

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

APPEAL (LODG) NO. 626 OF 2014
IN
NOTICE OF MOTION NO. 2247 OF 2014
IN
SUIT NO. 934 OF 2014

Shemaroo Entertainment Ltd. ... Appellant

Vs

1. Mr. Suryaveer Singh Bhullar & Ors. ... Respondents

Dr. Virendra Tulzapurkar, senior counsel with Mr. Venkatesh Dhond, senior counsel, with Mr. Rashmin Khandekar, Mr. Mahesh Mhadgut, Ms. Ankita Kanodia and Ms. Milonee Gala i/b Mr. Mahesh Mnadgut for the Appellant.

Mr. Ravi Kadam, senior counsel with Mr. Ashish Kamat, Mr. Kartik Desai and Mr. Dipan Dixit i/b Kartikeya & Associates for the Respondent Nos.1 to 3.

Mr. Janak Dwarkadas, senior counsel with Mr. Chirag Mody, Mr. Kartik Somasundaran, Ms. Priti Deshpande and Mr. Ashish Pujari i/b Krishnamurthy & Co. for the Respondent No.4.

CORAM : S.J. VAZIFDAR &
REVATI MOHITE DERE, JJ.

FRIDAY, 10TH OCTOBER, 2014

P.C. :

1. This is an appeal against an order of the learned single Judge, rejecting the appellant's application for urgent ad-interim orders taken

out in the above suit which is an action for infringement of copyright.

The appellant essentially sought orders restraining the respondents from using or incorporating any part of a song in a film "Mahaan" in a song in a cinematograph film "Tamanchey" to be released today.

2. A film titled "Mahaan" was produced by M/s. Satya Chitra International in the year 1983. By an agreement dated 22nd February 2007, M/s. Satya Chitra International assigned, transferred and sold all their negative rights including copyrights and all other rights in the film to one V. Ramakrishna who carried on business in the firm, name and style of M/s. S.S. Communications as a sole proprietor thereof. By an agreement dated 1st March, 2007, Ramakrishna, in turn, assigned the said rights in favour of the appellant. By virtue thereof, the appellant claims to be the absolute owner of all copyright and other rights in the film "Mahan". In the said film is a song titled "Pyaar Mein Dil Pe Maar De Goli Le Le Meri Jaan". That the song was and continues to be famous and well known is not disputed by any of the parties.

3. The appellant's grievance is that a portion of the lyrics of the song along with its striking and catchy tune and subsidiary words from the film are to be used in a film "Tamanchey" co-produced by respondent Nos.1, 2 and 3. The respondents do not dispute the same.

The first about 52 seconds of a song in the film "Tamanchey" have been copied / incorporated from the said song "Pyaar Mein Dil Pe Maar De Goli Le Le Meri Jaan" in "Mahaan". The appellant contends this to be an infringement of its copyright in the song, musical work and lyrics.

4. Respondent Nos.1, 2 and 3 are the producers of the film "Tamanchey". Ordinarily, they would not have been entitled to copy or incorporate the musical work relating to the film "Mahaan". They, however, claim a right do so pursuant to an agreement entered into by them with respondent No.4-M/s. Universal Music India Private Limited (formerly known as Music India Limited) dated 17th April, 2014. Respondent No.4, in turn, claims to be entitled to create such rights in favour of any person, including respondent Nos.1 to 3 in view of an agreement dated 24th March, 1981, entered into between

the original producers of the film "Mahaan" viz. M/s. Satya Chitra International and itself. The entire controversy depends upon the interpretation of this agreement.

5. As Mr. Kadam and Mr. Dwarkadas, the learned senior counsel appearing on behalf of the respondent Nos.1 to 3 and respondent No.4 respectively pointed out, the agreement appears to be a standard one. The text of the agreement is from a template. The necessary additions such as the names of the parties are typewritten and the original text work with the deletions are in the final copy. M/s. Satya Chitra International is referred to in the agreement as the "Producer" and Music India Limited (the former name of respondent No.4) is referred to therein as the "Company".

Recital (b) states that respondent No.4 is actively engaged, inter-alia, in the manufacture, marketing and sale of "records and prerecorded cassettes". Recital (c) states that the producer i.e. M/s. Satya Chitra International is desirous of assigning and transferring to respondent No.4, the rights mentioned in the agreement. The relevant clauses are as follows :

"1. *INTERPRETATION : In this Agreement, unless the context otherwise admits the following expressions shall have the meanings assigned to them :*

- a) "Cinematograph, "film", "work", "musical work", "literary work", "dramatic work", "artistic work" shall have the meanings assigned to them by the provisions of the Copyright Act, 1957 ;
- 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; [emphasis supplied]
- c) "recording" means the aggregate of the sounds and/ or visual images embodied in, and capable of being reproduced by means of a record ;
- d) "performance" includes any mode of presentation by the use of record and shall include such presentation by means of radio diffusion ;
- e) "radio diffusion" includes communication to the public by means of wireless or cable diffusion, whether in the form of sound or visual images or both ;
- f) "reproduction" shall include in relation to the recording, storing of such recording in any device by means of which it can be perceived ;
- g) "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.

All other expressions shall have the meaning assigned to them under the Copyright Act, 1957 or the statutory modification thereof for the time being in force and the meaning assigned to them thereunder.

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 the film entitled "MAHAAN"

~~*and or such other cinematograph films the production whereof shall commence during a period of three years from the date of this Agreement.*~~

{Note: The deletions are in hand]

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].”

....

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].

7. a) In full consideration of the assignment and transfer of rights by the Producer to the Company under this Agreement the Company shall pay to the Producer an all-in-royalty in respect of all records manufactured, sold and not returned hereunder and calculated on the Company's domestic dealer price,

(exclusive of sales taxes, excise duty, octroi and other taxes and duties levied and less a packaging deduction of 20% of the dealer price for pre-recorded tapes). The all-in-royalty shall be for each half-yearly accounting

period ;

12.5% if the total half yearly sales value is upto Rs. 2,00,000.

13.5% if the total half yearly sales value is between Rs. 2,00,001 and Rs. 10,00,000

14.0% if the total half yearly sales value is exceeding of Rs. 10,00,001.

For the determination of the all-in-royalty rate applicable, the sales value will be calculated at Company's domestic dealer price (exclusive of taxes, packaging allowance etc. as above) of all records embodying the Producer's recordings, including those of earlier contracts, sold by the Company and not returned. In consideration thereof, this agreement shall supersede all previous agreements between the Company and the producer, effective from the first half yearly accounting period after the date of this Agreement.

The all-in-royalty on sale of records by the Company's licensees will be computed separately on the same calculation bases as above.

b) If the producer's recordings are incorporated only in part of the records made or licensed by the Company, the all-in-royalty shall be calculated pro rata according to the proportion of the Producer's recordings to the total number of titles on those records.

c) Promotional records free or bonus records, as well as excerpts from the recordings, used by the Company for publicity and advertising purposes or otherwise, shall be excepted from payment of royalty.

d) The royalty payable by the Company to the producer

as herein provided shall be the only consideration payable and the producer warrants and represents that he will satisfy all claims, if any, of third parties in connection with the recording(s) of which the record is made hereunder, and agrees to indemnify and keep indemnified, the Company in respect of all demands, claims, actions and proceedings in that behalf.

e) The Company will pay royalties as long as the recordings covered by the Agreement are sold by the Company or its licencees, but not for longer than the period for which the recordings are legally protected. However, in the event of the producer committing a breach of the provisions of this or any other agreement with the Company, then, in that event, without prejudice to any other rights or remedies which the Company may have in that behalf, the Company's obligation to pay royalty to the Producer as herein before provided shall cease until such time as the Producer may have remedied such default."

The deletion of the words in clause 2 by us appears in the agreement as well. We have indicated the deletion as an argument has been advanced on the basis thereof on behalf of the respondents.

6. In our view, the concluding words in clause 1 (b) "with the exception of cinematograph films of any gauge, as used in movie theatres" are of vital importance. It is the effect of these words that falls for consideration. The same, however, has not been dealt with in the impugned order. The appellant sought an urgent ad-interim order

restraining the respondents from using or incorporating any part of the said song in the cinematograph film "*Mahaan*" or any part thereof in the film "*Tamanchey*" or any other film. The appellant also sought an order restraining the respondents from releasing or exhibiting the film "*Tamanchey*" containing any part of the original song or from making DVDs, ring tones, MP3 CDs, internet services, CDs, ring-back tones, caller tunes or any soft digital method of display of the said infringing material either on visual method or on ordinary audio method containing any part of the original song.

7. The agreement dated 22nd February, 2007 between the original producers M/s. Satya Chitra International and M/s. S.S. Communications and the agreement dated 1st March, 2007, between M/s. S.C. Communications and the appellant are not denied. The appellant thereby acquired all the rights of the producers of the film "*Mahaan*". The agreement dated 24th March, 1981, having been entered into prior to the agreements whereby the appellant acquired the rights of the original producer, *prima facie*, is binding on the appellant. For the purpose of the ad-interim application, at least, the

Court must proceed on that basis. The only question is whether by the said agreement dated 24th March, 1981, respondent No.4 acquired the right to incorporate a part of the said song in "Mahaan" into and as a part of a song in the film "Tamanchey" to be released today. In our view, it is mainly the interpretation of the agreement that would decide this question. If the agreement dated 24th March, 1981, did not assign such a right to respondent No.4, respondent No.4 could not have, in turn, assigned the same to respondent Nos.1 to 3, which it proposed to do by an agreement dated 17th April, 2014.

8. The clauses of the contract must be interpreted keeping in mind the definition of the terms in clause 1. Clause 1(b) defines the term "record". It refers to the material or devise upon or in which sounds and/or visual images are embodied for reproduction therefrom, but with the exception of cinematograph films of any gauge, as used in movie theatres. By clause 2, the producer assigned to respondent No.4, the right to make records. The term "record" in the clause must be interpreted as it is defined in clause 1(b). The right assigned by clause 2, therefore, was to make any disc, tape or perforated roll

and/or other devise in which sounds and/or visual images are embodied and reproduced therefrom "with the exception of cinematograph films of any gauge as used in movie theatres".

9. Dr. Tulzapurkar contended that clause 1(b) only specifies the material upon which sounds can be recorded. He submitted that only sounds can be recorded even upon a medium which is capable of recording sounds and/or visual images. That, however, he contended, is only descriptive of the medium and does not create a right to record visual images. The words in clause 1(b) "... in which sounds and/or visual images are embodied", according to him, are only descriptive of the material in which the sounds can be recorded and do not create a right to record visual images.

We will, however, assume for the purpose of this appeal that clause 1(b) permits respondent No.4 to reproduce even visual images.

Even assuming that to be so, the right would be only to record visual images upon devices specified in clause 1 (b). Clause 1(b) excludes the device of cinematograph films as used in movie theatres. Clause 2, therefore, *prima facie*, did not entitle respondent No.4 to make

records using the device of cinematograph films as used in movie theatres. We are at this stage concerned only with such material viz. cinematograph films used in movie theatres.

10. The concluding words in the opening part of clause 2 "*from recordings embodied in -*" refer to the source from which the records can be made by the assignee viz. respondent No.4. The sources are mentioned in clauses (i) and (ii) of clause 2. Under clause (i), the source is the film "*Mahaan*" itself.

11. *Prima facie* again, clause 7 supports this interpretation. Clause 7 refers to the royalty in respect of the records manufactured and sold and not returned and calculated on the fourth respondent's domestic dealer price. The reference to half-yearly sales is also obviously to records manufactured and sold and does not refer to cinematograph films. Clause 8 also requires the fourth respondent to furnish to the producers for each half-yearly accounting periods statements showing the numbers and types of records made from the records sold by the fourth respondent during the period specified therein and the amount

of royalty due to the producer in respect thereof. There is no reference in the agreement to any royalty for reproduction in cinematograph films. This is understandable considering the nature of the business of the fourth respondent as mentioned in recital (b) which is marketing and sale of records and prerecorded cassettes.

12. Mr. Dwarkadas' only response to Dr. Tulzapurkar's reliance upon clause 7 was that adequacy of consideration is not relevant. He submitted that a contract is not void on grounds of the consideration being inadequate. The latter submission is correct. However, the former is not. The absence of a reference to consideration in these circumstances is relevant. We do not suggest that it is conclusive. If, for instance, the other clauses are interpreted as suggested by the respondents, clause 7 by itself would not militate against the interpretation. It is possible, for instance, for the producers to have been content with the royalty received only upon the sale of records and cassettes and, their therefore not having demanded any additional amount in respect of the use of the soundtracks in cinematograph films. That is a commercial decision which is for the parties to take.

Suffice it to state that at the ad-interim stage absence of mention of any amount payable in respect of the use of soundtracks in a cinematograph film is a relevant factor.

13. On behalf of the respondents, it was contended that the concluding words of clause 1(b) "*with the exception of cinematograph films of any gauge, as used in movie theatres*" refer only to the film "Mahaan". The parties only wanted to protect the producer by ensuring that the producer did not lose any right by virtue of the definition in clause 2(w) viz. the soundtrack associated with the cinematograph film. In other words, it is submitted that the exclusion is with respect to the reproduction of a cinematograph film itself or a part thereof.

14. This may well be straining the definition of the term "record" in clause 1(b). *Prima facie*, we are unable to read such a restriction into the exception expressly carved out therein.

15. The contention that the concluding words in clause 1(b)

"... cinematograph films of any gauge, as used in movie theatres" is meant to exclude reproduction of the said cinematograph film "Mahaan" would, to say the least, require further consideration.

This is not the plain language of the clause. *Prima facie*, the words cinematograph films of any gauge as used in movie theatres referred to the medium and not to the film *per se*. In fact, such an interpretation would make the wording of clause 2 clumsy. The modifications and cancellations in clause 2(i) and the fact that the agreement is prepared on a template / predetermined form does not lead to the interpretation suggested on behalf of the respondents.

Whether clause 2 refers to one film or several films would make no difference in the interpretation either of clause 1(b) or of clause 2 itself.

16. The respondents essentially relied upon clause 5 of the agreement in support of their contention. They submitted that clause 5 is independent of clause 2. Thus, even assuming that clause 2 read with clause 1(b) confers only a restricted right upon respondent No.4, clause 5 does not contain any such restriction.

Prima facie again, this does not appear to be so. Clause 5 is prefaced with the words "*The copyright assigned and/or agreed to be assigned and transferred to the company (i.e. respondent No.4) hereunder shall vest in the company*". Thus, what clause 5 refers to is the copyright assigned under the agreement. The assignment is in clause 2. Clauses 2 and 5, therefore, must be read together. They do not appear to be mutually exclusive. In other words, clause 5 does not confer additional benefits. It is important to note that the learned Judge himself held that clause 5 cannot possibly expand the licence granted under clause 2.

17. The learned Judge, however, held that by virtue of clause 5, respondent No.4 acquired comprehensive rights to copyright the entire soundtrack of the film and that the producer continued to have the right to exhibit, distribute and make copies of the film along with soundtrack. The sound recording itself, separately from the film, was assigned to the fourth respondent. Even assuming that to be so, it does not answer the limitation of the devices contained in clause 1(b) viz. the exception of cinematograph films as used in movie theatres.

It is difficult, at least at this stage, to hold that the agreement assigned in favour of respondent No.4, to use the words of the learned Judge, "the complete panoply of rights in the sound recording" and that this would include the right to permit performances of the recording. Nor is it possible at least at the ad-interim stage, to hold conclusively that the said agreement dated 24th March, 1981, included the right in respect of the underlying work as well.

18. The learned Judge found himself bound by the judgment of another learned single of this Court in *Rupalli P. Shah v. Adani Wilmer Ltd. & Ors.* 2012 52 PTC 305. The clauses in that case, however, were materially different. In that case, the ownership of the plate was expressly transferred by the producer. This is not so in the agreement dated 24th March, 1981. Clause 5(vi) does confer a right upon respondent No.4 to control the physical property of the original recording. That by itself, however, would not necessarily imply a transfer of the ownership of the original recordings. The clause is also consistent with Dr. Tulzapurkar's contention that this was necessary in order to enable the company to make recordings therefrom as

expressly provided in clause 4 of the agreement. Clause 4 provides that on completion of the whole or part of the cinematograph film, the producer would deliver the original recordings "*in order to enable the company to make records therefrom*".

19. The least that must be said in favour of the appellant is that the clause would require further consideration before a categorical finding that the ownership of the original recordings vests in respondent No.4 by virtue of the said agreement. We are, with respect, unable to agree with the learned Judge that the mere control of the physical property of the plate confers proprietary rights in respect thereof.

20. The respondents also relied upon the judgment of a Division Bench of the Calcutta High Court in *Saregama India Limited v. Puneet Prakash Mehra and Ors.* Manu/WB/0616/2010. In paragraph 49 the Division Bench has referred to the judgment of a learned single Judge also of the Calcutta High Court in *Gramaphone Company of India Ltd. v. Shanti Films Corporation AIR 1997 Calcutta 63.* The Division Bench noted that the agreement before the Division Bench

was the same as the agreement before the learned single Judge. It is contended that the exception in clause 1(b) in the agreement before us dated 24th March, 1981 was also there in the clauses in those cases. It was held by the Division Bench that by the agreement, the entire copyright of the song in the film had been transferred and/or assigned.

The judgments, however, are distinguishable. The clauses in the agreement before us are not the same as the clauses in the cases before the Division Bench and the learned single Judge of the Calcutta High Court. The definition of contract works in those cases itself was different. It included the copyright from making records of all contract work and the copyright performing right and all other rights, title and interest in and to the literary, dramatic and musical works embodied in the producers films, including all rights of publication, sound and television broadcasting, public performance and mechanical reproduction of the said works. Moreover, clause 8 in the agreements in those clauses expressly and in so many words conferred upon the assignee the ownership rights of the original plate within the meaning of The Copyright Act, 1957.

21. The appellant, therefore, has made out a case for ad-interim reliefs. Having said that, however, the question is the nature of the ad-interim reliefs that the appellant is entitled to. Mr. Kadam rightly pointed out that the attempt to stall the movie at the last minute ought not to be permitted. In such cases, it is necessary that parties act immediately. The failure to do so can cause irreparable harm and injury to the respondents.

22. The appellant stated that it learnt from the market sources of the alleged infringement of its copyright in the first week of August, 2014. No particulars of the source of such knowledge are furnished. Dr. Tulzapurkar stated that upon learning of the alleged infringement, the appellant immediately served a notice dated 11th August, 2014, upon respondent Nos.1, 2 and 3 who are the producers of the film "Tamanchey". A reminder was sent a month later by a letter dated 10th September, 2014. Respondent No.4, however, replied to the same shortly thereafter. Respondent No.4 sought inspection of the documents on the basis whereof the appellant claimed to have acquired the rights of the producers. Thereafter, the suit was filed and

an application for ad-interim reliefs was made on 26th September, 2014.

23. We are, however, inclined to accept Mr. Kadam's submission that the appellant must have come to know about the film at least in April, 2014. For instance, there was a prominent article in the 4th April, 2014, publication of "Mid-day" - a newspaper with wide circulation in Mumbai. The very first line of the article read: "*Chartbuster from the 90's 'Pyar Mein Dil Pe Maar De Goli' to be replayed on the screen.*" Further, an article in a publication, popular with the trade, Bolly Spice also referred to the film "*Tamanchey*" using "*the classic song 'Pyar Mein Dil Pe Maar De Goli'* as its tag-line". The entire article refers to the song. It specifically refers to the film "*Mahaan*" and even to the details of the song. The article further stated that the film was to be released on 18th July, 2014. It is highly probable that the appellant which is also involved in the film trade would have noticed these articles. It is for the appellant to establish exactly when and how it came to know about the publication.

24. The delay of 5 months in such a matter is crucial at least at the ad-interim stage. The film is to be released today. The copies of the films have been forwarded to about 80 distributors. Further rights such as sound recording rights in respect of the film "*Tamanchey*" have, in turn, been created in favour of third parties. In these circumstances, we are not inclined to restrain the release of the film at this stage.

25. Mr. Kadam and Mr. Dwarkadas tendered a copy of the agreement entered into between their respective clients under which respondent No.4 purported to assign the exclusive right to use or incorporate a part of the said song in the film "*Tamanchey*". Clause 3 provides for the royalty payable by respondent Nos.1, 2 and 3 to respondent No.4. Clause 4 deals with accounting. Considering the facts of this case, the rights, if any, of the appellant at this stage can be protected only by safeguarding the consideration receivable by respondent No.4 under the agreement entered into between it with respondent Nos.1, 2 and 3 and by restraining respondent No.4 from further entering into any such agreements pending the hearing and

final disposal of Notice of Motion without the leave of the Court.

26. We make it clear that the order we intend passing does not restrain the respondents from exercising their rights under the said agreement dated 24th March, 1981, in relation to DVDs or any other medium upon which visuals can also be recorded other than cinematograph films of any gauge, as used in movie theatres.

27. We have consciously repeatedly mentioned that our views are *prima facie*. We say so not as a matter of form but as a matter of substance. The matter certainly requires further consideration. Neither the learned single Judge nor any subsequent Division Bench would be bound by what we have said in this order.

28. In the circumstances, the appeal is disposed of by the following order, which shall operate pending the hearing and final disposal of the Notice of Motion :

- (i) The impugned order, insofar as it rejects the application for an injunction restraining the release

of the film "Tamanchey" is upheld.

(ii) Respondent Nos.1, 2 and 3 shall deposit in Court, the consideration payable under the agreement entered into by them with respondent No.4 dated 17th April, 2014, or under any other agreement or understanding between them dealing with similar rights.

The amounts already received by respondent No.4 in the sum of about Rs.5.00 lakhs shall abide by the result in the Notice of Motion.

(iii) The details, including statement of accounts to be furnished under the said agreement to respondent No.4, shall also be furnished to the appellants .

(iv) Respondent No.4 shall not without the leave of the Court, record or otherwise use or

incorporate or permit any party to record, use or incorporate any part of the said song or any other part of the film "Mahaan" on cinematograph films of any gauge as used in movie theatres.

(v) Respondent Nos.1, 2 and 3 shall not be entitled to use in any manner the copyright in respect of the said song, on cinematograph films of any gauge as used in movie theatres, except as presently used in the proposed film "Tamanchey", and for matters connected therewith such as the promotional material, without the leave of the Court.

The application of respondent No.4 for stay of this order is rejected.

REVATI MOHITE DERE, J.

S.J. VAZIFDAR, J.