

(2020) 02 CAL CK 0095

In the Calcutta High Court

Case No : General Application (GA) No. 1952 Of 2016, Civil Suits (CS) No. 156 Of 2015

Saregama India Limited

APPELLANT

Vs

SKY B (BANGLA) Private Limited

RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:

Copyright Act, 1957 — Section 19, 19(5), 31C, 33, 34, 44, 45, 48, 49, 54, 55(2), 61

Citation : (2020) 02 CAL CK 0095

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Ranjan Bachawat, Debnath Ghosh, Soumya Roychowdhur, Avijit Dey, Sabyasachi Chowdhury, Rajarshi Dutta, J.D. Roy

Final Decision : Disposed Of

Judgement

Â Debangsu Basak, J

1. In a suit for infringement of copyright, the plaintiff has sought interim reliefs by this application. The application has been heard after completion of affidavits.

2. Learned senior advocate appearing for the plaintiff has submitted that, the plaintiff is the owner of a large repertoire of literary, musical and other

related works and sound recording in respect of several songs played in several films. He has submitted that, the defendant conducted various musical

programs in its television channel and wrongfully and illegally caused performance of the songs of the plaintiff therefore infringing the copyright

belonging to the plaintiff. He has drawn the attention of the court to the cease and desist notice issued by the plaintiff to the defendant. He has

submitted that, in the reply the defendant initially claimed ownership over the

sound and literary works comprised in the songs. Thereafter, the plaintiff called upon the defendant to produce documents of title. The defendant offered to negotiate. However, the defendant never made it convenient to meet the plaintiff and arrive at an amicable settlement. The defendant always avoided the plaintiff. According to him, since, the plaintiff is the owner of the sound recordings, the lyrics and the songs, the defendant could not have performed or allowed performance of such songs without the prior permission of the plaintiff. The defendant having done so, it should be restrained appropriately from repeating such infractions.

3. Learned senior advocate appearing for the plaintiff has relied upon Section 55 (2) of the Copyright Act, 1957 and submitted that, since, the plaintiff is the owner and has the copyright of the sound recording, lyrics and music composed in the songs, there is a presumption existing in favour of the plaintiff. He has drawn the attention of the court to Section 31C of the Copyright Act, 1957 and submitted that, in the event, the defendant claims that, the defendant undertook version recording of the songs over which, the plaintiff has copyright, then, the defendant ought to have issued prior notice to the plaintiff which the defendant in the present case did not do so. Therefore, the defence of version recording if set up, is of no consequence. In support of his contentions, learned senior advocate appearing for the plaintiff has relied upon All India Reporter 1997 Calcutta Page 63 (Gramophone Company of India Ltd. v. Shanti Films Corporation and others).

4. Learned advocate appearing for the defendant has submitted that, the plaintiff is yet to establish title in respect of the songs concerned. He has submitted that, there are no documents placed on record to suggest let alone establish that, the plaintiff has copyright over the songs in the form of sound recording or lyrics or music. He has drawn the attention of the court to the averments made in the petition and submitted that, the plaintiff is not claiming to be the owner of the songs or having copyright over the sound recording, lyrics and the music of the songs concerned. In absence of such ownership, the plaintiff is not entitled to call upon the defendant to restrain itself from allowing the performance of such songs in the television channel of the defendant. He has relied upon Sections 19, 45, 48 and 61 of the Copyright Act, 1957 in support of his contentions. He has submitted that, the songs in questions are more than five years old. The plaintiff cannot have

copyright ad infinitum. He has relied upon ILR (2008) Volume 2 Delhi 1267

(Phonographic Performance Limited v. Hotel Gold Regency and others) in support of his contentions.

5. Learned Advocate for the defendant has drawn the attention of the Court to Clause 12 of one of the deeds disclosed by the plaintiff and submitted

that, the documents of title that the plaintiff seeks to rely upon are deeds of assignments. Moreover the assignments were for a limited period of one

year. Such period expired prior to the filing of the suit. The plaintiff therefore cannot claim ownership on the basis of such deed. The plaintiff is yet to

disclose all the deeds on which the plaintiff is relying upon. The deeds which the plaintiff disclosed in the petition and the affidavit in reply, do not

establish the title of the plaintiff in respect of the copyright which the plaintiff claims over the songs. Therefore, the plaintiff is not entitled to any

interim protection as prayed for.

6. Relying upon 2017 SCC Online Delhi 12009 (Achla Sabharwal v. National Film Development Corporation Limited and another) learned advocate

for the defendant has submitted that, when, there are disputes with respect to the ownership of the copyright in the songs, then in such a case, the

owner in the copyright of the film in which the songs were played ought to have been made a party to the suit. According to him, the suit is bad for

nonjoinder of necessary party. According to him, the songs are of popular Hindi films. The owners of the copyright in such films are necessary parties

to the suit. In support of such contentions, he has relied upon ILR (2009) Volume 5 Delhi 800 (M/s. BCI Optical Disc Limited v. M/s. M.R.S. Film

Craft & Advertising Pvt. Ltd.).

7. Referring to Section 48 of the Copyright Act, 1957, learned advocate appearing for the defendant has submitted that, the so-called copyright of the

plaintiff in respect of the songs concerned are not appearing in the register maintained under Section 48 of the Act of 1957. Therefore, the plaintiff

cannot claim to be the owner of the copyright in the songs concerned. At least, at the prima facie level the plaintiff is yet to establish its ownership.

8. Relying upon Section 31C of the Act of 1957, learned advocate appearing for the defendant has submitted that, version recording of the songs over

which a person claims copyright is permissible. The songs allowed to be performed on the television channel of the defendant are to be considered as

version recordings and therefore, the plaintiff should not be granted any order of injunction.

9. Referring to and relying upon Sections 54 and 61 of the Act of 1957 and the documents of title relied upon by the plaintiff in the present application,

learned advocate for the defendant has submitted that, the claim of the plaintiff can at best be one of an assignee of the owner of the copyright. In the

present case, since, the songs are of films, the copyright owner of the films are necessary and proper parties in the suit by virtue of Sections 54 and 61

of the Act of 1957. In absence of the owner of the copyright in the films, the suit cannot be proceeded with. Therefore, the plaintiff is not entitled to

any interim protection in a suit which cannot be proceeded with for being bad for non-joinder and misjoinder of parties.

10. Learned advocate appearing for the defendant has submitted that, since, the period of assignment is not stated in all of the deeds relied upon by the

plaintiffs in the application, in support of the claim for its title, by reason of Section 19 (5) of the Act of 1957, the plaintiff at best has a period of five

years from the date of execution of the deed of assignment. A period in excess of five years has elapsed since the date of the deeds of assignment

relied upon by the plaintiff as on the date of presentation of the suit. None of the documents disclosed by the plaintiff in support of its claim has a valid

period of assignment.

11. In response, learned Senior Advocate appearing for the plaintiff has submitted that, on appeal, the decision of Phonographic Performance Limited

(supra) was reversed. He has relied upon the judgment and order of the Division Bench of the Delhi High Court in Phonographic Performance

Limited v. Hotel Gold Regency and others in RFA (OS) No. 57 of 2008 and RFA (OS) No. 58 of 2008. He has submitted that, the plaintiff is entitled

to the interim relief as prayed for.

12. The plaintiff has filed the present suit claiming relief against the defendant on account of infringement of copyright. The plaintiff has filed the

present application seeking an order of injunction against the defendant from exhibiting or causing performance or reproducing or broadcasting the

literal musical and sound recording and other works of the plaintiff over which the plaintiff has copyright. The plaintiff claims to be an owner of a large

repertoire of literary, musical and other related works and sound recordings in

respect of several films. The plaintiff claims that, the plaintiff entered into agreements with various producers and production houses by virtue of which the plaintiff became the owner of the sound recordings and literary and musical works in the sound recordings forming part of the films produced by such producers and production houses. The plaintiff claims on such basis that, the plaintiff has the sole right of production, reproduction, sale, use and performance including broad casting, throughout the world, by any and every means whatsoever, of the records of the work of which the plaintiff is the owner. According to the plaintiff, the defendant conducted various musical programmes in the television channel run by the defendant infringing the copyright of the plaintiff. In such television programmes, the defendant wrongfully and illegally used exploited and caused performance of the songs of the plaintiff as also the musical and literary and lyrical works in such songs.

13. The plaintiff issued a cease and desist notice dated March 27, 2015. The plaintiff called upon the defendant not to air or use the sound recordings and the underlying works without the permission and licence from the plaintiff by such cease and desist notice. The defendant responded thereto by an electronic mail dated April 2, 2015 where the defendant requested the plaintiff to furnish details of the songs over which the plaintiff claims copyright.

The defendant claimed right in respect of the songs. The plaintiff by a letter dated May 13, 2015 called upon the defendant to restrain causing the performance and broad casting of the songs of the plaintiff in the television channel of the defendant. Apparently, the defendant requested the plaintiff to furnish the list of the songs of the plaintiff that was played or performed on the television channel of the defendant for the period from January 2015 to April 2015. There are two e-mails dated May 26, 2015 and May 28, 2015 from the plaintiff to the defendant calling upon the defendant to settle the issue amicably. By the e-mail dated June 3, 2015, the plaintiff placed on record the fact that the defendant was not cooperating in settling the issues amicably.

14. In the course of hearing of the present petition, the defendant has questioned the ownership of the plaintiff in respect of the songs over which the plaintiff claims copyright. The plaintiff has produced sample deeds claiming to be deeds of ownership by virtue of which the plaintiff has copyright

over the songs. According to the defendant, the clauses of such deeds do not constitute assignment of ownership of the copyright in favour of the plaintiff.

15. Similar clause as that obtaining in the deeds disclosed by the plaintiff came up for consideration in Gramophone Company of India Ltd. (supra).

Similar clauses were construed by the Court and it was held that, by virtue of such deed the plaintiff cannot be said not to be entitled to interim

protection. It was held that, in a suit for permanent injunction, while the Court is considering an interlocutory application, the Court is not called upon to

decide the real disputes between the parties. The Court is called upon to see whether the plaintiff has a plausible case and whether there is a

possibility of such case succeeding at the trial. The Court will also consider the balance of convenience and inconvenience as also irreparable loss if

the order is not granted.

16. In Gramophone Company of India Ltd. (supra) the Court has held that, copyright is a beneficial interest in movable property in the actual or

constructive possession of the owner thereof, although strictly not an actionable claim, but capable of being transferred by assignment evidenced by a

writing executed by the assignor or by his duly authorised agent.

17. The Court having construed similar provisions of the deeds as obtaining in the present case in Gramophone Company of India Ltd. (supra) and the

Court having come to a finding there that, the Court was not in a position to say at the interlocutory stage that the plaintiff therein was not entitled to a

permanent injunction as prayed for at the trial of the suit, the Court granted temporary injunction in favour of the plaintiff. Applying the same principles

as that of Gramophone Company of India Ltd. (supra), in the facts of the present case, it cannot be said at this interlocutory stage that the plaintiff will

not succeed at the trial of the suit and that the plaintiff is not the owner of the copyright as claimed by the plaintiff. The Court at this interlocutory

stage is not called upon to decide the ownership disputes finally, as raised by the defendant. The plaintiff therefore makes out a prima facie case for

grant of interim protection.

18. In Phonographic Performance Limited (supra) the Delhi High Court has considered an application under Order VII Rule 11 of the Code of Civil

Procedure, 1908 on the ground of non-impleadment of a necessary party. It has

considered Sections 33 and 34 and Section 61 of the Act of 1957. In the facts of that case, the Court found that the plaintiff not to be an exclusive licensee. The Court found that, the plaintiff therein did not have the right to sue for infringement either by way of a licensee or on its own right. In such circumstances, the court rejected the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908.

19. An appeal was preferred against Phonographic Performance Limited (supra). The Division Bench of the Delhi High Court in the appeal therefrom being RFA (OS) No. 57 and RFA (OS) No. 58 of 2008 (supra) has set aside the order of rejection of the plaint and directed the suit to be proceeded with in accordance with law.

20. In Achla Sabharwal (supra) the Delhi High Court has in the facts of that case found Section 61 of the Act of 1957 to be attracted. It has upheld the decision of the Trial Court to dismiss the suit since the plaintiff was not the owner of the copyright infringement of which was the subject matter of the suit.

21. In M/s. BCI Optical Disc Limited (supra) the Delhi High Court has considered Section 61 of the Act of 1957 and found the suit to be barred under Section 61 of the Act of 1957 and therefore dismissed the suit with cost.

22. Section 61 of the Act of 1957 lays down that, in every civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant. It also allows such owner to have the right to dispute the claim of the plaintiff as the exclusive licensee. In the facts of the present case, the plaintiff claims to be the owner of the copyright by virtue of agreements entered into with the owners. As noted above, a similar agreement as that obtaining in the present case, was construed in Gramophone Company of India Ltd. (supra) and there, it was held that, at an interlocutory stage, it cannot be said that the plaintiff did not have a chance of success at the trial. On the strength of the ratio of Gramophone Company of India Ltd. (supra), at this stage therefore, it cannot be said that the suit is bad for non-joinder of parties and that the plaintiff herein is not entitled to interim relief as prayed for.

23. Sections 45, 48 and 49 of the Act of 1957 have been pressed into service by the defendant to claim that, since the claim of the plaintiff does not

appear in the register of copyrights, the plaintiff cannot be treated as the owner. Sections 45, 48 and 49 appears under Chapter X of the Act of 1957.

Chapter X deals with registration of copyright. Section 44 of the Act of 1957 requires a register of copyrights to be maintained. Section 45 provides

for entries in the register of copyrights. Section 48 of the Act of 1957 creates a rebuttable evidence of ownership in favour of a person whose name

appears in the register of copyrights. A person not featuring in the register of copyrights cannot be said not to be the owner of such copyright at all.

There may be instances where a person may not be registered in the register of copyrights, be the owner of the copyright. Where a person who does

not feature in the register of copyrights, he has to prove his right through a process known to law.

Section 49 allows correction of entries in the register of copyrights.

24. Section 31C of the Act of 1957 has been introduced with effect from June 21, 2012. It requires a person desirous of making a cover version to

obtain the consent of the owner of the right. It also lays down various parameters which the person making a cover version has to follow. In the facts

of the present case, the defendant did not obtain any permission under Section 31C of the Act of 1957 from the plaintiff nor followed the parameters

laid down under such provisions of law.

25. The plaintiff having made out a prima facie case and the balance of convenience and inconvenience being in favour of the plaintiff and the claim

for damages not being ascertainable at this stage, it would be appropriate to grant interim protection to the plaintiff as prayed for. There will be orders

in terms of Prayers (a) and (b) of the petition till the disposal of the suit.

26. GA No. 1952 of 2016 is disposed of accordingly without any order as to costs.