

(2010) 04 GUJ CK 0075

In the Gujarat High Court

Case No : Special Criminal Application No. 2168 of 2009

Gopalbhai Valjibhai Gohel and Another

APPELLANT

Vs

Jayeshkumar Umashanker Chikhle and Another

RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Cable Television Networks (Regulation) Act, 1995 — Section 21
Constitution of India, 1950 — Article 226
Copyright Act, 1957 — Section 37, 51, 63, 64, 69
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2010) 04 GUJ CK 0075

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Nayan D. Parekh, for the Appellant; M.G. Nanavaty, Dhaval G. Nanavati for Respondent 1 and C.M. Shah, Addl Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Brahmbhatt, J.—Heard learned advocates for the parties.

2. The petitioners, who have been named as accused in the CR. No. II-129 of 2009 registered with Athwalines Police Station, Surat City by

respondent No. 1 hereinabove alleging that accused has committed an offence by retransmitting, retelecasting and displaying without authority and

licence the programmes and broadcasting of Star Channel of ESPN Broadcasting Agency and thus, infringed copy right of the complainant-

informant under Sections 37 and 51 of the Copyright Act, 1957 and committed an offence punishable under Sections 63 and 69 of the Copyright

Act, 1957 (hereinafter referred to as "the Act" for short).

3. The complainant is the authorized officer of the ESPN Software (I) Pvt. Ltd,

who happens to be the sole licensee for distribution of ESPN and Star Sports International programming services in India. These two channels or broadcasting agencies are authorizedly telecasting live sports events for its subscribers. The complainant has acquired the rights to telecast these sporting events live on payment of license fees to the concerned. The ESPN may in turn permit Multi System Operator ("MSO" for short) and/or cable operator on payment of requisite fees to retransmit these programmes to their subscribers.

4. The accused are MSO and cable operator and it is alleged that they were retransmitting the programmes without their being any authority to do so as the earlier licence/permission under which the card decoding which is commonly known as Integrated Receiver Decoder (IRD) and Viewing Card (VC) under the contract had been surrendered by MSO and therefore, after surrendering the said card and such devices, the MSO and its cable operator could not have legally decoded the signals and retransmitted the programmes to its subscribers. The complainant has narrated instances wherein it was provided that the end user television sets were receiving the retransmitted programmes along with logo of concerned MSO which could not have been possible unless and until the device is installed unauthorizedly or signals are decoded unauthorizedly without their being contract and payment of fees for receiving and retransmitting signals and this could not have been done and this is so done in violation of provisions of the Act and they are liable to be prosecuted for the said offence.

5. The petitioners had approached this Court by preferring Criminal Misc. Application No. 12055 of 2009 for seeking quashment of the complaint registered against him, which came to be withdrawn with a view to file substantive petition being Special Criminal Application under Article 226 of the Constitution of India. The permission for withdrawal was granted by this Court (Coram: K.S. Jhaveri, J.) vide order dated 14.10.2009.

6. Thereafter, the petitioner filed present petition under Article 226 of the Constitution of India being Special Criminal Application for praying inter alia:

(A) Admit and allow the present petition;

(B) To direct respondents particularly respondent No. 2 and/or its agent, servant or officer not to seize its electronic equipments which are vital

and necessary for its broadcasting business and thereby restrain themselves from harassing present petitioner in connection with FIR bearing FIR

bearing No. CR.II-129 of 2009 registered with Athwalines Police Station, Surat City, Surat u/s 51, 63, 69 of The Copyright Act, 1957;

(C) To direct respondents and particularly respondent No. 2 and/or its agent, servant or officer not to arrest the petitioner and not to cause mental

torture or harassment by undue pressure from the complainant party, third degree treatment etc in connection with FIR bearing CR.II.129 of 2009

registered with Athwalines Police Station u/s 51, 63, 69 of The Copyright Act, 1957;

(D) To direct respondents and particularly respondent No. 2 and/or its agent, servant or officer not to take any coercive steps upon the petitioner

of any kind which are violative of his fundamental rights in connection with FIR bearing CR.II.129 of 2009 registered with Athwalines Police

Station, Surat City, Surat u/s 51, 63, of The Copyright Act, 1957;

(E) during the pendency and/or final disposal of the present application, be pleased to direct respondents and particularly respondent No. 2 and/or

its agent, servant or officer not to take any coercive steps such as arrest, torture and seizure, harassment and third degree treatment etc upon the

petitioner of any kind which are violative of his fundamental rights in connection with FIR bearing CR.II.129 of 2009 registered with Athwalines

Police Station on 30.9.09 for the offences punishable u/s 63, 69, 37 and 51 of The Copyright Act, 1957;

(F) to restrain respondents and particularly respondent No. 2 and/or its agent, servant or officer from causing any kind of undue harassment upon

the petitioner by the pressure of complainant in connection FIR bearing CR.II.129 of 2009 registered with Athwalines Police Station, Surat City,

Surat u/s 51, 63, 69 of The Copyright Act;

(G) Ad-interim relief in terms of Para-8-E be granted;

(H) Affidavit, Vakalatnama and certified copy of the FIR be dispensed with due to paucity of time and considering the diwali period and present

facts of the case.

1. to pass such other and further order/s which may deem fit and proper in the interest of justice;

7. The petitioner moved draft amendment on 11.11.2009 seeking addition of two

prayers namely:

(BB) to quash and set aside FIR bearing CR.II.129 of 2009 registered with Athwalines Police Station, Surat City, Surat for the offences

punishable u/s 63, 69 and 51 of The Copyright Act, 1957;

(EE) during the pendency and/or final disposal of the present application be pleased to stay further investigation and/or any further proceedings

arising out of and in connection FIR bearing CR.II.129 of 2009 registered with Athwalines Police Station, Surat City, Surat for the offences

punishable u/s 63, 69 and 51 of The Copyright Act, 1957;

8. This Court (Coram: R.R. Tripathi, J.) while issuing rule allowed the draft amendment and matter was slated for hearing.

9. Shri Parekh, learned advocate appearing for the petitioners has submitted that the petitioners are not liable to be prosecuted in any manner as

they are not responsible for catching the signals transmitted by ESPN and its agency. If the SET TOP box catches such signals and transmits the

live programmes, then, the MSO and Cable Operator are not responsible for the same. He further submitted that on account of advancement of

technology, hazards of such type are required to be borne by people. This being one of the most common hazard and disadvantage namely

catching the signals automatically by the SET TOP box, this itself should not be considered as offence and therefore, the present application is

filed, wherein, the prayer for quashment is also made by way of amendment. He further submitted that MSO of this Cable Operator had as per his

information surrendered Integrated Receiver Decoder (IRD) and Viewing Card (VC) long back on termination of the contract with ESPN or its

principal and therefore, there was no scope for decoding and transmission of signals of live programmes receives and broadcast by ESPN or its

principal. The end user's television sets got the signals with logo of MSO would not in itself be sufficient to indicate principle as piracy as it is

alleged to be made out. He submitted that the cable operator and MSO were apprehended high handed action at the behest of ESPN and hence

they moved an application to the concerned authority namely Police Commissioner and Police Inspector of the concerned Police Station voicing

their apprehension that may be catching of the signals by SET TOP box at the subscribers end with logo of MSO would result into unnecessarily &

undue harassment to MSO and/or cable operator.

10. Shri Nanavaty, learned advocate appearing for the respondent No. 1 submitted that transmitting of signals and cable operators are governed

by The Cable Television Networks (Regulation) Act, 1995 and by virtue of Section 21 of the said Act, the application of other laws is not barred

and as per the provision of the Copyright Act, especially Section 37 provides for Broadcast for reproduction right and Section 63 and 69 provide

for punishment. Shri Nanavaty submitted that prayer for quashment in this petition would not be tenable as the substantive petition for quashment

u/s 482 of the Code of Criminal Procedure had been withdrawn and having once withdrawn the said petition, quashment prayer could not have

been made by the petitioners in this petition under Article 226 of the Constitution of India. He submitted that the complainant is not in any way

interested in undue harassment to Cable Operator and MSO. He further submitted that apprehension of the petitioners is ill-founded in as much as

when such type of complaints are made, the Investigating Agency would not straightway press into service the provisions of Section 64 of the Act.

11. Shri Nanavaty further submitted that piracy of channel in the network is happen as under:

If a particular channel deactivates its services for the said MSO, for non payment of dues/default on any terms and conditions of the agreement,

then, this MSO can indulge in stealing that channel in following methods:

(a) MSO can tap the channel from the neighbouring cable network, where the said channel is ON and can transmit this channel in his own cable network.

(b) MSO can transmit this channel using a DTH box in his control room to source the channel.

To identify the Piracy, there is a method called Fingerprinting. In said method, signals of pay channels are received by the MSO through an IRD

(Integrated Receiver Decoder) with Viewing Card (VC) provided the channel broadcaster. The VC has unique serial number. By a command sent

by the broadcaster to all its IRDs, the VC number is displayed on every TV connected to MSO's cable network showing the broadcasters TV

channel. This display of VC serial number is called ""Fingerprinting"". Fingerprint establishes beyond the doubt the source of the pirated channel. Shri

Nanavaty also submitted that by scanning the list of channels in any home connected to the MSO's cable network, one can establish the identity of

the MSO. This is done by looking at the MSO's in-house movie/local news channels. These channels carry the MSO's company logo. This

exercise identifies the MSO from where the signals of the pirated channel are being transmitted.

12. Shri Nanavaty further submitted that quashment at this stage is out of question and the Court may pass appropriate order keeping in view the apprehension expressed by petitioners in appropriate manner.

13. This Court has heard learned advocate for the parties at length and perused the documents on record. It is pertinent to note that the petitioners

are MSO and Cable Operator and the entire system could be prescribed as under:

The television channels from the MSO Control room go to the networks of many smaller cable operator. The LCO then passes the channels to

individual household where all the channels are visible on the Television. MSO distributes his own movie channels/local news channel along with

normal satellite channels like ESPN, Star Sports, Zee Channels, Set Max etc. Such movie/news channels of the MSO carry MSO's company

logo on each channel clearly identifying the MSO who is distributing the channels. Any addition or deletion of channels in the MSO's Control

Room will have effect in all the homes connected to the cable network.

14. Thus, from the aforesaid it can be said that for catching and retransmitting of the signals of the programmes, the agency concerned has to have

Integrated Receiver Decoder (IRD) and Viewing Card (VC), without help of these two, it cannot be done and thus, devices are provided by

respondent No. 1 under contract. This term of contract is terminated and therefore, strictly speaking the cable operator or MSO could not have

been entitled to receive and retelecast or retransmitted those signals even after they have by default or mistake some device, which was said to

have been employed for retelecasting that programmes. Shri Parekh for the petitioners very candidly submitted that cable operator / MSO have no

legal right to transmit or retelecast the signals transmitted by ESPN and its agency legally. He further submitted that the end user's receiving the

signals could be because of setup box and for which, the MSO or cable operator is not responsible. Shri Nanavaty, learned advocate appearing

for respondent No. 1 was not absolutely unjustified in submitted that the petitioner ought not to have resort to first filing petition u/s 482 of the

Code of Criminal Procedure for quashment and after having it been withdrawn, once again requested this Court for reconsider this very prayer of

quashment under Article 226 of the Constitution of India, which was essentially filed for their illfounded apprehension with regard to high handed

actions by the State authority.

15. Looking to the averments made in the complaint and the submissions made on behalf of the advocate for the petitioners with regard to

petitioners having no license or authority to retransmit, retelecast programme for which exclusive rights are with complainant then the investigation

into these allegations needs no interference under Article 226 of the Constitution of India. The complaint is filed and investigation is therefore

required to be made. The advocate for the petitioners has not pointed out any valid ground for quashing either the complaint or the investigation

thereon. The Court need to be mindful of the fact that in fact the petitioners did file substantive petition being petition for quashing of the complaint

which subsequently came to be withdrawn for filing the present petition and in the present petition as such originally did not contain any prayer for

quashment as quashing of the complaint was in these facts of circumstances was naturally not warranted. The subsequent prayer of the petitioners

for quashment made by way of amendment therefore in my view would not be justified and the complaint cannot be quashed as the requirement for

quashment are essentially lacking in pleadings and submission of the petitioners. The quashment is permissible only when the accused's name is not

figuring in the complaint or when accused named in the complaint is successfully showing that he is not even remotely connected with the offence. It

is needless to say that principle of quashing as enunciated by the Supreme Court in case of State of Jammu and Kashmir Vs. A.R. Zakki and

others, is guiding principle till date and no eventualities in the principle enunciated in the decision much less establishment of complaint are attracted

in this case. Therefore, this Court is of the view that quashment of the complaint is out of question and prayer for quashment is required to be

rejected.

16. This brings the Court to consider the prayer as they originally stood in the

memo of petition namely issuing direction to the agency not to take coercive steps against the accused petitioners hereinabove and further directing them not to seize or take away their electronic equipments etc in guise of investigation and prayer with regard to safeguarding of the fundamental rights during investigation. The advocate for the respondent No. 1 has clearly submitted before this Court that the complainant is not even remotely interested in harassing the accused petitioner hereinabove. The Court under Article 226 of the Constitution of India cannot issue direction merely on apprehension of the accused otherwise, the same would amount to proceed on an assumption that the police authorities are not going to follow the law. Such a permission would be not called for in view of the present facts and circumstances of the case.

17. The apprehension of the petitioners could be taken care of by appropriate observation in this order that the investigating agency shall bear in mind the principles of law in carrying out the investigation and judgment of the Apex Court in case of D.K. Basu Vs. State of West Bengal, and avoid undue harassment and hardship to the petitioners and their agents and servants.

18. The Court is also of the view that rejection of this petition may not result into unwarranted emboldening of the complainant and investigating agency in resorting to an avoidable coercive steps, which may not be permissible under the law.

19. With this observation, the petition fails and same is accordingly dismissed. Rule discharged. Interim relief stands vacated.