

Novex Communication Pvt. Ltd. vs Lemon Tree Hotels Ltd. & Anr. on 11 January, 2019

Equivalent citations: AIRONLINE 2019 DEL 96

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Bench: Valmiki J. Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ RFA No. 18/2019 & CM Nos. 786-789/2019
% 11th January, 2019

NOVEX COMMUNICATION PVT. LTD. Appellant
Through: Mr. Chander M. Lall, Sr. Adv.
with Mr. Jasdeep Singh
Dhillon, Mr. Rupin Bahl, Mr.
Rajpal Singh and Ms. Priti
Naik, Advocates (9650414406)
versus

LEMON TREE HOTELS LTD. & ANR. Respondents
Through: Mr. R.K. Aggarwal and Ms.
Disha Gulati, Advocates
(9899488890)

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? YES

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 07.08.2018 by which the trial court has decided the preliminary issue as regards the maintainability of the suit partially in favour of the appellant/plaintiff and partially against the appellant/plaintiff. The trial court has partially rejected the entitlement of the appellant/plaintiff to sue for the infringement of copyright by referring to Section 33 of the Copyright Act, 1957 (hereinafter „The Act), but the trial court has allowed the appellant/plaintiff to sue for infringement of the copyright as an agent of only one party, being the defendant no. 2 in the suit, namely Yash Raj Films Private Limited. The trial court has held that the appellant/plaintiff cannot sue for infringement of copyright, although the appellant/plaintiff is the assignee and owner of the sound recordings in terms of the Assignment Deeds executed by Zee Entertainment Enterprises Ltd. (hereinafter „Zee), Eros International

Media Limited (hereinafter „Eros) and Shemaroo Entertainment Limited (hereinafter "Shemaroo"), because as per Section 33(1) of the Act only a copyright society is to legally license copyright works of sound recordings and it is this finding of the trial court that is impugned in the present appeal.

2. I may note that the impugned judgment decides the legal issue as a preliminary issue i.e. the impugned judgment is not passed at the stage of final arguments after trial, and this is because the limited issue is a legal issue as to whether or not the suit pleading infringement of copyright and seeking damages filed by the appellant/plaintiff is or is not barred by law as per the provisions of the Act, especially Section 33(1).

3. As per the plaint, the appellant/plaintiff pleads to be the owner of the copyright work in the sound recordings on account of Assignment Deeds executed in favour of the appellant/plaintiff by Zee on 11.08.2015, by Eros on 09.01.2017 and by Shemaroo on 09.03.2017. The appellant/plaintiff further pleads in the plaint that without obtaining any licenses, the respondent no.1/defendant no.1 was using the sound recordings/copyright works, and therefore, the respondent no.1/defendant no.1 is liable/injuncted from using the copyright work without obtaining any licenses from the appellant/plaintiff. The appellant/plaintiff has also claimed damages of Rs. 5,00,000/- on account of infringement by the respondent no. 1/defendant no. 1 of the copyright works in the sound recordings owned by the appellant/plaintiff, and on account of the respondent no.1/defendant no.1 using the same without obtaining any licenses from the appellant/plaintiff.

4. The issue which is argued before this Court, and was also argued before the trial court, is as to whether the provisions of Sections 33 to 35 only entitle a copyright society to collect the license fee, and the appellant/plaintiff not being a copyright society hence cannot file the present suit alleging infringement of copyright because the appellant/plaintiff is not entitled to collect the license fee. The case of the respondent no.1/defendant no.1 is that only a copyright society, registered under the provision of Section 33 of the Act, is one which is entitled to grant licenses and collect license fee/royalty with respect to the copyright works which are the subject matter of the Act, and since the appellant/plaintiff is not a registered society, hence, it cannot claim license/royalty, and therefore, it also cannot sue for infringement of the copyrights and claim damages because the causes of action of injunction against infringement of copyright with the claim of damages is predicated on the aspect that the respondent no.1/defendant no.1 must make payment of license fee/royalty to the appellant/plaintiff which is not a registered copyright society under Section 33 of the Act.

5. In order to appreciate the controversy at hand, various provisions of the Act are to be referred to, and these provisions are as under:-

"Section 2

2. Interpretation.-- In this Act, unless the context otherwise requires,--

(c) "artistic work" means,--

(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(ii) a work of architecture; and

(iii) any other work of artistic craftsmanship;

(d) "author" means, --

(i) in relation to a literary or dramatic work, the author of the work;

(ii) in relation to a musical work, the composer;

(iii) in relation to an artistic work other than a photograph, the artist;

(iv) in relation to a photograph, the person taking the photograph;

(v) in relation to a cinematograph film or sound recording, the producer; and

(vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

(dd) "broadcast" means communication to the public--

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast;

(f) "cinematograph film" means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films; (ff) "communication to the public" means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation.-- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;

(ffd) "copyright society" means a society registered under sub-section (3) of Section 33;

(h) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film;

(m) "infringing copy" means,--

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(ii) in relation to a cinematographic film, a copy of the film made on any medium by any means;

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act;

(o) "literary work" includes computer programmes, tables and compilations including computer databases;

(p) "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music;

(q) "performance", in relation to performer's right, means any visual or acoustic presentation made live by one or more performers; (xx) "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced; (y) "work" means any of the following works, namely:--

(i) a literary, dramatic, musical or artistic work;

(ii) a cinematograph film;

(iii) a sound recording;

Section 13

13. Works in which copyright subsists.-- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,--

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording.

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,--

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than a work of architecture, the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case of work of architecture the work is located in India. Explanation.-- In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist--

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any sound recording made in respect of a literary, dramatic or musical work, if in making the [sound recording], copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording 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 sound recording is made.

(5) In the case of work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

Section 17

17. First owner of copyright.-- Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that--

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical

under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;

(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(cc) in the case of any address or speech delivered in public, the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of any other person, such other person shall be the first owner of the copyright therein notwithstanding that the person who delivers such address or speech, or, as the case may be, the person on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf or premises such address or speech is delivered;

(d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(dd) in the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Explanation.-- For the purposes of this clause and section 28A, "public undertaking" means--

- (i) an undertaking owned or controlled by Government; or
- (ii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or
- (iii) a body corporate established by or under any Central, Provincial or State Act;

(e) in the case of a work to which the provisions of section 41 apply, the international organization concerned shall be the first owner of the copyright therein:

Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and(c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.

Section 18

18. Assignment of copyright.-- (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence:

Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

Section 30

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 licence 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.

Section 33

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 licence 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.

(2) Any association of persons who fulfils such conditions as may be prescribed may apply for permission to do the business specified in sub-section (1) to the Registrar of Copyrights who shall submit the application to the Central Government.

(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.

(3A) The registration granted to a copyright society under sub-section (3) shall be for a period of five years and may be renewed from time to time before the end of every five years on a request in the prescribed form and the Central Government may renew the registration after considering the report of Registrar of Copyrights on the working of the copyright society under section 36:

Provided that the renewal of the registration of a copyright society shall be subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty:

Provided further that every copyright society already registered before the coming into force of the Copyright (Amendment) Act, 2012 shall get itself registered under this Chapter within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012.

(4) The Central Government may, if it is satisfied that a copyright society is being managed in a manner detrimental to the interests of the authors and other owners of right concerned, cancel the registration of such society after such inquiry as may be prescribed.

(5) If the Central Government is of the opinion that in the interest of the authors and other owners of right concerned, or for non-

compliance of sections 33A, sub-section (3) of section 35 and section 36 or any change carried out in the instrument by which the copyright society is established or incorporated and registered by the Central Government without prior notice to it, it is necessary so to do, it may, by order suspend the registration of such society pending inquiry for such period not exceeding one year as may be specified in such order under sub-section (4) and that Government shall appoint an administrator to discharge the functions of the copyright society. Section 33A 33A. Tariff Scheme by copyright societies.-- (1) Every copyright society shall publish its Tariff Scheme in such manner as may be prescribed.

(2) Any person who is aggrieved by the tariff scheme may appeal to the Appellate Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein:

Provided that the aggrieved person shall pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Appellate Board and shall continue to pay such fee until the appeal is decided, and the Board shall not

issue any order staying the collection of such fee pending disposal of the appeal:

Provided further that the Appellate Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal.

Section 34

34. Administration of rights of owner by copyright society.-- (1) Subject to such conditions as may be prescribed,--

(a) a copyright society may accept from an author and other owners of right exclusive authorisation to administer any right in any work by issue of licences or collection of licence fees or both; and

(b) an author and other owners of right shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society under any contract.

(2) It shall be competent for a copyright society to enter into agreement with any foreign society or organisation administering rights corresponding to rights under this Act, to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organisation:

Provided that no such society or organisation shall permit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works.

(3) Subject to such conditions as may be prescribed, a copyright society may--

(i) issue licences under section 30 in respect of any rights under this Act;

(ii) collect fees in pursuance of such licences;

(iii) distribute such fees among author and other owners of right after making deductions for its own expenses;

(iv) perform any other functions consistent with the provisions of section 35.

Section 35

35. Control over the copyright society by the 2 author and other owners of right.-- (1) Every copyright society shall be subject to the collective control of the author and other owners of right under this Act whose rights it administers (not being author and other owners of right under this Act administered by a foreign society or organisation referred to in sub-section (2) of section 34)

and shall, in such manner as may be prescribed,--

(a) obtain the approval of such author and other owners of right for its procedures of collection and distribution of fees;

(b) obtain their approval for the utilisation of any amounts collected as fees for any purpose other than distribution to the author and other owners of right; and

(c) provide to such owners regular, full and detailed information concerning all its activities, in relation to the administration of their rights.

(2) All fees distributed among the author and other owners of right] shall, as far as may be, be distributed in proportion to the actual use of their works.

(3) Every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of the administration of the society as may be specified. (4) All members of copyrights society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of right in the distribution of royalties. Section 37

37. Broadcast reproduction right.-- (1) Every broadcasting organisation shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts. (2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,--

(a) re-broadcast the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges;

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

(e) sells or gives on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to in clause (c) or clause (d).

shall, subject to the provision of section 39, be deemed to have infringed the broadcast reproduction right.

Section 38

38. Performer's right.-- (1) Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance. (2) The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made.

Section 51

51. When copyright infringed.-- Copyright in a work shall be deemed to be infringed--

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act--

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person--

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports 2 into India, any infringing copies of the work:

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.-- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy". Section 55

55. Civil remedies for infringement of copyright.-- (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by

this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, or, subject to the provisions of sub-section (3) of section 13, a cinematograph film or sound recording, a name purporting to be that of the author, or the publisher, as the case may be, of that work, appears on copies of the work as published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the court."

6. Various Sub-Sections of Section 2 of the Act define the four basic works which are the subject matter of copyright under the Act, being a literary work, dramatic work, musical work and artistic work. Besides these four basic works, copyright also exists in a sound recording and a cinematograph film, and the same is provided in Section 2(y) of the Act. Besides the aforesaid six copyright works, there exist copyright with respect to the rights of broadcasting and performers' rights which are the subject matter of Chapter VIII of the Act.

7. It is the author of the work who is the first owner of the copyright as per Section 17 of the Act. Who is an author is defined in Section 2(d) of the Act. It may be noted that though a person may be a creator of the work, if the person is creating a work on account of payment made to him by another person, then though the author creates the work, since the work is created on account of payment made by third person, in that case, it is the person who makes payment who would become the first owner of the copyright vide Section 17 of the Act. The first owner of a copyright may transfer whole or part of the rights in the copyright work to another person, and this is known as assignment. The issue of assignment is the subject matter of Section 18 of the Act. Sub-Section 2 of Section 18 of the Act makes it clear that an assignee of the copyright work becomes the owner of the copyright. Section 19 of the Act defines the mode in which the assignment of the copyright works is required to take place. Section 30 of the Act deals with grant of licenses. A license is granted by the original owner of the copyright or by the assignee of the copyright. A licensee is not equal to the owner of the copyright. A licensee only has the right to use the copyright work as a licensee or if the license agreement so provides then to further license the work ahead including if the statutory licensee is a copyright society as per Section 33 of the Act.

8(i). Section 33 of the Act deals with the existence of a copyright society, the registration thereof, rights of such a copyright society, the requirements it should fulfill for registration etc.. 8(ii)(a). Sub-Section 1 of Section 33 of the Act starts with a non-obstante clause and states that after coming into force of the copyright (Amendment) Act 1994, no person or association can commence or carry on business of issuing or granting licenses in respect of the copyright works or other rights conferred by this Act upon the copyright society, except under, or in accordance with the registration granted under Sub-Section 3 of Section 33. In effect, therefore, Sub-Section 1 states that no person or association is entitled to grant license unless such a person is a registered copyright society under Section 33 of the Act.

8(ii)(b). The first Proviso to Section 33(1) of the Act, however clarifies and makes it clear that an owner of a copyright in his individual capacity will continue to have the right to grant licenses in respect of his own works i.e. works owned by the individual person, subject to and consistent with the obligation of such an owner as a member of the copyright society.

8(iii). In my opinion, the latter part of the first Proviso to Section 33(1) of the Act whereby it is stated that the owner has an entitlement to grant a license consistent with his obligation as member of the registered copyright society, this can only mean that if the owner of the copyright work has granted exclusive license to the copyright society to grant further licenses, then in such a case, the owner of the copyright could/can take away from himself the right of granting licenses i.e. thereby not being able to grant any license with respect to copyright work which is owned by the individual owner on such a right being granted exclusively to the copyright society. In other words, if an individual owner gives such a right to the copyright society that the individual owner though the owner of the copyright, he will not license the copyright works owned by him except to the copyright society, only in such a case would the individual owner of the copyright work not have a right to grant further license, but if the owner of the copyright work has retained with himself the right to give license, although the license is also granted to the copyright society, then such an individual owner despite having granted license to the copyright society can further keep granting licenses with respect to the copyright works owned by the individual owner.

8(iv)(a). The second Proviso to Section 33(1) provides that with respect to a literary work, dramatic work, musical work or artistic work, as embedded in a cinematographic work or sound recording, with respect to such basic works being a literary work, dramatic work, musical work or artistic work, the business of issuing or granting of license would vest only with a copyright society. As already stated above, it is noted that there exists an independent copyright in a cinematographic work or sound recording independent of a literary work and/or dramatic work and/or musical work and/or artistic work. The literary work or dramatic work or musical work or artistic work incorporated and embedded in a cinematograph film results in a copyright work, being a cinematograph film as a whole, yet the fact that the cinematograph film contains the basic copyright works, there will continue to exist such independent copyright that will not destroy the copyright in the literary work and/or dramatic work, and/or artistic work which is used to make the cinematograph film. This interpretation applies mutatis mutandis to the sound recording because a sound recording will, besides having an independent copyright, embody in its copyright, literary work and musical work. 8(iv)(b). At this stage, I may also clarify that there is a difference between a musical work and a

sound recording. Musical work does not mean music, as is known to a layman, because to a layman, music means hearing music. A musical work, under the Act, has nothing to do with sound or hearing, and a musical work is nothing else but the musical notes and notations which represent a particular sound and not the sound itself. It is when the musical notes are played on an instrument by a person or on instruments by an orchestra or a literary work is sung by a person, the same then results in a sound and this sound when recorded results in a sound recording which is a copyright work in itself, separate from the copyright in a musical work. To put it in an over simplistic fashion, musical work are the alphabets/words/sentences of the musical world or the sound recording world and it is such alphabets/words/sentences of a musical work which result in a sound recording when such musical work is played by a musician or orchestra or sung by a singer etc. 8(iv)(c). In my opinion, when the second Proviso to Section 33(1) talks of issuing or granting of license with respect to the musical work in sound recordings, it is only for the musical work in the sound recording and not the sound recording itself. To clarify further, there are two expressions used in the second Proviso to Section 33(1) of the Act, first being a cinematograph film and the second being a sound recording. Both these words are for the earlier copyright works existing and stated in the second Proviso being the literary work, dramatic work, musical work or artistic work. In a cinematographic work, all four works being literary work and/or dramatic work and/or musical work and/or artistic work are included, whereas, in a sound recording, only musical or literary work are included. Therefore, it is not as if that the second Proviso to Section 33(1) says that so far as sound recording is concerned, the same cannot be licensed except by a copyright society. Obviously, if this interpretation is given, the same will nullify or render otiose the first Proviso to Section 33(1).

9. Sub-Sections 2, 3, 3A, 4 and 5 of Section 33 of the Act deal with the registration of the copyright societies and the control of the Central Government on such societies including a provision for the parameters for registration and cancellation of registration of the society. These sub-sections do not in any manner pertain to issuing of licenses by the copyright society.

10. Section 33A of the Act provides for laying down of a tariff scheme by a copyright society, and a person who is desirous of taking license is liable to pay as per the tariff scheme of the copyright society.

11. Section 34 provides for the administration of the rights of the owner by copyright society, and it is relevant to note in this regard that in Sub-Section(1)(a) there is an expression "exclusive authorisation" and this expression shows that there need not be exclusive authorisation given by the owner of the copyright to give further licenses to the copyright society. This is in fact in furtherance of the first Proviso to Section 33(1) of the Act, and as already discussed above, that an owner of a copyright can/may continue to retain the right to give further licenses although he may also have given a right to give out licenses to a copyright society.

12. I need not burden this judgment with respect to the copyrights pertaining to the rights of a broadcasting organisation and performers, inasmuch as such rights are not the issue in this case and in this case, we are only concerned with the copyright in a sound recording, however, a reference has been made to such rights in the earlier part of this judgment because these works are also copyright works being the subject matter of the Act.

13. Section 51 of the Act prescribes as to when a copyright is infringed. Obviously, the use of a copyright work, without a license or without the permission of the owner of the copyright or any other person who is entitled to give such license or permission, would be infringement of the copyright.

14(i). Section 55 of the Act is very relevant for the purpose of the present judgment and discussion because Section 55 of the Act provides that only an owner of a copyright can institute a suit or legal proceedings with respect to the infringement of a copyright. It is required to be noted that there is no provision in the Act, which entitles a copyright society to sue for infringement of the copyright. Thus, only an owner of a copyright can sue for infringement of the copyright, and the same is a separate issue than the issue of grant of licenses whether by a copyright society exclusively or by the copyright society alongwith the owner of the copyright in terms of the first proviso to Section 33(1) of the Act.

14(ii). At this stage, it is also relevant to note that it is an undisputed position emerging in the facts of this case that so far as the copyright works of which the appellant/plaintiff is the owner, no copyright society has been constituted till date. In fact, it is also relevant to note that before the amendment to the Act by the amending Act of 2012, the right to license the sound recordings were with a society called the Phonographic Performers Limited, but even this society does not exist as of today. I am stating this aforesaid aspect because the law does not envisage a vacuum. It cannot be the legal position that although no copyright society exists, an owner of a copyright can only frustratingly keep on observing infringement of his copyright by an infringer simply and only because there does not exist a copyright society. It is in light of this situation that the provision of Section 54 of the Act has to be read, which entitles and protects the rights of a copyright owner to sue for infringement coupled with the fact that even if a copyright society is made, then the first Proviso to Section 33(1) entitles an owner of a copyright, in terms of the rights, if retained by him, to continue to give licenses for his own copyright works.

15(i). Ld. counsel for the respondent no.1/defendant no.1 has very vehemently argued that the entire scheme which is brought about by the Amendment Act 2012 to the Act is to create a situation whereby no exploitation takes place of the licensee of the copyright works for taking licenses and the payment of use of copyright works is on the payment of a reasonable tariff, and therefore, it is argued by the respondent no.1/defendant no.1 that the provisions of Sections 33 to 35 of the Act should be so read that no one except a copyright society can collect license fee or royalty for the copyright works, and that once only a copyright society can license copyright works and collect license fee/royalty for the licensed copyright works, then such a person such as the appellant/plaintiff who is not a copyright society, cannot claim payment of license fee or royalty and sue for the infringement of the copyright with the further claim of damages for such infringement. It is also argued on behalf of the respondent no.1/defendant no.1, by placing reliance upon the Judgment dated 12.10.2017 passed by a Id. Single Judge of this Court in W.P.(C) 12076/2016 that in this judgment, the present plaintiff has been held disentitled to collect the license fee/royalty, and once that is so, the Judgment dated 12.10.2017 will bar the present suit from being filed by the appellant/plaintiff.

15(ii). In my opinion, these arguments urged on behalf of the respondent no.1/defendant no.1 have no merit. The arguments of the respondent no.1/defendant no.1, in my opinion, if accepted, will lead to various undesirable consequences. The first undesirable consequence is that if only a copyright society can collect the license fee/royalty, and if no such society exists, which is the admitted position on facts today, then it would mean that the infringers of copyrights will make merry and keep on violating the rights of the owners of the copyright works, simply on the ground that a copyright society does not exist and no other person or entity except a copyright society can collect license fee or royalty, and also therefore there cannot lie a suit for infringement of a copyright. The second undesirable consequence would be that there would result in a warped interpretation of the first Proviso to Section 33(1) and the expression "exclusive authorisation" in Section 34. When these aspects are read together, it is implicit that a copyright society need not legally be the only one exclusive authorized entity/person to give out licenses. 15(iii). While on this aspect, it would be relevant to take into account and note the newly added Sub-Sections 9 and 10 of Section 19, and these Sub-Sections for the first time give statutory protection and recognition to the original owners of the literary work, dramatic work, musical work and artistic work that if the copyright works as created by these owners are used otherwise than by means of a cinematograph film or sound recording, then for the use of such works except in a cinematograph film or sound recording, the authors of the works or the owners of the works will be entitled to an equal share of the royalty for such use of the literary work or dramatic work or musical work or artistic work. Therefore, in view of the adding of the provisions of Sub-Sections 9 and 10 of Section 19 of the Act, no longer there takes place any exploitation of the original author or owner of the four basic copyright works being the literary work, dramatic work, musical work or artistic work except to the extent and when these works are put and used in the form of cinematograph film and a sound recording. By the amendment of the Act in 2012, thus, sufficient and additional protection has been given to the owners/creators of the basic work being literary work, dramatic work, musical work or artistic work.

16. The judgment of the Id. Single Judge dated 12.10.2017 titled as M/s Event and Entertainment Management Association (EEMA) v. Union of India and Ors in W.P.(C) 12076/2016 does not in any manner apply to the facts of the present case because all that the said judgment held was that the present appellant/plaintiff was not a copyright society, the present appellant/plaintiff could not as a copyright society collect any license fee or royalty with respect to the copyright works. Paras 15 and 16 of this judgment, however, make it clear that the issue with respect to the infringement of copyright of an owner was not the subject matter of the Judgment dated 12.10.2017 and the only issue before the Court in W.P.(C) 12076/2016 was of the disentitlement of a person to collect royalty or license fee as a copyright society without such copyright society being duly registered under Section 33 of the Act. Also, it is relevant to note that the said judgment in no manner deals with first Proviso to Section 33 (1) of the Act read with the expression "exclusive authorisation" which is found in Section 34 of the Act, and these aspects have already been discussed above by this Court.

17. Finally, I would like to note that on behalf of the appellant/plaintiff it is conceded that so far as the defendant no. 2 in the suit namely, Yash Raj Films Private Limited, the respondent no. 2/defendant no.2 would be transposed as an additional plaintiff in the suit, and necessary authorisation either exists or will be taken for transposing Yash Raj Films Private Limited as one of the plaintiffs in the suit.

18. In view of the above discussion, the impugned Judgment of the trial court dated 07.08.2018 is set aside, and it is held that the appellant's/plaintiff's suit seeking the relief of injunction and damages alleging infringement of copyright was maintainable against the respondent no.1/defendant no.1 and for the respondent no.1/defendant no.1 to not use the copyright works unless the license is obtained by the respondent no.1/defendant no.1 from the appellant/plaintiff.

19. So that there is no misunderstanding with respect to the aspects decided and the interpretation given to the provisions of the Act in this judgment, it is observed that what is dealt with and decided in this case is only in the context of the copyright in a sound recording, and of this copyright work the appellant/plaintiff claims to be the owner.

20. The appeal is accordingly allowed and disposed of in terms of the aforesaid observations. All Pending Applications, if any, are also disposed of.

JANUARY 11, 2019/ib

VALMIKI J. MEHTA, J