
(2018) 10 CAL CK 0075

In the Calcutta High Court

Case No : Government Appeal No.No.2949 Of 2018, Cs No.210 Of 2018

Indian Performing Right Society Ltd @APPELLANT@Hash Vodafone Idea Ltd

Date of Decision : 12-10-2018

Acts Referred:

Copyright Act, 1957 — Section 2(p), 2(y), 13, 14(3), 14(e), 18, 18(8), 19, 33, 34

Citation : (2018) 10 CAL CK 0075

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Anindya Kr. Mitra, bhrajit Mitra, Soumya Roychowdhury, Himanshu Bagri, Sourasij Dasgupta, Ritesh Kumar Ganguly, Mudrika Khaitan, Pratap Chatterjee, Arunabha Deb, Soumabho Ghose, Deepan Sarkar

Final Decision : Disposed Off

Judgement

The Court: In an action for copyright infringement, the plaintiff has filed this interlocutory application praying, inter alia, for appointment of a Special

Officer to visit the office/offices of the respondent and retrieve from the respondent's computer software and hardware memory the user data of

the respondent's past exploitation of the petitioner's works and the petitioner has also prayed for mandatory injunction directing the respondent

to remove from its Value Added Service platform (VAS) and other platforms all cinematograph films, sound recordings and the like where the

underlying copyright in literary and musical works belong to the petitioner save and except the petitioner's rights flowing from the sound

recordings belonging to Saregama India Limited.

The petitioner in short IPRS is a non profit body originally established on 23rd August, 1969 to monitor, protect and enforce the rights, interest and

privileges of its members comprising of more than 4000 authors (lyricists), music

composers and publishers of musical works and literary works (i.e.

lyrics) associated with musical works. The petitioner contends that the respondent as part of its telecommunication services also provides Value

Added Services (VAS) such as caller ring back tones CRBT wherein a subscriber to respondents' services may select certain sound recordings,

as a caller tone for another caller who dials the subscriber's number. Similarly, the respondent as a part of its VAS mobile applications like

vodafone play, idea music and idea movies & TV which provides a platform for the streaming of live TV, Movies, popular

TV shows and music videos. The respondent provides platforms under the vodafone and idea brands through which VAS services are provisioned and

provided to their subscribers and generate a substantial revenue from making available such services to their subscribers.

The members of the petitioners have assigned their copyrights in the literary and musical works to the petitioner. The petitioner alleged that as on 29th

December, 2017 the petitioner has requested the respondent to obtain licence for utilization of musical works and/or associated literary works included

in the songs and films as part of mobile VAS and other services in India. In the said notice the petitioner has alleged that in view of 2012 amendment

to the Copyright Act, the utilization of musical, literary works in any form and for any purpose require payments of royalty to the authors and owners

of the said works as a telecom operator providing basic voice services and non-voice services having content based services which allows customers

to access and consume various genre of entertainment, sports, devotional and other utility based services, IVR based services, caller ring back

tone(CRBT), Real tone, mobile TV etc. It is necessary that the respondent takes appropriate steps to secure a licence to enable it to exploit musical

works and associated literary works in its services by it in consonance with the IPRS tariffs enclosed with the said communication.

The petitioner again requested the respondent on 13th June, 2018 after obtaining a revised certificate of registration to have a discussion on the

licensing arrangement or exploitation of such musical rights. The petitioner complains that although the respondent in its communication dated 23rd

January, 2018 has agreed to have a discussion on the said issue and its parent association, Cellular Operators Association of India, that the discussion

for licensing arrangement with regard to licensing arrangements and/or associated literary works including the songs and films as part of MVAS and other services in India would take place shortly and appropriate steps would be taken in that regard. But unfortunately, the respondent till date has not obtained necessary licence from the plaintiff and is using such musical works, sound recordings and musical works in the form of caller ring back tones.

The petitioner initially wanted to move the application ex parte. However, day before yesterday when the matter was taken up for hearing the respondent appeared through counsel and prayed for service of the application. It was urged on behalf of the respondent that the present dispute appears to be similar to the dispute forming the subject-matter of the suit filed by the defendant against SAREGAMA India Limited and the present plaintiff being CS No.23 of 2018. In order to appreciate whether the nature of the agreements forming the subject-matter of CS no.23 of 2018 (Vodafone India Ltd. & Anr. vs. Saregama India Ltd. & Anr.) are similar to the agreements under which the defendants are using such musical works and sound recordings, the respondent was directed to disclose specimen agreements with Sony Musical Entertainment India Pvt. Ltd. and Tips Industries Ltd, in view of specific allegations being made by the plaintiff in paragraph 48 of the petition that the respondents' platforms under the Vodafone and Idea brands are offering VAS to end-users.

Mr. Pratap Chatterjee, learned Senior Counsel representing the respondent has produced few of such agreements in order to show that the nature of the dispute in both the suits are same. Each of the agreements produce for consideration have confidentiality clause. Let it be clarified that such agreements are produced in terms of the order of this Court and the respondents should not suffer for breach of confidentiality. Mr. Anindya Kumar Mitra, learned Senior Counsel appearing on behalf of the plaintiff has submitted that the plaintiff is a registered copyright society within the meaning of Section 33 of the Copyright Act, and is entitled to maintain this action on behalf of its members. Mr. Mitra submits that the agreements disclosed in this proceedings would only show that the said music companies have allowed Vodafone to use sound recording only and not in respect of other works which, inter alia, includes musical or artistic work. It is submitted that Section

2(p) of the Copyright Act, 1957 has defined a musical work which means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. Mr. Mitra submits that Section 2(y) of the Copyright Act defines "works" which, inter alia, means a literary, dramatic, musical or artistic work. It is submitted that Section 13 of the Copyright Act has classified three classes of works in which copyright subsists which, inter alia, includes original literary, dramatic, musical and artistic works, cinematograph films, and also sound recording.

Section 14(3) is referred to which deals with copyright in sound recording. It is submitted that Section 14(e) of the Copyright Act makes it clear that in case of a sound recording copyright would mean to make any other sound recording embodied in it including storing of it in any medium by electronic or other means. It does not cover communication of the music or broadcasting of the music from such sound recording. All the agreements disclosed by the respondent contemplate the use of such sound recording which is a key to enter the contents of the sound recording and once the respondent is allowed to enter the said world of music, the respondent cannot exploit such musical works without licence from the copyright society. The playing of music stored in the sound recording without the permission of the society is not permissible and is not even authorized by the several agreements disclosed by the respondents. Mr. Mitra, in particular, has referred to a licence agreement dated 14th March, 2017 between Sony Music and Idea in which Clause 6(o) deals with royalties. It has been stated that the publishing rights and any other society claims (by registered and statutory societies formed under the Copyright Act or any amendments thereof) are not part of the above rights and such costs, if applicable, will be borne by the licensee as instructed by the Indian laws. It is submitted that in clause 4.9 of the said agreement, it has been made clear that the content provider/licensor shall own all right, title and interest in the intellectual property rights in the content created, provided, supplied to the licensee under the said agreement. The publishing rights are not part of the above rights and the publishing rights costs (if applicable) will be borne by IDEA (or as instructed by the Indian Laws at the time of implementation.)

Mr. Mitra submits that intellectual property rights given by Sony and Tips as

disclosed in the proceedings is in relation to sound recordings, the copyrights of which are owned an/or controlled by the licensor. The sound recordings does not cover use of the musical works and unless tariffs are paid to the society for exploitation of such musical rights the defendant has no right to use such musical works. Mr. Mitra has referred to Section 18 third proviso which states that author of the literary or musical work included in the sound recording retain its right not to assign or waive the right to receive royalty to be shared on an equal basis with the assignee of copyright for any utilization of such work. Mr. Mitra further submits that after amendment of Section 19 the newly inserted sub-Sections namely, sub-Sections 8, 9 and 10 declare any assignment of copyright to any work contrary to the terms and conditions of the right already assigned to a copyright society in which the author of the work is a member shall be void. Mr. Mitra submits that it is a right of the author to realize equal share of royalties with the assignees that is being protected by the aforesaid provisions and any agreement relied upon by the respondent contrary to the aforesaid provisions are void and not enforceable. Mr. Mitra, in this regard has submitted that copyright society under Section 34 is entitled to accept from any author and other owners of right exclusive authorization to administer any right in any work by issue of licence or collection of licence fees or both and an author and other owners of right shall have the right to waive such authorization without prejudice to the rights of the copyright society under any contract. Mr. Mitra has referred to the deed of assignment dated 22nd May, 2017 entered into between Saregama and the society and another agreement dated 23rd May, 2017 between Sony and society to establish that under the said deed of assignment it is imperative that the defendant is required to obtain licence agreement from the society before exploiting such musical works.

Per contra Mr. Chatterjee, learned Senior counsel on behalf of the respondent has submitted that under the existing arrangement with Sony and Tips the respondent is paying the license fees which supposedly covers any claim that the society might have towards use of such musical recording. The learned Senior Counsel has referred to the copies of the agreements disclosed in this proceeding to show that under the license agreements both Sony and Tips have issued non exclusive and non transparent license to the

respondent for its use of ring back tones for the sole purpose of providing the ring back tone services as a part of value added services in the manner contained in the said agreement. Mr. Chatterjee has referred to the definition of licensed work which means sound recordings, the copyright of which are owned and/or controlled by the licensor and permitted for use as contemplated in the agreement. The licensor has granted permission to the licensee between the term. The intellectual property right clause in each of the agreements clearly specify that the licensed works including copyrights in respect of the same shall be the sole and exclusive property of the licensor and all licensed works and related derivative material shall be held for the term of the license by the licensee solely for the purpose of promoting, sampling and providing the facility as specified in the agreement. The learned Senior Counsel has referred to Non-Exclusive licensing agreement for Ring Back Tones Service on cellular phones and submits that all such agreements have defined license to mean non exclusive, non transparent license for licensee's use of ring back tones for sole purpose of providing the Ring back Tone Service as part of VAS.

It separately defines Ring Back Tone and Ring Back Tone Service which authorises the respondent to cut the sound recordings and digitally encoding in an approved format for use solely as a call ring back audio file and provide the caller a tailor made music tones (Ring back Tones) instead of conventional telephone ring for which the respondent pays royalty to the licensor. In short a non- exclusive, non-transferable licence for use of sound Recordings for the sole purpose of providing the Ring back Tone Services as part of VAS and Mobile Ring tone in the format as required by the licensee is granted in favour of Vodafone. Mr. Chatterjee has also referred to one of the content license agreements dated February 28, 2017 between Tips and Idea and has referred to Clause 1.3.14 to show that such clause certainly gives an impression that Tips have all the required permission from Statutory bodies to allow the petitioner to use such rights. The learned Senior Counsel has also referred to Clause 6 of the aforesaid agreement which records that the licensor warrants that content provided by it do not infringe upon or violate the copy rights or proprietary rights of any other party. However, in all fairness Mr. Chatterjee has submitted that respondent is not disputing that the society might have a claim for

exploitation of the musical works but the respondent cannot be held responsible as the respondent has proceeded on the basis that Sony Music and Tips Industries Limited have been duly authorised and permitted by the Copyright owners to accept such rights and in this regard Mr. Chatterjee has produced invoices to show that all the agreements are still in force and license fees/royalties have been received by Sony and Tips for allowing the petitioner to use such musical works.

In the instant case, the plaintiff has excluded the musical works forming the subject matter of the SAREGAMA suit. The agreements of

SAREGAMA, Sony and Tips are almost on similar lines. The agreements with SAREGAMA had expired, however, the respondent continued to use

the musical works on the basis that SAREGAMA had impliedly allowed such arrangement to continue. In the said suit the respondent was directed to

deposit Rs.3.5 crores with the Registrar, O.S. within 31.10.2017 failing which the right to exploit such musical rights would be lost. In the event, such

deposit is made SAREGAMA and the present plaintiff was restrained from initiating any action against Vodafone for alleged infringement of

Copyrights. In the instant suit Idea and Tips have not been made parties. However, few agreements under which the defendant was allowed to use

the ring back tones and other contents have been disclosed. The plaintiff appears to have not objected to the allowing of the contents of sound

recording or use of such musical works by Idea and Tips in favour of Vodafone. There is nothing on record to show that the plaintiff had ventilated its

grievance to Idea and Tips. Sony Music and Tips Industries and few other music bodies used to attend Annual General Meetings of the plaintiff at

least before the registration of the plaintiff as a copyright society.

The argument of the plaintiff appears to be that even if such agreement was entered into prior to the registration of the plaintiff as society such

agreements in view of Section 18(8) of the Copyright Act, 1967 would be void. This argument is based on two several agreements dated May 22,

2017 and May 23, 2017 by which the society claims that Idea and Tips have assigned all such rights in favour of the society. However, at the time

when these assignment agreements were entered into the plaintiff was not registered as Copyright Society. The registration has taken place only on

8.6.2018. Thereafter, no fresh agreement was entered into between the Society

and Sony or Society and Idea. However, for the present purpose it needs to be seen if Sony and Tips, who have already realised their fees/royalty which Vodafone have paid after registration of the said Society have been shared with the society as Vodafone may not in absence of payment of royalty to the plaintiff continue to use such music. It cannot be disputed that COAI in its communication dated 19.1.2010 has sought for a meeting to discuss the issue with regard to licensing arrangement for utilisation of musical works and/or associated literary works included in the Songs and Films as part of Mobile Value Added Services. The defendant also in its communication dated 23.1.2017 has requested the society for discussion on the subject to enable the defendant to seek better particulars to understand the matter in its proper perspective. In the said communication the respondent, however, maintained that as a telecom service provider having license from department of telecom the respondent is receiving contents of CRBT/Music under proper agreement from different content providers a few of whom appear to be the members of the said respondent. The content of the said letter has not been disputed. It was a sufficient notice to the society that exploitation of musical works is on the basis of existing agreements.

Incorporated in 1969 by a group of film producers, authors and composers, IPRS was incorporated as a company limited by guarantees. IPRS sought to be a society for mainly music, lyric and other underlying works in a sound track. This company has now been registered as a copyright society by which it has now acquired certain statutory rights. Ring tones royalties have always been an issue with the plaintiff. Ring tone contains both music and lyrics and a "sound recording" which incorporates the music and lyrics. A telecom company ideally would be required to obtain licenses now from IPRS as the plaintiff has rights over "music and lyrics". Now that a society is in place to take care of the musicians, composers and lyricists, the rights of the members of the plaintiff are required to be protected. The respondent appears to have received the schedule of tariffs for consideration from the plaintiff. The respondent apparently did not respond to the communication dated 13th June, 2018. Whether the Tips or Sony would be required to bear such liability out of the amounts received for exploitation of musical rights should not in any manner stand in the way of the society receiving its dues and share of royalty for musical exploitation and prima

facie it appears that after June 2018 no effort has been made by the respondent to carry forward the discussion and arrive at a solution.

The respondent cannot gain by remaining silent. If Sony and Tips does not have the right to allow the plaintiff to use such music as ringtones and such

right rests with the society then any such license giving such rights in favour of the defendant would be unauthorized and cannot bind the society.

However, these matters are required to be considered after exchange of affidavits. On a balance of convenience, in my view the respondent should

be put to terms for all future exploitations till issue is finally adjudicated. For the time being the defendant shall deposit a sum of Rs.2.5 crore to the

credit of the suit with the Registrar, Original Side within three weeks from date. In the event such amount is deposited within the aforesaid time the

defendant would be allowed to continue with the services provided by it to its subscribers, until the disposal of the matter. In default there shall be an

order in terms of prayer (c) of the Notice of Motion.Â

There shall be an unconditional right to use such value added services for a period of three weeks.Â Affidavit in opposition shall be filed on or before

19thÂ November, 2018; reply thereto, if any, shall be filed by 29th November, 2018. The matter shall appear under the heading â??Motion

Adjournedâ?? in the monthly combined list of December, 2018.