
(1999) 08 KAR CK 0022
In the Karnataka High Court
Case No : M.F.A. No. 5491/98

Gramophone Co. of India Ltd.

APPELLANT

Vs

Mars Recording Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 31-08-1999

Acts Referred:

Copyright Act, 1957 — Section 13, 18, 2 (y), 30, 30 A

Citation : (1999) 08 KAR CK 0022

Hon'ble Judges : M.P. Chinnappa, J

Bench : Single Bench

Advocate : K.C. Shivasubramanian, for the Appellant; Rajesh Chandar Kumar, for Kiran S. Javali, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Chinnappa, J.—The brief facts of the case are that the respondent No. 1 on 16.05.1998 notified its intention to record 1000 numbers of each audio cassette of three songs viz. "Kallusak-karc Kolliro", "maduve maduve maduve" and "chinnada hadugalu" and sent inlay cards of the above 3 cassettes along with 3 demand drafts of Rs. 1,500/ each towards royalty payable in favour of the copy right owner the appellant herein. The respondent No. 1 also after waiting for 15 days proceeded to sound record audio cassettes of the 3 above titled songs and released the same in the open market and the same was circulated throughout Karnataka State despite the appellant's refusal to grant licence/consent to do the same. Subsequently as the respondent apprehended that all the cassettes would be seized it filed a suit in O.S. 4792/98 on the file of the VIII Addl. City Civil Judge, Bangalore, along with an application under Order 39 Rules 1 & 2 CPC for temporary injunction restraining the defendants, their agents, representatives, works officers or any person or persons claiming under them from seizing the 1st respondent's 3 above titled audio music cassettes. Thereafter, the appellant appeared and filed objections contending inter alia that through several agreements acquired copyright in the literary, dramatic, musical

and artistic (sound trace) works, relating to various Kannada films and they are the owners of original plate in respect of the films mentioned therein and the respondent also is engaged in the business of manufacture of records, cassettes and the like. The appellant refused to give consent licence keeping the various aspects in mind and the same was informed to respondent No. 1 by letter dt. 8.6.98. In spite of refusal, the 1st respondent proceeded to re-record the release cassette which is a clear infringement of the appellant's copyright on the above said audio cassettes. The appellant also filed criminal complaint under the Copyright Act and Rules for seizure of articles, machines, tapes, cassettes, coverings, etc. against the 1st respondent in C.C. No. 165/96 earlier and the appellant has taken custody of the goods. Further, the appellant also moved the Calcutta High Court against the 1st respondent in which injunction relief was granted *ex parte* but this was suppressed by the 1st respondent, etc. After hearing both sides the learned Court allowed I.A.I, and granted temporary injunction as prayed for. Being aggrieved by the said order dt. 2.9.98 the 1st defendant preferred this appeal.

2. Heard the learned advocates appearing for the respective parties.

3. From a perusal of the pleadings and having heard the arguments advanced by both sides and in the light of the findings of the Court below, the only question that arises for consideration is:

Whether the finding of the Court below that Section 52(j) disjoins Section 52(j) (i) & (ii) calls for interference?

4. Before considering this question, it is necessary to refer to the admitted facts in this case which are: the appellant is engaged *inter alia* in the manufacture and sales of records, cassettes, discs and other sound recording system. A substantial portion of the appellant's business consists of the manufacture and sale of cassettes, records and discs relating to film music from the original sound track. The said original sound track forms part of the cinematograph films. It is also not in dispute that the appellant by several agreements acquired copyright in the literary, dramatic and musical works relating to various Kannada films and they are the owners of the original plate in respect of the films referred to by the appellant in accordance with the provisions of the Copyright Act, 1957, apart from various other Kannada and other language musical works. It is also not in dispute that the 1st respondent is also engaged in the business of manufacture of records, cassettes and the like. The 1st respondent during the course of its business wanted to sound record the cassettes of the following 3 films, viz. "Kallusakkare Kolliro", "maduve maduvc maduve" and "chinnada hadugalu" admittedly for which the copyright vests with the appellant. It is also not in dispute that the respondent No. 1 on 16.05.1998 notified its intention to record 1000 numbers of each audio cassette of the above three titled songs and also sent inlay cards of the above 3 cassettes along with 3 demand drafts of Rs. 1,500/ each towards royalty payable in favour of the copy right owner the appellant herein. The respondent No. 1 also after waiting for 15 days proceeded

to sound record audio cassettes of the 3 above titled songs and released the same in the open market and the same was circulated throughout Karnataka State despite the appellant's refusal to grant licence/consent to do the same. In view of this the question is whether the respondent ought to have waited for the consent of the appellant to record the cassettes after having complied with Section 52(j)(ii) of the Act.

5. The learned counsel for the appellant has vehemently argued that the finding of the learned Court below that Section 52 (j) (i) & (ii) shall be read disjunctively is contrary to the intention of the legislature. On the other hand, he contended that both the sections should be read co-jointly to give meaning and purpose to the Act. To substantiate his argument he has drawn my attention to certain provisions of law which are necessary to be quoted herein. At the very outset he submitted that Section 2(y) of the Act is relevant which reads:

"work" means any of the following works, namely:-

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a (sound recording);

As far as this case is concerned, it is based on the work of sound recording. He has also further drawn my attention to Section 13 which deals with "Works in which copyright subsists" Literary and musical works are involved in this section.

Section 18 is yet another important section in this case which deals with "Assignment of copyright".

From a reading of this section, it is clear that a mere acceptance of remuneration or delivery of manuscript does not constitute an assignment of copyright. It is also clear that in determining, whether there is only a licence to print, publish and sell copies or there is partial assignment of copyright, the Court has to look at the real meaning of an agreement, rather than the particular choice of words of the parties.

Section 19 deals with "Mode of assignment". From the comments it is clear that the assignment of Copyright in any work shall-

- (i) identify such work, and
- (ii) specify the rights assigned, the duration, territorial extent of such assignment and the amount of royalty payable, and
- (iii) be in writing signed by the assignor or by his duly authorised agent.

As far as licence is concerned, Chapter VI of the Act deals with it. However, Sections 30, 30A and 31 are relevant sections for the purpose of this case which deal with "Licenses by owners of copyright", "Application of Section 19 & 19A" and "Compulsory licence in works withheld from public.

Section 51 deals with "when copyright is infringed". Section 51 shall be read long with Section 14 of the Act which deals with the meaning of copyright which says that "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof:

Section 58 deals with "Rights of owners against persons possessing or dealing with infringing copies".

Section 2(f) deals with "cinematograph film" and Section 2(m) defines "infringing copy".

6. The learned counsel for the respondents however argued that there is no dispute in regard to the facts as stated by the appellant in this case. On the other hand, he submitted that Section 51 deals with the question as to when the copyright is infringed. Section 52 on the other hand is an exception to Section 51. Section 52(j) reads this:

(1) The following acts shall not constitute an infringement of copyright, namely:-

(j) the making of sound recordings in respect of any literary, dramatic or musical work, if-

(i) sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work;

(ii) the person making the sound recordings has given a notice of his intention to make the sound recordings , has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him, at the rate fixed by the Copyright Board in this behalf:"

As indicated above, there is no dispute that the respondent has complied with the requirement of Section 52(j)(ii) r/w Rule 21 of the Rules by issuing a notice of his intention to make a sound recording has provided copies of all covers or labels with which the sound recordings are to be sold and has paid in the prescribed manner to the owner of rights in the work royalties of Rs. 1,500/- each in respect of all such sound recordings to be made by him and Rs. 1,500/- is the rate fixed by the Copyright Board in this behalf. Sub-clause (ii) of Section 52 shall be read in conjunction with Rule 2 of Copyright Rules, 1958, which deals with making of records.

7. The learned counsel for the appellant has vehemently argued that if Section 52(j)(ii) is read separately, the very right of the appellant is deemed to have been infringed as admittedly the respondents have not obtained the permission of the appellant who is the owner of the copyright. He further emphasised that by merely sending a sum of Rs. 1,500/- towards royalty and expressing his intention by notice to produce the cassettes if held to be sufficient compliance,

the appellant cannot proceed against the respondents even if it produces more than 1000 copies and in actual fact, he submitted that under the guise of sending Rs. 1,500/- towards royalty, the respondents have produced more than 1000 cassettes and the appellant is left without any remedy. Therefore, he stated that taking into consideration the fact that it is absolutely necessary for the respondent to obtain prior consent or assignment by a valid agreement. Section 52 (j) (i) & (ii) shall be read together to give a full meaning and object to the Act. According to him, only after compliance of Section 52(j)(ii) r/w Rule 21, one has to wait for the licence or consent of the owner of the right in the work. It is absolutely necessary to mention here that under the original Act, the word "and" was added after the words "in the work" under Sub-clause (i) of Clause (j) of Section 52 and preceding Sub-clause (ii). However, by the amended Act of 38 of 1994 which came into effect from 10.5.95 the word "and" has been deleted. From this it is abundantly clear that the legislature intended that these two provisions of law shall be read separately thereby giving a meaning to the effect that the exemption for infringement of copyright is made available either by sending records of that work is made by or with licence or consent of the owner of the right in the work or the person making sound recordings notice of his intention in compliance with Sub-clause (2) of Clause (j) of Section 52 which is re-produced. In consonance with this Section Rule 21 has been framed. From a perusal of Rule 21 it is clear to obtain consent or licence, a person shall comply with the necessary requirements of this rule. Therefore, it is dealing only with Clause (j) of Sub-section (1) of Section 52 and it does not refer to Sub-clause (j) of Section (ii) of Section 52. If the respondent were to take shelter under the Clause (j) in Sub-section(1) of Section 52, he has to wait till the consent or licence is given. The assignment of copyright can be obtained by written agreement as provided u/s 19. Licence or consent can be obtained u/s 30 of the Act. If the licence or consent is obtained u/s 30, naturally the licensee is exempted from proceeding against him for infringement of copyright. In the event such licence or consent is not given, even after compliance of the requirement of Section 52(1)(j)(ii) within 15 days, I am of the opinion that the licence is deemed to have been granted and the person producing the cassette after the expiry of 15 days is not said to have infringed copyright. If Section 52(j) (i) & (ii) are read conjointly, Section 52(j)(ii) becomes redundant and such narrow interpretation cannot be given to defeat the very object and purpose of Section 52(1)(j)(ii). From a perusal of Rule 21 it is clear that it is framed so as to enable a person intending to make a sound recording to obtain consent or licence from the copyright owner by complying with the requirements of sending a notice of such intention to the owner of copyright and to the Registrar of Copyrights giving 15 days notice in defence of making the sound records and also paying the required amount and the rate of royalty is as fixed by the Copyright Code in this behalf.

8. The learned counsel for the appellant has vehemently argued that if the respondent is allowed to make recording without there being a licence or consent

of the owner, the owner cannot proceed against the respondent even if he makes more than 1000 cassettes in each case, having paid Rs. 1,500/- only to safeguard the interest of the owner of the copyright, a provision is made enabling the copyright owner to examine the records maintained by the maker to find out as to whether he has produced more than what is allowed as per the royalty paid by him. It is not in dispute that the royalty is not a thing to be bargained as it is fixed by the copyright board with particulars of the inlay cards. Section 52(j)(ii) does not require pre-requisite consent from the owner. The owner is entitled for royalty fixed and a notice of the intention of the respondent to make the cassettes. It is also necessary to mention that the intention of the respondent is not copying but making sound recording. Admittedly, the musician is different, singer is different, only the respondent is using the lyrics owned by the appellant. Section 52(j)(ii) does not go into the question of negotiation thereby consent is not required. Section 52(j)(i) recognises the right of copyright owner. The respondent has made an independent recording. The recording of respondent and also the appellant are different. Quality of sound recording is also different from each other. Section 20 gives the right to owner for 60 years which is subject to the provisions of Section 20 which deals with transmission of copyright in manuscript by testamentary its position. Section 14(a)(iii) reads thus:

"For purposes of this Act, "Copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

(iii) to perform the work in public, or communicate it to the public;"

As far as this case is concerned, the 3rd clause is relevant. Therefore, there is no dispute with regard to application of this provision but Section 14 is made subject to the provisions of this Act i.e. including the exception provided u/s 52(j) (i). In this case, as indicated above, the respondent has complied with the requirement of Section 52(j)(ii) and the refusal letter was received by the respondent only after a lapse of 15 days. Therefore, since the time of 15 days is mentioned in Rule 21, it has to be construed that there is a deemed provision of having given consent. Therefore, the Court below is right in holding that Sub-clauses (i) & (ii) of Section 52(1)(j) shall be read disjunctively and not co-jointly. Therefore, the learned counsel for the respondent submitted that Section 52(1)(j) (ii) is an exception to the general provisions of this Act. This argument according to me is well founded.

9. The learned counsel for the appellant further argued that from a perusal of the entire act that the right is given only to the copyright owner to go to Court either by filing a civil suit or the criminal case against the person who is infringing the copyright. This argument cannot be accepted. The respondent has complied with the requirement of Section 52(ii)(j) and his right has to be protected and there is no prohibition in the Act prohibiting the respondent from filing the suit. The plaintiff/respondent only sought for injunction against the appellant from seizing

the cassettes produced by him and naturally if these cassettes were seized as apprehended by the respondents, they will be without any remedy which is not the object of the Act. If the respondent satisfies the requirements of the relevant provisions of law, the same Act also provides a right to protect his interest. Therefore, this argument also is unsustainable.

10. The learned counsel has vehemently argued that the inaly cards furnished to the appellant and also produced in this case are misleading to the general public as they would be under the impression that it is the records produced by the appellant. This question has been examined by the learned Court below in greater detail.

11. The learned counsel for the respondents also brought to my notice that in the front side the name of the cassette is only mentioned with a picture of Lord Krishna printed. On the left side of the cover in the bottom in red colour the respondent has clearly stated that it is printed from original sound track. Further it is stated that the same is recorded as per the provisions of Section 52(j). It is specifically stated "not from original sound track". The learned counsel further argued that the photo of the original singer also is shown which will misguide the public. That itself is not sufficient. G.V.Atri who is the singer of these songs with a lady singer Manjula Gururaj is also mentioned. Therefore, there is no possibility of the public mistaking it as the original recording. This is not seriously disputed by the appellant. (Paragraph 16).

12. The learned counsel for the appellant has also drawn my attention to the decision reported in The Gramophone Company of India Limited Versus Super Cassette Industries Lid. (1999 PTC 2 (Del) wherein it is held:

"Three distinct copyright works are involved. These are literary works (lyrics), musical works and sound recordings (see: Clauses (Y), (O), (P) and (xx) of said Section. 2) Needless to repeat that in the aforesaid letter dt. 29th July, 1993 defendant has categorically acknowledged the copyright of the plaintiff in literary and musical works. Aforesaid Section 52(1)(j) has to be read in harmony with the aforementioned provisions of the Act. Considering all these provisions together, I am not inclined to accept the said submission advanced on behalf of the defendant that on despatch of the cheque for Rs. 2,230/- towards royalty which was indisputably returned by the plaintiff simultaneously intimating that it did not permit the defendant to make the version recording of their songs, the defendant automatically became entitled u/s 52(1)(j) to make the sound recordings of the work of the plaintiff and the plaintiff is only entitled to statutory fee. I am also not inclined to agree with the other limb of the submission referred to above made on behalf of the defendant that there is no infringement of copyright within the meaning of Section 51 of the Act as the singers of the said work of the plaintiff and the defendant are different. Plaintiff has thus prima facie made out a strong case for issue of the ad interim injunction restraining the defendant from issuing any sound recordings which infringes the copyrights of the plaintiff. Obviously, balance of convenience in the matter is in favour of the

plaintiff and it is the plaintiff v/ho is likely to suffer irreparable injury if the ad interim injunction to the above effect is not granted in its favour. Having arrived at this conclusion .

For the foregoing discussion, defendant, its directors, partners, servants and agents are restrained from issuing any sound recordings of the audio cassette titled GANPATI AARTI ASHTVINAYAK GEETE which infringes the copyrights of the plaintiff till the disposal of the suit."

From the reading of the Judgment it is clear that Section 52(j)(i) and (ii) were not considered in detail. From an examination of these two provisions as indicated above, it is clear that if action is taken u/s 52(j)(ii) and the recording is done, it cannot be said that the copyright of the appellant is infringed. In addition to that before that Court it is clear that the design, colour scheme, get-up and layout of the defendant's audio cassette is deceptively and confusingly similar to that of the plaintiff. Further all the songs of the defendant's cassette appear in an identical sequence as they appear on the plaintiffs cassettes. Defendant has thus infringed the copyrights held by the plaintiff.

13. In similar circumstances, where the appellant and the defendants are the same, the same High Court in (1995 (1) A.L.R 555) Gramophone Company Of India Ltd. v. Super Cassette Industries Ltd:1996 PTC 252 held that the unoffending alternate title must also contain underneath it a declaration in sufficiently bold letters that the record is not from the original sound track but only a version record with voices of different artists. The word "not" should be underlined. This is a guideline issued by the Delhi High Court. As stated above, this guideline has also been followed by the respondents herein. Further, the Court also considered the question as to what is version recording. According to the Court version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copying nor reproduction of the original recording.

14. The learned counsel for the appellant further argued that he had already obtained a temporary injunction by filing a suit against the respondent and the Calcutta High Court was pleased to grant him injunction as sought for and if this injunction is not vacated, the appellant would be without any relief. It is for the appellant to take necessary steps to work out his remedy in accordance with law but the fact remains that certain rights are available to the respondent and it has to be protected by the Court in this suit. Therefore, the Court below has rightly come to the conclusion that the plaintiff has made out prima facie case and balance of convenience weighs in his favour. Further, the Court also has held that in the event injunction is not granted, irreparable injury would be caused to the respondent. Therefore, it is also to be noted that if any loss is caused to the appellant, he is entitled to recover damage in accordance with law.

15. The learned counsel for the appellant submitted that the matter is pending

before the Supreme Court. Be that as it may, the fact remains that from the Judgment of the Court below it is clear that the Court has considered all aspects of the matter and according to me arrived at a right conclusion. But the fact which remains to be considered is the apprehension that the respondent is producing cassettes more than the permissible limit and the appellant is not in a position to have control over the same. This contention cannot be gone into as the Act has provided the necessary remedies to the appellant and it is for him to work out his remedies.

16. Therefore, it is clear that the order of the learned Court below is neither arbitrary, injudicious, capricious nor prohibited under any law. It is also settled law that even if the Appellate Court can come to a different conclusion than from the one arrived at by the Court below, normally the Appellate Court cannot interfere. Such being the position of law, I hold that the appeal has no merit and accordingly it is dismissed. No order as to costs.