

(2009) 05 DEL CK 0478
In the Delhi High Court
Case No : CS (OS) 2050 of 2008

BCI Optical Disc. Ltd.

APPELLANT

Vs

M.R.S. Film Craft and Advertising Pvt. Ltd.

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Copyright Act, 1957 — Section 61, 61(1)

Citation : (2009) 164 DLT 666 : (2009) 5 ILR Delhi 800 : (2009) 41 PTC 256 : (2010) 7 RCR(Civil) 2550

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : S.K. Chawla, for the Appellant; Varun, for Defendant No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The plaintiff has approached the court with a case that;

(i) It is engaged inter-alia in the business of manufacturing and marketing Audio & Video, CDs & DVDs;

(ii) That M/s Magnasound (India) Ltd., (hereinafter called Magnasound) was also engaged in the same trade and owned copyright of various Audio & Video Albums;

(iii) Magnasound was being managed by Mr. Shashi Gopal, his wife Ms. Kalpana Gopal and Mr. Madhav Dass being the husband of Ms. Sudha Dass sister of Mr. Shashi Gopal;

(iv) That Magnasound was facing financial crises and owed monies to several creditors, one of which filed a petition in the High Court of Bombay for winding up of Magnasound;

(v) That the aforesaid persons in management of Magnasound, on the verge of their removal and appointment of the provisional liquidator wanted to transfer

the copyright of Music Videos, owned by Magnasound and which was a valuable asset of Magnasound;

(vi) They in furtherance of their misdeeds, involved the defendant No. 1 in their conspiracy and manipulated a sham, bogus and back dated agreement dated 20th September, 2002 of transfer of copyright of Magnasound of the Albums, to the defendant No. 1 and to the detriment of Magnasound.

(vii) However, since Mr. Shashi Gopal aforesaid could not trust the defendant No. 1, he also got an agreement dated 25th October, 2003 of transfer of the rights under the agreement dated 20th September, 2002 by the defendant No. 1 in favour of the defendant No. 3 being a proprietary concern of Mrs. Sudha Dass aforesaid;

(viii) This was done because Magnasound could not directly transfer the rights to the defendant No. 3 owing to the relationship;

(ix) That the transfer of copyright in favour of the defendant No. 1 and then to the defendant No. 3 is a clear case of fraud, cheating, misrepresentation and conspiracy.

(x) That Mr. Sashi Gopal however did not trust his sister also and obtained a power of attorney from her regarding the rights so created in favour of defendant No. 3; He acting under the said power of attorney approached the plaintiff for assignment of rights which were originally vested with Magnasound to the plaintiff;

(xi) That since Mr. Shashi Gopal was incharge and controlling authority of Magnasound, the plaintiff did not doubt the transfer of rights by Shri Shashi Gopal to the plaintiff even though through such circuitous agreements;

(xii) That the plaintiff purchased the copyright for consideration of Rs. 2 lac paid to the defendant No. 3.

(xiii) That accordingly an agreement dated 17th June, 2004 with respect to the said copyright was executed in favour of the plaintiff.

2. The case of the plaintiff is that even though the agreement dated 20th September, 2002 which had been executed in favour of the defendant No. 1 was fraudulent as aforesaid and even though the defendant No. 1 had transferred the rights acquired under the said agreement in favour of the defendant No. 3 vide agreement dated 25th October, 2003 but the defendant No. 1 on the basis of the agreement dated 20th September, 2002 was interfering with the exercise of rights under the agreement dated 17th June, 2004 by the plaintiff. The plaintiff thus claimed the relief of permanent injunction restraining the defendant No. 1 from interfering with the exercise of copyrights vested in favour of the plaintiff under the agreement dated 17th June, 2004 and for restraining the defendant No. 1 from infringing the said copyright. The defendant No. 2 is one of the stockist of the plaintiff to whom threats are alleged to have been meted out by

the defendant No. 1.

The necessary reliefs of mandatory injunction, accounts, delivery, and damages have also been claimed. On 5th November, 2008 when this suit was listed before the court, the plaintiff informed the court that the defendant No. 1 had instituted CS (OS) No. 1187/2005 in this court against some parties, in relation to the copyrights aforesaid. On that date the statement of the representative of the plaintiff was also recorded inter-alia to the effect that when the plaintiff had entered into the agreement with the defendant No. 3 the plaintiff had not verified whether the defendant No. 3 had any rights over the songs/video recordings. The present suit was as such ordered to be listed along with CS(OS) No. 1187/2005.

3. On 20th January, 2009 both the suits were listed together. The Counsel for the plaintiff in CS(OS) No. 1187/2005 and which is the defendant No. 1 in this suit was asked to take instructions from the defendant No. 1 and to inform the defendant No. 1 of the present suit. It was informed on the next date i.e. 17th February, 2009 that though the Counsel had informed the defendant No. 1 of this suit but the defendant No. 1 had neither instructed the Counsel to appear for the defendant No. 1 in this suit nor the defendant No. 1 was otherwise represented. The defendant No. 1 was as such proceeded against ex-parte. The defendant No. 2 also failed to appear inspite of service and was proceeded against ex-parte. The defendant No. 3 has filed a written statement supporting the plaintiff. The plaintiff has, in any case, not made any claim against the defendant No. 3.

4. The plaintiff has led ex-parte evidence and the Counsel for the plaintiff has also been heard.

5. The suit is for infringement of copyright. As per the averments in the plaint, the owner of the copyright is Magnasound which is now under liquidation. Magnasound has not been impleaded as a party. u/s 61 of the Copy Right Act, 1957 in every civil suit or other proceedings regarding infringement of copyright instituted by an exclusive licensee, as the plaintiff herein claims to be the owner of the copyright shall, unless the court otherwise directs, is to be made a defendant. Upon attention of the Counsel for the plaintiff being invited to the said provision, he first contended that Magnasound being in liquidation was not made the defendant. However, that is no ground; Magnasound can be sued through the official liquidator. It was next contended that u/s 61(1) the court is empowered to exempt impleadment of the owner of the copyright. However, neither any application in that regard was made nor any prayer to the said effect made at any time.

6. Moreover, I find that the present suit from the averments in the plaint itself is based on an illegality. The plaintiff himself claims the transaction of which it claims to be the ultimate beneficiary to be fraudulent, conspiratorial and intended to defeat the rights of the creditors of a company in liquidation. The plaintiff is admittedly in possession of property of the said company in liquidation and which property ought to have been placed at the disposal of the official

liquidator. Under Chapter 5 of the Companies Act, 1956, the transactions pleaded are liable to be investigated and may constitute an offence.

7. The question which arises is that should this court come to the rescue of a plaintiff whose case is steeped in such illegality. The answer necessarily has to be in negative. The present is a case where the plaintiff as well as the defendant against whom the relief has been claimed are both not entitled to the property which is of a company in litigation. The witness of the plaintiff in his affidavit by way of examination in chief also supports the said view. From his affidavit, it is not borne out and is not believable that the plaintiff at the time of entering into the agreement was not aware of the illegality of the transaction. The plaintiff as a trade person is presumed to know of proceedings for winding up having been initiated against Magnasound and it is unbelievable that the plaintiff while acquiring the copyrights of Magnasound under the agreement dated 17th June, 2004 but through the defendant No. 3 was not aware of the reason therefor.

8. I have recently in *Alka Gupta v. Narender Kumar Gupta* CS (OS) 302/2007 decided on 13th March, 2009 discussed the principle of *pari delicto potior est conditio defendantis* i.e. the courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud, in detail.

9. The plaintiff is thus not found entitled to the relief of injunction which, in any case, is a discretionary relief. The suit is also found to be barred by Section 61 of the Copy Right Act. No ground is found to exempt the plaintiff from impleading the owner of the copyright, particularly when the direct consequences of such exemption would be to allow the plaintiff and the defendants to continue profiteering from the properties which in fact are of Magnasound. The suit is thus liable to be dismissed with costs. Exemplary costs of Rs. 25,000/- are imposed on the plaintiff for making an attempt for abusing the process of this court. The cost be paid to the Delhi Legal Services Authority within four weeks and proof of payment thereof be furnished to the Registry failing which the Registry to put up the file before the court.

10. In the circumstances, of the case it is also deemed expedient that Registry to forward a certified copy of this judgment to the official liquidator attached to the High Court of Bombay, with reference to the winding up proceedings against Magnasound, for information and appropriate action.