
(1995) 02 DEL CK 0021

In the Delhi High Court

Case No : I.A. 217 of 1995 - Suit No. 2924 of 1994

Gramophone Company of India Ltd.

APPELLANT

Vs

Super Cassette Industries Ltd.

RESPONDENT

Date of Decision : 15-02-1995

Acts Referred:

Citation : (1995) 2 AD 905 : (1995) 1 ARBLR 555 : (1995) 58 DLT 99 : (1995) 33 DRJ 333

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : Mr. Arun Jaitley, Mr. A.R. Lall and Mr. C.M. Lall, for the Appellant; Mr. Kapil Sibal Mr. Parveen Anand and Mr. N.K. Bhardwaj, for the Respondent

Judgement

Jaspal Singh, J.—The dispute mainly revolves around clause (j) of sub-section (1) of Section 52 and clauses a(i) and c(ii) of sub-section (i) of Section 14 of the Copyright Act (hereinafter called the Act). However, first the facts.

2. The Gramophone Company of India Limited which is the plaintiff before me had produced audio records titled Hum Aapke Hain Kaun under rights alleged to have been assigned to it by Rajshree Productions Pvt. Ltd. who happen to be the Copyright owners of the cinematographic work. The plaintiff claims that it has already sold 55 lakh audio cassettes and 40,000 compact discs titled "Hum Aapke Hain Kaun" and hope to sell an equal number of additional audio cassettes and compact discs with the result that the title "Hum Aapke Hain Kaun", when used on a record, has come to be associated with the plaintiff alone. Its grievance is that the defendants too have launched an audio cassette by adopting "Hum Aapke Hain Kaun" as its title with its design, colour scheme, get-up and lay-out deceptively and confusingly similar to that of the plaintiff's and have even used a photograph of Salman Khan and Madhuri Dixit on the inlay cards. Both of them, it may be noticed, have acted in the film "Hum Aapke Hain Kaun". Hence the suit of the plaintiff for permanent injunction restraining the defendants from manufacturing, selling, or passing of audio cassettes under the

said title or from using a carton or inlay card identical or deceptively or confusingly similar in design, colour scheme, lay out and get up to the packaging used by the plaintiff. Along with the suit, the plaintiff company also moved an application under Order 39 Rules 1 and 2 for grant of ad-interim injunction.

3. Before I proceed to notice the defense set up by the defendants it may be mentioned that Hon"ble Mr. Justice Devinder Gupta while sitting as Vacation Judge had passed an ex parte ad-interim order of injunction against the defendants restraining them from manufacturing selling, offering for sale, audio cassettes under the title Hum Aapke Hain Kaun or any other similar title or using a carton or any inlay card or any other packaging material similar in design, colour scheme, lay out and get up, to the packaging of the plaintiffs in respect of the title "Hum Aapke Hain Kaun". In response to the ad-interim injunction order defendants have moved an application under Order 39 Rule 4 for vacation of the said order. Since it was submitted that the said application be treated as reply to plaintiff's application under Order 39 Rules 1 and 2 also, the defense version has consequently been culled out from it.

4. As per the defendants what they are making is the version recording permissible u/s 52(1)(j) of the Act and that this has been done only after a notice in the prescribed form to the copyright owner accompanied by royalties at the rate fixed by the Copyright Board.

5. What is a version recording ? A version recording, we are told, is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version record-is thus neither copying nor reproduction of the original recording.

6. How is a version recording protected under clause (j) of sub-section (1) of Section 52 of the Act ? Let us first have a look at the provision. It runs as under is :

"52. Certain acts not to be infringement of copyright, (1) The following acts shall not constitute an infringement of copyright namely :

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

(i) records recording that work have previously been made by or with the license or consent of the owner of the copyright in the work : and

(ii) the person making the records has given the prescribed notice of his intention to make the records and has paid in the prescribed manner to the owner of the copyright in the work royalties in respect of all such records to be made by him, at the rate fixed by the Copyright Board in this behalf :

Provided that in making the records such person shall not make any alterations in, or omissions from the work unless records recording the work subject to similar alteration and omissions have been previously made by or with the license or consent of the owner of the copyright or unless such alterations and

omissions are reasonably necessary for the adaptation of the work to the records in question.

7. The perusal of clause (j) as reproduced above would go to show that following conditions must exist to attract the provision : (a) The making of the records must be in respect of any literary, dramatic or musical work; (b) records recording that literary, dramatic or musical work must have been previously made either by the owner of the Copyright in the work or with his license or consent, any (c) before making the records the person desirous of making them must have not only given prescribed notice on his intention to make them but also must have paid in the prescribed manner royalties in respect of such records to the owner of the copyright in the work at the rate fixed by the Copyright Board in this behalf.

8. And, what is a "musical work" ? Clause (p) of Section 2 of the Act defines it as under :

"musical work" means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced".

9. It was contended by the learned counsel for the defendants that the work in question being a "musical work" and the defendants having fulfilled all the conditions of clause (j) of sub-section 52 of the Act as noticed above, the plaintiff company could have no complaint and that for that reason the ex parte order of injunction deserved to be vacated.

10. Initially when arguments were addressed by Mr. A. R. Lall, Advocate for the plaintiff Company it was submitted that the words "records recording that work" as used in S. 52(1)(j) would mean the record of only the printed or written and graphically produced or reproduced material and would not cover musical performance of such printed or written or graphically produced or reproduced work. However, later, when the reins (if I may be permitted to use that expression) were taken over by Mr. Jetley he adopted an entirely different approach. Of course, he too took the position that Section 52(1)(j) was not applicable. However, his argument which found inspiration from clauses (a) and (c) of sub-section (1) of Section 14 of the Act, was that as under sub-clause (v) of sub-clause (c) "Copyright" means the exclusive right "to make any cinematograph film or a record in respect of the work" and as in the present case a cinematograph film had actually been made, Therefore, it would attract sub-clause (iii) of clause (c) of sub-section (1) of Section 14 of the Act which runs as under :

"14 Meaning of copyright - (1) For the purposes of this Act, "copyright" means the exclusive right, by virtue of, and subject of the provisions of, this Act,

(c) in the case of a cinematograph film, to do or authorise the doing of any of the following acts, namely -

(i)

(ii)

(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track."

The argument was that the records made by the plaintiff company having embodied part of the sound track associated with the film by utilising such sound track, they could not be treated as records recording the musical work and for that reason Section 52(1)(j) could not be taken as attracted. In further support of the argument my attention was drawn to the definition of "record" as appearing in clause (w) of Section 2 of the Act which runs as under :

"record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced there from, other than a sound track associated with a cinematograph film."

The contention was that the records made by the plaintiff company having been made from the sound track associated with the cinematograph film, the same did not fall within the definition of the word "record" and for that reason also Section 52(1)(j) would not apply.

11. The next limb of arguments of Mr. Jetley was based on sub-clause (ii) of clause (m) of Section 2 of the Act which defines "infringing copy" to mean as under :

"infringing copy" means -

(i)

(ii) in relation to a cinematograph film, a copy of the film or a record embodying the recording in any part of the sound track associated with the film."

It was argued that the records made by the defendants being covered by sub-clause (ii) as reproduced above, they were guilty of having infringed copyright of the plaintiff company.

12. Let me first deal with the submission made by Mr. Lall

13. It may be recalled that the argument of Mr. Lall was that the records made by the plaintiff being of the performance of the musical work and not of the printed or written or graphically produced material. Section 52(1)(j) would not apply. The problem with this argument is that it ignores the definition of the word "record" which, as per clause (w) of Section 2 of the Act means any discs, tape, perforated roll or other devise in which "sounds are embodied so as to be capable of being reproduced there from". The words "sounds are embodied" clearly go to show that the word "record" here does not mean the record of images or written or printed word but of what has been musically rendered converted into a durable form, as for example, on disc, tape or perforated roll etc. In other words, "record" here would mean a representation of such sounds

which would be combination of melody and harmony or either of them. This is further borne out from the use of the word "recording" in Section 52(1)(g). The word "recording" is defined in clause (x) of Section 2 of the Act as meaning the "aggregate of the sounds embodied in and capable of being reproduced by means of a "record". Surely, a printed or written word or something graphically produced or reproduced relates to the visual and in some cases to the sensation of touch. A written or printed word produces no sensation in the organs of hearing. Sound, on the other hand, produces such sensation when the surrounding air is set in vibration in such a way as to affect these. Sound, thus, is not a printed or written word. It is the audible articulation corresponding to them. Once we accept this, the words "records recording that work" as used in Section 52(1)(j)(i) would clearly lead to the conclusion that they refer to such records only in which sounds are embodied. This then completely demolishes the argument of Mr. Lal that the "records" referred to in Section 52(1)(j)(i) do not relate to sound but to printed or written and graphically produced combination of melody and harmony.

14. As noticed above, Mr. Jetley adopted a different line of argument. As per him since a cinematograph film had been made and as the records made by the plaintiff company embody the recording of a part of the sound track associated with the film, Therefore, the records so made would not come within the definition of the word "record" and as such Section 52(1)(j) would not apply.

15. I feel it would be better to have yet another look at the definition of the word "record" as defined in Section 2(w) of the Act. It runs as under :

""record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced there from, other than a sound track associated with a cinematograph film."

16. Undoubtedly as would be clear from above, a sound track associated with a cinematograph film would be outside the definition of "record". It is also true that "Copyright" means the exclusive right to make any record embodying the record in any part of the soundtrack associated with the film by utilising such sound truck. It is also undeniable that "infringing copy" in relation to a cinematographic means a copy of the film or a record embodying the recording in any part of the sound track associated with the film. But then the argument advanced by Mr. Jetley ignores the fundamentals. The plaint or the application under Order 39 Rules 1 and 2 nowhere claims that the records made by the plaintiff company embody the recording in any part of the soundtrack associated with the film by utilising such sound track. What the agreement entered into by the plaintiff company with Rajshree Productions Pvt. Ltd. goes to show is that for purposes of making the records it had been supplied the plate only. The word "plate" has been defined in clause (t) of Section 2 of the Act as under :

""plate" includes any stereotype or other plat, stone, block, mould, matrix, transfer, negative duplicating equipment or other device used or intended to be

used for printing or reproducing copies of any work, and any matrix or other appliance by which records for the acoustic presentation of the work are or are intended to be made."

Surely then "plate" is different from sound track. The agreement itself differentiates between "soundtrack" and "plate" by saying that the plate stood supplied and sound track could be supplied on request. If the plaintiff made records from the "plate" as it prima facie, appears to be, the whole edifice raised by Mr. Jetley falls to the ground.

17. Let us assume that the plaintiff company has made records embodying any part of the sound track associated with the film by utilising such sound track. Can it be said that a case of "infringing copy" is made out. Let us jog our mind a bit and recapitulate as to what is meant by "infringing copy". Clause (m) of Section 2 of the Act tells us that in relation to cinematograph film "infringing copy" means a copy of the film or a record "embodying the recording" in any part "of the sound track" associated with the film. The plaintiff now claims that the records made by the defendants "embody" the recording in any part of the sound track associated with the film. Rather, the records so made by the defendants are only a version recording by using another voice or voices and with different musicians and arrangers. In short the records in question embody no part of the sound track of the film. Thus the records so made do not prima facie fall within the definition of "infringing copy".

18. Are the records made by the defendants protected u/s 52(1)(j) of the Act ?

19. One need not go into the writings of ancient Greek philosophers and music theorists like Aristotle, Aristoxenus or Pseudo-Euclid known as Cleonides to know as to whether the records made by the plaintiff and by the defendants represent a combination of melody and harmony or not. Whereas, in the middle ages the word "melody" was more often than not used synonymously with "song" or "plainsong" in the 19th Century it came to be known as "tunefulness". The beginning of the 20th Century saw "melody" being considered to be the surface line in a series of harmonies. Broadly speaking "harmony" is the sound of two or more notes heard simultaneously, though in practice the definition so offered may also include some instances of notes sounded one after the other. Surely, the records made by the parties satisfy these definitions. As already noticed above. Prima facie it also stands established that records recording the combination of melody and harmony or either of them had been made previous to the records made by the defendants. However, the defense set up so assiduously by the learned counsel for the defendants meets its Waterloo on two grounds. Let me elucidate.

20. The Agreement relied upon by the plaintiff company goes to show prima facie, that it is the Company which is the owner of the copyright. Admittedly no prescribed notice of intention of the defendants to make the records was given to the plaintiff company. Even royalties in respect of the records to be made had

not been paid to the plaintiff company. Since it is the plaintiff which is prima facie shown to be the owner of the Copyright, notice to and/or payment to the Film Producer has no meaning. I may, however, hasten to mention that refuge was sought to be taken under a letter written by the plaintiff company on March 18, 1986 directing the defendants to deal with and pay royalty to the concerned Film Producers. That letter had nothing to do with the making of the records in question. It related to different films and different records and in any case that letter stood explained through letters which followed and more particularly the letter dated April 13, 1987.

21. What follows ? Obviously, on account of non-compliance of sub-clause (it) of clause (j) of sub-section (1) of Section 52 of the Act, the defendants cannot claim protection under that provision.

22. There is yet another difficulty. "Musical work" is not merely a combination of melody and harmony or either of them. It must necessarily also have been "printed, reduced to writing or otherwise graphically produced or reproduced". As we know figurations, progressions and rhythmic patterns are sometimes used in creation of melodies. Every musical composition has a structure, or shape, that is, the arrangement of individual elements so as to constitute a whole and that musical notation means a visual record of musical sound (heard or imagined) or a set of visual instructions for performance of music. Its main elements are pitch (location of musical sound on the scale), duration, timbre, and volume. There are various systems of notation like verbal, alphabetical, numerical, graphic and tablatures. The words p. 111.7" printed, reduced writing or otherwise graphically produced or reproduced" are thus not an empty formality. What is surprising is that the defendants have nowhere claimed that the combination of melody and harmony which one finds in the records made by the plaintiff as well as the defendants had ever been printed, reduced to writing or otherwise graphically produced or reproduced. What is more surprising is that the plaintiff too nowhere pleads the record made by it as being a combination of such melody and harmony or either or them which had been printed, reduced to writing or graphically produced or reproduced. The result is that the record made by the plaintiff cannot be claimed to be of a "musical work" both by the plaintiff as well as the defendant. Probably this was an added reason for Mr. Jetley to look towards Section 14 of the Act.

23. This leads to a confused scenario. The plaintiff company in its anxiety to steer clear of Section 52(1)(j) takes a stand which fails to make out a case of "infringing copy". The defendants too fall in their defense. It was perhaps such a situation (or was it the seeming side of the law ?) that made Lord Halifax observe that if the laws could speak for themselves they would complain of lawyers in the first place.

24. What should then be done ? I would rather look into the case as one of passing off. Is the title of the record and the get up, colour scheme etc. of the carton of the defendants such as to create a likelihood that a substantial section

of the purchasing public would be misled into believing record to be of the plaintiff ? p. 11.1 "My answer is that a substantial body of music lovers would be confused into believing the record was made by the plaintiff company.

25. What are the principles applicable in such cases of interlocutory injunction ? The Court of Appeal in *Hubbard v. Vesper* 1972 (2) W.L.R. 389, has re-stated them. Though the judgment was not referred to by either side, it needs a place here. As I read that case, the remedy of an interlocutory injunction is to be kept flexible and discretionary rather than being the subject of strict rules and that the real basis should be one of fairness, justice and common sense in relation to all the relevant laws and facts.

26. Keeping that approach in mind let me examine the claim of the plaintiff to stop the defendants from using the word "Hum Aapke Hain Kaun" in any context in the title of the defendants' records and rather to injunct them from making toe records at all. Whether or not the plaintiffs could get such a relief at the trial of the action is perhaps of little relevance today but I do feel that it indeed would be a strong measure at this stage to grant the plaintiff full measure of relief. I decline to do so. But then, there is enough in the plaintiffs' case to make it right to grant some interlocutory relief which, at the same time, should not hamper the defendants, though it may put them to a little expense. I propose to vary the injunction that was made ex parte by saying that the defendants are Not to use in the carton or inlay card or any other packaging material a design, colour scheme, layout and get up similar to that of the plaintiffs; not in the title to use the words "Hum Aapke Hain Kaun" simplicities or any combination of words including "Hum Aapke Hain Kaun" which would be calculated to lead to the belief that the defendants' record was the plaintiff's record. 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. I think that is essential.

27. This then is the order I make.