

(2006) 04 DEL CK 0173

In the Delhi High Court

Case No : IA No"s. 2647 and 3177 of 2006 in CS (OS) 405 of 2006

Neha Bhasin

APPELLANT

Vs

Anand Raj Anand and Another

RESPONDENT

Date of Decision : 20-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4
Contract Act, 1872 — Section 70
Copyright Act, 1957 — Section 2

Citation : (2006) 132 DLT 196 : (2006) 32 PTC 779

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Harish Malhotra, Ashok Bhasin and Tanuj Khurana, for the Appellant;
Sudhir Chandra Aggarwal and Abhishek, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The plaintiff (Neha Bhasin), a singer, claims that her voice has been used by the defendants for the three versions¹ of the song "ek look ek look" in the forthcoming hindi feature film "Aryan " unbreakable" produced by the defendant No. 2 (Poonam Khubani). What is more, the plaintiff alleges, the defendant No. 2, in connivance with the music director (defendant No. 1-Anand Raaj Anand), has shown herself to be the singer Along with the defendant No. 2. The plaintiff has been shown as a backup vocalist in all the three versions of "ek look ek look". The credits for the three versions are apparent from the jacket/inlay card of the audio compact disc of "Aryan unbreakable" and are as under:

3. EK LOOK EK LOOK Remix Version

Poonam Khubani & Anand Raaj Anand

Backup Vocals : Earl / Neha / Praful / Devesh

Remix By : Praful Karlekar

6. EK LOOK EK LOOK

Poonam Khubani & Anand Raaj Anand

Backup Vocals : Earl D'Souza / Neha Basin

9. EK LOOK EK LOOK Dhol Mix

Poonam Khubani & Anand Raaj Anand

Backup Vocals : Earl D'Souza / Neha Basin

The plaintiff alleges that (1) she has sung the song in all the three versions as the lead singer and it is her voice which has been recorded and is heard when the song is played; and (2) that defendant No. 2 (Poonam Khubani) is not the lead singer and, in fact, it is not her voice at all. In sum and substance, the plaintiff claims that instead of defendant No. 2's (Poonam Khubani's) name, her name should have been shown as the lead singer and that her name has been mischievously shown only as a backup vocalist. In other words the plaintiff alleges that her voice has been "stolen" and falsely attributed and held out to be that of defendant No. 2 (Poonam Khubani).

2. In this background the plaintiff has filed the present suit seeking inter alias a decree of permanent injunction in favor of the plaintiff and against the defendants, their dealers, distributors, stockists and all other persons acting on their behalf from using, selling, distributing, exhibiting the motion picture as well as audio cassettes, compact discs, promos of the film "Aryan - unbreakable" containing the song "ek look ek look" without displaying the name of the plaintiff as the lead singer. The plaintiff has also prayed that the defendants be further restrained from advertising and giving the name of the defendant No. 2 as the lead singer of the said song "ek look ek look" in all the three versions. The plaintiff has also sought a decree for damages and rendition of accounts.

For the present I am concerned with two applications -- is 2647/2006 & is 3177/2006. The first of which is an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 filed on behalf of the plaintiff for interim injunction. The second application has been filed on behalf of the defendants under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 for vacating the ex parte ad interim order passed by this Court in is 2647/2006 on 07.03.2006. By that order the defendants were restrained from using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film "Aryan unbreakable" containing the song "ek look ek look" without displaying the name of the plaintiff as the female singer.

3. It is alleged in the plaint that the plaintiff was approached by the defendants through her manager (Mr Manish Savant) for recording and dubbing of a song "ek look ek look". According to the plaintiff, as the defendant No. 1 one was a well-known music director the plaintiff gladly agreed, in good faith, to the dubbing and recording of the said song for the defendants. No remuneration was settled and it was agreed that the plaintiff would be paid suitably after looking to the popularity of the song once it is released in the market. The the plaintiff was

called for the said dubbing and recording at the studio "Wings" on 15.11.2004. The plaintiff reached the said studio as arranged and the first recording was done. Apparently the plaintiff's manager on or about 30.11.2004 was informed by the defendant No. 1 that the song sung by the plaintiff was "very much appreciated" and that the same would be used for the motion picture "Aryan - unbreakable" and that the plaintiff would be required for final recording of the said song for the said film. Thereafter there was no news from the defendants for about four to five months when, one-day, the defendants called upon the plaintiff's manager to arrange for the immediate re-recording of the said song. On 22.3.2005 the plaintiff, Along with her manager, once again went to the studio "Wings" when the second recording of the entire song was completed in the presence of the defendants with a fresh mode of lyrics. Shortly thereafter, the plaintiff was informed that the song was also approved by the director of the motion picture. The plaintiff was called for a final recording of the song with some modifications at "Nirvana" studio and the dubbing of the song was done with the backup vocals of Ms Sushan and a rap portion by Mr Earl D'Souza. This final recording of the song was done on 5.4.2005. It is further alleged that despite all the effort put in by the plaintiff, as mentioned above, the plaintiff was not paid any thing for the song and the defendants postponed the payment on the pretext that the plaintiff would be suitably compensated looking to the popularity of the song after it is released in the market.

4. In the month of February, 2006 the plaintiff was delighted to hear the said song when she was watching television at home but was shocked to know that her name was not displayed as the singer. The plaintiff went to the market and purchased the audio cassette as well as the audio CD (compact disc) to verify whether her name had been printed on the inlay card. The plaintiff was shocked to learn that, although her name was mentioned in the inlay card of the audio CD, she was shown only as one of the backup vocalists and, instead of crediting the song to the plaintiff, the name of the defendant No. 2, who is the producer of the said film, had been mentioned as the singer. The plaintiff has asserted that the said song in all its three versions as appearing in the audio CD had been sung by her and that the defendant No. 2 had no role in the same and that consequently the defendant No. 2 cannot be permitted display her name as the singer and hold out to the world at large as if she had sung the song and not the plaintiff. It is alleged that, in utter misuse of her position as the producer of the said film, the name of defendant No. 2 has been mischievously and dishonestly mentioned as the lead singer. The plaintiff averred that the said song sung by the plaintiff had attained popularity in the market and that she had never given her consent/approval to defendant No. 2 to use her (defendant No.2's) name as the lead singer. Consequently, using the voice of the plaintiff and showing the name of defendant No.2 as the lead singer and not disclosing the name of the plaintiff as the lead singer amounted to an illegal act on the part of the defendants. It was submitted by the plaintiff that the said song "ek look ek look" is featured in three different versions and in all the three versions the voice of the plaintiff has

been used as the lead female singer but, the defendants have shamelessly put the name of the defendant No.2 (who is the producer of the film) on the inlay card of the audio CD as the lead singer. It is also stated that this has amounted to an infringement of the performer's rights in terms of the Copyright Act, 1957.

5. The plaintiff's lawyers sent a notice dated 14.2.2006 to the defendants wherein it was, inter alia, stated :-

12. That the above fact came to the knowledge of my client only when the said song was featured in various Music Channels and the cassettes and CDs of the music album of the motion picture "Aryan" was made available in the open market. It is painful to see that the Song "ek look ek look" features in three different versions on the album and in all the three versions, the voice is that of my client and surprisingly the credits of the same have been given to you, addressee No. 2.

13. That you, addressee No.1 & 2 have tried to pass off my client's voice as the voice of addressee No.2; have cheated my client of the hard work and dedication she put into the song, "Ek Look Ek Look" by depriving my client the due credit on the cassette, CD & T.V. Promos" "Video; have played fraud by using the name of you, the addressee No. 2 by the addressee No.1, for the song, "Ek Look Ek Look" which is sung by my client, whose voice can be heard clearly, on the Cassette; CD & T.V. Promos & Video, of the motion picture, "ARYAN".

14. That my client is a trained classical singer and has a formidable reputation as a professional singer in the field of singing. Also, she has earned a lot of respect in the music world. But you, the addressee No.1 and 2 have overlooked the said fact and very shamefully, without any hesitation, used my clients voice on all the three versions of the song, "Ek Look Ek Look", on the cassette and CD of the motion picture, "ARYAN" and have wrongly, illegally and unethically given credit for the same to you, addressee No.2, whereas the entire main "" lead female rendition of the said song has been done by my client.

By virtue of the said notice dated 14.2.2006, the defendants were called upon to give due credit to the plaintiff on all cassettes, CDs, TV promos and in the film "Aryan" by showing the plaintiff's name as the main -- lead singer of the song "Ek Look Ek Look" after withdrawing all the offending material from the market wherein the defendant number two has been shown as the lead singer and the plaintiff as a mere backup vocalist. The defendants were also called upon to pay an amount of Rs 10,00,000/- as damages towards the loss of reputation and imputation of a bad name to the plaintiff. Lastly, the defendant's were called upon to tender a written apology for the said act to the plaintiff.

Another notice on the same lines was sent by the plaintiff's lawyers on 16.2.2006 to the defendants.

6. The defendant No.2 did not reply to any of the said notices. However, the defendant No.1 sent a reply dated 17.2.2006 to the notice dated 14.2.2006

through his lawyers. In the said the reply, while generally denying the claims made by the plaintiff, it was admitted on behalf of the defendant No.1 that he was working on the musical score for an upcoming project titled "ARYAN" and that he had decided to audition the plaintiff and for which purpose the plaintiff was invited to the recording studio "TUNE" sometime in November 2004. It is then that the plaintiff was made to audition for a song allegedly composed by the defendant No.1 and tentatively titled "Ek Look Ek Look". It is further admitted in the said reply that the defendant No.1 one carried out further auditions with the plaintiff at other recording studios between March and April 2005. It is however stated in the said reply that the defendant No.1 decided to use the voice of defendant No.2 (Poonam Khubani) for the said song. As regards the factum of the plaintiff's voice being used in the said song without giving her due credit thereof, the reply on behalf of the defendant No.1 indicated that the plaintiff's voice found its way in the final release version of the song through "inadvertence". The statements contained in the said reply in this regard are of material the importance for a decision in this case and Therefore need to be reproduced verbatim. They are:-

D. During the process where the recording of the Song was being mixed, the sound engineer, inadvertently overlapped the audition recordings of Your Client with those of Ms Khubani's recording.

E. The said inadvertence of the sound engineer was carried to the printer, who, on the said basis, printed the name of Your Client in the inlay card.

F. As soon as the said the inadvertence was brought to the notice of My Client, he has requested the sound engineer to rectify the recording so that the rendition of the song is in the voice of Ms Khubani alone, as intended.

G. My Client and the producer of the said film, ARYAN, have also not only stopped the next lot of cassettes and CDs from being released in the market, but also tried to recall all units already in the market so that the inadvertence is not replicated. Accordingly, the loss, if any, in relation to the inadvertence is not that of Your Client, but of My Client.

"I. Thus, though the sound engineer's inadvertence resulted in an overlap of Your Client's recording with the recording incorporating the rendition of the actual singer, Ms Khubani, it does not confer any right on Your Client either to claim use of her voice in connection with the Song, or to claim any credit in the inlay card for the said Song.

"... it is also reiterated that only with a view to audition Your Client, did My Client request Your Client to attend the recording of the song at TUNE and subsequently at other recording studios.

"... it is reiterated that the recording of Your Client's audition was inadvertently mixed with the recording of Ms Khubani's rendition of the Song by the sound engineer, which inadvertence, upon being noticed, has been rectified, both in the

recording of the Song as well as the inlay card....

"... it is stated that though the aforementioned inadvertence caused the incorrectly mixed version to be released in very limited quantities, the producers of the film, ARYAN are in the process of recalling the same from the market and releasing the actually intended recording carrying Ms. Khubani's voice....

"... the reason why the Song has been credited to Ms. Khubani is because she has sung and recorded the Song, as mentioned above...

"...it is stated that there is nothing surprising in the credits being in the name of Ms. Khubani as she has sung and recorded the Song...

"...the sole purpose of recording the Song in Your Client's voice was that of audition. Though the sound engineer's inadvertence resulted in an overlap of Your Clients recording with the recording incorporating the rendition of the actual singer, Ms. Khubani, it does not confer any right on Your Client either to claim use of her voice in connection with the Song, or to claim any credit in the inlay card for the said Song. In view of the same, it is denied that My Client has tried to pass off Your Client's voice as the voice of Ms. Khubani, or that My Client has cheated Your Client of any alleged hard work or dedication she allegedly put into the Song, as alleged or at all. It is denied that any credit in respect of the Song was due to your client....

"... the sole purpose of recording the Song in Your Client's voice was that of audition. Though the sound engineer's inadvertence resulted in an overlap of Your Client's recording with the recording incorporating the rendition of the actual singer, Ms. Khubani, it does not confer any right on Your Client either to claim use of her voice in connection with the Song, or to claim any credit in the inlay card for the said Song.

"... it is stated that getting an opportunity to record, even through an audition with My Client is a rare event and your client ought to be grateful for the said opportunity....

7. The plaintiff, through her lawyers, sent a rejoinder dated 21.2.2006 to the said reply. In this rejoinder the contents of the earlier notices including the notice dated 16.2.2006 were reiterated. In response to the claim of the defendants that they had not only stopped the next lot of cassettes and CDs from being released in the market but also tried to recall all the units containing the material in dispute already in the market, the plaintiff stated that the said stand was totally false and dishonest as, till date, in all promos on TV, the song as recorded in the said cassettes and CDs were being played with the voice of the plaintiff and the cassettes and CDs with the plaintiff's voice were also being sold without giving her due credit for it. It is also stated in the said the rejoinder that once the recording done by the plaintiff has been commercially used, whether or not there was any agreement, the plaintiff was entitled to be remunerated, compensated and accredited. In the rejoinder it was ultimately stated that in case the

defendants failed to tender an apology publicly in the media and failed to withdraw the contentions raised in the reply dated 17.2.2006, the plaintiff would, inter alia, be constrained to seek civil and criminal remedies.

8. As the defendants did not offer any apology nor did they offer any compensation to the plaintiff, the plaintiff instituted the present suit and filed the application under order XXXIX rules 1 & 2 for an ex parte ad interim injunction. As mentioned above, on 7.3.2006, this court, in the aforesaid circumstances indicated in the plaint and the correspondence exchanged between the parties referred to above, granted an ex parte ad interim order in favor of the plaintiff and against the defendants restraining the defendants, their dealers, distributors, stockists and all other persons acting on their behalf from in any manner using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film "Aryan - Unbreakable" containing the song "Ek Look Ek Look" without displaying the name of the plaintiff as a female singer. The reasons for passing the ex parte order were given in the order itself and are set out here and below:-

This order has been passed ex parte because the plaintiff has been able to show prima facie that the song titled "Ek Look Ek Look" does contain the recordings of the plaintiff as recorded by the defendants in the studio "TUNE" and other studios and that the recordings were conducted between March and April, 2005. This is so because the reply on behalf of the defendant No.1 to a notice issued by the plaintiff records that auditions were carried out and that recordings of the plaintiff singing the song were done. It is, however, sought to be stated in the said reply on behalf of the defendant No.1 of 17.02.1996 at page 77 of the document file that during the process, where the recording of the song was being mixed, the Sound Engineer, inadvertently overlapped the audition recordings of the plaintiff with those of the defendant No.2's recording. It is further stated in the said reply that the said inadvertence of the Sound Engineer was also carried to the printer, who, on the said basis, printed the name of the plaintiff in the inlay card also. One fact which comes out clearly from the said reply is that, whether it was a mistake or it was intentional, the voice of the plaintiff does find place in the song and, Therefore, due recognition for this aspect must be given to her. This is my prima facie view and, Therefore, the said ex parte order has been passed.

9. Thereafter, the defendants filed the said application (IA 3177/2006) under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 for vacating the said ex parte order dated 7.3.2006. The defendants also filed their joint written statement. In the written statement it was admitted that the defendant No.1 was working on the musical score for an upcoming project titled ARYAN. It is further stated that the defendant No.1 decided to audition the plaintiff sometime in November 2004 for the said song composed by the defendant No.1 It is further admitted that the defendant No.1 carried out further recordings with the plaintiff at other recording studios between March and April 2005. It is however stated

that the defendant No.1 decided to use the voice of defendant No.2 for the said song as the lead vocalist.

10. To this extent the written statement was in consonance with the said reply on behalf of defendant No.1. However, the further stand taken in the written statement was at variance with what had been submitted by the defendant No.1 in his said reply to the plaintiff's notice. It would be appropriate to set out the stand now being taken by the defendants as it appears in the written statement:

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D. It is also pertinent to provide a little background of the process by which a song is recorded. Once the singer records/dubs the vocal rendition of a song in a studio, the vocals are "mixed" or married by a sound engineer with the instruments and/or other vocals. The existing technology Therefore permits the various contributors to a song to participate in the process of recording a song at different times, according to their convenience. In the process of mixing, when two vocals are being overlapped, or "layered", the sound engineer uses more number of layers of the lead vocalist's voice and fewer layers of the back-up vocalist's voice. The skill of the sound engineer, however, is demonstrated in blending the two voices in such a manner so as to project the lead vocals and at the same time to retain the back-up vocals in such a manner that the overall quality of the sound is enhanced when heard by the general public.

E. It is stated that during the said process of mixing the Song, the sound engineer overlapped the audition recordings of plaintiff with those of defendant No.2's recording, thereby resulting in a recording that carries the voices of both, the plaintiff as well as defendant No.2. However, in view of use of fewer layers of the plaintiff's voice as compared to defendant No.2's voice, the voice being heard reflected defendant No.2's voice, whereas the plaintiff's voice still appeared only as a back-up vocalist. The recording for the Song had, however, prior to commencement of the present action, been modified to retain only the voice of the defendant No.2. Also, the fact of the said change being undertaken was communicated to the plaintiff. In this regard, it is pertinent to mention that the plaintiff has deliberately misled this Hon'ble Court by falsely alleging in paragraph 12 of the plaint, that defendant No.2's voice does not figure in the Song as released and that defendant No.2 has nothing to do with the Song and it is submitted that the ex parte order of injunction deserves to be set aside on this ground alone. The defendants refer to and rely upon the affidavit of the Sound Engineer deposing to the use of the aforesaid technology in general and with specific reference to the Song, and defendants further place reliance on the old and the new CD of the film accompanying the said affidavit.

F. The said use of plaintiff's voice as a back-up vocalist also resulted in printing of plaintiff's name in the inlay card, as a backup vocalist. Thus, there was no misrepresentation by the defendant's in the inlay card accompanying the old CD.

11. As indicated in the aforesaid extract of the written statement, the sound

engineer Mr Ashish Manchanda has given an affidavit dated 16.3.2006 and the same has been filed by the defendants. A reading of the affidavit indicates that the sound engineer was engaged for mixing the music for the film entitled "ARYAN - UNBREAKABLE" in January 2006. It is further indicated that one of the songs that he was engaged to mix was entitled "EK LOOK EK LOOK". He makes a categorical statement in the affidavit that he was forwarded two recordings of the said song in December, 2005 with instructions to create the master recording of the song. The instructions further set out the name of the lead vocalist as Poonam Khubani and the name of Neha Bhasin was mentioned as a back-up vocalist. He then stated that the process of mixing a song to create a master recording involves a technology which in addition to permitting the combination of the vocals and instruments, also allows for overlapping more than one voice through a process known as "layering". He further stated that when mixing two vocals through the process of layering, it is possible to use a greater number of layers of one voice and fewer layers of the other voice(s), thereby resulting in a recording that projects the voice appearing in the greater number of layers and yet retains the print of the voice appearing in the fewer layers. With particular reference to the said song titled "EK LOOK EK LOOK", he stated that while creating the first master recording, he mixed/overlapped the recording containing Ms Poonam Khubani's vocals with the recording of Ms Neha Bhasin, in a manner that a greater number of layers of Ms Poonam Khubani's vocals were mixed with fewer layers of Ms Neha Bhasin's vocals. The said Sound Engineer has stated in the Affidavit that Annexure-I thereto is a CD (hereinafter referred to as "the Original CD") which contains the recording of the song which includes the vocals of Ms Poonam Khubani as well as Ms Neha Bhasin in the alleged layering proportion claimed to have been mixed by him as stated above. He further stated that subsequently he was requested to make a fresh master recording of the song, without the vocals of Ms Neha Bhasin. He finally stated that he created such a new master recording of the said song which does not include the vocals of Ms Neha Bhasin. Annexed to the affidavit as Annexure - II is the CD (hereinafter referred to as "the New CD") alleged to contain the recording of the song mixed by the said sound engineer which includes the vocals of Ms Poonam Khubani but not the vocals of Ms Neha Bhasin.

12. The defendant No.1 filed another affidavit dated 30.3.2006. In this affidavit he stated that the first master recording in respect of all the songs in the film, including the song "Ek Look Ek Look" was created in or around January 2006. The said first master recording of the song in question carried the layered / overlapped voices of defendant No.2 and the plaintiff. He further stated that thereafter, on 17.2.2006, he recorded backup vocals for the said song in the voices of Mrs Samantha Edwards, Mrs Neisha Mascarenhas and Ms Bianca Gomes and these were mixed along with the existing vocals of defendant No.2, the existing instruments and existing male vocals. He also stated that the new master recording of the said song, though carrying the identical music and instrumentation as the earlier version of the said song, incorporates the female

lead vocals only of defendant No. 2, which are backed up by the voices of Mrs Samantha Edwards, Mrs Neisha Mascarenhas and Ms Bianca Gomes and that the new master recording does not have the vocals of the plaintiff. Annexure-A to the said affidavit of the defendant No. 1 is said to be the original agreement dated 17.2.2006 between the defendant No. 1 and the said Samantha Edwards, Neisha Mascarenhas and Bianca Gomes to sing as chorus singers for the song "Ek Look Ek Look". The agreement is said to have been signed at Mumbai on 17.2.2006. It purports to have been signed by Mrs Samantha Edwards and Ms Bianca Gomes and by Mr Mascarenhas for Mrs Neisha Mascarenhas.

13. I had heard arguments on these applications and reserved judgment on 22.03.2006. But, after hearing the CDs (the Original CD and the New CD) which were annexed to the affidavit of Mr Ashish Manchanda (the Sound Engineer), I had certain doubts which I wanted to be clarified. Accordingly, on 30-03-2006, I directed that this matter be listed on 04.04.2006 for further hearing. On 04.04.2006, as the said sound Engineer (Mr Ashish ManChanda) was present in court, I thought it fit to take up the matter in chambers in the presence of counsel for the parties. I asked Mr Manchanda to play the two CDs. He played the same on his laptop which he had brought along with him. He was also asked to explain the technique of "layering" which the defendants referred to in their written Statement and which also found mention in his affidavit. Apparently, he and his assistants employed the software Nuendo for mixing and producing the masters. I asked him whether it was possible to isolate the voices of the plaintiff and the defendant No. 2 from the audio tracks of the said two CDs. He said that it was possible and he played the isolated voice tags of the plaintiff and the defendant No.2 on his laptop using the said software - Nuendo. Seeing the possibility of separation and isolation of the voice tags, I asked Mr Manchanda if he could burn a further two CDs for the court, one CD containing only the voice tags of the plaintiff for each of the three versions of the song "Ek Look Ek Look" and the other CD containing only the voice tags of the defendant No.2 for each of the three versions of the song "Ek Look Ek Look". He said that he could and that he would file the same by the next day. He did file the two CDs as promised. These CDs were labeled as

ARYAN

EK LOOK -

NEHA VOX ONLY

and

ARYAN

EK LOOK -

POONAM VOX ONLY.

I shall refer to these CDs as the Neha CD and the Poonam CD respectively. These

applications were again listed on 05.04.2006 when I heard counsel for the parties briefly and concluded the hearing.

14. In the light of all this material, let me sum up the rival claims of the parties. It is the plaintiff's case that she was called for recordings of the said song by the defendant No. 1 and that the recordings took place. It is her further case that the audio CD and cassettes of the forthcoming motion picture "Aryan -Unbreakable" were released in February 2006. The promos were also shown on various channels in February 2006 itself. That when she went to the market and purchased the cassette and the CD she was shocked to see that the inlay card showed her only as a back-up vocalist for all the three versions of the said song "Ek look EK look" and the defendant No. 2 (Poonam Khubani) was shown as the main-lead female vocalist. It is her case that the CD released in February 2006 (the Original CD) contains her voice as the main female vocalist - and not that of the defendant No 2 and the defendants have illegally and mischievously credited the song to defendant No.2 even though it was sung by the plaintiff. According to the plaintiff, the song in all its three versions has become very popular and the defendant No.2 is being given false credit for having sung the song when, in fact, it is the song sung in the plaintiff's voice which has reached the public.

On the other hand, the defendants have setup a two-pronged defense: one based on facts and the other founded on law. On the factual side, the defendants firstly contended, as would be evident from the reply of the defendant No.1's lawyers dated 17.2.2006, that the sound engineer "inadvertently overlapped the audition recordings" of the plaintiff "with those of Ms Khubani's recording" and that the "said inadvertence of the sound engineer was carried to the printer, who, on the said basis, printed the name of" the plaintiff "in the inlay card". However, in the written statement, this "inadvertence" story has been given a go-by. Even the affidavit of the Sound Engineer does not state that he had "inadvertently" overlapped the audition recordings of the plaintiff with those of the Ms Khubani (defendant No.2). On the contrary, he made a categorical statement in the affidavit that he was forwarded two recordings of the said song in December, 2005 with specific instructions to create the master recording of the song with Poonam Khubani (defendant No.2) as the lead female vocalist and Neha Bhasin (the plaintiff) as a back-up vocalist. Working on these instructions, he stated that while creating the first master recording, he mixed/overlapped the recording containing Ms Poonam Khubani's vocals with the recording of Ms Neha Bhasin, in a manner that a greater number of layers of Ms Poonam Khubani's vocals were mixed with fewer layers of Ms Neha Bhasin's vocals. Therefore, as stated in the written statement as well as the said affidavit of the sound engineer, the plaintiff's voice found its way in the Original CD not through inadvertence but, through conscious design. The positive case now being sought to be set up by the defendants is that Poonam Khubani's (defendant No.2's) voice was consciously "layered" with the voice of the plaintiff (Neha Bhasin) in such a way that a greater number of layers of the defendant No.2 were mixed with a fewer number of layers of the plaintiff's voice. According to the defendants, this

resulted in projecting the defendant No.2's voice as the lead singer, though, retaining some elements of the plaintiff's voice. And, that, Therefore, the defendant No.2 was rightly described as the main "" lead female vocalist in the Original CD and the plaintiff was correctly described as a back-up vocalist. Consequently, the defendants now take the position that the credits printed on the inlay card of the Original CD are correct. The "inadvertence" story, which was set up contemporaneously to the issuance of the said notice, has been debunked. This is so because an act done inadvertently cannot at the same time be said to be done purposely and consciously.

15. Apart from the fact that is shift in the stand taken earlier and now being taken by the defendants would in itself run counter to the cause of the defendants, it must also be ascertained whether the defense now being set up by the defendants is plausible. The question that arises at this juncture is "" Is the defendant No.2 (Poonam Khubani) the main "" lead female vocalist in all the three versions of the song "Ek Look Ek Look" in the Original CD?

16. The Original CD, as mentioned above, has three versions of the song "Ek Look Ek Look" -- (1) Ek Look Ek Look (Remix version); (2) Ek Look Ek Look; and (3) Ek Look Ek Look (Dhol mix). The lyrics for the female vocals are the same in all the three versions. The differences in the vocals in three versions being inter alias the tempo, repetitions and sequencing. The lyrics of the female vocals are a set of five couplets, largely in Punjabi. They are:-

I. ek look ek look pyar vali Sajna saun tainu rab diyan ek vari takna

II. tu mera suroor hai tu mera ghuroor hai tujhe meri jaan maine paana zuroor hai

III. waise to main rab ke sajde hoon kardi par meri zindagi tere vi huzoor hai

IV. tu jo mere sang hai mujh mein umang hai dil mera soNaiya ho gaya patang hai

V. ek jo nazar teri mujh pe parhi hai main khil gayee hil gayee uT ki tarang hai

17. Let me now examine the sequence in which the component parts of these lyrics appear in the remix version of the said song in the Original CD. The sequence is as follows:-

Table 1

Ek Look Ek Look (Remix version) [Track 3 in the Original CD]

S.No Time (mm:ss) Lyrics 1. 00:29 ek look ek look pyar vali Sajna; saun tainu rab diyan ek vari takna 2. 00:38 ek look ek look pyar vali Sajna; saun tainu rab diyan ek vari takna 3. 00:48 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari taknaaa 4. 01:15 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 5. 01:24 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari taknaaa 6. 02:14 tu mera suroor hai tu mera ghuroor hai; tujhe

meri jaan maine pa_a_na4 zuroor hai 7. 02:24 waise to main rab ke sajde hoon kardi; par meri zindagi tere vi huzoor hai 7a. 02:29 tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine paana zuroor hai 8. 02:55 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 9. 03:19 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai 10. 03:29 ek jo nazar teri mujh pe parhi hai; main khil gayee hil gayee uT ki tarang hai 10a. 03:33 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai 11. 04:00 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 12. 04:15 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna

Table 1 indicates the sequence and the times at which the component parts of the female vocals appear in the Remix version of the said song. For example, at 29 seconds into the song, the female vocalist sings the words "ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna". These exact words, sung in identical fashion, are repeated at 38 seconds, 1 minute 15 seconds, 2 minutes 55 seconds, 4 minutes and 4minutes 15 seconds. The words at Serial Nos. 3 and 5, though the same as these words, are sung differently, in that, the last word "takna" is stretched to sound as "taknaaa".

18. Now, what is required to be done is to compare the vocals as indicated in the table above with the vocals as sung by the plaintiff (Ms Neha Bhasin) and the vocals as sung by the defendant No.2 (Ms Poonam Khubani). Fortunately, the voices of the plaintiff and the defendant No.2 have been isolated in the two CDs called Neha CD and Poonam CD. Before I compare the vocals in these CDs with the vocals in the Original CD, it would be necessary to explain the contents of these two CDs. The Neha CD comprises of 13 tracks. Each of these tracks, in turn, comprises of one or more sequences of parts of the song sung in the plaintiff's voice. Similarly, the Poonam CD comprises of 17 tracks, each of which, in turn, contain one or more sequences of parts of the song sung in the Defendant No.2's voice. So, it is possible to compare the identical words as sung by the plaintiff and the defendant with those appearing in the song in the Original CD.

19. Let me begin with the first set of words i.e., the words at Serial No. 1 of Table 1 or, putting it differently, the first couplet of the song. These words as heard on the Original CD are "ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna" and these very words can be heard in the same accent and voice as sung by the plaintiff and isolated in the Neha CD. But, this is sung differently by the defendant No. 2. As can be heard in tracks 01, 02, 04, 06, 07, 10, 11, 12, 14, 16 and 17 of the Poonam CD, the words are "ek look ek look pyar vari sajna saun tainu rab diya ek vari takna". When one hears this sung in the voice of the defendant No. 2, one is immediately struck by the different manner in which the word "sajNa" has been sung. In the Original CD, the word "sajNa" has been sung in the Punjabi style as "It.kk" and this is how it has been sung by the plaintiff. On the other hand, the defendant No.2 has sung it as "Ituk" , as if it

were a Hindi/Urdu song. The conclusion is irresistible. This couplet in the Original CD has been sung by the plaintiff and not by the Defendant No.2. Under the "layering" hypothesis as set up by the defendants, it is admitted by them that the voice that comes through or is projected is the one whose greater number of layers are used and is, Therefore, the lead singer. The "projected" voice in the rendition of the first couplet in the Original CD is that of the plaintiff as the word "sajNa" has been clearly sung as "It.kk". The defendant No.2 has sung the word as "Ituk", as would be apparent from her voice tags contained in the Poonam CD. Consequently, her rendition is certainly not the "projected" voice in the Original CD.

20. But, this is not all. In the original lyrics the expression is "pyar vali" and, this is how it is sung in the Original CD as also by the plaintiff. The defendant No.2 has sung it differently as "pyar vari". Obviously, it is not her voice that is heard when these words are played in the Original CD. Then, the word "diyan" appearing in the first couplet has been sung as a nasal "diyan" by the plaintiff. And, this is exactly how it sounds when the Original CD is played. But, the defendant No.2 has sung it differently as "diya" without the nasal intonation. So, insofar as the first couplet "ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna" is concerned, the dominant or projected voice, if not the sole voice, is that of the plaintiff.

21. The 3rd and 5th time this couplet appears in the sequence of female vocals, as set out in the aforementioned Table 1, is sung differently. The last word "takna" is stretched to sound as "taknaaa". This variant of the first couplet is completely missing from the Poonam CD. Implying thereby that she has not sung it at all! But, this variant appears in the Remix version of the song in the Original CD. It is also there in the Neha CD. Even according to the defendants, there are only two female vocalists insofar as the Original CD is concerned. Though, they allege that defendant No.2 is the lead vocalist and the plaintiff is the backup vocalist. But, this variant of the first couplet with the stretched "taknaaa" has not been sung by the defendant No. 2 at all. Ergo, it has been sung entirely by the plaintiff.

22. This first couplet (including its aforesaid variant) appears 8 times in the Remix version of the song in the Original CD out of a total sequence of 14 couplets (including repetitions) of female vocals. This amounts to roughly 57% of the female vocals in the said song. And, the projected, dominant, if not sole, voice is that of the plaintiff (Ms Neha Bhasin).

23. As regards the second couplet ("tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine paana zuroor hai"), the plaintiff and defendant No. 2 have sung it differently. In particular, the pronunciations of the words "suroor" and "ghuroor" are different. The words as sung by the plaintiff match the words as recorded in the Original CD. Whereas those as sung by the defendant No. 2 don't. Therefore, this couplet, too, as recorded in the Original CD clearly appears to be in the voice of the plaintiff. What is more, this couplet appears twice in the

song as indicated by Serial Nos. 6 and 7a of the aforementioned table. The rendition at Serial No. 7a is entirely different to the rendition at Serial No. 6. This rendition (ie., as at Serial No. 7a) is not there in the Poonam CD while it is there in the Neha CD. It follows, Therefore, that this rendition (ie., as at Serial No. 7a), is also not in the voice of the defendant No.2 but in the voice of the plaintiff.

24. Coming, now, to the third couplet ("waise to main rab ke sajde hoon kardi; par meri zindagi tere vi huzoor hai"), I find that here, too, the defendants are in difficulty. This is so because the defendant No. 2 has sung it incorrectly as "waise to main rab ke sajde hoon karti; par meri zindagi tere bhi huzoor hai". The Punjabi words "kardi" and "vi" have been sung by the defendant No. 2 as "karti" and "bhi". In the Original CD as well as the Neha CD these words are recorded as "kardi" and "vi". So, obviously, this couplet, too, in the Original CD is not in the voice of the defendant No. 2 but in the voice of the plaintiff.

25. An examination of the rendition of the fourth couplet ("tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai "), to my mind, completely demolishes the "layering" story set up by the defendants. The defendant No. 2 has sung this couplet in the following manner -- "tu jo mere sang hai dil mein umang hai; dil mera sonaiya ho gaya patang hai". For layering to be successful, the vocals which are to be layered must be the same, word for word. For example, the words "tu jo mere sang hai" as sung by the plaintiff could possibly be overlapped by these very words sung by the defendant No. 2. But, if these were to be overlapped by the words "waise to main rab ke" sung even by the same person, the result would, most likely, be gibberish. In this context, I find that the defendant No.2, by design or mistake, has substituted the word "dil" for the word "mujh" as appearing in the first line of the said couplet. These two words cannot be laid over each other and yet clearly sound as "mujh". So, when the Original CD is played and we clearly hear the words "mujh mein umang hai", there is no scope for saying that these words were "layered" with the voice of the defendant No. 2 singing the words "dil mein umang hai". Therefore, to suggest, as indeed the defendants and the said sound engineer do, that the voices of the plaintiff and the defendant No. 2 were "layered", would, prima facie, appear to be a travesty of the truth. One more point needs mention with regard to this couplet ("tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai ") and that is the way in which the word "soNaiya" has been sung by the plaintiff and the defendant No.2. The plaintiff has sung it as "lks.sk;k" and, this is how it sounds when the Original CD is played. The defendant No. 2, on the other hand, has sung it differently as "lksus;k". Clearly, the defendant No. 2's voice, even if the "layering" hypothesis is assumed to be correct, which it is not, is not the "projected" or "dominant" voice and she cannot be said to be the lead or main female vocalist. Moreover, this couplet appears twice in the song as indicated by Serial Nos. 9 and 10a of the aforementioned Table 1. The rendition at Serial No. 10a is entirely different to the rendition at Serial No. 9. This rendition (ie., as at Serial No. 10a) is not there in the Poonam

CD while it is there in the Neha CD. It follows, Therefore, that this rendition (ie., as at Seriall No. 10a), is also not in the voice of the defendant No.2 but in the voice of the plaintiff.

26. The fifth and last couplet of the song ("ek jo nazar teri mujh pe parhi hai; main khil gayee hil gayee uT ki tarang hai") also throws up some interesting aspects. This is how the couplet is sung in the Original CD and this is how the plaintiff has sung it as would be apparent from the Neha CD. But, there appears to be a mistake in the wording of this couplet. The word "uT" apparently does not exist and the correct word is "uth" (to rise). The phrase could be "uth gayee tarang hai" or "uthdi tarang hai". Whatever may have been the original and correct phrase, the fact of the matter is that the plaintiff appears to have sung it as "uT ki tarang hai" whereas the defendant No. 2 has sung it as "uth ki tarang hai". Since, the Original CD, when played, is heard as "uT ki tarang hai", it is obvious that it is in the voice of the plaintiff and not of the defendant No. 2.

27. The conclusion, Therefore, with regard to the remix version of the song "Ek Look Ek Look" as recorded in track 3 of the Original CD is that the plaintiff is the lead-main female vocalist and not the defendant No. 2. It would be wrong to describe the plaintiff as a back-up vocalist. The defendant No.2's voice is not discernible in the Original CD at all. And, the case set up by the defendants that the vocals of the defendant No. 2 were layered with the vocals of the plaintiff has been found to be without any tangible basis.

28. The position is the same with regard to the song "Ek Look Ek Look" as recorded in track 6 of the Original CD. The sequence of the couplets is virtually identical to that of the remix version. The only difference being that the sequence at Seriall No. 12 in table 1 is not there in this version. Meaning thereby that the first couplet (including its variant with the stretched "taknaaa") occurs only 7 times in the song whereas in the remix version it appeared 8 times. There is also a difference in tempo as the remix version has been marginally sped up to fit in with the "remix" setting. Apart from these differences, whatever has been found in respect of each rendition of the couplets of the remix version holds good for this version too. For the sake of completeness the sequence and the points of time when the component parts of song appear in this version of the said song in the Original CD at track 6 thereof are as follows:-

Table 2

Ek Look Ek Look [Track 6 in the Original CD]

S.No Time (mm:ss) Lyrics
1. 00:37 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna
2. 00:48 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna
3. 00:56 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari taknaaa
4. 01:15 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna
5. 01:22 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari taknaaa
6. 02:03 tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine pa_a_na4
zuroor hai
7. 02:13 waise to main rab ke sajde hoon

kardi; par meri zindagi tere vi huzoor hai 7a. 02:18 tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine paana zuroor hai 8. 02:37 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 9. 03:25 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai 10. 03:36 ek jo nazar teri mujh pe parhi hai; main khil gayee hil gayee uT ki tarang hai 10a. 03:41 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai 11. 04:00 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna

29. The same conclusions as in the case of the remix version would also apply to the Dhol mix version [track 9 of the Original CD]. The only difference being in the much fewer occurrences of the first couplet. There are 3 such occurrences in the Dhol mix version as compared to the 8 occurrences in the Remix version. The rest of the female vocals remain the same. This would be apparent from the following table:-

Table 3

Ek Look Ek Look (Dhol mix) [Track 9 in the Original CD]

S.No Time (mm:ss) Lyrics 1. 00:19 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 2. 00:28 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari takna 3. 00:38 ek look ek look pyar vali sajNa; saun tainu rab diyan ek vari taknaaa 4. 01:24 tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine pa_a_na zuroor hai 5. 01:33 waise to main rab ke sajde hoon kardi; par meri zindagi tere vi huzoor hai 5a. 01:38 tu mera suroor hai tu mera ghuroor hai; tujhe meri jaan maine paana zuroor hai 6. 02:24 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai 7. 02:33 ek jo nazar teri mujh pe parhi hai; main khil gayee hil gayee uT ki tarang hai 7a. 02:38 tu jo mere sang hai mujh mein umang hai; dil mera soNaiya ho gaya patang hai

30. Thus, the plaintiff has been able to establish, prima facie, insofar as the Original CD is concerned, that (1) she has sung the song in all the three versions as the lead singer and it is her voice which has been recorded and is heard when the song is played; and (2) that defendant No. 2 (Poonam Khubani) is not the lead singer, in fact, its not her voice at all. The plaintiff's claim that instead of defendant No. 2's (Poonam Khubani's) name, her name should have been shown as the lead singer and that her name has mischievously been shown only as a backup vocalist, stands established, prima facie.

31. Mr Sudhir Chandra, the learned senior counsel who appeared on behalf of the defendants, while agreeing that wrong credits for a song must not be given and a performer must get the credit which is due to him or her, had made a two-fold submission. Firstly, he submitted that the plaintiff's voice was layered with that of the defendant No. 2 and, as there were greater number of layers of the defendant No. 2's voice, she was rightly shown as the lead "" main singer and the plaintiff was correctly shown as the backup vocalist. This submission of his is

untenable as has been demonstrated above in detail. His second submission was that, in any event, now, the plaintiff's voice has been removed altogether from all the three versions of the song and the same have been re-recorded with the defendant No. 2's voice alone. He further submitted that the Original CDs are being recalled and, now, only the New CDs without the plaintiff's voice are being released and sold in the market. He also submitted that the plaintiff's voice would also be removed from the soundtrack of the film "Aryan "" Unbreakable" prior to its release. Therefore, he contended, the plaintiff would at best, if she is able to prove that her voice was used, be entitled to be compensated but, she would not be entitled to an injunction any longer.

32. I shall now examine the second submission of Mr Sudhir Chandra. It may be recalled that the Sound Engineer (Mr Ashish Manchanda) had stated in his Affidavit that the Original CD [Annexure-I thereto] contained the recording of the song which includes the vocals of Ms Poonam Khubani as well as Ms Neha Bhasin in the alleged layering proportion claimed to have been mixed by him as stated above. This statement, of course, on a prima facie consideration of the matter has been found to be not correct. That aspect of the matter has already been dealt with by me in detail and needs no further discussion. At this juncture, I am considering his further statement in the said affidavit that subsequently he was requested to make a fresh master recording of the song, without the vocals of Ms Neha Bhasin. He also stated that he created such a new master recording of the said song which does not include the vocals of Ms Neha Bhasin. The New CD [Annexure "" II to the said affidavit] is alleged to contain the recording of the song mixed by the said Sound Engineer which includes the vocals of Ms Poonam Khubani but not the vocals of Ms Neha Bhasin. In this connection, it would be pertinent to also remember that the defendant No. 1 in his affidavit of 30.3.2006 stated that on 17.2.2006, after the release of the Original CD, he recorded backup vocals for the said song in the voices of Mrs Samantha Edwards, Mrs Neisha Mascarenhas and Ms Bianca Gomes and these were mixed along with the existing vocals of defendant No.2, the existing instruments and existing male vocals. He also stated that the new master recording of the said song, though carrying the identical music and instrumentation as the earlier version of the said song, incorporates the female lead vocals only of defendant No. 2, which are backed up by the voices of Mrs Samantha Edwards, Mrs Neisha Mascarenhas and Ms Bianca Gomes and that the new master recording does not have the vocals of the plaintiff. So, the first thing to do is to ascertain whether the New CD contains the vocals of the defendant No. 2 and whether the vocals of the plaintiff have been removed altogether?

33. I have compared the three versions of the said song at track Nos. 3, 6 and 9 of the New CD with the vocals of the plaintiff in the said Neha CD and the vocals of the defendant No. 2 in the said Poonam CD and am of the view that the New CD does not contain the vocals of the plaintiff. The female vocals of the said tracks 3, 6 and 9 of the New CD match the vocals of the defendant No. 2 as isolated by the Sound Engineer in the Poonam CD. Of course, certain portions of

the female vocals have not been sung by defendant No. 2 such as the variant of the first couplet with the stretched "taknaaa". This variant, apparently has been sung by the backup singers "" Mrs Edwards et al. So, too, the chorus portions. Anyhow, just as the Original CD does not contain the voice of the defendant No. 2, the New CD does not contain the voice of the plaintiff. Just two illustrations would suffice. In the New CD, the word "sajNa" appearing in the first couplet is pronounced as "sajna" [ltuk] as sung by the defendant No. 2 and not as "sajNa" [lt.kk] as sung by the plaintiff. Then, the New CD contains the words "dil mein umang hai" as sung by the defendant No. 2 and not the words "mujh mein umang hai" as sung by the plaintiff.

34. With regard to the New CD, Mr Harish Malhotra, the learned senior counsel appearing on behalf of the plaintiff, submitted that it has been produced only to circumvent the orders of this Court and for this Court only. He submitted that the New CD does not contain any ID tags with regard to the Album name or the titles of the individual songs. On the other hand, he submitted, if the Original CD is played the Album name and titles of the individual songs are displayed. To verify this, I played both the CDs in the computer using Windows Media Player 10. When the Original CD was played, the Album name showed up as ARYAN. The individual track titles also showed up. The details that showed up for each of the three versions of the said song are as under:

Ek Look Ek Look (Remix) 4:31

Artist: Anand Raaj Anand, Poonam

Album: Aryan

Track: 3

Length: 4:31

Type: Audio

Ek Look Ek Look 4:36

Artist: Anand Raaj Anand, Poonam

Album: Aryan

Track: 6

Length: 4:36

Type: Audio

Ek Look Ek Look (Dhol mix) 3:32

Artist: Anand Raaj Anand, Poonam

Album: Aryan

Track: 9

Length: 3:32

Type: Audio

On the other hand when the New CD was played no Album name or title name or names of the artists appeared. What appeared as regards the album name and the three versions of the said song was as follows:

Unknown Album (3/22/2006 7:18:12 PM)

Track 3 4:33

Artist: Unknown Artist

Album: Unknown Album (3/22/2006 7:18:12 PM)

Track: 3

Length: 4:33

Type: Audio

Track 6 4:37

Artist: Unknown Artist

Album: Unknown Album (3/22/2006 7:18:12 PM)

Track: 6

Length: 4:37

Type: Audio

Track 9 3:33

Artist: Unknown Artist

Album: Unknown Album (3/22/2006 7:18:12 PM)

Track: 9

Length: 3:33

Type: Audio

It is Therefore apparent that the New CD does not contain any ID tags with regard to the Album or the individuals song titles. Moreover, the inlay card of the New CD is blank on the inside . Though the outer side is printed, as shown in Appendix III, from which the name of the plaintiff has been removed altogether. There is a small white box with text on the back outer side of the inlay card which reveals that the New CD was apparently prepared in march 2006 ("PKD. 3/2006"). Mr Malhotra also submitted that the TV promos as well as the music channels continue to air and play the song as sung by the plaintiff and not the new version as recorded in the New CD. Even though the song in the plaintiff's

voice is being played, credit continues to be given to the defendant No. 2. I may take judicial notice of this fact as even a couple of days back the song as sung by the plaintiff in the Original CD was telecast on one of the channels but the same was being attributed to Poonam (the defendant No. 2). So, the position is this. The Original CD which was released commercially on 7.2.2006 contained the song in its said three versions as sung by the plaintiff but falsely credited to the defendant No. 2. Those CDs have been sold continuously since their release till date. The defendants who are in the know of how many copies were released have chosen to remain silent about the numbers. They have also remained vague about their assertion that they have stopped the next lot of the cassettes and CDs from being released and have also attempted to recall the Original CDs. The exact words used in the reply dated 17.2.2006 on behalf of the defendant No. 1 being:-

My Client and the producer of the said film, ARYAN, have also not only stopped the next lot of cassettes and CDs from being released in the market, but also tried to recall all units already in the market so that the inadvertence is not replicated.

How many copies of the Original CDs (and cassettes) were released? How many were stopped from being released? What does the expression "tried to recall" translate to in terms of action taken by the defendants? And, how many copies have they actually recalled from the market, if at all? These questions beg for answers. Answers which the defendants have but have withheld from this court. Have they notified the music channels not to play the songs from the Original CD? Have they supplied these very music channels with copies of the New CD? Have they notified the public at large that the Original version was sung by the plaintiff and not the defendant No. 2 as wrongly propagated by them? They have not. So, prima-facie, there is no evidence that the original CDs have been recalled. There is also no evidence that now only the New CDs are being sold in the market. On the contrary the absence of any ID tags in the New CD and the blank inner of the inlay card lend credence to the submission of the learned Counsel for the plaintiff that the New CD has been produced in limited numbers, perhaps only for the purposes of this case and certainly not as a whole and sole substitute of the Original CD. In these circumstances it would be difficult to accept Mr. Sudhir Chandra's submission that now, as the New CD without the voice of the plaintiff has been introduced, the case for an injunction no longer survives.

There is another reason why this argument of Mr Sudhir Chandra must fail. The Original CD was released on 7.2.2006. The song in question has attained a certain degree of popularity. It has reached the hundreds and thousands and even lakhs of homes in all corners of India. Audio Cassettes and CDs have been sold and presumably played over and over again by music lovers all over Delhi and India. Television Promos of the film "Aryan" have carried clips of this song. Music channels have regularly played this song. And, so have the many radio

stations. To say that this song has been heard in every nook and cranny of Delhi and even India would not be far from the truth. All this while, the public at large, the discerning and not so discerning, have been told that it has been sung by the defendant No. 2 (Poonam Khubani) when, in fact, it has been sung by the plaintiff (Neha Bhasin). Would it be fair, just or equitable, now to permit the defendants to quietly slip in the New CD which contains the same song in the voice of the defendant No.2 and discard the name of the plaintiff altogether as a "never ran"? The act of introducing the New CD without publicly acknowledging the mischief and injury caused to the plaintiff qua the Original CD would be like piling insult over injury.

35. I now come to the argument on law. Mr Sudhir Chandra submitted that there is no contract between the plaintiff and the defendants. The plaintiff also has no copyright as defined under the Copyright Act, 1957. Even the allegation of the plaintiff that the plaintiff has a performer's rights cannot be sustained inasmuch as, according to Mr.Sudhir Chandra, such rights are only in respect of live performances and not recorded songs. He raised the question more than once - what is the right which the plaintiff seeks to enforce or to prevent its breach? And, of course, he submitted that if in the suit the plaintiff is able to establish that she was wronged then she would be entitled to damages but not an injunction. While the submission that the plaintiff does not have a copyright in the song may have substance⁵, the submission that the plaintiff also does not have any performer's rights is at best debatable. It is essentially the reproduction of the performance through sound or visual recordings without the permission of the performer that is prohibited⁶. While the definition of "performer" in Section 2(qq) of the Copyright Act, 1957 includes within its sweep a singer, Section 2(q) defines "performance", in relation to performer's right, to mean any visual or acoustic presentation made live by one or more performers. Every performance has to be live in the first instance whether it is before an audience or in a studio. If this performance is recorded and thereafter exploited without the permission of the performer then the performer's right is infringed. So, as regards performers' right's the plaintiff definitely has a serious triable case. But, de hors the Copyright Act, 1957, the plaintiff's relationship with the defendants is in the realm of quasi contracts. Section 70 of the Indian Contract Act, 1872 deals with these kinds of contracts. Section 70 reads as under:

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

The Supreme Court explained this provision in the case of State of West Bengal Vs. B.K. Mondal and Sons, in the following words:

14. It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing

the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable u/s 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability u/s 70 arises.

The plaintiff has lawfully done something for the defendants. She has sung for them. Her singing has been recorded by them. When she underwent the process of recordings she did not intend to act gratuitously. The defendants enjoyed the benefits of the plaintiff's recordings. They used the same in the cassettes and CDs and commercially sold by them. They used her voice in the original soundtrack of the film "Aryan" which is yet to be released. Since there was no formal contract between them as alleged by the defendants, they had the option not to use her recordings at all. But, because they opted to use the plaintiff's recordings, a quasi contract comes into existence. All the ingredients of Section 70 are satisfied. The liability to compensate the plaintiff has Therefore fallen on the defendants. That is insofar as the question of compensation or damages is concerned which shall be decided in the suit after trial. But, what is more is that the plaintiff also has a right in equity for being given proper credit for the song sung by her. If her voice is used and commercially exploited she has the right to prevent it being attributed to somebody else. This, even Mr. Sudhir Chandra agreed that if the plaintiff's voice were used then she must be given credit for it and the defendant No. 2 cannot take wrong credit for a song which does not have her voice. Of course, in the same breath he submitted that no wrong credits were given as the song in the Original CD was sung by defendant No. 2. This has been demonstrated to be factually incorrect. The song in all its three versions in the Original CD was sung by the plaintiff. The defendants, knowing this to be the position, mischievously attributed the role of the lead/main female singer to the defendant No. 2 and relegated the plaintiff to the status of a mere backup singer. The damage and injury caused and being caused to the plaintiff is twice over. First, she is not described as the lead female singer and in her place the name of the defendant No. 2 appears as the lead/main female vocalist. Second, the plaintiff, who indeed was the lead/main singer has been demoted to the status of a mere backup singer. The latter act in itself is likely to cause grave harm and injury to the reputation of the plaintiff as a singer. Her aspirations to rise as a

female vocalist would receive a big jolt if in the market she is perceived merely as a backup singer and not as a lead singer.

36. The question of giving appropriate credit for services rendered in the production of a film as an interim relief came up for consideration before the Supreme Court in the case of *Suresh Jindal Vs. Rizsoli Corriere Della Sera Prodzoini T.V.S.p.a. and others*, . This decision puts paid to all arguments on behalf of the defendants for rejection of the plaintiff's application for ad interim relief. The facts of the case before the Supreme Court were that the appellant therein, who was a film producer, entered into an arrangement with the respondents therein which were three Italian companies and a foreign film producer for the production and exhibition of a television Seriall based on an Italian novel. The appellant alleged that there was a concluded contract between them. The respondents, on the other hand took the position that that was no contract between them. The respondents were not making any headway in the project and they could not even get permission from the Government of India for shooting the film in India. The appellant arranged for this permission after making certain modifications in the script and also took concrete steps for the study of suitable locations for the shooting of the film and to discharge his responsibilities as a co-producer. Soon after the government permission was obtained, the respondents dissociated themselves with the appellant and went ahead with the production of the film without his participation. In these circumstances, the appellant filed a suit for specific performance and also filed two applications for interim relief. By the first, he sought an interim injunction restraining the defendants-respondents from proceeding with the production of the film and from transferring and/or assigning the rights of the appellant under the agreement to any other person. By the second application, he sought to restrain the respondents from carrying on with the production or exhibition of the picture without the participation and / or involvement of the appellant as one of the producers. Before these interim reliefs could be obtained, the respondents completed the production of the film. Therefore, when the applications for interim relief came on for hearing, the appellant confined his claim only to a three-second display, in the "credit titles" of the Seriall, of his name as a "co-producer". But, this relief was not granted to him by the learned Single Judge on the original side and an appeal by him to a Division Bench was also unsuccessful. While disposing of the appeal there from, the Supreme Court held:-

6. The High Court seems to have taken the view that, even if the appellant had rendered some services as claimed and the respondents refused to acknowledge it, he can be adequately compensated by the award of damages. Of course, it is possible that the court may ultimately be able to assess some damages for this breach if it comes to the conclusion that there has been such breach. However, we think that in a matter of this type the award of damages is not a complete and adequate remedy or relief. As the appellant has made clear, he is not interested so much in the monetary aspect of the deal he claims to have entered into with the respondents. The gain by way of reputation as well as goodwill

which the appellant would secure if his services are acknowledged in the title shots of the film is not one which can be adequately expressed in terms of money. By the time the suit is finally decided, any such exhibition of acknowledgment may become totally impossible or infructuous. In that situation, perhaps, there would be no alternative but to assess the damages somehow or other depending upon the findings of the court on the issues in the case. We, however, think, on the prima facie case made out and having regard to the fact that the necessary modifications in the "credit titles" can be easily made as the film is still in the early stages of its exhibition, that it is just and necessary that the appellant should be granted interim relief at this stage by injuncting the respondents from exhibiting the film except after displaying an acknowledgment of the appellant's services.

7. We have pondered on the nature of the relief that should be given to the petitioner. As we have already said, there is no doubt in our minds that, whether there was a concluded contract as claimed by the appellant or not, the appellant did play some part in making the film possible and that the respondents are acting unreasonably in denying him the benefit of the limited acknowledgment he is entitled to have.... We, Therefore, restrict the scope of the interim relief and direct, in the interests of justice, that in case the film is proposed to be, or is, exhibited either on the T.V. or in any other medium in India, it shall not be so exhibited by the respondent or their agents unless it carries, in its title shots, an acknowledgment of the services rendered by the appellant to the producers in some appropriate language. We direct accordingly.

38. In Suresh Jindal (supra), the Supreme Court found that the appellant therein was entitled to due acknowledgement being given to him as the appellant did "play some part in making the film possible" whether there was a concluded contract between them or not. The Supreme Court also held that the High Court's view that the appellant therein could be suitably compensated instead of granting the interim injunction would not be an adequate remedy. The decision is a complete answer to the argument of the defendants that if the plaintiff has been wronged she can be adequately compensated at the conclusion of suit. The plaintiff would be entitled to get a similar order for giving her due acknowledgement for having sung the song in the Cassettes, CDs and film. The plaintiff, as the discussion above reveals, has been able to establish a very strong prima facie case in her favor. The balance of convenience also lies in favor of the grant of an injunction for the benefit of the plaintiff. If the plaintiff is not granted the interim relief, she shall suffer grave harm and irreparable injury which cannot be adequately compensated by damages alone.

39. In these circumstances, the plaintiff is entitled to an interim order restraining the defendants, their dealers, distributors, stockists and all other persons acting on their behalf from in any manner using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film "Aryan - Unbreakable" containing the song "Ek Look Ek Look" in any of the three

versions as contained in the Original CD without displaying the name of the plaintiff as lead female singer. It is ordered accordingly. In case the defendants opt to introduce and sell the New CD which does not contain the voice of the plaintiff then the defendants shall give wide publicity in the print media, the electronic media, the internet as well in the printed inlay cards/ covers of the cassettes and CDs that (a) the three versions of the song "Ek Look Ek Look" in the Original CD were sung by the plaintiff as the lead/main female vocalist and that the defendant No. 2 was not the lead/singer thereof ; (b) the three versions of the song "Ek Look Ek Look" in the New CD have been sung by the defendant No. 2 and not by the plaintiff who had originally sung these three versions. In addition, the defendants shall prepare and submit a statement indicating the number of copies of the Original CDs and cassettes produced, the number released in the market, the number not released and the number recalled. This statement be submitted within four weeks of this order.

40. is 2647/2006 is allowed as above. is 3177/2006 stands dismissed.