

(1988) 02 CAL CK 0019
In the Calcutta High Court
Case No : Suit No. 56 of 1987

Gramophone Company of India Limited	APPELLANT
Vs	
Baleswar and another	RESPONDENT

Date of Decision : 26-02-1988

Acts Referred:

Copyright Act, 1957 — Section 14, 2, 22, 55
Specific Relief Act, 1963 — Section 38
Trade Disputes (Amendment) Act, 1965 — Section 1
Trade Disputes Act, 1906 — Section 3, 5(3)

Citation : AIR 1990 Cal 6

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Judgement

1. In this application the petitioner has prayed for an order of injunction restraining the respondent No. 2 its servants or agents from in any way manufacturing or selling or marketing or dealing with or distributing any copies of any records of any performances rendered by the respondent 1 or for the respondent 2 either in disks or in any cassette or otherwise or at all. Petitioner has also prayed for an injunction restraining the respondent 1 from giving any performance for any person other than the petitioner for the purpose of manufacturing of records. The case of the petitioner is that by a contract entered into by and between the petitioner and the respondent 1 dt. May 14, 1984 the respondent 1 became exclusive artiste of the petitioner on inter alia the following terms and conditions :

"1. For the purpose of this Agreement the following words shall have the meanings set forth against them:

"PERFORMANCE" shall include speech, singing playing on instrument whether alone or with another or others.

"RECORD" shall mean a gramophone record magnetic tape (whether reel to reel endless loop in cassette or cartridge form or otherwise howsoever) or any other

contrivance or appliance whatever bearing or used for emitting sounds (whether or not the same also bears or can bear visual images or is or can be joined to use in conjunction with or part of a contrivance or appliance bearing or used for giving visual images).

"CINEMATOGRAPH FILM" shall mean any recording however made of a sequence of visual images which is capable of being used as a means of showing that sequence as a moving picture (whether or not joined to or part of a "record" as defined herein) PROVIDED THAT it shall only include such recordings as aforesaid as are used for presentation through normal cinema theatrical or television media and shall not include any such recordings as are used for presentation in any other manner whatsoever.

"RETAIL PRICE" shall mean the retail price or recommended retail price less any tax or taxes levied in respect of the sale or which have to be recovered as part of the selling price.

2. The Artiste shall during a period of ONE (1) year computed from the 3rd day of April, 1984 attend at such places and times reasonably convenient to both the Artiste and the Company as the Company shall require and shall render such performance (whether alone or together with one or more other artistes) as the Company shall elect for reproduction in by or on any record. The minimum number of performances which the Artiste shall render and the Company shall record as aforesaid during the said period shall be sufficient to comprise per annum not less than the equivalent of One double sided seven inch single gramophone record(s) manufactured to plate at a speed of 45 revolutions per minute. The Company shall commence sale of each record containing the aforesaid performances within six months of completing the recordings, provided however that the Company may release two successive records of the same artiste at intervals of up to twelve months.

3. The Artiste shall at the request of the Company repeat any performance for the purpose of producing in the opinion of the Company a satisfactory record.

4. The Artiste shall not: --

(a) during the currency of this Agreement and any extension therefore render any performance whatsoever nor

(b) following the termination of this Agreement or any extension thereof during a period of ten years from the first day of the month in which any record of a performance by the Artiste hereunder is first offered to the public perform (sic) the work performed for the purpose of that record.

One the Artiste's own account or for any individual firm company corporation or other person other than the Company whereby such performance is or is intended to be recorded in any form from which any record may be offered to the public PROVIDED THAT performances for sound or television broadcasting or cinematograph films shall not be prohibited by this clause in which (i) records

thereof are not and are not intended to be offered to the public and (ii) the Artiste contracted make any such performance with the person (s) who will broadcaster or produce such performance on the express written condition that no record thereof will be offered to the public except by or with the written consent of the Company".

2. It is the further case of the petitioner that the petitioner has come to learn in the first week of January 1987 that the respondent 1 wrongfully and illegally and in breach of the said contract with the petitioner has recorded performances for the respondent 2 which are intended to be sold as records or cassettes by the respondent 2 to the public. It is the further case of the petitioner that the petitioner is the sole and exclusive owner of the copyrights or recording rights in the said recording and/or performances rendered by the respondent 1 and the respondents are not entitled to release or sell any of the said records or cassettes. Petitioner further stated that no such records or cassettes or performances rendered by the respondent 1 or the respondent 2 had yet been released in the market. The petitioner further claims copyright and sole recording rights of the performances given by the respondent 1 or the respondent 2. It has been alleged that the respondents are denying and/or are interested in denying the legal character or right of the petitioner.

3. This application has been opposed by the respondent 2 Super Cassette Industries Pvt. Ltd. It has been contended on behalf of the respondents that the period of the said agreement has already expired and as such the petitioner is no longer entitled to restrain the respondent from recording the performances rendered by the respondent 1 which are not being already performed or recorded or in respect of which the petitioner has exclusive copyright. It has been submitted by the petitioner that in respect of the two recordings "M.L.A. Se Barta" and "B.A. Pass Ghora" have already come out in the market the music of which was rendered by the respondent 1 in violation of the agreement with the petitioner and the respondent 2 manufactured such cassettes being fully aware of the said agreement. The petitioner contended at first that it can claim copyright also in respect of these cassettes. It is clear, however from the Cl. 10 of the said agreement itself that the Company shall be entitled to the sole right of the production, sales, use and performance throughout the world of the records manufactured in pursuance of the said agreement and the company shall be the owner of the original plate within the meaning of Copyright Act thereof or each of the performances recorded under the provisions of the said Act at such time when such plate shall be made. The copyright, therefore, can be claimed in respect of the performance rendered by the artiste in terms of the agreement of which the company is the owner of the original plate of the recording so manufactured by the company of any performance rendered by the artiste. Under the provisions of the Copy-right Act the petitioner can claim copyright for a period up to 50 years from the beginning of the calendar year next following the year in which the author dies, in respect of such performances rendered in terms of this agreement and the records or cassettes manufactured by the

company, the petitioner herein. In this connection relevant provisions in the Indian Copyright Act are set out hereinbelow :

"Section 2

In this Act, unless the context otherwise requires --

Section 2(d) "author" means-

(vi) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of the plate.

Section 14

For the purpose of this Act, "copyright" means the exclusive right, by virtue of and subject to the provisions of, this Act-

(b) in the case of an artistic work, to do or authorise the doing of any of the following acts, namely ; --

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to include the work in any cinematograph film;

(iv) to make any adaptation of the work;

(v) to do in relation to an adaptation of the work any of the acts specified in relation to the work in Cls. (i) to (iii)

(d) in the case of record, to do or authorise the doing of any of the following acts by utilising the record, namely-

(i) to make any other record embodying the same recording;

(ii) to cause the recording embodied in the record to be heard in public;

(iii) to communicate the recording embodied in the record by radio diffusion.

Section - 22

Except as otherwise hereinafter provided, copy-right shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until fifty years from the beginning of the calendar year next following the year in which the author dies."

4. Admittedly respondent 2 is the owner of the original plate in respect of the two records which have come out during the pendency of the agreement. As the cassette has come out through the respondent 2 the petitioner cannot claim any copyright in respect of such agreement. The petitioner, however, contends that since the respondents have committed breach of the contract knowingly and intentionally he is entitled to an order of injunction for such breach of contract being committed by the respondents during the period when the agreement was

in force. Although the period of the agreement has already expired the said breach took place during the period when the agreement was in force and during which period respondent 1 was not entitled to enter into any such contract or to bring out cassette in violation of the said agreement. It was pointed out that by letter dt. 5th Aug. 1986 respondent 2 wrote to the petitioner for recording his voice. In reply the petitioner stated that the agreement is valid up to 1987 and as such respondent 2 may refrain from recording his voice. It does not appear from the agreement which is made annexure to the petition that the said agreement is valid up to the end of 1987, Considering the aforesaid terms and conditions it appears that the agreement can continue up to maximum period of 3 years and since the agreement commenced from 14th May, 1984 it can continue maximum period up to 14th April, 1987 and not till the end of 1987 as made out in the letter. It is the admitted position that those two cassettes have come out in the market since 1986 during which period the artiste could not have made out any contract for recording of his voice with any other company and accordingly it has been submitted that the respondent should be restrained from selling out the same to the public. Admittedly the period of the contract has expired. The question, therefore, is can such an order be passed now in view of the fact that the contract has ceased to be in force particularly when no copyright can be claimed in respect of those cassettes by the petitioner. The Ld. Advocate for the petitioner submitted that he is entitled to get an order of injunction for alleged breach of the agreement and/or contract by respondent 1 which has been procured or induced to have been procured by respondent 2 only particularly when respondent 2 was aware of the contract with the petitioner whereby the petitioner was debarred from making performance with any other party. In support of his contention the Ld. Advocate has relied upon the decisions in the following cases :

(1) Acrow (Automation) Ltd. v. Rex Chainbelt Inc. reported in (1971) 1 WLR 1676 (2) Torquay Hotel Co. Ltd. V. Cousins reported in (1968) 3 WLR 540; (3) Daily Mirror Newspapers Ltd. v. Gardener reported in (1968) 2 All ER 163; (4) Emerald Construction Co. Ltd. v. Lowthian reported in (1966) 1 All ER 1013.

Ld. Advocate also referred to the passages from Winfield & Jalowis on Tort, 10th Edition pages 445 to 450.

5. In the case of Acrow (Automation) Ltd. v. Rex Chainbelt Inc. (supra) the material facts inter alia were that by an agreement of December 28, 1967 an American Corporation ("S.I.") with an English subsidiary granted to the plaintiffs, an English company, the exclusive right to manufacture in England a special automatic equipment for conveying goods. The licence was in effect granted for five years at least and gave the plaintiffs exclusive rights of sale in England and certain other countries, The agreement was made in England and was expressed to be "read and construed in accordance with English law". An essential part of the equipment was a chain which was made in America by an American Corporation, Rex Chainbelt Inc., which had a subsidiary, Rex International Inc.

The plaintiffs ordered the chain from Rex International who passed the order to Rex Chainbelt who then sent the chain to the plaintiffs. S.I. were closely associated with Rex Chainbelt and asserted the right to direct the latter as to whom the chains might or might not be supplied,

6. In February 1971 S.I. purported to terminate the licence agreement. They gave directions to the Rex corporations that the plaintiffs were not to be supplied with the chains which were an essential part of the equipment. On June 15, 1971 the plaintiffs obtained an injunction against S.I. restraining S.I. from, inter alia, doing or procuring to be done anything to impede the plaintiffs in the manufacture of the equipment. The plaintiffs' solicitors informed S.I. and Rex International of the injunction. S.I. determined to ignore the injunction. They contended that the proceedings were against an English company and gave instructions to the Rex Companies that the chains were not to be supplied to the plaintiffs. When the plaintiffs ordered chains Rex Chainbelt refused to implement the order saying that their contractual relations with S.I. prevented them from doing so. Donaldson J. dismissed the plaintiffs' application for an injunction against the Rex companies to restrain them from carrying out the directions of S.I. and for a mandatory order requiring them to use all reasonable endeavours to supply the chains. The plaintiffs preferred an appeal against the said decision. While allowing the appeal it was held-

(1) That S.I. had broken an implied term of the licence agreement not to impede the plaintiffs in the manufacture of the equipment.

(2) That since the agreement expressly chose English law and thereby impliedly gave jurisdiction to the English Courts S.I. were bound by the injunction and the directions which they gave to the Rex Companies were unlawful, in breach of the agreement and amounted to contempt of Court.

(3) That since the Rex companies knew all about the injunction granted against S.I. they would be aiding and abetting S.I. in breaking that injunction and themselves be in contempt of Court if they complied with their directions not to supply the plaintiffs with the chains. Accordingly an injunction was granted to restrain the Rex companies from obeying the order of S.I. (which purported to prohibit them from supplying the chains) and a mandatory order was passed to use all reasonable endeavours to supply the chains.

7. In my view the principles of law decided in the aforesaid case cannot apply to the facts of this case so as to grant an order of injunction as prayed for by the petitioner. The learned Advocate for the petitioner mainly relied upon the observation of learned Denning M. R. in the said case of Acrow (Automation) Ltd. v. Rex Chainbelt Inc. (1971 (1) WLR 1676) (supra) which runs as follows :

"If a person without just cause and by unlawful means deliberately interferes with the trade or business of another he is liable in damages and in a proper case an injunction can be granted against him."

8. The facts in the aforesaid case were that the defendant had deliberately interfered with the trade and business of another which does not appear from the facts in the present case. Even assuming that the respondent has committed breach of the contract it has to be considered if such breach can be adequately compensated in terms of money and in that event it would be sufficient to pass a decree awarding damages and order of injunction at this stage may not be proper.

9. The next case cited on behalf of the petitioner viz. *Torquay Hotel Co. Ltd. V. Cousins* (1968 (3) WLR 540) (supra). That case was mainly on the fact of Torquay's interference with the plaintiff company's right under the contract. The material facts inter alia, were that : --

"A breach of the defendant-Union was inaugurated in Torquay in January, 1968, in order to organise employees in the hotel and catering industry, who were by agreement with the Hotels and Restaurants Association of Great Britain organised by two other unions. On January 24, the defendant-Union, through its District Secretary, sought a meeting with the Managing Director of the Torbay Hotel "to avoid serious consequences".

He replied that no useful purpose would be served by a meeting in view of their active negotiation with another Union.

10. The Torbay Hotel was thereafter picketed by members of the defendant-Union and employees who were members of that Union withdrew their labour. Fuel oil supplies to the hotel were members of the defendant-Union would not pass the pickets.

11. Those events were published in the Press and also some remarks attributed to the manager of the plaintiff company's hotel, the Imperial, none of whose employees were members of the defendant-Union.

12. It was thereafter announced that the Manager's reported statement meant sanctions. Without communicating with the plaintiff company an officer of the defendant-Union telephoned EP.Co. Ltd., with whom the plaintiff company had a contract for the supply of fuel oil, advising them that there was an official dispute with the Imperial Hotel and any deliveries of fuel oil would be prevented. The contract between the plaintiff company and E.P, Co. Ltd. contained a force majeure clause by which neither party would be liable for failure to fulfil any term if fulfilment was delayed by -

".....strikes, lockouts, labour disputes of any kind, partial or general stoppages of labour, refusals to perform any kind of work."

The plaintiff company later obtained fuel oil from A.F. Ltd. at a higher price but the latter company received a telephone call from an official of the defendant union that unless oil supplies were stopped there would be serious repercussions.

13. On February 17, the plaintiff company's solicitors wrote a letter before action

to the defendant union in which express notice of the contract with E.P. Co. Ltd. was given and on February 19, a writ was issued.

14. On a motion for interim injunction inter alia to restrain the defendant union and its officers from procuring breaches of contract made, or to be made, between the plaintiff company and suppliers and breaches by the plaintiff company of its existing or advance contracts for the accommodation of guests and for an injunction ordering the defendants to withdraw all instructions given or made to the effect that oil should not be delivered to the Imperial Hotel. It was held :--

(1) That the defendants had not made out a prima facie case that the dispute at the Tarquay Hotel was a genuine claim for bargaining status with a view to regulating or improving the conditions or terms of employment of its members and that, even if it were, the acts directed against the plaintiff company were not done in furtherance or contemplation of that dispute but were rather in furtherance of a dispute between two rival unions that accordingly S. 5(3) of the Trade Dispute Act, 1906, could not protect the defendant union's act.

(2) That although the plaintiff company's contract with EP. Co. Ltd. contained a force majeure claim, which covered the events which had occurred, and thus no liability had been incurred by either party to the contract, and thus no liability had been incurred by either party to the contract, the defendant union had interfered with the plaintiff company's rights to receive delivery of oil within a reasonable time after request which were conferred by the contract and since such interference had continued after the defendant union had notice of the terms of the contract, there was, accordingly a tortious interference with the plaintiff company's rights under the contract; further that on the evidence the defendant union had showed an intention to prevent future suppliers of oil from entering into contracts with the plaintiff company and that the Court could, and should, restrain such interference both with future and existing contracts.

15. Considering the facts and circumstances of this case it does not appear that the same would be applicable in the dispute involved in the present case.

16. The next case cited is that of *Daily Mirror Newspapers Ltd. v. Gardener* (1968) (2) All ER 163). The material facts of the case, inter alia, were that:

"On May 7, 1968 the first and second defendants, who were the president and the general secretary of the National Federation of News Agents, Book-sellers and Stationers, sent a letter to all members of the federation saying that nothing less than the complete boycott of the plaintiffs newspaper, the daily Mirror for one week would be effective viz., effective to meet a request made by the plaintiffs to wholesalers to accept a small reduction in their margins on the price of the newspaper being increased on account of increased cost, of the rise in the cost of newsprint and of devaluation. With their letter were sent "stop-notices", which were to be sent by retailers, members of the federation to their wholesalers. These instructed the wholesalers to discontinue the retailers supplies of the

newspaper from Monday, March 18, to Saturday, March 23, inclusive; and asked for the supply of the newspaper to be restored on March 25. Posters were also sent with the letter reading "Trade Dispute". No Daily Mirror". The federation objected to the proposed reduction in the wholesalers' margin as likely to lead to a reduction in retailers' margins on sale to the public of the newspaper through the retailers. The plaintiffs' method of sale was to sell the newspaper to wholesalers, of whom there were about one thousand, and who in turn sold it to retailers for resale to the public. There were not, in general, written contracts between the plaintiffs and the wholesalers. The plaintiffs, having learnt of the letter, delayed issuing a writ while they published an explanation in the newspaper. A letter in reply on behalf of the federation was also published. On March 15 an ex parte injunction was obtained restraining the defendants who were the president, the general secretary and nine committee members of the federation, from doing anything further in the proposed boycott. On appeal the Court of appeal took the view that there were running contracts between the plaintiffs and the wholesalers which were determinable on reasonable notice, which might be a matter of weeks and not days, and that a wholesaler had no right to stop the order of the newspaper for one week and then start the order again. It was further held inter alia as follows :

(i) That the plaintiffs having shown prima facie an actionable wrong by the defendants, the Court should exercise its discretion to grant an interlocutory injunction, as the balance of convenience was greatly in favour of preserving the present position (ii) the plaintiffs had established a prima facie case of inducement by the defendants without lawful justification of breach of contract by the wholesalers with the plaintiffs, for the following reasons-

(a) on the facts the defendants had sought to induce the wholesalers to reduce greatly their orders for the newspaper only a day or two's notice and

(b) it was no defence either that the defendants did not know the terms of the plaintiffs' contract with the wholesalers, because the defendants acted without caring whether they caused a breach of contract or not, and

(c) it was no defence that the defendants did not exert pressure directly on the wholesalers but only indirectly through the retailers.

(iii) There was a prima facie case of interference by the defendants by unlawful means with contractual relations between the wholesalers and the plaintiffs, because the recommendation to the members of the federation to stop ordering the newspaper constituted unlawful means in that, prima facie, the recommendation was equivalent to a restriction deemed contrary to the public interest by virtue of S. 21(1) and S. 6(7) of the Restrictive Trade Practices Act, 1956."

17. In this case the interlocutory injunction was granted on the basis that the federation sought to induce breach of contract between wholesalers and newspaper proprietor. Inducement to commit breach of contract was the

allegation made against the Federation. Such allegation in the present case does not appear from the petition but sought to have been made out at the time of hearing and as such cannot be accepted at this stage. Considering the facts and circumstances as above the principles though undisputed cannot be made applicable to the facts of the present case in my opinion.

18. The next case cited is that of *Emerald Construction Co. Ltd. v. Lowthian* (1966 (1) All ER 1013) (*supra*). The material facts and the principles decided in the said case are *inter alia* as follows :

"Main building contractors sub-contracted with the plaintiff for supply only of labour for work on a building site. The defendants were officers of a trade union of existence of the bricklayers. They knew of the existence of the sub-contract but did not know until after the action had started, what its precise terms were. The union made demands to the main contractors that the sub-contract should be terminated and endeavoured by industrial action to bring pressure to bear on the main contractors to get the labour only sub-contract terminated (*sic*). They continued such endeavours after they knew of the precise terms of the sub-contract, under which the main contractors had the right to terminate it if the plaintiff did not maintain reasonable progress. In an action by the plaintiff against the defendants the plaintiff sought an interlocutory injunction to stop the defendants doing anything to procure termination by the main contractors of the sub-contract. On appeal, it was held: an interlocutory injunction should be granted because-

(i) ignorance of the precise terms of the sub-contract was not enough to show absence of intent to procure its breach, and on the facts the inference was that the defendants intended to get the sub-contract terminated if they could, regardless of whether that would be done in breach of contract or not.

(ii) the subcontract was not a ""contract of employment" within S. 3 of the Trade Disputes Act, 1906 or S. 1 of the Trade Disputes Act, 1965, as it was not a contract between employer and workmen, and accordingly there was not immunity under those enactments for action to procure its breach.

(iii) the balance of convenience was in favour of granting an interlocutory injunction, since irreparable damage would be done to the plaintiff if it were withheld, but little damage would be done to the defendants if it were granted."

19. In my opinion the aforesaid case does not appear to be of any assistance to the petitioner.

20. The learned Advocate for the petitioner has also referred to the passages from Chapter 21 under Heading "Interference with Contract or Business" from *Winfield & Jalowicz on "Tort"*, 10th Edition. It does not appear that the petitioner had made out that case of interference with contract or business or inducement to procure a breach of contract. Accordingly the said principle cannot be made applicable on the basis of the case made out by the petitioner in his pleadings.

21. In my opinion balance of convenience does not lie in favour of granting an interlocutory injunction at this stage restraining the respondents from selling the said two cassettes "B.A. Pass Ghora" and "M.LA. Se Barta". On the other hand the plaintiff may be adequately compensated by damages in terms of money so far as the aforesaid two cassettes are concerned in case they succeed in this suit. There will, however, be an order of injunction restraining the Respondent 2 its servants and agents from interfering or selling or marketing, dealing with or distributing any copies of any records of any performances rendered by respondent 1 for respondent 2 during the period of the said contract, between respondents 1 and 2. Respondent 2 is further directed to keep a separate account in respect of the said two cassettes "MLA Se Barta" and "B.A. Pass Ghora" in respect of the sale proceeds of the two cassettes.

22. Costs of this application costs in the cause.

23. Parties to act on the signed copy of the operative portion of this judgement.

24. Order accordingly.