

(2008) 11 DEL CK 0053

In the Delhi High Court

Case No : CM No. 16817 of 2008 in FAO (OS) No. 464 of 2008

Gaurav Dayal

APPELLANT

Vs

Rabbi Shergil and Others

RESPONDENT

Date of Decision : 28-11-2008

Acts Referred:

Citation : (2009) 39 PTC 205

Hon'ble Judges : Mukul Mudgal, J; Manmohan, J

Bench : Division Bench

Advocate : Sanjay Jain, Rajendra Kumar, Latha Nair and Prashant Gupta, for the Appellant; Maish K. Saryal, for R1, Vikas Pahwa, B.K. Patra and Abhinid Das for R2 and 3 and Prashant Kumar and Triveni Polekar for R4, for the Respondent

Judgement

Mukul Mudgal, J.—Issue notice to the respondents, returnable on 15th December, 2008. Notice accepted by the learned Counsel appearing on behalf of the respondents. Reply to the application, if any, be filed within one week from today. Rejoinder thereto, if any, be filed before the next date of hearing.

2. This appeal is by the appellant-defendant No. 5, the Music Director of the Motion Pictures "Sorry Bhai". The appellant is aggrieved by the ex-parte order of the learned Single Judge dated 26th November, 2008 by which it was held that the intellectual property rights of the plaintiff are likely to suffer if the movie "Sorry Bhai" is released with the song Jalte Hain.

3. The learned Single Judge also heard the two songs in the Chamber and has recorded a finding that the music of the two songs i.e. the appellant's song Jalte Hain and the plaintiff's song Ballo are similar if not identical. One of the reasons given by the appellant is that the defendant No. 5 i.e. the appellant was the producer of his earlier album Avenge Ja Nahin and has utilized that familiarity with the plaintiff's music.

4. The learned Single Judge had heard the two rival songs in his chamber.

5. The learned Counsel for the appellant challenged the impugned order on two main grounds:

a. That the concepts of balance of convenience and irreparable harm have not been considered by the learned Single Judge and he has only gone on the prima facie case.

b. The plaintiff averred that the music cassettes and the CDs of the film titled "Sorry Bhai" having the song Jalte Hain were released by the defendants in October 2008.

6. It is submitted that in light of these averments that the music cassettes and CDs of the film were released by the defendant No. 4 in October 2008, the plaintiff's assertion that he came to know of the similarity of the music composition of the two songs jalte hain and ballo only on 25th November, 2008, i.e. a day prior to the filing of the suit, cannot be given any credence.

7. The appellant further submitted that the orchestral arrangement of the plaintiff's song jalte hain is itself based upon the song aisha, a prior release and therefore, even if it is assumed that the appellant's orchestral arrangement was similar, the respondent No. 1 was not entitled to an injunction as his musical arrangement lacked originality.

8. It has been averred by the learned Counsel for the respondent that the defendant No. 5 was instrumental in the recording of the song ballo in the album of the plaintiff and he along with the other defendants is directly involved in the infringement of the copyright of the song ballo. We, at the instance of the learned Counsel, and since the learned Single Judge had also heard the two conflicting songs, heard the two songs in the Chamber. In addition, we also heard the song aisha at the instance of the appellant. The CD containing the three songs is taken on record.

9. Upon hearing the three songs in question, both in the Court and in the Chamber, at length, we are of the view that in so far as the song jalte hain composed by the appellant is concerned, in melodic structure, it does not have similarity with the plaintiff's song ballo. There was some similarity in the use of the guitar, which is an electric guitar in so far as the song aisha is concerned and an acoustic guitar in the case of the appellant's and the defendant's song. This apart, there is some difference in the use of the accompanying sounds comprising of instruments and claps in so far as the defendant's song is concerned.

10. We are of the view that the main constituents of the song is the melody and some similarity in the rhythm of the accompanying acoustic guitar cannot be sufficient to infer that the appellant has plagiarized the plaintiff's song. In any event, the lyrics of the two songs are entirely different. Consequently, we are of the prima facie opinion that the song jalte hain is not a reproduction in a material form of the plaintiff's song.

11. We are also of the view that the respondent No. 1/plaintiff, has not explained properly in the plaint as to how, when the CDs and cassettes were released in October 2008, he heard them only on 25th November, 2008, a day prior to the filing of the plaint, which was two days prior to the release of the film today i.e. 28th November, 2008. In the cases of Kanungo Media (P) Ltd. Vs. RGV Film Factory and Others, and Biswaroop Roy Choudhary Vs. Karan Johar, , the interim injunction was refused as the plaintiff though aware about the title of the defendant's movie had approached the court for injunction only a few days prior to its release.

12. We have also noticed that the learned Single Judge while passing the impugned order has prima facie dwelled upon the nature of the case, without going into the balance of convenience, evident from the date of the release and the date of the filing of the suit and the irreparable injury which could be redressed by damages.

13. We were also shown an order of the learned Single Judge dated 27th November, 2008, wherein at the behest of the producers, i.e. defendants No. 1 to 3, a statement was made that they were in the process of deleting the song from the numbers of the film. The learned Counsel for the defendants No. 1 to 3 have explained as to why the statement was made, namely, owing to the impending release. However, in our view, this would certainly not affect the rights of the appellant-defendant No. 5, as he has independent rights as a Music Director. Though the order of 27th November, 2008 has not been challenged but since it is consequential to the order dated 26th November, 2008, we are treating this appeal to be a challenge to both the orders at the request of the appellant's counsel.

14. Accordingly, while staying the operation of the learned Single Judge's orders dated 26th and 27th November, 2008, we direct the defendants No. 1 to 5 in the original suit to maintain full accounts of the movie "Sorry Bhai", the sale of the audio and video cassettes and CDs and the revenue generated by the film. Such accounts shall be filed in this Court from time to time.

15. Copy of the order be given dasti under the signature of the Court Master.