

(2008) 04 BOM CK 0024

In the Bombay High Court

Case No : Notice of Motion No. 1330 of 2008 in Suit No. 1135 of 2008

Ram Sampath

APPELLANT

Vs

Rajesh Roshan and Others

RESPONDENT

Date of Decision : 09-04-2008

Acts Referred:

Copyright Act, 1957 — Section 17, 2, 52
Evidence Act, 1872 — Section 45

Citation : (2009) 2 MhLj 167 : (2009) 40 PTC 78

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : V.V. Tulzapurkar, Virag Tulzapurkar, Tehemtaa D. Daruwalla, Blossom Noronha and Kiran Desai, instructed by Jehangir G., Billimoria and Daruwalla, for the Appellant; Arif Bookwalla, instructed by Desai and Desai for Defendant Nos. 1, 2 and 3, Ashok Singh, instructed by R.N. Gaonkar, for Defendant No. 4, Ravi Kadam, General, Sanjay Udeshi, Vijay Sondhi, Kapil Arora and Rohan Cama, instructed by Sanjay Udeshi and Co. for Defendant No. 5 and Sushma Singh, for Defendant No. 7, for the Respondent

Judgement

D.G. Karnik, J.—Heard counsel.

2. In a suit for perpetual injunction restraining the defendants from directly or indirectly infringing in any manner the plaintiff's copyright in musical composition/theme tune entitled "The THUMP" and for damages the plaintiff has taken out this motion for an interim relief of injunction.

3. The facts, in brief, are that the plaintiff is a music composer and the owner of a proprietary concern "The Mint". Defendant No. 1 is a music director/composer of repute. Defendant No. 2 is the brother of defendant No. 1 and is a director of defendant No. 3 company which is engaged in the production of feature films and has produced a cinematographic film titled as "KRAZZY 4". Defendant No. 4 is a manufacturer and distributor of compact discs (CDs) and audio tapes containing the sound track of music contained in the film "KRAZZY 4". Defendant No. 5 is a foreign company engaged in the entertainment business including sale,

distribution and exhibition of cinematographic films and audio and video CDs. Defendant No. 6 is an advertising agency acting for defendant No. 5. Defendant No. 7 is a proprietary concern engaged in the media and advertising business.

4. In or about March 2007, the defendant No. 7 engaged the plaintiff for producing a musical composition theme tune which was proposed to be used as an audio clip in the advertisement it was to produce for the defendant No. 5. As per the agreement, the plaintiff produced the musical composition/theme tune titled "The THUMP". Under the agreement between the plaintiff and the defendant No. 7, the copy right in the musical composition/theme tune remained with the plaintiff and the defendant No. 7 was given a licence to use the same in its advertisements for a period of one year.

5. The defendant No. 3 has produced a cinematographic film "KRAZZY 4" and the music for the film is given by the defendant No. 1. The film is said to be due for release (for public exhibition) on 11th April 2008. The defendant Nos. 1 to 3, have given a licence of producing the CDs and audio cassettes of the music/songs contained in the sound track of the film "KRAZZY 4" to defendant No. 4. According to the industry practice, audio cassettes and CDs of the music/songs in "KRAZZY 4" are marketed earlier from end of February 2008. Before the release of the film audio visual clips of parts of the film "KRAZZY 4" (called as "promos") are shown as trailers in cinema theatres as also on television. In March 2008 the plaintiff, while watching a programme on MTV channel, heard the music contained on the sound track of the film "the KRAZZY 4". The plaintiff was astonished to notice that the music contained copy of his musical composition/theme tune "THE THUMP". Immediately on 18th March 2008, the plaintiff purchased a CD produced by the defendant No. 4 from market and played and heard it. He noticed that four songs titled on the cover of the C.D as "KRAZZY 4", "Break Free", "KRAZZY 4 remix" and "Break Free remix" contained copies of his musical composition/theme tune "THE THUMP". The plaintiff through his advocates issued a notice to the defendants 1 to 3 on 24th March 2008, calling upon them to cease and desist from in any manner infringing his copy right in the musical composition/theme-tune "The THUMP". By a reply dated 26th March 2008 the defendant No. 3 acknowledged receipt of the notice and stated that it was handed over to its solicitors for proper action. However no further reply was sent. Apprehending that the defendants would not cease and desist from infringing his copy right in the musical composition "The THUMP" the plaintiff has filed this suit on 1st April 2008 for injunction and damages.

6. The motion came up before me on 7th April 2008 and on request of the parties the matter was posted in Chambers on 8th April for hearing of the plaintiffs musical composition "The THUMP" as also the music/songs contained in the audio CD of "KRAZZY 4". The musical CDs were played and heard in the presence of the counsel and representatives of the parties present and the matter was fixed for hearing today. In view of the urgency, counsel for the parties were heard briefly and the order is dictated and pronounced in the open

court immediately.

7. At the outset, learned Counsel for the plaintiff stated that the defendant Nos. 5 to 7 were joined as parties to the suit apprehending that the defendant 1 to 3 may contend that the limited licence which was initially given by the plaintiff to the defendant 7 was a full fledged assignment and the defendants 1 to 3 had copied the musical composition with their permission. However, as in his affidavit in reply, the defendant No. 1 has asserted that he had composed the music contained in the sound track of the film "KRAZZY 4", and the defendants 1 to 3 have not made any claim as licencees of defendant Nos. 5 to 7 or any of them. Counsel for the plaintiff stated that he claims no relief against defendant Nos. 5 to 7. Counsel for defendant Nos. 5 and 6 therefore chose not to address the court. Counsel for the defendant 7 supported the plaintiff. She submitted that the musical composition/theme tune contained in "The THUMP" was created by the plaintiff; the plaintiff was the author and owner of the copy right in the musical work "The THUMP" and the defendant 7 was only a licensee for one year ending 30th April 2008 and the defendant 7 claims no other right in the said musical work.

8. Learned Counsel for the plaintiff submitted that the soundtrack of the film "KRAZZY 4" contained copies of the plaintiff's musical composition/theme tune "The THUMP". In particular, the music of two songs viz. "KRAZZY 4" and "Break Free" contained copies of the theme tune "The THUMP". The defendants 1 to 3 had infringed the plaintiff's copyright in his musical work "The THUMP". The plaintiff was therefore entitled to an injunction preventing any infringement.

9. Counsel for defendants 1 to 3 made following submissions:

i) The plaintiff was not the owner of the copy right in the musical work "The THUMP". Plaintiff had assigned the copy right in the musical work to the defendant 7. It was the duty of the plaintiff to produce on record the agreement between him and the defendant 7 for proving that he was the owner of the copy right in the musical work "The THUMP". As the plaintiff had failed to produce the copy and prove that he was the owner of the copy right he was not entitled to an injunction.

ii) The musical work "The THUMP" was not copied by the defendants in the sound track of their film "KRAZZY 4". The musical work in the sound track of the film "KRAZZY 4" was independent musical work of the defendant 1. It was neither a copy nor was it deceptively similar to the plaintiff's work "The THUMP". The defendants were not plagiarist as alleged.

iii) Assuming without admitting that the plaintiff's musical work "THE THUMP" was copied in the defendants' musical work, it was a copy of an infinitely small portion of the musical work "The THUMP" of the plaintiff. The musical work "The THUMP" was of a duration of one minute whereas the entire film "KRAZZY 4" was about 2.15 hours. The two songs "KRAZZY 4" and "Break Free" with two remixes thereof were of 4 1/2 and 2 1/2 minutes respectively. The music in those songs

which was allegedly similar to the plaintiff's work "The THUMP" was not of more than a few seconds. At the most it was a copy of a small part extending only a few seconds and therefore plaintiff was not entitled to an injunction.

iv) Balance of convenience was in favour of the defendants.

v) In the event the court comes to the conclusion that there has been an infringement, then instead of granting a relief of injunction the damages would be an adequate remedy and the defendants were willing to provide a security/bank guarantee of Rs. 25 lakhs or such other sum as the court thought fit. Regarding submission No. (i)

10. Section 17 of the Copyright Act, 1957 says that an author of a work shall be the owner of the copy right therein. Section 2(d) defines the word "author" in relation to a musical work as the composer. Section 2(ffa) defines a "composer" in relation to a musical work to be the person who composes the music. In respect of a musical work the person who composes the music is the composer, author and the owner of the copyright in that musical work. It is not disputed that the musical work titled "The THUMP" was composed by the plaintiff. The plaintiff was thus the first owner of the copyright in the musical work "The THUMP". Under the agreement, he had only granted a licence to the defendant 7 to use and incorporate the musical work in any advertisement for a period of one year commencing from 1st May 2007 to 30th April 2008. The defendant 7, through its counsel admitted that the plaintiff was the composer and the owner of the copyright and that the defendant 7 claimed no ownership in the copyright of the musical work "The THUMP". In view of this admission the contention of the defendants 1 to 3 that plaintiff is not the owner of the copy right in the musical work "The THUMP" is required to be rejected. Regarding submission No. (ii)

11. The plaintiff has produced on record affidavit dated 5th April 2008 of Mr. Shiv Mathur as his witness. In his affidavit, Mr. Mathur has stated that he has studied music in London, Vienna and Austria and is an Associate of London College of Music and Licentiate of Trinity College of London. He has undergone rigorous training as a musician and is well conversant and acquainted with Indian and western music. In paragraph 7 of his affidavit, he has stated that he was requested by the plaintiff to give his opinion as to whether the four songs of film "KRAZZY 4" were in any way a substantial reproduction and/or plagiarized version of the musical composition "The THUMP". In the affidavit Mr. Mathur gives opinion in the following words:

The Thump track and the aforesaid four songs of film KRAZZY 4 share the same musical cadence, rhythmic structure and phrasing, genre of music and melodic structure. It is an uncommon resemblance that goes way beyond the ordinary, for many factors are similar. Both tracks are constructed around one melodic refrain which is of 8 bars. They are exactly the same but with variations in degrees of repetition, obviously due to the different durations for which they were made.

Mr. Mathur has further stated that the main melodic frame of the songs "KRAZZY 4" and Break Free is exactly the same as "The THUMP" Track. The expert opinion as produced by the plaintiff thus is that the musical work contained in the musical work "KRAZZY 4" shares the same musical cadence, rhythmic structure and phrasing, genre of music and melodic structure which goes way beyond the ordinary. The main melodic frame of the songs "KRAZZY 4" and "Break Free" are exactly the same as "The THUMP" track. In short, the expert opinion is that the musical work contained in "KRAZZY 4" is a copy of the musical work "The THUMP". The defendants have not filed any affidavit of any expert in reply to controvert the expert opinion of Mr. Mathur. On the other hand in sub-para (iii) of Clause (e) of paragraph No. 8, the defendant has stated that four bars of total duration of 6 seconds (which are the same or similar to the bars of the plaintiffs musical work) are played 4 - 5 times in the song "Break Free" and in the title at the end of the film. In paragraph No. 8(e)(VIII) of the affidavit he has further stated:

Presuming without admitting that these 4 Bars are similar or the same as that contained in the music of the Thump alleged to be composed by the plaintiff, then also as per the norms and Rules of the I.P.R.S. and C.M.D.A. there is no infringement in using the same 4 Bars.

The defendant has thus tacitly admitted similarity of four Bars of six seconds which are repeated 4 - 5 times in the songs of "KRAZZY 4".

12. Learned Counsel for the defendants submitted that no injunction can be granted on the basis of the opinion of an alleged expert that the musical work in the songs "krazzy 4" and "Break Free" contain copies of the musical work "THE THUMP" of the plaintiff. Expert opinion is a weak evidence and until it stands the test of cross examination at the stage of trial, the court cannot rely upon the expert opinion at all. Although Section 45 of the Evidence Act makes expert opinion admissible as evidence a decision of a court may not solely rest upon an expert opinion. When the Court has to form an opinion upon a point of foreign law or of science or art, or as to the identity of hand writing or finger impression, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to the identity of handwriting or finger impressions are relevant facts. The expert opinion on a musical work (which undoubtedly is an art) is thus admissible and is one of the relevant circumstances to be taken into consideration while deciding the question whether the musical work of the defendant No. 1 is identical with or is a plagiarism of the musical work of the plaintiff. No doubt the expert opinion would have to stand the test of a scrutiny at the stage of trial, but when the matter is at the interim stage where the motion is decided only on the basis of affidavits and none of the parties have asked for a permission to cross examine any of the witnesses, the expert opinion cannot be ignored only on the ground that it is not yet subjected to cross examination which is due at the stage of trial. In my view, therefore, the expert opinion is admissible in evidence and is relevant. Needless to say that the

weight to be attached to the expert opinion is a question of fact and dependent on the facts and circumstances of each case. Accordingly, I would take into consideration this opinion as one of the relevant circumstance while deciding whether the defendants' musical work is copy of or plagiarism of the musical work of the plaintiff.

13. As stated earlier, the CDs containing the musical work "The THUMP" and the two songs "KRAZZY 4" and "Break Free" as well as the remix versions of the said two songs were played and heard by me in the chambers in the presence of the counsel and representatives of the parties present. I confess I have no expert knowledge of music. However, to my untrained ear, the two musical works appeared similar; that is to say when I was hearing the songs/music titled "KRAZZY 4" and "Break Free", I was unmistakably reminded of the musical work "The THUMP" of the plaintiff. In my view, the true test in deciding whether the latter musical work is a copy or plagiarism of the former is whether a person illiterate in music on listening the latter musical work would say to himself "Hay! I have heard this tune before". If on hearing the latter musical work he is not only reminded of the former which he might have listened several days before but thinks that he has heard the same tune before, the latter is a copy of the former. In my view, there are three circumstances for coming to the conclusion that the musical works titled as "KRAZZY 4" and "Break Free" are copies of the plaintiff's work "The THUMP" and they are (i) An expert feels that they are the copies as can be seen from the expert opinion of Mr. Mathur. (ii) There is a tacit admission in the affidavit of defendant 1 that his songs contain copy of a small portion of six seconds which is repeated four to five times. (iii) A man, illiterate in music, on hearing the two songs feels that the latter is a copy of or plagiarism of the former work. I therefore hold that the defendants' work infringes copyright of the plaintiff in his musical work "The THUMP". Regarding submission No. (iii)

14. No difficulty arises in grant of an injunction where the defendant infringes copyright of the plaintiff by copying the whole or substantially the whole of work of the plaintiff in his work, whether such work is a literary work, a musical work or a work of any other type, in which copyright exists. A difficulty may however arise when the defendant takes a small portion of the work of the plaintiff and uses it in his work. Section 52 of the Copyright Act provides what shall not constitute an infringement. No defence u/s 52 was raised either in the affidavit in reply or in the oral submissions. I would therefore examine the submission that infringement, if at all there by any, was of a small portion of about 6 seconds, de hors Section 52 of the Copyright Act.

15. Copinger and Skone James on Copy Right Fifteenth Edition deals with the infringement of a musical work by copying a part of the work in paragraph 7-53 at page 409 thus :-

As to whether a substantial part of a musical work has been copied, the question remains whether the alleged infringement has made use of a substantial part of

the skill, labour and taste of the original composer. It is common practice in music copyright cases to call expert evidence to identify and explain the significance of similarities and differences between the works. Although the court is often helped by such evidence, the issue of substantial part does not depend solely on a note for note comparison but must be determined by the ear as well as by the eye, for the most uneducated in music can recognise that an altered work of music is, in effect, the same as or is derived from the original work. In undertaking the comparison, the works as a whole should be considered, and it is wrong to isolate certain features and concentrate on those. It is clear that a relatively short part of a work can amount to a substantial part, particularly if what has been taken is the vital or essential part of the work, as opposed to being musical commonplace. A relevant question may be whether the amount taken is so small that it is impossible to recognise the original work, or whether it can still be recognised, but where the part taken has been added to other material it is important not to fall into the trap of asking whether the defendant's work sounds like the claimant's. The correct comparison is between the part taken by the defendant and the claimant's work, not between the defendant's work and the claimant's work. Where the claimant's work contains material that was not original to him, then in the usual way these parts should be left out of the comparison exercise and attention centred on those parts which were original.

Particularly in the field of popular music, the vital or essential part of the work may be a short refrain or hook line. The problem here becomes even more acute with the modern practice of "sampling", whereby a short piece of music is taken and often repeated many times in the making of a new recording. The same point arises in relation to "ringtones". The piece taken is often a distinctive part of the original work and thus immediately recognisable, which is of course the reason why it was taken. In cases of this kind, although it will be relevant to ask whether the piece which was copied was the result of any particular inventiveness on the part of the original author or was, for example, merely a hackneyed phrase, it is suggested that it will often be appropriate in these cases to apply the rule of thumb that "what is worth copying is worth protecting".

Even where the material in common is sufficient to amount to a substantial part, it of course still has to be established that the reason for this is copying. It is in the field of music copyright cases in particular that the difficult issue of subconscious copying can often arise.

16. In my view for considering whether a copy of a part of the former musical work into the latter musical work amounts to an actionable infringement, the following factors would be required to be taken into consideration. First is to identify the similarities and the differences between the two works. Second is to find out whether the latter would meaningfully exist without the copied part. It may be necessary to find the soul of a musical work. The soul cannot be determined merely by comparing the length of the part copied but whether the part copied is an essential part of a musical work. Though a musical work may

have a length of several minutes, the listener often remembers a "catch part" to which he is immediately hooked on. It is necessary to look for such "catch part" or the "hook part". If the "catch part" or hook part, howsoever small, is copied the whole of the latter work would amount to actionable infringement. It is necessary to remind oneself that the desire, of an infringer, is necessarily to copy "the attractive", "the catchy", the grain" and leave the chaff, for he would attract the audience only by the attractive, and not by the ordinary. These factors are only illustrative and there would be many other factors which may be required to be looked into depending upon the facts and circumstances of each case. In the present case, though the part which is copied is small and is only of 6 seconds, it is repeated atleast four to five times in the defendants' work even as per their own admission. What was the need of repetition of the same part has not been explained in the affidavit in reply and that is perhaps because the defendant No. 1 knew that it was the "catch part" or the part to which the listener would be hooked to when he hears or re-hears the musical work. I think it was in *University of London Vs. University of Tutorial Process Ltd* that Lord Justice Paterson said: "What is worth copying, is prima facie worth protecting" I would only add "what is worth copying 4 - 5 times over in the same work is most certainly worth protecting. In my view, therefore, even if it is held that the portion copied is only a small part of the work of the plaintiff, it amounts to an actionable infringement giving rise to a cause for action in damages as well as injunctive relief. Regarding submission Nos. (iv) and (v)

17. Learned Counsel for the defendants contended that the balance of convenience was in favour of the plaintiff. He submitted that film is due for release tomorrow i.e. 11th April 2008. The prints of the film have been sent in hundreds of theatres in the country and even abroad. As per the industry practice, the film is released on the same day throughout India and throughout the world. Since hundreds of copies have been sent, grant of an injunction on a penultimate day of the scheduled release would cause great, if not irreparable loss and hardship to the defendants. As against that, the plaintiff would not suffer any hardship. The plaintiff can be adequately compensated in terms of money. The plaintiff was guilty of delay and laches in filing the suit and that is also one of the circumstances which tilts the balance of convenience in favour of the defendants.

18. As regards the delay, the plaintiff did not know and could not have known that a film was being produced by the defendants containing the songs and/or music violating the copyright of the plaintiff in his musical work. According to the defendants 1 to 3 the trailers of the film "KRAZZY-4" are exhibited/showing in the theaters since 17th February 2008. According to the plaintiff he heard the defendants work on MTV channel in March 2008 immediately purchased a CD on 18th March 2008. The plaintiff came to know of the infringement on or about 18th March 2008. This fact is not denied in the affidavit in reply by the defendants and hence I see no reason to disbelieve him. Within less than a week, which is normal time for a lawyer to take instructions and draft a notice,

the plaintiff issued a notice to the defendants on 24th March 2008 calling upon them to cease and desist from infringing his copyright within six days. Immediately on expiry of six days i.e. 1st April 2008 the plaintiff has moved this Court. The plaintiff therefore cannot be said to be guilty of delay or laches.

19. As regards the despatch of the prints of the film, counsel for the plaintiff tendered for my inspection the gate passes of the film laboratory wherein the prints were made and/or stored. The gate passes are dated 4th and 5th April 2008. The notice of the suit and motion was served on the defendant nos 1 to 3 on 3rd April 2008. The defendants 1 to 3 despatched the prints of the film to the distributors knowing full well that the suit for injunction and damages was filed and plaintiff was seeking an interim relief of injunction against them. The defendants 1 to 3 have thus to blame themselves for actions taken after the notice of the suit and the motion. In *Bal Pharma Ltd. v. Centaur Laboratories Pvt. Ltd.* reported in 2002 (24) PTC 226, a Division Bench of this Court while considering the question of balance of convenience in an action for infringement of a trade mark, has held that a person who consciously or without taking necessary steps to assure himself of the existence of such a mark (the trade mark which was alleged to be infringed) uses it and invests money therein, does not obviously have balance of convenience in his favour. In the present case, the defendant Nos. 1 to 3, after being fully aware of the plaintiff's claim and the suit declared the date of release of their film and despatched the infringing copies. It can never be said that the balance of convenience lies in favour of an infringer who takes any steps with the knowledge of the infringement.

20. Learned Counsel for the defendants 1 to 3 strongly relying upon a decision of the Court of Appeal in *Aljose Fashions Ltd v. Alfred Young and Company Ltd* reported in (1978) FSR 364 submitted that damages would be an adequate remedy and injunction should not be granted. There, the issue was whether the defendant had copied the plaintiff's dresses and was guilty of any infringement of copyright of the artistic work belonging to the plaintiff. Relying upon the decision of the House of Lords in *American Cyanamid*, the Court of Appeal held that the balance of convenience was in favour of the defendant and plaintiff had adequate remedy in damages. The Court of Appeal held that injunction against the defendants would make things very difficult for them and therefore damages would be an adequate remedy. In my view, the decision appears to be based upon a finding of fact reached in that case that the balance of convenience was in favour of the defendants. In the present case, as I have held that balance of convenience is not in favour of the defendants, the decision is of no assistance of the defendants.

21. Before I part, one more circumstance needs to be noted. The defendant 1 who is the author of infringing musical work is the brother of defendant 2 who is the director of defendant 3 company, the producer of the film. Mr. Hritik Roshan is the son of defendant 2 and nephew of defendant 1 and also a director of defendant 3. Hritik Roshan, has also acted in the video part of the advertisement

in which the plaintiff's music "The THUMP" was used in the background. Mr. Hritik Roshan was thus aware of the plaintiff's musical work "The THUMP". This has been stated by the plaintiff in his affidavit dated 7th April, 2008 and is not denied by the defendants by filing any counter affidavit. In the said affidavit, the plaintiff has stated that on 4th April 2008 Mr. Hritik Roshan sent a short message on mobile (popularly known as SMS) on plaintiff's mobile telephone No. 9820644066 from his mobile telephone No. 9820622294. In the first message(sms), Mr. Hritik Roshan stated that he hated the fact that somebody is giving stress to his father, the defendant 2, at his age and requested the plaintiff to call him. As the plaintiff did not call, he sent second message (sms), again requesting the plaintiff to call him. As the plaintiff did not respond, Hritik Roshan sent the third message (sms) which reads as follows:

"Ram - "I just want you to know that I'm one of the flag bearers in the fight against piracy. Which is why we didn't move forward until we acquired the NOC from ericsson. Since cinema began, all rights have always remained with the producer. It is the norm for motion pictures, is thus for all Indian films ever made! So there was no reason to doubt ericsson's NOC! Since they were the producer. The fact that the ad world operates differently is news to us. Just want you to know that we have done everything in our power to go about it the right way. That's all. Rest is upto you." At 4.39 P.M on 04.04.2008.

In view of the relationship/kinship of the defendants and the facts of circumstances of the case there is every reason to believe that these messages were sent by Hritik Roshan not on his own behalf but on behalf of defendants 1, 2 and 3. Hritik Roshan is one of the directors of defendant 3 and he is closely related (nephew and son respectively) of defendants 1 and 2. The last message makes one believe that the defendants had obtained NOC from Ericsson - the defendant No. 5, for whom the defendant 7 had produced the advertising clip containing in the plaintiff's work "The THUMP". The defendants 1 to 3 obtained "No Objection" from defendant No. 5 whom they believed to be the owner of the copyright in the musical work "The THUMP". The music in "The THUMP" was used by the defendants 1 to 3 on the basis of the alleged permission of the owner of the copyright. This case is completely given up by the defendant 1 in his affidavit in reply dated 7th April 2008. In that affidavit, defendant 1 claims that he is the author and composer of the music contained in the entire sound track of the cinematographic film "KRAZZY 4". The two versions are at complete variance with each other and cannot co-exist. It appears that initially the defendants thought to take up a defence that they had a permission of the copyright owner to use the musical work "The THUMP" but when they realised that the defendant 5 was not the owner of the copyright they changed their stand to contend that the defendant 1 was the author and composer of the music. This dishonesty is another reason which disentitles the defendants from claiming that they used the musical work bonafide. Lack of bonafides on the part of any of the parties is one of the circumstance to be taken into consideration while considering grant or refusal to grant an equitable relief of injunction.

22. As regards the contention that damages would be an adequate remedy and that the defendants were willing to give bank guarantee in the sum of Rs. 25 lakhs or such other amount as the court thinks fit, I must state that this offer is a pittance. The defendant 3 has given the music rights of producing the CDs and cassettes to defendant 4 and the minimum amount guaranteed by the defendant 4 to the defendant 3 is Rs. 2.5 crores. This amount can go up several folds by way of a royalty in the event the music is a hit. In any event this offer need not hinder me any further because the plaintiff through its counsel has unequivocally rejected the offer.

23. The plaintiff has prima facie proved that he is the owner of the copyright in the musical work "The THUMP". Plaintiff has also prima facie proved that the musical work contained in the soundtrack of the film "KRAZZY 4" in the two songs "KRAZZY 4" and "Break Free" and the remixes thereof contain copies of his musical work "The THUMP". None of the defences of the defendants have any merit. In the circumstances, plaintiff is entitled to an injunction.

24. The last question to be considered is the form and extent of the injunction. Obviously, there cannot be an injunction for release of the entire film. The injunction would have to be limited to the release of the film with the soundtrack containing any copy of the plaintiff's musical work. The defendants would be entitled to release the film "KRAZZY-4" by removing the infringing part in the soundtrack of their film. Hence, I pass the following order:

25. The defendant Nos. 1 to 3 are hereby restrained from releasing the film "KRAZZY 4" containing the soundtrack with the songs "KRAZZY 4", "Break Free" and remixes of "KRAZZY 4" and "Break Free" which in turn contain copies of the plaintiff's musical work "The THUMP". It is clarified that the plaintiff may release the film by removing the infringing part from the soundtrack of the film.

26. The defendant No. 4 is restrained by injunction from selling or otherwise distributing copies of the CDs, cassettes or any other media containing the songs "KRAZZY 4" and "Break Free" or their remixes which in turn contain copies of the plaintiff's musical work "The THUMP". The defendant No. 4 shall surrender before this Court the master or plate containing the impugned work and all CDs, cassettes and other materials containing the infringing work within seven days. If the infringing material is not surrendered, plaintiff shall be entitled to get a court receiver appointed for seizure of the infringing work or other appropriate reliefs.

After this order was dictated and pronounced in the open court, learned Counsel for defendants 1 to 3 prays for stay of this order. Mr. Tulzapurkar for the plaintiff strongly opposes grant of stay on the ground that this would amount to negation of the injunction. He submits that if the stay is granted, the film would be released tomorrow and the injunction would become infructuous. Request for stay of the operation of the order is rejected.