

(2017) 10 DEL CK 0372

In the Delhi High Court

Case No : Civil Suit (COMM) No. 625 Of 2017

Saregama India Limited

APPELLANT

Vs

Eros Digital FZ LLC & Anr

RESPONDENT

Date of Decision : 12-10-2017

Acts Referred:

Code Of Civil Procedure, 1908 — Section 20(c)
Copyright Act, 1957 — Section 62
Trademarks Act, 1999 — Section 134
Indian Contract Act, 1872 — Section 23, 28
Arbitration And Conciliation Act, 1996 — Section 2(e), 11, 11(12)(b)

Citation : (2017) 10 DEL CK 0372

Hon'ble Judges : S.P Garg, J

Bench : Single Bench

Advocate : C.M.Lall, Ankur Sangal, Sucheta Roy, Pragya Mishra, Dayan Krishnan, Anshu Bhanot, Sanjeev

Judgement

S.P. Garg, J

IA No.10917/2017 (u/O 39 R-1&2 CPC)

1. The instant application for seeking ad-interim injunction till the disposal of the suit has been preferred by the plaintiff; it is contested by the defendants.

2. The plaintiff has instituted a suit for permanent injunction for restraining the infringement of its copyright; rendition of accounts and damages against

the defendants. It is averred that the plaintiff is the owner of copyright in a wide variety of sound recordings published in India. The plaintiff has

acquired rights in numerous songs, including regional and Hindi film as well as non-film sound track music from the respective producers thereof. The

plaintiff is also the owner of copyright in the musical works (musical

compositions) as well as the literary works (lyrics) embodied in the said sound recordings which were assigned to it by the producers of the respective sound recordings. The plaintiff is also the producer of number of sound recordings and by virtue of the same, is also the owner of copyright of the underlying musical and literary works of the same. The plaintiff holds the exclusive right to "grant a license" or "authorize the doing" of any of the acts provided for in the Copyright Act, 1957.

3. The plaintiff entered into a Content License Agreement dated 13.07.2015 with defendant No.1 whereby the defendant No.1 was granted a non-

exclusive license to exploit the copyrighted works of the plaintiff through the defendants' website "www.erosnow.com" and their mobile

application "ErosNow". By virtue of the said agreement, the defendant No.1 was permitted to use the plaintiff's content of

"streaming" and "online caching" wherein the latter permitted the end-users i.e. clients of the defendants to access temporary copies of

the plaintiff's Works in cache memory of internet enabled devices. The License Agreement was granted for a period of twenty four months

effective from 13.07.2015. As per the terms of the License Agreement, defendant No.1 was required to pay the plaintiff a Minimum Guarantee

amount of ₹ Rs. 9,50,00,000/-; he was also liable to pay a streaming fee of ₹ Rs. 0.14 per stream in case the value of the utilization of the

plaintiff's Works exceeded the Minimum Guarantee amount. The defendant did not pay the installments in time for which he was served with

various notices. The said license has now come to an end by efflux of time on 12.07.2017. It is alleged that the defendants are guilty of copyright

infringement due to default in making due payment to the plaintiff. The defendants continue to infringe the copyright on account of continued

exploitation of the work despite expiry of the agreement. Currently the defendant No.1 is in default of payment of ₹ Rs. 6,12,50,000/- besides interest

and penal interest. It is further pleaded that defendants are in the process of selling their business to third parties. Since both the defendants are based

out-side India, grave hardship and significant damage would be caused to the plaintiff if immediate steps to restrain them from selling the business

were not taken.

4. The defendants put appearance on advance notice and sought time to file

response to the application. In reply, the defendants have denied the plaintiff's allegations. It is vehemently urged that this Court has no territorial jurisdiction to entertain the present suit due to Clause 29 of the License Agreement whereby the parties had consented to submit to the jurisdiction of the courts at Kolkata. It is further averred that the disputes between the parties are purely contractual and there is no infringement of any copyright after the expiry of the License Agreement on 12.07.2017 by e-mail dated 25.07.2017. Defendant No.1 confirmed that contents of the plaintiff were taken down from Eros Now platform. The said email was never disputed by the plaintiff. It is further stated that no cause of action arose against defendant No.2; there was no privity of contract between the plaintiff and defendant No.2; and he has been unnecessarily dragged to litigation.

5. Learned Senior counsel for the plaintiff urged that this Court has territorial jurisdiction to entertain the present suit under Section 20 (c) of the Code of Civil Procedure; Section 62 of the Copyright Act 1957 and Section 134 of Trademarks Act. Relying upon FAO (OS) 494/2015 titled Ultra Home Construction Pvt.Ltd. vs. Purushottam Kumar Chaubey & Ors. decided by this Court on 20.01.2016, the learned Senior counsel contended that Principal Office of the plaintiff was at Kolkata; it has subordinate branch office at Delhi and cause of action arose in Delhi. Hence, Delhi is the place where the plaintiff additionally seek ad-interim injunction under Section 134 of Trademarks Act and Section 62 of the Copyright Act. Reliance was also placed on FAO(OS) 506/2013 titled World Wrestling Entertainment vs.Reshma Collection 2014 SCC OnLine Del 2031. It was urged that the License Agreement was not entered into with defendant No.2. There was thus, no bar to file the instant suit by the plaintiff at Delhi.

6. Learned Senior counsel for the defendants relying upon Indian Performing Rights Society Ltd.Vs.Sanjay Dalia & Anr. (2015) 10 SCC 161; A.B.C.Laminart Pvt.Ltd.& Anr. Vs.A.P.Agencies, Salem (1989) 2 SCC 163; Federal Express Corporation Vs. Fedex Securities Ltd. & Ors. (in Case CS No.2213/2014) and Lakshmi Raj Shetty & Anr.Vs.State of Tamilnadu (1988) 3 SCC 319 urged that this Court has no territorial jurisdiction to entertain and decide the suit as Clause 29 of the License Agreement ousted its jurisdiction in express terms. On merits, it was urged that the defendants have not exploited any plaintiff's Works after the expiry of the

License Agreement. No reliance can be placed upon the newspaper report being in the nature of hearsay secondary evidence.

7. The entire case of the plaintiff is based upon the License Agreement dated 13.07.2015 which was executed with defendant No.1. The said License Agreement was not only entered into but was also acted upon. In terms of the said License Agreement, several installments were admittedly paid to the plaintiff on various dates. Apparently, the parties are governed by the terms and conditions incorporated in the License Agreement. It is also not in dispute that the said License Agreement was entered into between the parties at Kolkata. It was entered into between Saregama India Ltd.; an existing Company under the Companies Act having its office at No.2 Chowringee Approach, Kolkata-700072 and Eros Digital FZ LLC; an existing company incorporated under the laws of United Arab Emirates (UAE) and having its Registered office at 12th Floor, Fujalrah Creative City Free Zone, Fujalrah Media Group, Creative Tower, PO Box 4422, Fujalrah, United Arab Emirates. It was signed by the authorized signatory Mr. G.B. Aayeer, Chief Financial Officer of Saregama India Ltd. Clause 29 of the License Agreement reads as under:

“This Agreement shall be governed by and interpreted in accordance with the Laws of India and in case of any matter or dispute arising here from, the High Court of Calcutta, India alone shall have jurisdiction.”

8. Needless to say the parties have expressly excluded jurisdiction of any other court except High Court of Kolkata. The agreement specifies the jurisdiction of the courts at a particular place i.e. Kolkata. It is not in dispute that the courts at Kolkata have jurisdiction to entertain the instant suit as the cause of action arose there due to the execution of the License Agreement. It has further come on record that the installments in terms of License Agreement were made at Kolkata. The invoices were raised at Kolkata and the payments were credited in the account maintained by the plaintiff at Kolkata i.e. ICICI Bank Ltd. Kolkata Branch, Rasol Court 20, Sir R.N.Mukherjee Road, Kolkata. The defendants do not reside at Delhi.

9. Without delving into the controversy if any part of cause of action arose in Delhi due to the alleged infringement of plaintiff’s work under the Copyright Act or Trademark Act, it is well-settled that where there are two or more competent courts which can entertain a suit consequent upon a

part of the cause of action having arisen therewith, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which

might arise as between themselves, the agreement would be valid. This cannot be understood as the parties contracting against the statute. The said

agreement would not be contrary to public policy or in contravention of Section 28 or 23 of the Indian Contract Act.

10. In *Swastik Gases P. Ltd. vs. Indian Oil Corporation Ltd.* MANU/SC/0654/2013 in para (31) it was held:

“In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of

cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction

to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)

(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the C.P.C., there remains no doubt that the Chief Justice or the designate

Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement

have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the

jurisdiction of Chief Justice of the Rajasthan High Court has been excluded. For answer to the above question. Court have to see the effect

of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a

fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not

been used but this is not decisive and does not make any material difference. The intention of the parties--by having Clause 18 in the

agreement--is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall

have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est*

exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the

exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have

impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such

courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts. A clause like

this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not

offend Section 28 of the Contract Act in any manner.â??

11. Similar are the observations of the Honâ??ble Supreme Court in A.B.C.Laminart Pvt.Ltd.& Anr. Vs.A.P.Agencies, Salem (supra):

16 So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the

cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law

several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them

it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes

arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent

they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they

agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being

against public policy. Would this be the position in the instant case?

21 From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there

is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the

parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction, As regards construction of

the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words

in appropriate cases the maxim 'expressio unius est exclusio alterius' expression of one is the exclusion of another may be applied. What is

an appropriate case shall depend on the facts of the case. In such a case

mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

12. In the instant case Clause 29 of the agreement is clear and unambiguous. The parties by this clause have bound themselves that in any matter arising between them under the said agreement, it is the court in Kolkata alone which will have jurisdiction. Once parties bound themselves as such, it is not open for them to choose a different jurisdiction as such as suit would be in violation of the said agreement.

13. It is relevant to note that in the plaint, the plaintiff did not aver at all that the license agreement was executed at Kolkata. It was also not revealed that the installments were paid in the bank account maintained by the plaintiff at Kolkata.

14. The averments in the plaint are to be considered to ascertain if this Court has territorial jurisdiction to entertain the suit. The plaintiff has alleged infringement of its copyright by the defendants. Merely because defendant No.2 is not a party to the license agreement it cannot be inferred that the suit qua defendant No.2 alone can be entertained by this Court.

15. Since this Court has no territorial jurisdiction to entertain the suit, relief as claimed cannot be granted by this Court. The plaintiff will have to approach the court of competent jurisdiction to avail the relief claimed.

16. The application is disposed of in the above terms.

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17. Since this Court has no territorial jurisdiction to entertain the suit, as discussed above, the plaint be returned to the plaintiff for presentation before the court having jurisdiction i.e. the High Court of Calcutta.

18. Copy of the order be given dasti to the counsel for the parties.