

(2013) 11 DEL CK 0167
In the Delhi High Court
Case No : CS (OS) 676 of 2012

Blueberry Books and Others

APPELLANT

Vs

Google India Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 28-11-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 20(c)
Copyright Act, 1957 — Section 14, 51(a)(i), 62, 62(2)

Citation : (2013) 205 DLT 228 : (2014) 58 PTC 62

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Pratibha M. Singh, Mr. Ashwani Kumar and Ms. Suhasini Raina, for the Appellant; Abhishek Malhotra and Mr. Angad Duggal, Advocates for Defendant No. 1, Mr. Akhil Anand and Mr. Praveen Sehrawat, Advocates for Defendant No. 2, Mr. Manav Kumar, Advocate for Defendants 3 and 4, Mr. Udit Sood, Advocate for Defendants 5 and 6/Applicants in IA No. 18547 of 2013, Ms. Sneha Jain and Mr. Sahil Sethi, Advocates for Defendant No. 10/Applicant in IA 13852 of 2012., Mr. Mohan Vidhani and Mr. Rahul Vidhani, Advocates for Defendant No. 11, for the Respondent

Judgement

S. Muralidhar, J.

IA Nos. 7706-07 of 2012 (Order I Rule 10 CPC)

1. These are two applications under Order I Rule 10 of the Code of Civil Procedure, 1908 ("CPC") seeking deletion of Defendants 1 and 3

respectively from the array of parties. The background to these applications is that the aforementioned suit has been filed by M/s. Blueberry

Books, Plaintiff No. 1, Mr. Ashish Gupta, Plaintiff No. 2 and Mr. Jatin Mehta, Plaintiff No. 3, all at New Delhi for a permanent injunction

restraining the Defendants from infringing the copyright of the Plaintiffs in its stories (i) The Lazy Penguin; (ii) How The Rainbow Was Formed; (iii)

The Greedy Fisherman and (iv) The Flower Goes For A Walk.

2. It is stated that in 2003, the Plaintiffs published a series of books under the name "Moral Stories" Parts-I, II and III each containing four stories.

Part-I contained the stories (i) Careless Tanu; (ii) The Merchant Learns A Lesson; (iii) Sejal's Gift for Soni and (iv) Selfish Monu. Part-II

contained the stories (i) The Greedy Fisherman; (ii) A Flower Went for a Walk; (iii) How The Rainbow Was Formed and (iv) Two Good Friends

and Part-III contained the stories (i) The Cunning Jackal; (ii) The Lazy Penguin; (iii) The Wicked Cub and (iv) Harry and Bob. It is stated that

these stories contained in the aforementioned books are original literary and artistic works of the Plaintiffs and are protected under the Copyright

Act, 1957 ("CA"). The books were released in 2003, supplied to a large number of schools and also sold in several book fairs. In 2005, they

were reprinted and circulated widely. In 2010, the stories were published afresh, some of the characters in the stories were changed and the

designs of caricature were modified to show modern background, clothing etc. The above four stories were included in Moral Stories Part-II and

were also widely circulated through book exhibitions, book fairs and even sold in the international market, including South East Asia, Africa and

Middle East.

3. The Plaintiffs state that, in February 2012, they discovered that the above four stories were made available by the Defendants through the

internet on several applications across several platforms and websites for their users. It is further averred that these applications are downloadable

on almost all handy devices including mobile phones, tablets, etc. that run on various Android, BlackBerry, Apple and Windows based platforms

and include devices manufactured by Apple, Samsung, Sony Ericsson, LG, Blackberry, Nokia, HTC, etc. These applications are run and are

available on different platforms including Android Market now known as Google Play, Blackberry Applications, APPLE iTunes, Microsoft on

Windows Phone. The applications appear to have been designed by Defendant No. 11 titled "Story Time for Kids". It is stated that all the above

stories have been lifted word to word with the caricatures, images, designing and the text inserted in the form of voice-over. The stories have also

been translated into different languages including English, French, Italian,

Chinese etc.

4. It is stated that a comparison of the stories available on Android, Blackberry, Windows and iTunes, the applications show that the wording of

the stories were lifted from the books of the Plaintiffs. The Plaintiffs had never been approached by any of the Defendants to seek approval,

licence or permission to use the stories on those applications. It is stated that the Defendants have earned huge sums of money and have not

acknowledged the copyright of the Plaintiffs.

5. On 19th March 2012, the following order was passed:

CS (OS) 676/2012 and I.A. No. 5055/2012

Let the plaint be registered as a suit.

Issue summons in the suit and notice of the application to the defendants by way on filing of ordinary process, registered AD cover, e-mail and fax,

returnable on 09.04.2012.

The service of defendant No. 1 is dispensed with as Mr. Akhil Anand, Advocate appears on behalf of the defendant No. 1.

The learned counsel for the plaintiff has referred to various paras of the plaint as well as the documents placed on record. The plaintiff has also

produced original manuscript and art work of the stories in question during the course of hearing. The plaintiff has been able to make out prima

facie a case for grant of an ex-parte injunction. However, at this stage, I consider that the limited interim order be passed.

Upon service, the defendants are directed to file on affidavit within ten days, disclosing the number of downloads of each of the stories, namely,

THE FLOWER GOES FOR A WALK; THE LAZY PENGUINE; THE GREEDY FISHERMAN; HOW THE RAINBOW WAS FORMED,

along with the number of downloads of the application "Story time for Kids" for each of their platforms, namely, Android, iTunes, Windows and

Black Berry application on which the said stories are made available as also containing the advertising revenue by advertisements booked on the

said application as a whole or on the individual stories.

The written statement and reply to the interim application be also filed by the defendants by the next date of hearing.

Dasti under the signature of the Court Master.

6. Pursuant to the above order some of the Defendants filed affidavits. Defendants 1, 3 and 5 also filed applications under Order I Rule 10 CPC.

7. On 27th April 2012, the Court passed an order in I.A. 5055 of 2102 qua Defendant No. 11 as under:

12. As far as defendant No. 11 is concerned, counsel says that his client has no objection if interim orders are passed till the disposal of the suit.

Hence, the plaintiffs' application for injunction against defendant No. 11 is allowed. The defendant No. 11 is restrained from making available the

copyrighted works of the plaintiffs including the four titles: THE FLOWER GOES FOR A WALK; THE LAZY PENGUIN; THE GREEDY

FISHERMAN; HOW THE RAINBOW WAS FORMED, in any form Electronic, Physical or otherwise through various platforms/websites either

as per the application of "Story Time for Kids" or individually. The defendant No. 11 is further restrained from in any manner, infringing the

copyright of the plaintiffs in any of the works and stories contained in the books titled Moral Stories Part-1, Moral Stories Part-2 and Moral

Stories Part-3.

8. Google India Pvt. Ltd., Defendant No. 1 filed IA No. 7706 of 2012, stating that the Applicant failed to disclose even a single instance of

infringement against it; that it has been impleaded as a Defendant on the sole basis that it is a subsidiary of Google Inc. Defendant No. 2 or on a

mistaken basis that Defendant No. 1 owns and operates www.google.com or play.google.com. It is stated that Defendant No. 1 has not been

appointed as an agent, partner or franchisee of Defendant No. 2. It is stated that Defendant No. 1, as a non-exclusive distributor of Google Inc.,

engages in business development and promotional activities for certain limited products and is not responsible for the content available on the

products. Defendant No. 1 carries out certain software development and general research development for Defendant No. 2 and does not play

any role in providing or administering specific Google products/applications including "Android Play.

9. It is submitted by Mr. Abhishek Malhotra, learned counsel for Defendant No. 1, that the application in question i.e. "Story Time for Kids" is

provided by the application developer on Android Play, a platform provided by Defendant No. 2. Defendant No. 1 neither has control over the

application in question or the Android Play platform nor has it been appointed as an agent of Defendant No. 2 in India. The only relationship

between Defendants 1 and 2 is that Defendant No. 1 is the subsidiary and Defendant No. 2 is the parent company. It is submitted that barring a

bald allegation in para 13 of the plaint, there is no specific allegation linking Defendant No. 1 with the impugned activity of infringing the Plaintiffs'

copyright. It is submitted that Defendant No. 1 is a separate legal entity and is not involved in the infringing activity complained of. It is submitted

that Defendant No. 1 is, therefore, not a necessary or proper party to the suit and accordingly may be deleted from the array of parties.

10. IA No. 7707 of 2012 has been filed by Defendant No. 3, Research in Motion India Pvt. Ltd. ("RIMPL"), on more or less similar grounds. It

is submitted that RIMPL is a subsidiary of Defendant No. 4, Research in Motion ("RIM"). RIMPL is the marketing entity for RIM. The activities

of Defendant No. 3 are limited to marketing and sales support, increasing overall awareness of BlackBerry in the Indian marketplace and providing

local wireless carrier partners and distributors with information on upcoming BlackBerry devices.

11. It is submitted by Mr. Manav Kumar, learned counsel for Defendant No. 3, that RIMPL is not involved, directly or indirectly, in any aspect of

the BlackBerry App World. It is stated that RIMPL has no direct or indirect involvement in the alleged infringement by Defendant No. 11. It is

accordingly submitted that Defendant No. 3, RIMPL, is neither a necessary nor a proper party to the suit and, therefore, may be deleted from the

array of parties.

12. Replies have been filed by the Plaintiffs to both these applications. In the reply filed to IA No. 7706 of 2012, it is stated by the Plaintiffs that

the website of Google Inc. states that it has more than 70 offices in more than 40 countries. The locations of the said offices show that Defendant

No. 2 is present in India through Defendant No. 1 at Bangalore, Gurgaon, Hyderabad and Mumbai. Defendant No. 1 is thus the face of Defendant

No. 2 in India and hence both Defendants 1 and 2 are one and the same and are responsible for providing the application through the website

<http://play.google.com>. The other contentions of Defendant No. 1 in this application are denied by the Plaintiffs.

13. In reply to IA No. 7707 of 2012 filed by Defendant No. 3 RIMPL, it is submitted that ""the Defendants by providing the various applications on their respective platforms are guilty of infringing of copyrights and are liable for damages towards the Plaintiffs."" It is stated that the popularity and wide circulation of the impugned applications leading to the unjust enrichment of the Defendants is evident from the affidavits the Defendants have filed in compliance with the order dated 19th March 2012 passed by the Court.

14. At this stage, it is necessary to refer to the affidavits filed pursuant to the order dated 19th March 2012. Affidavits have been filed by Defendant No. 6 on 27th April 2012, by Defendants 7 and 8 on 26th April 2012 and by Defendant No. 2 on 15th May 2012. Interestingly, there is no affidavit of Defendant No. 1 in this regard. There is also no affidavit by Defendant No. 3, although written statements have been filed by them.

15. Turning to the plaint itself, the specific allegation as regards Defendant No. 1 is in para 13, where it is stated that as per the information available to the Plaintiffs, ""the Defendant Nos. 1 and 2 provide the applications on the Android platform"" There is a general allegation thereafter that the Defendants are making available the four stories on their website and the snapshots available on <https://play.google.com> have been placed on record. In reply to the specific averment by Defendant No. 1 that it does not control the above website and is not responsible in any way for hosting those websites, the only response of the Plaintiffs is that Defendant No. 1 be put to strict proof of such averment. There is nothing placed on record to show that Defendant No. 1 is controlling the platform hosting the above application. The categorical assertion by Defendant No. 1 that it does not own or operate www.google.com or Google Inc. and has no control over the application, i.e., "storytime for kids" on Android play has not been able to be denied by the Plaintiffs. It has been reiterated by learned counsel for Defendant No. 1 that apart from the fact that Defendant No. 1 has no control over www.google.com or Google Play, even the website google.co.in is not controlled by Defendant No. 1. It has no say in what is hosted by Google Inc. on its website, whether available in India or elsewhere.

16. The mere fact that Defendant No. 1 happens to be the subsidiary of Defendant No. 2, having its offices in Bangalore, Hyderabad, Mumbai and Gurgaon, does not automatically make it a necessary or proper party to the present suit. Google.Inc is a separate legal entity and has been impleaded separately as such. Interestingly, in its written statement, Defendant No. 2 has not questioned the jurisdiction of this Court. It has submitted to the jurisdiction by filing its written statement. Consequently, the apprehension that Defendant No. 2 would avoid the jurisdiction of this Court and, therefore, it is necessary to make its subsidiary Defendant No. 1 a party to the present suit, is misplaced.

17. Likewise, even as regards Defendant No. 3, there is nothing to show that it is involved, directly or indirectly, in the BlackBerry App World or

its activities. Defendant No. 3 is not shown to have any contractual relationship with Defendant No. 11. There is no specific allegation against

Defendant No. 3 about its role in the alleged infringing activities complained of in the suit. Even in reply to the application, there is only a broad

allegation that the Defendants are infringing the copyright of the Plaintiffs. There is no specific allegation as regards Defendant No. 3 having been

responsible in any manner for controlling what is available on the BlackBerry App platform. Defendant No. 4 has also not refused to submit to the

jurisdiction of this court. The only relationship between Defendants 3 and 4 is that Defendant No. 3 is the Indian subsidiary of Defendant No. 4.

Defendant No. 4 has filed its written statement and has not questioned the jurisdiction of this Court. Consequently, there appears to be no

justification for impleading Defendant No. 3 only because it happens to be the subsidiary of Defendant No. 4.

18. It was submitted by Ms. Pratibha Singh, learned counsel for the Plaintiffs, that in the event of the suit being decreed against Defendants 2 and 4

and the decree put to execution, it may be necessary to move against Defendants 1 and 3 as well, since they are the Indian subsidiaries of

Defendants 2 and 4 respectively. The mere fact that Defendant No. 2 happens to be the subsidiary of Defendant No. 1 and Defendant No. 3 a

subsidiary of Defendant No. 4 would not be sufficient for making them parties to the suit, if they are not, in any way, involved in the infringing

activities complained of.

19. For the aforementioned reasons, this Court finds that neither Defendant No. 1 nor Defendant No. 3 is a necessary or a proper party to the suit. Accordingly, IA Nos. 7706 and 7707 of 2012 are allowed and Defendants 1 and 3 are directed to be deleted from the array of parties.

IA No. 13852 of 2012

20. This is an application by Defendant No. 10, Amazon.com Inc. for deleting its name from the array of parties.

21. The specific allegation against Defendant No. 10 is contained in para 19 of the plaint, which reads as under:

19. Defendant No. 10 is also website which is also offering for download applications of the four stories through the App "Story Time for Kids"

and also separately each of the said four stories for Android based devices. Further investigation on the website of the Defendant No. 10 i.e.

www.amazon.com also revealed that the said stories were available for download at a price of 0.99 \$ (USD) per story. Printouts from the said

website filed in the present proceedings.

22. Ms. Pratibha M. Singh, learned counsel for the Plaintiffs, referred to page 287 of the list of documents, which lists out the links in respect of

each of the four stories which are offered on the Amazon platform. At page 288 of the documents, the screen shot of the relevant web page at

Amazon.com has been included. On the left side of the said page, the picture image of the story "'The Flower Goes For A Walk'". Next to the said

image the following text appears:

The Flower Goes For A Walk: Story Time for Kids by Teknowledge Software

Platform: Android

Rated: Children

Be the first to review this item

...

Price: \$0.99

Available instantly for your Android device

23. By clicking on the words "Teknowledge Software" the viewer is taken to the website where the story is made available for a price as

indicated. However, on the Amazon.com page itself, it is not possible for a viewer to see anything more than just the image. This is because in the

lower part of the page, the download restrictions have been set out as under:

AT&T has enabled purchases from the Amazon Appstore for some devices (Learn more)

Amazon Appstore is only available to customers located in the United States.

24. Defendant No. 10 filed its written statement on 23rd July 2010. In response to the order dated 19th March 2012, the affidavit of Mr. Rakesh

Bakshi, the authorised signatory of Defendant No. 10 was filed on 17th July 2012. The said affidavit sets out the number of downloads and the

revenue collections for the App ""Story Time for Kids"" as regards each of the stories as well as the advertisement revenue booked in connection

with the advertisement on the App. It is stated in paras 3, 4, 5 and 6 of the said affidavit as under:

3. Specifically, as set forth in the ""Amazon Appstore for Android Terms of Use"" (the ""Terms of Use""), a copy of which is attached herewith as

Annexure 2, the Apps are available for download only to customers within the United States of America. Clause 4 of the Terms of Use provides

unequivocally that ""We are currently only able to make Apps available to customers located in the United States. We regret that you may not

purchase or download Apps if you are outside the United States. If you are inside the United States, you may not transfer Apps outside the United

States. Defendant No. 10 uses various technological filters to enforce compliance with that prohibition. Clause 2.1 of the Terms of Use also makes

clear that apps downloaded from the Amazon Appstore for Android ""can be used only on mobile devices that use the Android platform.

4. As a result, the number of downloads and corresponding revenue collections for the Apps in India and every other jurisdiction outside of the

United States is zero.

5. A view of sales records confirms a total of only thirty-three (33) downloads of the Apps, by customers identified as United States customers,

producing total revenue of approximately US\$24.75.

6. Moreover, it is stated that Defendant No. 10 does not sell ""in-app advertising"", i.e. sale of advertising space within an application.

Consequently, it is stated that there is no advertising revenue earned ""by advertisements booked on the said APP as a whole or on the individual

stories"", and the advertising revenue earned by advertisements booked on the

said APP/individual stories is also nil/zero.

25. Ms. Sneha Jain, learned counsel for Defendant No. 10, submitted that this Court has no territorial or subject-matter jurisdiction over the

alleged infringing acts of Defendant No. 10. It has contended that the territorial and subject matter scope of the CA would extend only to the acts

of infringement which occur within India. It is contended that the long-arm statute provision in Section 62 CA would not extend to activities outside

India. Reference has also been made to Clause 4 of the ""Amazon Appstore for Android Terms of Use"" which stipulates that that the Apps would

be made available only to customers located in the United States. It is accordingly submitted that no cause of action has arisen within the scope of

the CA in India.

26. On the same lines, Defendant No. 10 has filed the present application, IA No. 13852 of 2012 seeking its deletion from the array of parties. It

is pointed out that the plaint fails to state any material fact disclosing any infringement in India of the Plaintiffs' copyright by Defendant No. 10. It is

stated that no averments have been made in the plaint alleging that the App ""Story Time For Kids"" or the App for each of the stories is available in

India for download accessible through Defendant No. 10. It is stated that the remaining paragraphs of the plaint contained allegations of

infringement against all the Defendants generally without disclosing the specific act of infringement attributable to Defendant No. 10. It is asserted

that Defendant No. 10 uses various technological filters to enforce compliance with the above prohibition concerning availability of Amazon

Appstore only to customers located in the US. It is stated that none of the Apps have been ""reproduced, downloaded, or communicated through

Amazon's Appstore for Android to the public, within the territorial limits of India."" It is stated that unless the Plaintiffs make specific disclosures of

existence of a cause of action in India qua the Defendant No. 10, i.e., infringement of copyright through Amazon's Appstore for Android in India,

the Court cannot apply Section 62 CA to assert jurisdiction over Defendant No. 10.

27. In the reply filed to the above application, it is stated that since Defendant No. 10 has provided for the download of the impugned Apps from

its store, as is clear from the affidavit of Mr. Bakshi and there are 33 downloads

for a revenue of approximately USD 24.75, Defendant No. 10

has infringed the copyright of the Plaintiffs, irrespective of where the said downloads have taken place. It is stated by the Plaintiffs that u/s 14 CA,

the owner of the copyright has a right to protect his interests and initiate proceedings against any infringement irrespective of where the infringing

activities take place. Reliance is placed on the decisions in *Exphear SA and Another Vs. Eupharma Laboratories Ltd. and Another*, *Dhodha*

House Vs. S.K. Maingi, and *Super Cassettes Industries Ltd. v. Myspace Inc.* 2011 (47) PTC 49 (Del). Reliance is also placed on the decision of

the Madras High Court in *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.* 2011 (45) PTC 575.

28. Ms. Pratibha Singh submitted that the covering page "The Flower Goes For A Walk", which is displayed on the Amazon.com website is an

artistic work and the mere reproduction of that artistic work on the website of Amazon.com constitutes an infringement, since it was without the

permission of the author of the work. She referred to Section 51(a)(i) read with Section 62 CA. She added that the revenue is being earned by

Amazon.com from the activities of Defendant No. 11 as was evident from the agreement it has entered with Defendant No. 11. She accordingly

submitted that Defendant No. 10 is a necessary and a proper party. It is stated that Amazon.com controls how the Apps are viewable in India.

29. The Court is of the view that while Section 62(2) CA is a long-arm provision, the CA itself operates only through the territory of India. For the

infringing activity to constitute a cause of action, it must be shown to have taken place in the territory of India. In *Banyan Tree v. A. Murali Krishna*

Reddy 2010 (42) PTC 361, the Court held that a passive website would not by itself vest the forum court with jurisdiction. A commercial

transaction should be shown to have been concluded using the website within the jurisdiction of the forum court.

30. In *Super Cassettes Industries Ltd. v. Myspace Inc.* (supra), the website of the Defendant was found to be ""engaged in the online business of

providing and exhibiting the songs and cinematograph films worldwide including India."" The Court further noted ""the said website is usually

accessed by Indians for downloading the songs of upcoming movies from the website of the defendants."" Also, in that case, the Court noted that

The Plaintiff has substantiated the cause of action by showing some instances of infringements which has been caused in relation to the specific

works. Thus, the said commission of the tort has occurred or occurs in India wherein the Indian user goes to the website, the defendants through

its search engine exhibits the said works and the work is communicated to the public by sending the work to him and facilitating downloading or

reaching to the computer of Indian user." It was found that "the said actions are sufficient to constitute part of cause of action u/s 20(c) of the Code

of Civil Procedure.

31. In the present case, however, the website Amazon.com makes it clear that the facility is only available to the viewers in US and not elsewhere.

The agreement with Defendant No. 11 also specifies this. The affidavit of Mr. Bakshi also makes it clear that there were 33 downloads for a

revenue of approximately USD 24.75 and that the downloads took place in the US and not in India. In other words, there is nothing to show that

using the website of Amazon.com any transaction constituting infringement of the copyright of the Plaintiffs was concluded in India. The decisions in

Dodha House v. S.K. Maingi and Exphar SA v. Eupharma Laboratories Ltd., do not support the case of the Plaintiffs that Section 62(2) CA

would enable the Plaintiffs to bring a suit against a foreign Defendant notwithstanding the fact that no part of the cause of action arose within the

territory of the forum Court.

32. In Smith Kline Beecham Plc v. Sunil Singhi 2001 PTC 321(Del) , the Court, in the context of Section 62(2) CA, accepted a similar plea that

the Defendant ought to be shown to be carrying on its local business activities within India. The decision in Consim Info Pvt. Ltd. v. Google India

Pvt. Ltd. does not assist the Plaintiffs. In the said judgment, the High Court of Madras found it necessary to allow the application of the Plaintiff

seeking the impleadment of Google Inc. as the fifth Defendant in the suit. The stand taken by Google India Pvt. Ltd. in its counter affidavit in the

said case was that "it is a wholly owned subsidiary of Google Inc., USA and that Google Inc. is the owner of the search engine." The Court

accepted the plea and observed that "Perhaps, the policies are trimmed by the subsidiaries in different jurisdictions, depending upon the local laws.

But, ultimately, it is the holding company which owns the search engine.

33. The mere fact that the image of one of the stories is able to be viewed on Amazon.com cannot by itself furnish a cause of action. That is not even the case pleaded by the Plaintiffs in the first place. The Plaintiffs case is one of infringement of their copyright as a result of the downloading of their stories from various websites of the Defendants and not because the image of the stories is able to be viewed on the websites including Amazon.com.

34. For the aforementioned reasons, the Court is satisfied that Defendant No. 10 is neither a necessary nor a proper party to the suit. The application is accordingly allowed. Defendant No. 10 is directed to be deleted from the array of parties.

IA No. 7821 of 2013 (under Order I Rule 10 CPC)

35. This is an application on behalf of Defendant No. 5 Apple India Pvt. Ltd. ("Apple India") under Order I Rule 10 CPC for deletion of its name from the array of parties.

36. Apple India states that the averment in para 16 of the plaint that the iTunes store is operated both by Apple India as well as Apple Inc

(Defendant No. 6) is not correct. It is stated that it is operated by Luxembourg based entity namely "iTunes S.a.r.l." A reference is made to the

terms and conditions ("T&C") to which a user has to agree prior to using iTunes store and services. It is pointed out that the T&C itself states that

the stores are operated by iTunes from its offices in Luxembourg"". It is contended that (a) Apple India does not exercise any control, direction or

oversight over the iTunes store; (b) Apple India does not determine what content/Applications are to be made available on the store; and (c)

Apple India does not determine pricing nor does it collect any monies itself for any downloads/sales of Applications from the iTunes store.

37. Mr. Sudhir Chandra, learned Senior counsel appearing for the Applicant, referred to the affidavit filed by Mr. Mark Buckley dated 22nd April

2012 on behalf of Apple Inc pursuant to the order dated 17th March 2012 stating that ""Apple India Pvt. Ltd. is not involved in the operations of

the App Store services"". He also referred to the written statement on behalf of Defendants 5 and 6 where it is stated that ""Apple India does not

exercise any control, direction or oversight over the App Store and plays no role in determining the content/Applications to be made available

therein". It is further stated in para 3 of the written statement that Apple Operations International (AOI) owns 99% of Apple India and Apple Inc

owns 96.42% shares of AOI. It is stated that Apple India was incorporated only to provide sales support to Apple Inc within India and that has

nothing to do with the present suit. In reply to para 16 of the plaint it is specifically denied that iTunes store is operated by Defendants 5 and 6. It is

submitted that the impugned stories "are not available for download on the iTunes store." The impugned App can merely be downloaded via the

iTunes store and "the said App enables the users to choose and download numerous stories including the four impugned stories." It is submitted

that "the number of downloads of the impugned App do not, in any manner, reflect the number of downloads of the impugned stories." In the

replication the Plaintiff denies that "it is only the impugned app which can be downloaded by the iTunes stores and that the said app enables the

users to choose and download numerous stories including the four impugned stories." Mr. Sudhir Chandra relied on the decisions in Anjum Nath

Vs. British Airways PLC and Others, and Facebook India Online Services Pvt. Ltd. Vs. Mufty Aijas Arshad Qasmi, .

38. On the other hand, Ms. Pratibha M. Singh, learned counsel for the Plaintiffs, submitted that from the affidavit of Mr. Mark Buckley, it was

clear that there have been downloads of the impugned apps from the app store provided on the iTunes platform. The details of the number of

downloads and the number of updates and re-downloads for the application "Story Time for Kids" from the iTunes platform and the other details

concerning the download of the Plaintiffs' stories have been set out in para 4 of the replication. It is stated that Apple Inc as well as Apple India

have provided free downloads through iTunes stores of the app "Story Time for Kids" and it is further evident that the story "How the Rainbow

was Formed" was provided under the head "other stories" on payment basis and thus there was a clear infringement of the Plaintiffs copyright.

39. Ms. Singh submitted that Section 14 of the Copyright Act was violated as Apple India facilitated the download of iTunes. She relied upon the

decisions in International Business Corporation Vs. Bhagirath Dolkheria and Others, , State of Assam Vs. Union of India (UOI) and Others, . She

further referred to the documents filed by the Plaintiff which included the print out of the website and referred to the web address which showed

that the stories were downloadable from the web address itunes.apple.com/in/app/storie-della-buona-notte. She pointed out that the contact address for Apple was Apple India.

40. First, the law concerning necessary and proper parties as explained in the decisions of the Courts may be noticed. In *State of Assam v. Union of India* it was held in para 15 that "it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy". It was further clarified in para 16 that "a necessary party is one without whom, no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision of the question involved in the proceeding." In *International Business Corporation*, the above principle was reiterated.

41. In *Anjum Nath* it was held that a bare allegation of fraud or collusion is not sufficient to maintain an action against parties arrayed in the memo of parties "unless material particulars disclosing cause of action against the Defendants so arrayed were spelled out in the plaint itself." In *Facebook India Online Services Pvt. Ltd.* while reiterating the above principle it was pointed out that "where there is merely a generic allegation without any specific relief being sought against any defendant, no decree can be passed against them."

42. In the present case, it cannot be said that there is no averment whatsoever concerning Apple India. It appears that the iTunes download is available on the website of Apple India. The question whether download can be made of the impugned story in India using the Apple India website will be a matter for evidence. Prima facie it does appear that the iTunes store could be visited using the website of Apple India which is the first step towards downloading of the impugned stories. While it is not possible at this stage to come to a definite conclusion on the role of Apple India, it is equally not possible at this stage to decide to the contrary viz., that Apple India has nothing to do whatsoever with the download of the impugned stories through the app provided on iTunes store. Consequently, the Court is unable to accept the plea of the Applicant that Apple India is neither a necessary nor a proper party in the suit. While an issue will be framed on this question, the Court is not persuaded to strike off Apple

India from the array of parties at this stage. The application is accordingly dismissed.