures, etc.) would not amount to infringement of copyright if such work is permanently situated in a public place or any premises to which the public has access. In addition, it may interest you to know that Section 52(1)(u) of the Act provides that inclusion in a cinematograph film of (a) any artistic work permanently situated in a public place or any premises to which the public access; or (b) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 principal matters represented in the film, would not constitute infringement of copyright.

(ii) The artistic work referred to by you in your Notice is a mural titled 'Humanity' which is painted on a public building situated in a public place i.e. the Sassoon Docks in Mumbai. Therefore, the use of the same in a photograph or as part of our client's advertising campaign is fair use and would not amount to infringement of copyright because your client's artwork is permanently situated in a public place/premises to which the public has access. Thus, our client is well covered within the fair use exceptions provided under the Act."

29. Thereafter, the Plaintiffs issued a letter dated 13th April 2023, wherein it is contented that the said mural, despite being in a public space, is temporary and not permanently situated. As per the Plaintiffs, Section 52(1)(t) of the Copyright Act, 1957 is limited to works such as paintings, drawings, engravings, or photographs of sculptures or other artistic works under a different subclause. The mural in question is a painting, falling under a separate category, and thus, the provision under Section 52(1)(t) of the Copyright Act, 1957 does not apply. Additionally, in respect of Section 52(1)(u) of the Copyright Act, 1957, the Plaintiffs state that the said mural, although in a public space, is temporary and not permanently situated. Furthermore, it is argued that the incorporation of the said mural is not incidental or background in cinematographic works, but is the principal subject of the Defendant's advertisements, rendering other elements incidental.

30. Therefore, Mr. Dhruv Anand, Id. Counsel for the Plaintiffs submits that the advertisement/hoarding and the Instagram page leave no doubt that the entire purpose was commercial in nature. In fact, he submits that Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 'Welcome Change' is a tagline used by the Defendant to promote its own business, rather than a social impact movement or activity initiated by the Defendant.

31. He relies on a press article on 26th September, 2022, titled 'Acko brings alive its latest 'Welcome Change' brand proposition through three ad films' which states that advertisement and the accompanying content were created by Leo Burnett Orchard, the advertising agency. The press article also stated that the 'Welcome Change' is intended to portray the Defendant's business as different from the traditional insurance space. Id. Counsel further submits that the Defendant continues to retain the said advertisement on online platforms.

32. Mr. Kalra, Id. Counsel appearing for the Defendant submits that the above notices issued by the Plaintiffs had led to a resolution of dispute, after which the Defendant did not expect any further litigation in this matter. He further submits that the hoarding itself had been removed.

33. Heard. A perusal of the hoarding incorporating the said mural would reveal that it is clearly an advertisement. The Defendant has confirmed its removal, but it still continues to remain on online platforms. At this juncture, Id. Counsel for the Defendant submits that his client is willing to take down any related social media listings, including on Instagram, Facebook etc.

34. The primary question raised in this suit concerns whether the Defendant's conduct would constitute fair dealing or not under the provisions of the Copyright Act, 1957. The said issue would have to be adjudicated. There is no doubt in the present case that the advertisement of the Defendant reproduced the mural. There could not have been a presumption that the same was a public domain work that could be used in Signature Not Verified Digitally Signed Signing Date:16.11.2023 15:58:32 the manner as the Defendant has done. The same is not for a mere public messaging but for an advertisement - albeit, with a social cause. The use being for a commercial purpose by the Defendant, the question whether the same qualifies as fair dealing or fair use, would require to be examined.

35. However, in the interim, since the Defendant has agreed to take down the Instagram posts and any other online postings of the above mural, accordingly, it is directed that the Defendant shall take down the said listings within 72 hours. Specific URLs displaying the said mural on the Defendant's posts, if any, may also be communicated to the Defendant by the Plaintiffs. The above order shall be without prejudice to the rights and contentions of both parties.

36. It is made clear that the Court has not made an opinion on the legal issues that have arisen in this case. The present order is being passed at the ad-interim stage considering the submissions made on behalf of the Defendant.

37. List before the Court on 2nd February, 2024.

PRATHIBA M. SINGH JUDGE NOVEMBER 10, 2023 mr/dn Signature Not Verified Digitally
Signed Signing Date:16.11.2023 15:58:32