

(2019) 09 DEL CK 0096

In the Delhi High Court

Case No : Civil Suits (COMM) No. 492 Of 2019

Saregama India Limited

APPELLANT

Vs

Balaji Motion Pictures Limited & Ors

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Copyright Act, 1957 — Section 2(d), 17(c), 55(2), 62
Code Of Civil Procedure, 1908 — Section 20, 20(a), 20(b), 20(c)
Trade Marks Act, 1999 — Section 134
Evidence Act, 1872 — Section 91

Citation : (2019) 263 DLT 390 : (2019) 10 AD(Delhi) 488 : (2019) 80 PTC 99

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Parag Tripathi, Chander M. Lall, Ankur Sangal, Ajay Bhargava, Sucheta Roy, Shiva Tokas, Richa Bhargava, Neeraj Kishan Kaul, Vivek Jain, Suchitra Kumbhat, Hardik Rupal, Manav Gupta, Esha Dutta, Sahil Garg, Devang Kumar, Mansi Khanna

Judgement

Rajiv Sahai Endlaw, J

IA No.12374/2019 (of the plaintiff u/o XXXIX R-1&2 CPC)

1. The plaintiff has instituted this suit, to restrain the three defendants namely (i) Balaji Motion Pictures Limited, (ii) ALT Digital Media Entertainment Limited and (iii) Zee Entertainment Enterprises Limited, from exploiting/using the plaintiff's copyrighted works i.e. the sound recording and the underlying musical and literary works in the song "Var Dhagala Lagli Kal" from the Marathi cinematograph film "Bot Lavin Tithe Gudgulya", in the song "Dhagala Lagli" in the defendants' to be released cinematograph film "Dream Girl", amounting to infringement of the plaintiff's copyright and copyright works, and for ancillary reliefs. Needless to state the suit was accompanied with this application for ex-parte interim relief.

2. The suit, along with this application came up before this Court first on 6 th

September, 2019 when the senior counsel for the defendants No.1&2 and the counsel for the defendant No.3 appeared on seeing the matter in the Cause List. The senior counsels for the plaintiff pressed for ad-interim relief. The senior counsel for the defendants No.1&2 stated that the film "Dream Girl" was to be released on 13th September, 2019 and since paper book of the suit had been received at that time only, the defendants be given time to prepare and the matter be taken up on 11th September, 2019. It was further stated that the impugned song in the forthcoming film was not even part of the film and constituted about two lines only in the song which played towards the end of the film with the end credits. The senior counsels for the plaintiff however expressed urgency contending that if the hearing was posted to 11th September, 2019, the defendants would take the advantage, of the same being at the last minute and it being not possible for the defendants to make the change as sought. The said apprehension of the plaintiff was allayed, by directing that it would not be so permitted. Though the senior counsels for the plaintiff, on 6th September, 2019 also contended that the defendants, till further hearing should not play the impugned song on the music/promotion channels of the forthcoming film, as they had been doing since 21st/27th August, 2019, but no such order was granted.

3. The senior counsels for the plaintiff, the counsel for the defendant No.3, the senior counsel for defendants No.1&2 though were heard for more than one and a half hour on 11th September, 2019 but the hearing spilled over to 12th September, 2019 and could be concluded only at about 1110 hours. Since the film "Dream Girl" was informed to be slated for release at 1230 hours today, this order was scheduled for pronouncement today at 1030 hours.

4. The defendants, though could have filed the written statements taking advantage of Court holidays from 7th to 10th September, 2019, have opted not to do so. The counsels have been heard on the basis of the documents filed by the plaintiff and the documents/materials handed over during the course of hearing.

5. I may at the outset record that though the defendants in reply to the notice preceding the suit and which reply was received by the plaintiff post institution of the suit, took the stand that the impugned song in the forthcoming film "Dream Girl" of the defendants was not the same or an infringement of the song in which the plaintiff claims copyright and had also taken a stand that the "song" was a "folk song" and it was so suggested during the hearing on 6th September, 2019 also but neither the counsel for the defendant No.3 nor the senior counsel for the defendants No.1&2, in their arguments on 11th & 12th September, 2019, have raised the said plea. Thus infringement of the copyright claimed by the plaintiff, by/in the impugned song, is not in dispute.

6. I had, on 6th September, 2019, while adjourning the hearing requested the counsels to WhatsApp to me the two songs and the counsels had so complied. I have thus had the benefit of hearing the two songs.

7. It is the case of the plaintiff, (a) that the plaintiff, vide an agreement dated 12th May, 1979 acquired the rights over the sound recordings and underlying musical and literary works in the songs of the cinematograph film "Bot Lavin Tithe Gudgulya", from the original producer of the said film i.e. M/s Sadichha Chitra; the said rights were assigned to the plaintiff in perpetuity and the plaintiff continues to be the rightful owner of the songs in the said film including the sound recording and underlying musical and literary works of the song "Var Dhagala Lagli Kal"; (b) that under the said agreement, M/s Sadichha Chitra had agreed to assign in favour of the plaintiff, in perpetuity, the copyright and sound recording and underlying musical and literary works of the songs of all cinematograph films to be produced by the said M/s Sadichha Chitra during the tenure of the said agreement; the initial tenure of the said agreement was from 2nd November, 1978 till 1st November, 1979; (c) that during the tenure of the said agreement, the film "Bot Lavin Tithe Gudgulya" was released by the said M/s Sadichha Chitra; in view of the same, as per the terms of the said agreement, the rights in the sound recording and underlying musical and literary works in the songs of the said cinematograph film stood assigned in perpetuity to the plaintiff; (d) that the plaintiff is the owner of the original plate of the sound recordings forming a part of the subject film; (e) that the plaintiff's name also appears on the in-lay cards of the subject film, as the owner/publisher of the sound recordings and underlying musical and literary works of the said cinematograph film; (f) that as per Section 55(2) of the Copyright Act, 1957, the plaintiff is presumed to be the owner of the copyright in the said works; (g) that the plaintiff thus has the exclusive right inter alia to issue copies of the said works to the public, the right to make any sound recording thereof, the right to communicate them to the public, the right to make a cinematograph film of the same and the right to reproduce the same; (h) that on 27th August, 2019, it came to the knowledge of the plaintiff that the defendants had adopted, used and synchronized the song "Var Dhagala Lagli Kal" in their to be released cinematograph film "Dream Girl", without seeking any licence or consent of the plaintiff; (i) that exploitation of the plaintiff's copyrighted works in the said song by adoption, use and synchronization thereof in the music of the film of the defendants, without proper licence/permission from the plaintiff, amounts to infringement of copyright of the plaintiff; (j) that the defendants, in the recreated song have copied the integral part of the original song which is commonly referred to the "hook part" or the "catch part" of the song and which is the part through which the song is commonly known or referred to by the general public; (k) that the plaintiff got issued a legal notice dated 3rd September, 2019 to the defendants to cease and desist from so infringing the copyright of the plaintiff but till the institution of the suit on 5th September, 2019, no response had been received from the defendants; (l) that the defendants' intention of illegally exploiting the plaintiff's copyrighted works is evident from the fact that a representative of the defendant No.1, on 5th August, 2019 had approached the representative of the plaintiff for licensing certain song forming part of the plaintiff's repertoire; however once the plaintiff's

representative informed the terms and conditions that would be involved, including the monetary terms and conditions, the defendant No.1 stopped communicating with the plaintiff with regard to the same; (m) that the defendant No.3 was well aware of the plaintiff's right over the subject song and is continuously paying licence fee to the plaintiff for the use of the same on its TV channels, since the last three years, under orders of this Court; and, (n) that this Court has territorial jurisdiction to entertain the present suit under Section 20(c) of the Code of Civil Procedure, 1908 (CPC) as the recreated song is being broadcast/communicated to the public within the territorial jurisdiction of this Court, on various television channels as well as on online streaming platforms and hence the cause of action for the suit accrued to the plaintiff within the territorial jurisdiction of this Court.

8. The senior counsels for the plaintiff argued, (i) that the plaintiff, under the Agreement dated 12th May, 1979 at pages 10 to 15 of Part IIIA file, is the owner of the copyright in the subject song; (ii) that though the aforesaid agreement does not specifically refer to the song "Dhagala Lagli" or to the film "Bot Lavin Tithe Gudgulya" but the plaintiff, at pages 16 & 17 of Part IIIA file has filed the Certificate issued to the subject film by the Central Board of Film Certification (CBFC) showing the date of the Certificate as 10th November, 1978 and showing the name of the producer as "Dada Kondke" and the name of the applicant as M/s Sadichha Chitra, amply proving that the subject film was produced and released during the term of one year commencing on 2nd November, 1978 of the Agreement dated 12th May, 1979; (iii) that of the total duration of 129 seconds of the impugned song in the forthcoming film "Dream Girl" of the defendants, the infringing part is of as many as 59 seconds and the "catch" or "hook" part of both the songs is the same; (iv) that it has been held by the High Court of Bombay in Ram Sampath Vs. Rajesh Roshan 2008 SCC OnLine Bom 370, that copying part of the song in which another has copyright, amounts to infringement; (v) that the mala fides of the defendants, are evident from the defendants vide their email dated 5th August, 2019 (at 11:12 AM) enquiring from the plaintiff, if the songs "Jumma Chumma", "O Meri Maina" from the movie "Pyar Kiye Jaa", "Yeh Kaali Kaali Aankhen" from Baazigar and "Dream Girl" from movie "Dream Girl", belonged to the plaintiff and were available for use in the film; the plaintiff vide its email dated 5th August, 2019 (at 7:34 PM) informed the defendants that the songs "O Meri Maina" from the movie "Pyar Kiye Jaa" and "Dream Girl" from movie "Dream Girl" could be licensed; the defendants vide their email dated 6th August, 2019 (at 10:18 AM) again informed the plaintiff that the defendants were looking to recreating the song of "Dream Girl" and asked the availability thereof; the defendants vide another email dated 6th August, 2019 (at 4:07 PM) informed the plaintiff that the defendants would like to choose one of the songs to recreate for "Dream Girl"; the plaintiff vide email dated 4th September, 2019 (at 8:37 PM) informed the defendants of availability of the song "Dream Girl" from movie "Dream Girl" subject to payment of licence fee of Rs.1 crore plus applicable taxes and other terms and conditions including giving of credit to

plaintiff therefor in the opening and end credits of the film; (vi) that the defendant No.3 has been paying licence fee to the plaintiff for the subject song "Dhagala Lagli" from the film "Bot Lavin Tithe Gudgulya"; attention in this regard is invited to order dated 3rd January, 2017 in CS(COMM) No.3/2017 titled Zee Entertainment Enterprises Ltd. Vs. Saregama India Ltd. and orders dated 24th January, 2017, 22nd December, 2017 and 18th December, 2018 in CS(COMM) No.57/2017 titled Saregama India Ltd. Vs. Zee Entertainment Enterprises Ltd. a list of songs subject matter of the aforesaid orders is handed over in the Court and in which list the subject film and the subject song are included; (vii) that the defendant No.3 has paid royalty in terms of the aforesaid orders to the plaintiff till the year 2019-2020 and is estopped from disputing the title of the plaintiff to the subject song; (viii) that the defendants, in the reply to the legal notice have stated "Var Dhagala Lagli Kala (Folk Song) is a popular Marathi folklore and popular in the Marathi culture as the rain dance song. The Folk Song first appeared in the film "Bot Lavin Tithe Gudgulya" and thereafter has time and again appeared in several films and has been independently recreated by several parties" and have admitted "the only similarity in the lyrics and composition of the two songs is in relation to the generic Verse" and have further stated "....the New Song forms an integral part of the Film and that removal of the New Song from the Film would result in irreparable losses to our Client", thereby again admitting the claim of the plaintiff; (ix) that Dada Kondke, in his biography published in the year 1999, has written that "he had written the lyrics of the subject song" and the same negates the contention of the defendants in the reply to the legal notice, of the same being a folk song; (x) that the plaintiff was not aware of infringement of the subject song by any other person as disclosed by the defendants in reply to the legal notice and immediately on learning of the same, the plaintiff has taken requisite steps and some of the alleged infringers have already obtained licence from the plaintiff; (xi) that the plaintiff, at pages 6&7 of Part IIIA file has filed the photocopy of the in-lay card inter alia of the subject song and which also shows the plaintiff to be having rights therein in; attention in this regard is invited to Section 55(2), Section 2(d) and Section 17(c) of the Copyright Act; and, (xii) reliance is placed on Indian Performing Right Society Vs. Eastern Motion Pictures Association (1977) 2 SCC 820, laying down that unless there is a contract to the contrary between the composer of the lyrics or music on the one hand and the producer of the cinematograph film on the other, the producer of the film is the owner of the copyright and it is argued that the agreement dated 12th May, 1979 is between the producer of the subject film and the plaintiff.

9. Before recording the arguments of the defendants, it is apposite to reproduce herein in entirety the Agreement dated 12th May, 1979. The same is as under:

"An Agreement made the 12th day of May 1979, BETWEEN

THE GRAMOPHONE COMPANY OF INDIA LIMITED

having its Registered Office at 5, Old Court House Street, Calcutta-1

(hereinafter called "the Company" which expression shall include its legal successors and assigns) of the one part and

M/s. Sadichha Chitra,

302, Bombay Market, 3rd floor,

Near Tardeo Airconditioned Market, BOMBAY-34.

(hereinafter called "The Producer") of the other part.

WHEREAS the Producer has represented and assured the Company that the Producer is free from any obligation to third party which would in any way restrict the Producer's right to enter into Agreement for carrying out the Producer's obligations to the Company as hereinafter appearing.

AND WHEREAS the Company on the basis of such representation and assurance from the Producer has agreed to enter into this Agreement for the purpose of carrying out the respective obligations hereinafter set forth.

IT IS HEREBY AGREED by and between the parties as follows:

1. For the purpose of this Agreement the following words shall have the meaning set forth against them:-

"WORK"

shall mean any one or more of a literary dramatic musical or artistic work as defined in the Copyright Act, 1957.

"RECORD"

shall mean a gramophone record magnetic tape (whether reel to reel endless loop in cassette or cartridge form or otherwise howsoever) or any other contrivance or appliance whatever bearing or used for emitting sounds (whether or not the same also bears or can bear visual images or is or can be joined to use in conjunction with or part of a contrivance or appliance bearing or used for giving visual images).

"CINEMATOGRAPHFILM"

shall mean any recording however made of a sequence of visual images which is capable of being used as a means of showing that sequence as a moving picture (whether or not joined to or part of a record as herein defined) PROVIDED THAT it shall only include such recordings as aforesaid as are used for presentation through normal cinema theatrical or television media and shall not include any such recordings as are used for presentation in any other manner whatsoever.

"RETAIL PRICE"

shall mean the retail price or recommended retail price less any tax or taxes-

levied in respect of the sale or which have to be recovered as part of the selling price.

"PERFORMANCE"

shall include speech singing playing an instrument conducting or directing either alone or with another or others.

"PRODUCER'S FILMS"

shall mean all cinematograph films commenced and or under production during the period of this Agreement and the extension(s) (if any) thereof the sound-tracks of which contain performances of any work(s) in respect of which the Producer directly or indirectly.

(i) is or shall be the producer of owner or (ii) otherwise owns or controls or shall own or control the right to make available licence and assign in respect of the sound-track thereof the rights granted to the Company under this Agreement

"CONTRACT RECORDINGS"

shall mean recordings of performance available to the Company pursuant to Clauses 2 and 3 hereof.

"CONTRACT WORKS"

shall mean all works performed in contract recordings and the rights in which are assigned to the Company pursuant to Clause 4(b)(i) hereof.

2. The Producer shall at the Producer's own expense promptly after the completion of the Producer's films make available solely and exclusively to the Company for the purposes of the Agreement the sound-track or a recorded tape thereof.

3. (A) (a) In the event that any sound track or recorded tape there of any of the Producer's films shall not in the opinion of the Company be suitable for any reason for use in the manufacture of records therefrom the Producer shall at the sole expense of the Producer and at the request of the Company promptly make available to the Company the artistes and musicians whose performances are reproduced herein and such other persons (if any) necessary in the Company's opinion to enable the Company to record the performance of the works from the producer's films for the purposes of manufacturing records therefrom.

(b) Such artistes musicians and other persons (if any) shall attend at the Company's studio or such other place as may be appointed by the Company and shall at such place and time render and if necessary repeat such performances reproduced on the sound-track as the Company may require until in the opinion of the Company a satisfactory recording shall have been obtained.

(B) The Company shall manufacture for sale records of such contract recordings and other recordings of contract works which in the opinion of the Company will

be suitable for such purposes.

4. (A) The Company shall be the owner of the original plate within the meaning of the Copyright Act 1957 and any extensions or modifications thereof of any performance from which are made any records manufactured in pursuance of this Agreement recorded or re-recorded by the Company pursuant to Clause 2 or 3 (A)(a) or 3(A)(b) hereof.

(B) The Producer hereby assigns and transfers and agrees to assign and transfer to the Company absolutely and beneficially for the world:

(i) the gramophone recording rights in all works the performances of which are made available to the Company under the terms of this Agreement and

(ii) the right to make or authorise the making of any record embodying the recordings in any part of the said sound-track(s) associated with the Producer's films.

The Producer undertakes to execute or obtain the execution of such further assignments or assurances as the Company may time to time require.

(C) It is hereby declared that the rights in the recordings and works hereby assigned and transferred or agreed to be assigned and transferred and in the recordings of the performances referred to in Clause 2 or 3 (A) (a) or 3(A) (b) include but are not limited to:-

(i) the sole right of production reproduction sale (under such trademarks as the Company may select) use and performance (including broadcasting) throughout the world by any and every means whatsoever of records reproducing the said performance or any of them.

(ii) the sole right at the Company's discretion to decide whether and or when to commence or discontinue or recommence the said production and sale of records reproducing the said performance or any of them and to fix and alter the price of such records and the irrevocable right and licence at all times to use and publish the said artiste(s) and musicians name(s) and photograph(s) for labelling cataloguing and exploiting the said records

(iii) the right to grant non-exclusive licences for the mechanical reproduction of the works or any of them.

AND the Company shall have the irrevocable right to authorise any other person, firm or corporation to do any and all such acts and things.

5. The Producer hereby assures the Company:-

(a) That the copyright and other rights in the works as mentioned in Clause 4 are or will be the Producer's free and unencumbered property immediately prior to their assignment or transfer to the Company.

(b) That prior to the despatch of such sound-track or recorded tape thereof to be

made available to the Company under this Agreement and prior to any performance by artistes or musicians or other persons under Clause 3 hereof the Producer will have secured the consent in writing of all such artistes musicians and other persons (if any) whose performances are reproduced in such sound-tracks or are rendered at such performances together with all other consents necessary for the manufacture and sale of the records and for the use and publication by the Company and its licensees of the names including professional name(s) (if any) and photographs of the said artistes for the purposes of this Agreement.

(c) That except as otherwise expressly provided herein the Company shall be under no liability whatsoever to any of the said artistes or musicians or to any other third party arising out of the Company's exercise of any of its rights under this Agreement.

6. During the currency of this Agreement and any extension thereof and following the termination of this Agreement or any extension thereof during a period of twenty-five years from the first day of the month in which any record of the contract recordings is first offered to the public the Producer :

(a) shall not directly or indirectly supply or make available to any individual firm company corporation or other person the whole or any part of the said sound-track(s) made or to be made available to the Company for the purposes of manufacturing and selling records hereunder and

(b) shall not directly or indirectly provide the services of any of the said artistes and/or musicians to perform any of the works performances of which have been made available to the Company for the purpose of manufacturing and selling records hereunder on their own account or for any individual firm company corporation or other person other than the Company whereby such sound-tracks(s) and other performances are or are intended to be recorded in any form from which a record may be offered to the public PROVIDED THAT such sound-track(s) and performances by the said artistes and musicians can be made available for sound or television broadcasting or cinematograph films in cases in which records thereof are not and are not intended to be offered to the public except by or with the prior written consent of the Company.

7. (A) Subject as hereinafter mentioned the Producer shall be entitled in respect of all records of contract recordings made available hereunder by the Producer and sold by the Company or by any individual firm Company or corporation or other person authorized by the Company to a royalty on net sales calculated on the retail price in the country of manufacture as follows:-

(a) On a single 45-RPM record reproducing :

(i) On both sides contract recordings alone () per record.

(ii) On both sides contract recordings together with other recordings a proportion of per cent) per record according to the number of other recordings.

In the case of such a gramophone record only one side of which reproduces a contract recording as aforesaid the amount of royalty shall be of that set out above.

(b) In the case of any other record the same shall be deemed to consist of sections each section comprising one side of a single 45-RPM gramophone record or the equivalent thereof and royalty shall be calculated as above on each such section reproducing a contract recording. For this purpose the retail price of such other record shall be divided by the total number of sections. Where in the opinion of the Company it is impracticable to divide into sections a record containing other recordings in addition to the contract recordings each recording shall be timed in relation to the total playing time of the record and the royalty shall be calculated upon the same proportion of the retail price.

(c) Royalty payable in respect of a tap record shall be calculated and payable on the retail price as in the opinion of the Company is or would be appropriate of a disc record or records containing the same material and for the purpose of this Clause 7 sales of tap records shall be calculated separately from sales of disc records.

(d) Royalty as above shall be payable during the currency of this Agreement and thereafter for 25 years.

(e) Records manufactured for the Company outside India on a custom pressing basis but intended by the Company primarily for sale in India shall for the purpose of this Clause 7 be considered as having been manufactured in India; similarly records so manufactured for any licensee of the Company outside the country in which such licensee shall have its main operating office but primarily intended for sale in such country shall be considered as having been manufactured in such country.

(B). In addition to the royalty on contract recordings provided for in Clause 7(A) hereof the Company shall also pay to the Producer a copyright royalty in respect of sales of records containing performances of contract works. The provision of Clause 7(A) shall apply to the calculation of the copyright royalty mutatis mutandis and in particular "contract works" shall be deemed to be inserted instead of the words "contract recordings" where such words appear; in sub clause 7(A)(a)(i) and (ii) the rate () shall be deemed to be inserted instead of the rate therein mentioned.

8. The Company shall have the right to suspend payments of all royalties hereunder if at any time the Producer shall be in breach of this Agreement until such time as the damage suffered by the company as a result of such breach shall have been quantified by agreement or in default of agreement by the Court and the Company shall also have the right to retain royalties becoming due under this Agreement and to apply the same in discharge of any liability of the Producer for damages for breach of this Agreement as aforesaid.

9. The Company shall deduct or shall authorize the deduction from royalty payments any sums which may be demanded from the Company its licensees or associates in respect of the remittance of such payment by the Governments or other fiscal authorities of the respective countries in which the records are sold.

10. The Company's liability to pay royalty shall be limited to the amounts actually received and it shall not be payable until received from its licensees or associates. In countries where currency restrictions are in force and should such restrictions in any country prevent the remittance of the whole or part of the royalty due any royalty not remitted shall if requested by the Producer and at the Producer's expense be held in an account to be nominated by the Producer in the country concerned subject to the laws of such country and of India.

11. The Company shall endeavor to furnish to the Producer within 90 days after the end of each half-year a statement showing the latest information received by the Company as to the number of records sold during such half-yearly period and the amount of royalty due in respect thereof and subject to the provisions of Clauses 8 and 10 hereof the Company shall thereupon pay such amount to the Producer and such payment shall be a complete discharge of the Company's liability to make payments hereunder. The Producer shall at the expense of the Producer be entitled to receive upon so requesting the Company in writing a certificate of the Company's Auditors as to the correctness of any such statement.

12. (A) This Agreement shall be for an initial period of ONE year year(s) commencing on the 2nd day of NOVEMBER 1978.

(B) The Company shall be entitled to continue this Agreement for TWO successive period of ONE year each on giving notice in writing to the Producer before the expiration of the Agreement or the relevant period in continuation thereof and all the provisions herein contained shall apply in their entirety in respect of each such period.

13. Any notice given under the Provisions of this Agreement may be given by hand to the Procedure or to the Principal Officer of the Company or may be sent by registered letter to the address of the Producer appearing above or to such other address as the Producer may for the purpose notified to the Company in writing or to the Company at its Registered Officer in which event such notice shall be deemed to have been received in the course of the normal post.

14. The Producer shall not without the prior written consent of the Company:

(a) assign all or any of the Producer's rights or obligations whatsoever under this Agreement nor

(b) appoint an agent to collect on the Producer's behalf any monies due under the provisions of this Agreement except that the Producer may in respect of royalties payable herein for records sold of any contract recordings or the works performed therein by written notice to the Company requests the Company to

pay the whole or such proportion as the Producer may specify in the notice to an artiste or any third party.

15. The Producer agrees that all the rights and obligations under this Agreement shall be construed to apply to works included or to be included in Producer's films commenced and or under production during the period of this Agreement.

16. The Producer without prejudice to the Producer's responsibilities and obligations hereunder hereby nominates constitutes and appoints the Company as the Producer's attorney to bring and conduct in such form and manner as to the Company may seem reasonable any legal proceedings whatever in the name and on behalf of the Producer or in the name of the Company's and at the Company's expense against any person for the purpose of enforcement of the provisions of this Agreement or against any person who has committed anything whereby the Company's rights and interests under this Agreement are adversely affected PROVIDED THAT the authority hereby granted may be exercised by any Director or Secretary of the Company and also by any officer of the Company who is authorized by a resolution of the Board of Directors of the Company for the purpose.

17. This Agreement is being entered into by the Company with the Producer on the Producer's representation and assurance that the Producer is entirely free to enter into and to perform the Producer's obligations under this Agreement and in case such representation and assurance prove to be incorrect and the Company suffers any loss of damage the Producer shall indemnify the Company against all such losses or damages and such indemnity is without prejudice to any other rights or remedies that may be available to the Company.

18. The rights and obligations of the parties hereunder and the terms and conditions of this Agreement shall be governed by and be construed according to the Laws of India.

19. This Agreement (which shall operate throughout the world) is accepted in Calcutta and all matters claims and disputes arising in respect of the terms and conditions thereof shall be settled and paid by the parties in Calcutta and any legal proceedings in respect of any matters claims and disputes shall be instituted in the High Court of Calcutta in West Bengal which shall be the Court of Jurisdiction.

IN WITNESS whereof (sd/-) on behalf of the Company and the said M/s Sadichha Chitra have hereunto set their hands the day and year first above mentioned.

Signed by the said SADICHHA CHITRA

(sd/-)

In the presence of PROPRIETOR"

10. The counsel for the defendant no.3 argued, that (i) the owner of the copyright in the subject song was Dada Kondke; (ii) the legal heir of Dada

Kondke instituted a suit in the District Court at Pune, for declaration and injunction under Section 62 of the Copyright Act and one of the films subject matter of the said suit was "Bot Lavin Tithe Gudgulya" and the Court of the District Judge, Pune, vide judgment dated 5th July, 2017, copy of which was handed over, declared the said legal heirs of Dada Kondke to be having copyright and exclusive right of video, dubbing, reproducing, reprinting and / or redistributing the rights in respect of the films of Dada Kondke including the subject film "Bot Lavin Tithe Gudgulya" and restrained the defendant therein from infringing the said copyright; (iii) the plaintiff, in para 6(a) of the plaint has claimed rights in perpetuity but in the Agreement dated 12th May, 1979 there is no such provision; (iv) the Pune suit is a complete bar to the present suit; (v) in the credits of the film "Bot Lavin Tithe Gudgulya", the name of M/s Sadichha Chitra does not appear and Dada Kondke is credited as the lyricist of the subject song; (vi) the plaintiff itself at page 16 of Part-IIIA file has filed the CBFC Certificate of the film "Bot Lavin Tithe Gudgulya" and the same also shows Dada Kondke as the producer thereof; (vii) the Agreement dated 12th May, 1979 in favour of the plaintiff / its predecessor is not executed by Dada Kondke but by M/s Sadichha Chitra; (viii) the Agreement dated 12th May, 1979 does not mention the subject film "Bot Lavin Tithe Gudgulya" anywhere and thus the plaintiff could not have acquired any rights with respect to music of the said film under the said Agreement; (ix) even if the Agreement is believed to be covering the subject film, the plaintiff thereunder does not step into the shoes of Dada Kondke; (x) the Agreement dated 12th May, 1979 is not of assignment of copyright but is merely of grant of licence; attention in this regard is invited to Clause 4(C) of the Agreement; (xi) Clause 5(b) of the Agreement provides for the producer to have secured the consent in writing of all artists and other musicians but no such consents have been shown; (xii) Clause 6 of the Agreement limits the term thereof for 25 years and the said period of 25 years from 12th May, 1979 lapsed in the year 2004; thus rights if any acquired by the plaintiff under the said Agreement came to an end in the year 2004; attention in this regard is also invited to Clause 7(A)(d) of the Agreement; (xiii) Clause 8 of the Agreement also is counter indicative of any assignment of copyright inasmuch had there been any assignment, any action of the producer of the film in contravention of the Agreement would have amounted to infringement of copyright assigned to the plaintiff; (xiv) Clauses 14 and 16 of the Agreement are also counter indicative of the Agreement being of assignment of copyright; (xv) the United States District Court in Saregama India Ltd. Vs. Mosley 687 F.Supp.2d 1325 (S.D.Fla.2009), on an interpretation of the Agreement, as the Agreement dated 12th May, 1979 which is in template form, held the agreement to be not of assignment; (xvi) the plaintiff has its registered office at West Bengal and this Court does not have territorial jurisdiction over the subject matter of the suit; all the defendants are at Bombay and the publication of the impugned song in the forthcoming film of the defendants is all over India and the plaintiff should have sued the defendants at West Bengal and the choice of this forum by the plaintiff is in bad faith; (xvii) the reliance by the plaintiff on the communications of 5th August, 2019, 6th

August, 2019 and 4th September, 2019 between the plaintiff and defendants is misplaced inasmuch as the reference thereto is to the song "Dream Girl" in the film "Dream Girl" starring Hema Malini; the queries made by the defendants from the plaintiff were thus not with respect to the subject song; such argument on the part of the plaintiff amounts to misconduct by the plaintiff; and, (xviii) once plaintiff has not shown any rights in the song infringement of which is alleged, the plaintiff has no case.

11. The senior counsel for the defendants no.1 and 2 argued, that (a) this Court does not have territorial jurisdiction to entertain the suit; (b) Supreme Court Indian Performing Right Society Vs. Sanjay Dalia (2015) 10 SCC 161, in paragraphs 19 and 21 has held that where a Corporation is having ordinary residence/principal place of business and cause of action has also arisen at that place, it has to institute a suit at the said place and not at other places and that the impediment imposed under Section 20 of the CPC to a plaintiff to institute a suit in a court where the defendant resides or carries on business or where the cause of action wholly or in part arises, though has been removed by Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, 1999 but the right is subject to the rider that in case the plaintiff resides or has its principal place of business/carries on business or personally works for gain at a place where cause of action has also arisen, the suit should be filed at that place and not at other places where plaintiff is having branch offices etc.; (c) the plaintiff is thus not entitled to institute the suit in this Court even though the cause of action for the suit to the plaintiff may have accrued within the territory of this Court also; (d) the plaintiff has avoided to go before the Courts at Calcutta and approached this Court, for a reason; the High Court of Calcutta in Saregama India Ltd. Vs. Suresh Jindal AIR 2006 Cal. 340, on an interpretation of the Agreement, as the Agreement dated 12th May, 1979, held the Agreement to be not of assignment of copyrights; the plaintiff, if had approached the Courts at Calcutta, would have faced the hurdle of the said judgment; and, (e) as per averments in the plaint, the cause of action also accrued at Calcutta.

12. The senior counsels for the plaintiff, at this stage interrupted, to contend that the reliance placed on the judgment aforesaid of a Single Judge of the High Court of Calcutta is misconceived inasmuch the said judgment has been set aside by the Division Bench of the High Court of Calcutta vide order dated 1st September, 2006 in GA No.2723/2006 titled Saregama India Ltd. Vs. Suresh Jindal & Ors.; a copy of the said order was handed over in the Court.

13. The senior counsel for the defendants no.1 and 2 stated that he was not instructed that the judgment had been overruled but after going through the order of the Division Bench states that the judgment of the Single Judge has been set aside only for the reason of the parties, prior to the said judgment having compromised the matter and having not invited the judgment; it is contended that the Division Bench has not set aside the judgment of the Single Judge on merits. Contending so, certain paragraphs of the judgment of the

Single Judge have been read.

14. However I am of the opinion that once the judgment of the Single Judge has been expressly set aside, be it for whatever reason, the same cannot be cited as a precedent. In law also, a judgment against which there is no opportunity to appeal, does not constitute *res judicata*. Thus, I am not proceeding to record the contentions of the senior counsel for the defendants no.1 and 2 with respect to the judgment of the Single Judge.

15. Else, the senior counsel for the defendants no.1 and 2 has contended that (i) the Agreement dated 12th May, 1979 is not in perpetuity (as had already been argued by the counsel for the defendant no.3); (ii) once the rights subject matter of the Agreement are disputed, the plaintiff has no *prima facie* case and trial is necessary to decide the title claimed by the plaintiff; and, (iii) the allegedly infringing material constitutes only two lines in the song played at the end of the film along with end credits and which is also part of the promotional videos / audios of the film and which is compensable.

16. I enquired from the senior counsel for the defendants no.1 and 2, how is the compensation to be determined and even if the licence fee demanded by the plaintiff is taken as a measure, how is the loss suffered by the plaintiff from the defendants, not mentioning the plaintiff in the credits of the film, to be compensated.

17. The senior counsel for the defendants no.1 and 2 merely stated that it is for the plaintiff to prove the loss.

18. The senior counsel for the defendants no.1 and 2 also contended that save for the two lines, the rest of the song which plays at the end of the film along with end credits is entirely different, with a different theme and is at best an adaptive / transformative work and is not a parrot like repetition of the entire song in which the plaintiff claims copyright. It is argued that thus the damages which would be suffered by the plaintiff even if succeeds in the suit would be restricted. It is also argued that even the name of the song in which plaintiff claims title, does not figure in the forthcoming film of the defendants.

19. The senior counsels for the plaintiff, in rejoinder have argued that (i) the defendant no.3, in its arguments has not responded to the argument of the plaintiff, of the defendant no.3 having accepted the title of the plaintiff in the subject song and having paid royalty to the plaintiff therefor is stopped from "today" disputing the title of the plaintiff to the subject song; (ii) the argument of the counsel for the defendant no.3, of Dada Kondke as distinct from M/s Sadichha Chitra, being the owner of the copyright in the song is misconceived; attention is invited to page 15 of Part-IIIA file, where Dada Kondke has signed the Agreement dated 12th May, 1979 as proprietor of M/s Sadichha Chitra; (iii) the Pune suit filed by the legal heir of Dada Kondke is irrelevant to the rights claimed by the plaintiff; (iv) the judgment of the United States District Court referred by the counsel for the defendant no.3 deals with a different contract;

only the gramophone recording rights were subject matter of that contract; (v) this Court, in order dated 16th May, 2012 in CS(OS) No.1325/2012 titled Shemaroo Entertainment Ltd. Vs. Amit Sharma & Ors. held the said judgment of the United States District Court to be in different facts; the appeal preferred against the said order of the Single Judge was dismissed by the Division Bench in Shemaroo Entertainment Ltd. Vs. Amrit Sharma 2012 SCC OnLine Del 3772; thus the reliance on the judgment of the United States District Court is misconceived; (vi) Supreme Court in Sanjay Dalia supra was concerned with Section 62 of the Copyright Act and Section 134 of the Trade Marks Act and did not deal with Section 20(c) of the CPC and referred only to Section 20(a) of the CPC and partly to Section 20(b) of the CPC; (vii) the entire argument of territorial jurisdiction, raised to convey a design in avoiding the Calcutta Court, was misconceived and without realizing that the judgment of the Single Judge of the Calcutta High Court had been set aside; (viii) the judgment of the United States District Court has been held to be different facts, not only in Shemaroo Entertainment Ltd. supra but another judgment of the United States District Court in Timothy Vs. Mosley is decisive on an interpretation of an agreement like the Agreement dated 12th May, 1979; and, (ix) in Shemaroo Entertainment Ltd. supra, it has been held that the agreement such as the agreement dated 12th May, 1979 is in perpetuity.

20. The counsel who was earlier appearing for the defendant no.3 only, on 12th September, 2019 stated that he is appearing for all the three defendants and has handed over a copy of the judgment of the United States Court of Appeals in Saregama India Ltd. Vs. Timothy Mosley 10-10626 (11th Cir.2011). However, the senior counsels for the plaintiff contend that the same is in a different matter.

21. The counsel for the defendants, on 12th September, 2019 also argued, that even if M/s Sadichha Chitra is the sole proprietor of Dada Kondke, the same does not get every right Dada Kondke possessed and could possess only such rights which Dada Kondke vests in his sole proprietary. It is argued that thus, merely because M/s Sadichha Chitra was the sole proprietary of Dada Kondke, does not mean that the Agreement dated 12th May, 1979 is with respect to every right possessed by Dada Kondke. It is also argued that while the Agreement relied upon by the plaintiff is dated 12th May, 1979, as per the CBFC Certificate the subject film was released prior thereto on 10th November, 1978. (However this argument ignores the clause in the Agreement of the term thereof commencing from 2nd November, 1978). The counsel for the defendants also contended that had the film "Bot Lavin Tithe Gudgulya" been subject matter of the Agreement nothing prevented the film from being mentioned in the Agreement. Section 91 of the Indian Evidence Act, 1882 has been invoked.

22. On enquiry, of the relationship between the defendants inter se, the counsel for the defendants stated that the defendants no.1 and 2 have assigned all their rights in the music of the forthcoming film "Dream Girl" in favour of the defendant no.3 and thus it is now the defendant no.3 only which is concerned

with the rights claimed by the plaintiff in the suit.

23. The counsel for the defendants, on specific query, as to how the defendant no.3 who now claims to be alone concerned with the impugned song can at this stage dispute the title of the plaintiff in the subject song, after having paid royalty to the plaintiff therefor for the last several years under orders of this Court, generally states that the said royalty is being paid for "mechanical reproduction" and that royalty is being paid for a large number of songs of which "Var Dhagala Lagli Kal" is one.

24. The counsel for the defendants, finally accused the plaintiff, of theft.

25. Use by the counsel for the defendants, of such strong words, compelled me to, in Court on 12th September, 2019, observe, whether not, if anyone can be called "thief", at this stage, it is the defendants, because while the plaintiff at least claims a title to the subject song, though disputed by the defendants, the defendants, in their entire argument, though not disputing infringement by the song in their forthcoming film "Dream Girl", of copyright in the song "Var Dhagala Lagli Kal", have not disclosed any right or title to the song "Var Dhagala Lagli Kal".

26. And that, forms the *raison d'etre* for the interim injunction to follow.

27. Thought has crossed my mind, of implication of interim order restraining the defendants with respect to subject song when the film "Dream Girl" of the defendants is informed to be scheduled for release today. However, I am of the opinion that no benefit thereof can be given to the defendants; not only for the reason that the defendants chose not to argue on 6th September, 2019 but also for the reason that the defendants themselves, till 4th September, 2019 were scouting for music for their forthcoming film scheduled for release on 13th September, 2019, showing that the changes if any required in the music, can be made at the last moment also.

28. Though the fulcrum of the arguments of counsels for the defendants has been of disputing the copyright of the plaintiff, including on interpretation of the Agreement dated 12th May, 1979 whereunder the plaintiff claims right, but need to adjudicate the respective contentions at this stage is not felt. Though ordinarily, even for deciding an application for interim relief, a *prima facie* finding would have been required to be given on interpretation of the agreement but it is felt that the same is not required in the present case owing to the defendant no.3 who as aforesaid now claims to be solely concerned with the impugned song, under orders of this Court in CS(COMM) No.3/2017 and CS(COMM) No.57/2017 and which have attained finality, admittedly paying royalty to the plaintiff for the subject song "Var Dhagala Lagli Kal", in acceptance of the right and title of the plaintiff thereto. I am of the view that once the defendant no.3 has so accepted the right and title of the plaintiff in the subject song, at least at this *prima facie* stage, the principles of estoppel would apply and for the present purposes the said title has to be accepted.

29. Rather, I find it strange that the defendant no.3, though paying royalty to the plaintiff under orders of this Court for the subject song, while incorporating the said song or part thereof in the forthcoming film, did not chose to approach the plaintiff. Such conduct of the defendants who though initially were represented by separate counsels, ultimately are represented by one counsel only, itself is enough for interim order to be granted in favor of the plaintiff.

30. Not only have neither counsel for the defendants in their arguments on 11th September, 2019 and 12th September, 2019 not controverted infringement of the subject song in the forthcoming film but the plaintiff has also filed before this Court at pages 39 and 40, the printout from YouTube where the defendants, while advertising their forthcoming film have stated "Relive Dhagala DREAM GIRL style" clearly admitting that the defendants are inciting interest in their forthcoming film "Dream Girl" as well as in its music, by referring to the subject song in which the plaintiff claims rights.

31. The senior counsels for the plaintiffs, during the hearing, have also referred to the advertising by the defendants (i) in the Indian Express of 5th September, 2019, under the title "Dream Girl"s Dhagala Lagli is an interesting recreation of the original that stays true to the spirit of the song",

(ii) on the website as, "The makers of much-anticipated Ayushmann Khurrana starrer Dream Girl have released third song from the film.

"Dhagala Lagli" is a recreated version of the Marathi song "Dhagala Lagli Kala" by Dada Kondke" and that the song in the forthcoming film "is a recreation of a legendary Marathi one". Attention was also drawn to the other publicity material, where similar admissions have been made and title of Dada Kondke in the song been admitted.

32. The defendants cannot be permitted to blow hot and cold, by, in the publicity of their forthcoming film and its music, referring to the original song subject matter of the present suit and in which the plaintiff claims right and here, contending otherwise.

33. I have also heard both the songs and find the impugned song in the forthcoming film of the defendants has the same catch line and is likely to be referred in all music albums and otherwise by the same words, as the original song, with everyone identifying the song in the forthcoming film of the defendants with the original song in which the plaintiff claims copyright. Once it is so, infringement is established.

34. I even otherwise enquired from the counsel for the defendants, whether not once it is found that the defendants are infringing copyright in a song, which they themselves in their advertising describe as iconic, whether copyright in the song be of the plaintiff or anyone else, the defendants are liable to be restrained. It appears that the purport of the laws relating to copyright and trade mark is to prevent theft of intellectual property and a public element is also involved in

preventing such thefts.

35. The senior counsels for the plaintiff, after the hearing, in this context handed a copy of judgment in Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd. (2008) 13 SCC 30, relying on Copinger & Skope James on Copyright (16th Edition), opining that the protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition, in public interest.

36. The defendants, though have not denied infringement of copyright, have not even whispered in their arguments, that they have any right or title to the song copyright wherein is infringed. In my view, on this ground alone the defendants are liable to be restrained.

37. The plaintiff thus is found to have a prima facie case.

38. The elements of irreparable injury and balance of convenience are found in favour of plaintiff, because though the monetary rights of plaintiff, to license fee as was claimed, can be protected but the right of the plaintiff to credit for the subject song, in the forthcoming film to be released today, if not given, cannot in my view be compensated. The counsel for defendants, after taking instructions, has specifically informed that the defendants are not ready to give credit to plaintiff. Though such query was put during the hearing, but not answered relying on specious plea of "onus". An artist, as the lyricist and music composer or producers or their assignees, are most concerned, besides reaping monetary benefits, in their name and without legal formula of compensating for loss of the same being disclosed, injury from such exclusion in credits, is irreparable. On the contrary, the defendants, even at last minute, can make the requisite change.

39. As far as the argument, of distinction between M/s Sadichha Chitra and Dada Kondke is concerned, the applicant of CBFC certificate is described as M/s Sadichha Chitra, prima facie showing the executants of the agreement dated 12th May, 1979 to be having rights in the subject film.

40. No merit is found in the dispute raised with respect to territorial jurisdiction of this Court. Such an argument has already been rejected by me in Travellers Exchange Corporation Ltd. Vs. Celebrities Management Pvt. Ltd. 2019 SCC OnLine Del 6943 and need to reiterate reasons given therein is not felt. No attempt to distinguish the said judgment has even been made.

41. The application is thus allowed.

42. The defendants, during the pendency of this suit, are restrained from exploiting / using the plaintiff's copyrighted works i.e. song recording and the underlying musical and literary works of the song "Var Dhagala Lagli Kal" from the cinematograph film "Bot Lavin Tithe Gudgulya", in their forthcoming film "Dream Girl", amounting to infringement of the plaintiff's copyright therein. The defendants are specifically restrained from including in their film the objected

portion of the impugned song subject matter of this hearing and / or from using the same for any other purpose whatsoever.

43. Though both counsels have pressed for costs in their favour but the question of costs for interim hearing is deferred. Certificates of actual expenses incurred be filed.

44. The application is disposed of.

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45. Written statements be filed within the prescribed time.

46. Reply within thirty days thereafter.

47. List for further consideration on 12th December, 2019.