

(2015) 01 KAR CK 0158

In the Karnataka High Court

Case No : Regular First Appeal No. 125 of 2009

Mars Recording Private Limited

APPELLANT

Vs

Saregama India Limited

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Copyright Act, 1957 — Section 13, 14, 14(e), 16, 19

Citation : (2015) 01 KAR CK 0158

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Arvind Kamath K., for the Appellant; Ganapathy M.S., Advocate for Gayathri Balu, Advocate for Khaitan and Company, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Anand Byrareddy, J.—This appeal is filed by the plaintiff. The plaintiff had filed the suit in the following background:

The plaintiff is said to be a private limited company, incorporated under the Companies Act, 1956 (Hereinafter referred to as the "Companies Act", for brevity). It has its registered office at Bangalore. It is said to be engaged in the business of recording musical, cultural and entertainment programmes, in the audio and video medium. The plaintiff is said to market the recordings made on cassettes and compact discs, under the name and style of "Shankar Music Cassettes". 2. The defendant is a company incorporated under the Companies Act, with its registered office at Kolkatta. It was earlier known as the Gramophone Company of India Ltd. The defendant is said to have obtained copyrights to many musical works.

It transpires that the plaintiff had, in the course of its business, intended to make sound recording or, what are known as "cover versions", in the form of audio cassettes of musical works, the copyrights of which were held by the defendant. The plaintiff is said to have issued a notice of intention of making sound

recordings, as contemplated under Section 52(1)(j)(ii) of the Copyright Act, 1957 (Hereinafter referred to as the "CR Act" for brevity), dated 23.6.2006 in respect of the following titles:

I. Ee dehadinda dooranaade,

II. My name is Raj and

III. Nagabeda nagabeda

And also issued a further notice of intention dated 3.7.2006, of making sound recordings of the following titles:

I. Premada aatake and

II. Hrudaya thumbi haaduve

The plaintiff is said to have complied with the following requirements in issuing the respective notices of intention as enumerated under Rule 21 of the Copyright Rules, 1958 (Hereinafter referred to as the "1958 Rules", for brevity):

(a) the details of work in respect of which the sound recordings were to be made,

(b) the name, address and nationality of the owner of the copyright in the work,

(c) the particulars, of the sound recording made previously recording the work,

(d) the number of sound recordings intended to be made,

(e) declaration that the plaintiff did not propose to make any alterations to the work,

(f) A copy of the inlay card/label along with payment of royalty sent to the copyright owner by cheques along with a copy of notices of intention sent to the Registrar of Copyright, Copyright Board, New Delhi.

It was the plaintiff's contention that The Registrar of Copyright, Copyright Board, New Delhi, was the competent authority to fix the royalty payable to the original copyright owner. It is stated that the royalty payable in respect of such version recording was 5% of the retail price of the original recording on similar cassettes. The plaintiff is said to have accordingly calculated the royalty payable in having issued the cheques.

It was the plaintiffs case that a person making a sound recording need not obtain the prior consent of the copyright owner. The requirement of law was the issuance of a letter of intention 15 days prior to the commencement of such recording. It was the plaintiff's case that it had fully complied with the procedure in this regard. However, the defendant is said to have caused a reply to the notice of intention by its communication dated 11.7.2006 - refusing permission to the plaintiff to make any sound recording of its copyrighted titles.

Notwithstanding the refusal of consent by the defendant, it was the plaintiff's

case that as the plaintiff did not propose to make any alterations from the work and as indicated in the inlay card, the proposed version sound recording was not from the original sound track, it would not be an infringement of the copyright nor would it mislead a buyer as to the product purchased.

It was further urged that notices of intention were served on the defendant on 24.6.2006 and 4.7.2006, respectively. And the Copyright Board had been served with the notices on 26.6.2006 and 7.7.2006, respectively. Hence, the stipulated period of 15 days having elapsed before the plaintiff commenced recording the cover version of the works, the plaintiff contended, it was legally entitled to do so without any consent from the defendant. The plaintiff had furnished the details of when and how the recordings were made.

It was stated that it was in the above background that the representatives of the defendant are said to have visited the office of the plaintiff and had warned the management to desist from recording and marketing the said cover versions and threatened to seize such material wherever possible. The plaintiff had filed the suit in the above circumstances, seeking a declaration that the cover version recordings made by the plaintiff, of works in which the defendant held copyright, did not amount to infringement of copyright and for consequential injunction restraining the defendant from interfering in such activity.

3. Upon service of summons, the defendant is said to have entered appearance and contested the suit. It was stated that the defendant had already filed a suit before the High Court of Calcutta, in CS 119/2006, as against the plaintiff, restraining it from making cover versions as above and that there was an order of temporary injunction in that regard, dated 17.5.2006. Hence the present suit was not maintainable.

It was also pointed out that admittedly, the defendant was the copyright holder of the works in question and hence the relief of a declaration, to enable the plaintiff to make recordings and market the same was untenable. It would follow that without a tangible legal right, the relief of injunction was not available.

It was contended that there was no express or implied consent granted by the defendant to enable the plaintiff to make any recordings as aforesaid, merely after issuing a notice of intention. The plaintiff was seeking to canvass a distorted interpretation of the provisions of the CR Act.

The defendant had cited the relevant provisions of the CR Act and the 1958 Rules, in extenso, to demonstrate that the basis of the plaintiffs claim was erroneous and untenable.

It was contended that in Civil Suit No. 265/1998 filed by the defendant under the Proviso to Section 60 of the CR Act, the High Court at Calcutta had granted an order of injunction against the plaintiff and the matter is pending before the Supreme Court of India.

Insofar as O.S. No. 4792/1998 filed by the plaintiff under Section 60 of the CR

Act against the copyright owner - the defendant, is concerned, the special leave petition in SLP (Civil) No. 2120 of 2001 and Civil Appeal No. 6122 of 2011 came to be disposed of by the Supreme Court on 3.9.2001. The suit bearing No. CS 265 of 1988 filed before Calcutta High Court was ordered to be transferred to Bangalore to be tried along with O.S. No. 4792/1998 by the Supreme Court.

It was contended that after trial, O.S. No. 4792/1998 was dismissed and Civil Suit No. 265/1998 was renumbered as O.S. No. 1319 of 2002, which was decreed. The regular first appeals in RFA Nos. 534-535 of 2004 preferred by the plaintiff against the judgments in the above referred suit, were dismissed as withdrawn by an order dated 10.10.2006 before this Court.

It is contended that the judgment in O.S. No. 4792 of 1998 and O.S. No. 1319 of 2002 pursuant to the dismissal of RFA Nos. 534-535 of 2004 has become final and binding.

It is further contended that the plaintiff having failed in his attempts, had again issued purported notice of Intention to M/s Saregama India Limited. As stated hereinbefore, the suit in CS No. 119 of 2006 filed by the defendant, the copyright-holder, against plaintiff before the Calcutta High Court, an order of injunction has been granted restraining the plaintiff therein from giving effect to the purported notice in any manner.

Incidentally, the defendant had returned the royalty amount said to have been dispatched by the plaintiff along with the notices of intention.

4. On the above pleadings, the trial court had framed the following issues:

"1. Whether plaintiff proves that there is no need for the company to obtain consent of the defendant company for version sound recording of the literary musical works of which defendant is the owner of copy right in the titles mentioned in para 6 of the plaint?

2. Whether plaintiff proves that it is suffice for the company if notice of intention is issued to the defendant company as prescribed under Section 52[1][j][ii] of the Copy Right act?

3. Whether defendant proves that the plaintiffs suit is not maintainable in law as the company has already filed suit against the plaintiff in Calcutta Court?

4. Whether plaintiff is entitled for the relief claimed in the suit?

5. What order or decree the parties are entitled do?"

The trial court has proceeded to consider Issues Nos. 1 to 3 as preliminary issues and answered the same in the affirmative. The suit was dismissed as not maintainable.

The trial court has opined that the defendant was admittedly the owner of the copyright in the subject works. In answering the question whether the plaintiff could proceed to make sound recordings of such works without the express

consent of the plaintiff, on merely issuing a notice of intention, the trial court on a reading of the relevant provisions of the CR Act, has held that the fallacy in the plaintiff's argument lay in seeking to misinterpret the tenor and construction of Section 51(1)(j)(i) and (ii) of the CR Act.

The plaintiffs contention that the sub-clauses (i) and (ii) therein ought to be read disjunctively was held to be erroneous and untenable. It was held that the tacit consent under sub-clause (i) was a pre-condition in proceeding to comply with the further conditions under sub-clause (ii).

It was further held that the defendant having already instituted a suit in the High Court of Calcutta, and having obtained an order of injunction, the present suit was held to be not maintainable and was dismissed. It is that which is under challenge in the present appeal.

5. The learned counsel Shri Arvind Kamath, appearing for the appellant contends that the finding of the trial court that sub-clauses (i) and (ii) of Section 52(1)(j) of the CR Act, can no longer be read conjointly is incorrect. In that, the intentional deletion of the conjunction - "and", that conjoined sub-clauses (i) and (ii), having been omitted by an amendment vide Act 38 of 1994, the two sub-clauses are mutually exclusive and are to be read disjunctively. In other words, it is contended, when sound recordings are made with licence, or consent, of the owner of the copyright in the work, as contemplated under sub-clause (i), there would be no need for any elaborate procedure to be followed. But in cases where after the expiry of two calendar years, after the expiry of the year in which the first recording of the work was made, a person intending to make a recording would have the deemed consent of the owner of the copyright of the work, on complying with the procedure and conditions prescribed under sub-clause (ii). It is hence contended that as the trial court had proceeded to consider the case without reference to the significant amendment to the law, the entire findings are erroneous and are liable to be set aside.

Shri Kamath also places reliance on an unreported judgment, by a learned single judge of this court, in an appeal in MFA 5491/1998, dated 31.8.1999, The Gramophone Co. of India Ltd., v. Mars Recording Pvt. Ltd. and another (this was a matter between the very parties to the present appeal). It is pointed out that the very controversy as is the subject matter of these proceeding, was considered in the said judgment and it was opined, with reference to the interpretation of the scope and tenor of Section 52(1)(j)(i) and (ii) of the CR Act, thus:

"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-cl.(i) of cl. (j) of Section 52 and preceding sub-cl.(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-cl.(2) of Cl.(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 cl. (j) of sub-Section (1) of Section 52 and it does not refer to sub-cl. (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 under Section 19. Licence or consent can be obtained under Section 30 of the Act. If the licence or consent is obtained under Section 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) and (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." Reliance is placed on a judgment of the High Court of Delhi, The Gramophone Company of India Ltd. Vs. Super Cassette Industries Ltd., . It is pointed out that in the said judgment, there is an in-depth analysis of the provisions of law and a complete discussion of the case law, in forming the following opinion:

"41. The scheme of the Act, as to grant of licences and assignments is clear. Wherever under the Act the Copyright Board is authorized to issue a compulsory licence, provision has been made for making an application to the Board for the said purpose. However, Section 52(1)(j) of the Act does not require any application to be made for obtaining consent/licence either to the Copyright Board or to owner of the Copyright(s) in the work(s) already authorizedly utilized for making a sound recording, much less to the owner of the copyright in the earlier made sound recording. Had the said provision intended that express, or even implied consent of such owner(s) is essential, it would have specifically said so. In any event, if prior permission from such owners was essential, then there was no need for enacting Section 52, as Section 30 (which provides for voluntary licence) would have adequately taken care of the situation. It also cannot be said that to make a new sound recording a compulsory licence from the Copyright

Board is required to be obtained as there is no provision for making any application to the Copyright Board for this purpose, and had such a licence been required there was, again, no need to place the provision concerned in Section 52.

42. Section 52 protects certain actions which otherwise would amount to an infringement of copyright. Evidently, exploitation of the literary, dramatic or musical work(s) for making a sound recording with the consent of the owner of copyright(s) or by compulsory licence from the Board cannot be considered to be an infringement. Where such express consent/licence is obtained either voluntarily from the owner(s) or a compulsory licence is obtained from the Copyright Board, Section 52 would have no application. Only if the conditions set out in Section 52 are satisfied, the action would be saved from being condemned as infringement of copyright.

43. There seems to be no ambiguity in the language employed by the legislature in formulating Section 52(1)(j). Therefore, the golden rule of construction need only be employed. The plain literal construction of the said Section is also in consonance with the scheme of the Act and the textual and contextual setting in which the said provision appears. I may notice that similar distribution of rights involving "statutory licencing" is prevalent in Australia (as is evident from the decision of the Federal Court of Australia in *CBS Records Australia Limited and Ors. V. Telmak Teleproducts (Aust.) Pvt. Ltd.* 8 IPR 473, in U.S.A. (as is evident from the commentary "KOHN ON MUSIC LICENSING", extracts from 2nd edition of which has been filed by learned Counsel for the defendant). Also filed on record is extract of "Copyright Principles", Law and Practice by Paul Goldstein Vol.1, which is to the same effect. World Copyright Law - Protection of Author's Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law (1998) edition by J.A.L. Sterling LL.B. is also to the same effect. No doubt, the Law of compulsory licencing has undergone a change in the U.K. and the same has been done away with the enactment of the 1988 Act "in recognition of the fact that the conditions of the market had long since changed and that there had been a breakdown of the consensus....." (see Copinger and Skone James on Copyright, 15th edition, 2005), but the fact remains that prior to 1988, even in the U.K. compulsory licencing was prevalent. In India, statutory licencing is very much a part of the law as embodied in, inter alia, Section 52 and merely because in the U.K. the same has been abolished in 1988 is no ground to give a restricted interpretation to the provisions of the Act, which do not admit of any ambiguity in their interpretation. The Supreme Court has held in *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others*, (hereinafter referred to as "Gramophone V") that municipal law must prevail in case there is conflict with International Law. National Courts will endorse International Law but not if it is in conflict with national law."

It is contended that the above reasoned view be applied to the case of the

appellant.

6. On the other hand, the learned counsel for the respondent would seek to justify the impugned judgment. It is further pointed out that in so far as the view taken by a learned single judge of this court in an earlier appeal between the same parties, is concerned, it had been challenged by the respondent before the Supreme Court in *Gramophone Co., of India Ltd. Vs. Mars Recording Pvt. Ltd. and Another*, and the same had been set aside and remanded to be tried along with the suit filed by the respondent before the High Court of Calcutta, in Civil Suit No. 265/98, which in turn was transferred to the City Civil Court, Bangalore. Thereafter, the appellant's suit was dismissed and the respondent's suit was allowed. The appellant had then filed an appeal before this court in RFA 534/2004, the same was withdrawn as not pressed, at the stage of hearing. The appeal was accordingly dismissed with costs of Rs. 5000/-, by judgment dated 10.10.2006. Therefore, it is contended that the view taken by this court stands effaced. It is contended that a similar view taken by the High Court of Delhi would also not advance the case of the appellant.

7. By way of reply, it is pointed out that the apex court had merely remanded the matter to be tried along with the pending suit of the appellant and therefore had not addressed the opinion formed on the point of law by the learned single judge of this court. The subsequent remand by the apex court and the dismissal of the suit of the appellant though was challenged before this court in the appeal in RFA 534/2004, the same was dismissed as withdrawn, without any consideration on merits. Therefore, it cannot be said that the very legal contention is not capable of being canvassed.

8. In the light of the above contentions, we may proceed to take stock of the relevant legal provisions and address the scope and tenor of the same in applying them to the facts of the case.

It is to be kept in view that the present case is with reference to the provisions of the CR Act, before it was substantially amended by the Copyright (Amendment) Act, 2012 and before the 1958 Rules were superseded by the Copyright Rules, 2013.

Section 16 of the CR Act provides that no copyright can be acquired in respect of any work except in accordance with the provisions of the Act.

The expression "work" is defined in Section 2(y) as:

"2(y). "work" means any of the following works, namely:-

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

Section 2(p) defines "musical work" as:

"2(p). "musical work" 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;" Section 2(xx) defines "sound recording" as:

"2(xx). "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced;" The definition of an "infringing copy" with reference to a sound recording, which is relevant is defined under Section 2(m)(iii), thus:

"infringing copy" means,-

(i).....

(ii).....

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv)....."

Section 13 defines the works in which copyright subsists. It provides that copyright shall not subsist in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, a copy right in such work has been infringed. It is emphasized in Sub-section (4) thereof that the copyright in a sound recording shall not affect the separate copyright in any work in respect of which the sound recording is made.

It is evident that the Act contemplates a copyright in the primary and original literary, dramatic and musical works as also a separate copyright in sound recording made of the same. The separate copyrights co-exist.

Section 14 specifies the content of the rights comprised in the "copyright". Section 14(e) deals with sound recordings. A owner of a copyright in sound recordings would have the following exclusive rights:

- to make any other sound recording embodying it;
- to sell or hire any copy of the sound recording; or
- to communicate the sound recording to the public.

Sound recording being a derivative right is a limited right - when compared to the right in the primary musical work.

Chapter VI of the CR Act deals with licences. Section 30 deals with voluntary licences, as may be granted by the owner of the copyright to another. Sections 31, 31A, 32, 32A, 32B, deal with compulsory licences which may be granted by the Copyright Board, in certain circumstances.

Chapter XI deals with infringement of copyright. Section 52 provides exceptions

and protects certain acts, which would otherwise amount to an infringement of copyright. As it is a lengthy provision, the relevant portion for our purposes is extracted hereunder:

"Section 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 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:

Provided that--

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such sound recording:

Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;"

Rule 21 of the 1958 Rules is with reference to sound recordings made under Section 52(1)(j). The same reads as follows:

"21. Making of records.--(1) Any person intending to make sound recordings under clause (j) of sub-section (1) of section 52 shall give a notice of such intention to the owner of the copyright and to the Registrar of Copyrights at least fifteen days in advance of making of the sound recordings and shall pay to the owner of the copyright, along with the notice, the amount of royalties due in respect of all the sound recordings to be made at the rate fixed by the Copyright Board in this behalf and provide copies of all covers and labels with which the sound recordings are to be sold.

(2) Such notice shall contain the following information, namely:-

(a) the particulars of the work in respect of which sound recording are to be made;

(b) alterations, if any, which are proposed to be made for the adaptation of the work to the sound recording;

(c) the name, address and nationality of the owner of the copyright in the work;

(d) particulars of the sound recording made previously recording the work;

(e) the number of sound recording intended to be made; and

(f) the amount paid to the owner of the copyright in the work by way of royalties and the manner of payment."

It is seen that under the scheme of the CR Act, there are three kinds of licences available:

i. Voluntary license;

ii. Compulsory license; and

iii. Statutory license.

Section 30 of the CR Act provides for a Voluntary licence, whereby the owner of the copyright in any existing or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing.

Section 31 of the CR Act contemplates a Compulsory licence, whereby in a circumstance where a complaint is made to the Copyright Board, to the effect that the owner of the copyright of any work, which has been published or performed in public, has refused to re-publish or allow the re-publication of the same or has refused to allow the performance in public of the work and thereby has withheld the work from the public; or has refused to allow communication to the public by broadcast, the Copyright Board after holding an enquiry and affording a hearing to the owner of the Copyright, if it finds that the grounds for such refusal are unreasonable, would direct the Registrar of Copyrights to grant to the complainant a licence to re-publish, perform the work in public or communicate the work to the public, subject to such other conditions. Similarly a compulsory licence in an unpublished work is contemplated under Section 31A.

Though the reference to a "Statutory licence" is not to be found in the CR Act prior to its amendment by Act 27 of 2012, the procedure to secure such licence to make a sound recording as is contemplated under Section 52(1)(j)(ii) and the procedure to obtain, what is now defined as a "Statutory licence for cover versions", under Section 31C of the amended Act, are identical -though with some variation as to particulars.

In so far as a compulsory licence is concerned, provision is made as to the manner in which an application is made to the Copyright Board and dealt with. Section 52(1)(j) on the other hand, does not require an application to be made for obtaining a licence from the Copyright Board or for consent from the owner of the Copyright in the work which has been authorized for being used in making an existing sound recording. This may be viewed from another perspective. Section 30 which contemplates a voluntary licence was adequate protection for the owner of a copyright if the prior consent of the owner was always necessary. There was then no necessity to have enacted Section 52(1)(j). It is also significant that there are no provisions or procedure prescribed to obtain a compulsory licence to make a new sound recording. If such a licence was required there was no need to incorporate Section 52.

Section 52 of the CR Act is extracted hereunder for ready reference:

"Section 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 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:

Provided that--

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar

years after the end of the year in which the first recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such sound recording:

Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;"

It is fascinating as to how the position becomes clearer and to discern the intent of the legislature, if the Section is read thus, in two parts:

(i) (The following acts) (It) shall not constitute an infringement of copyright, namely, the making of sound recordings in respect of any literary, dramatic or musical work if 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) (It) shall not constitute an infringement of copyright, namely, the making of sound recordings in respect of any literary, dramatic or musical work if the person making the sound recording 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:

Provided that--

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such sound recording:

Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings

purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;

The above read with Rule 21 of the 1958 Rules if complied with by a person, whether he is denied consent or otherwise by the owner of a copyright, to make a sound recording, it would not be an infringement of the copyright, such licensing has been recognized the world over. The object is to prevent monopoly of popular music by a copyright owner, indefinitely, and to make it available to the public.

(As for instance, in the United States of America).....

"the exclusive rights of an owner of copyright in a sound recording are limited in that they extend only to the right to reproduce, adapt, and distribute copies or phonorecords of the work, and do not extend to the right of public performance. The sound recording copyright owner's right to reproduce is also limited to the right to duplicate the actual sounds fixed in the recording. Thus, only the particular sounds captured in the recording are protected and anyone else may make another recording of the same material, that is, the song embodied in the recording, without infringing the sound recording copyright. The sound recording copyright holder's exclusive right to prepare a derivative work is basically limited to the right to prepare a work in which the actual sounds fixed in the recording are rearranged, remixed or otherwise altered in sequence or quality.

"Non dramatic musical works are subject to "compulsory licensing". The concept of "compulsory licensing" was first established under the Copyright Act of 1909, which provided that whenever the owner of a musical copyright has used, permitted, or knowingly acquiesced in the mechanical reproduction of the copyrighted work, any other person could make similar use of the copyrighted work upon the payment to the copyright proprietor of a specified royalty. The system was established to encourage the widespread mechanical or recorded use of music to prevent absolute control of popular music by the copyright owner thereof.

Under the Copyright Act of 1976, whenever the copyright owner of a non dramatic musical composition authorizes the public distribution in the United States of phonorecords embodying that musical composition, any other person may, by complying with the statutory provisions, in effect, compel the copyright owner to license, or permit, the making and distribution of other phonorecords embodying such musical composition.

Thus, the compulsory license applies only to second and subsequent recordings of musical works, after the copyright owner has authorized the first recording to

be made. The compulsory license applies only to phonorecords, which includes disks and audio tapes, but does not include sound tracks or other sound records that accompany a motion picture or other audiovisual work, nor does the provision apply to other uses of music such as song sheets or public performances.

Once the creator of a nondramatic musical work has allowed phonorecords of that work to be produced and distributed, the statute requires him to grant a license upon request to any other person who proposes to make and distribute phonorecords of the work at a royalty rate set by law. As a practical matter, the vast majority of contracts for use of copyrighted musical works involve voluntary payment at the statutory rate and there has been little need to invoke the licence procedures of statute. However, if a negotiated license is not readily obtainable, recourse may be had to the compulsory licensing provisions.

A compulsory license is not available for duplication of an existing recording of the song, but rather to make a new rendition thereof.

In other words, it is only the musical work, and not a particular recording by a performer of that song, that is the subject of a compulsory license; no one is entitled to a compulsory license of copyrighted musical works for the purpose of making unauthorized duplication of a musical sound recording originally developed and produced by another. Thus the compulsory license may record a copyrighted song using musicians, singers, studio engineers and the equipment and personnel necessary for the production of a phonograph recording, but he may not reproduce a performance by another.

A compulsory licensee may make new arrangements of the music to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but such new arrangement may not change the basic melody or fundamental character of the work nor may the music be perverted, distorted or travestied. The compulsory licensee may not claim an independent copyright in the arrangement as a derivative work without the express consent of the copyright owner of the musical work.

The compulsory license is obtained by serving notice of intention to distribute phonorecords of a work, either before or within 30 days after making and before distributing such work, on the copyright owner. Failure to serve or file notice forecloses the possibility of a compulsory license and in the absence of a negotiated lease, renders the making and distribution of such record actionable as an act of infringement."

(See: American Jurisprudence 2d, Volume 18, Sections 93, 94 and 95)

It is thus seen that even in the Indian context as well, a similar intent is embodied - as seen from the tenor of Section 52(1)(j) of the Act. It would not be an infringement of a copyright in a sound recording, if the same has been made

with the consent or by licence of the copyright owner. If a negotiated consent is not possible, a person becomes legally entitled to make a sound recording of such a copyrighted sound recording by recourse to the procedure prescribed and subject to the conditions that would apply. It is to be emphasized that it however, does not entitle the person to make a copy or a duplication of the sound recording. But is entitled to produce a "version recording", which is a fresh recording using a different set of performers, musicians and artistes and facilities. It would be a "sound alike" recording or a close imitation, of the original sound recording and would not be an infringement of the copyright.

9. The question, whether the appellant was entitled to make a sound recording in terms of the notice of intention, on compliance with the procedure contemplated under Section 52(1)(j)(ii) of the Act, read with Rule 21 of the 1958 Rules, notwithstanding the refusal of consent by the respondent, which would arise for consideration in the present appeal, is answered in the affirmative.

The Order and decree of the court below are with regard to the preliminary issues framed by the court, which in the opinion of the court below were pure questions of law and hence could be decided summarily, from the material on record. Since this court has disagreed with the opinion of the court below on the first two issues that were framed for consideration, the findings of the court below on the said issues are set aside and it is declared that the plaintiff, on due compliance with the procedure contemplated under Section 52(1)(j)(ii) of the CR Act, read with Rule 21 of the 1958 Rules (before the amendment of the Act vide Act 27 of 2012 and supersession of the Rules vide The Copyright Rules, 2013) and subject to meeting other conditions prescribed thereunder would be entitled to make the intended sound recordings, notwithstanding the refusal of consent by the respondent.

In so far as the finding on Issue No. 3 to the effect that as a prior suit filed by the respondent in CS 119/2006, before the High Court of Calcutta, was pending and in which there was an order of injunction issued against the appellant herein. The relief of injunction is declined only on that ground. It would be for the appellant to pursue its remedy before that High Court in that regard. For if not for the said Order of the Calcutta High Court, the appellant would also be entitled to the injunctory relief prayed for.

The appeal is allowed in part, in terms as above. The parties to bear their own costs.