
(2012) 07 DEL CK 0103

In the Delhi High Court

Case No : FAO (OS) No. 292 of 2012 and C.M. No. 11437 of 2012

Shemaroo Entertainment Ltd.

APPELLANT

Vs

Amrit Sharma and Others

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2012) 52 PTC 325

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Jayant K. Mehta and Mr. Abhinav Sharma, for the Appellant; Neeraj Kishan Kaul, Mr. Abeer Kumar, Advocate Respondent No. 3, Mr. Sandeep Sethi, Mr. Ajay Bhargava, Gaurav Bahl and Ms. Soumili Das, Advocates Respondent No. 6, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The instant appeal lays a challenge to the order dated 16th May, 2012 passed in I.A. No.8837/2012 in CS(OS) No.1325/2012 whereby the learned Single Judge has dismissed the application filed by the appellant under Order XXXIX Rule 1 and 2 CPC read with Section 151 of the Code of Civil Procedure, 1908, seeking interim order to restrain defendants No.1 to 4 and 7 from using the catch words of the song "Thodi Si Jo Pee Li Hai" from the film "Namak Halal" in their film "Department" and from exploiting the audio rights of the film "Department" containing the above portion, by way of DVDs, MP3, CDs etc. The appellant claims to be the exclusive holder of the copyrights and all rights, inter-alia, in the music and literary work comprised in the said work who has acquired all rights through assignment agreement executed by respondent No.6 and his successors-in-interest. The appellant's contention is that respondent No.5 has absolutely no right to grant any licence or assignment to any person and respondents No.1 to 4 & 7 have used the said literary and musical work without the permission of the appellant, hence the copyright of the appellant is violated.

2. Respondents No.1 & 2 are co-producers and are line producers of the feature film titled "Department" jointly with respondent no.3. Respondent No.4 is stated to be the director and producer of the said film. Respondent No.5 is the original producer of the film "Namak Halal" who is stated to have entered into an agreement dated 29th September, 1983 with respondent No.6 for assignment of the copyright in certain contract works including the film "Namak Halal".

3. The learned Single Judge by order dated 16th May, 2012 dismissed the injunction application of the appellant, inter-alia, by prima-facie coming to the following conclusion:-

In terms of Clause 3A defendant no. 6 has been given copyrights for making records of all "contract works" which are made available to the company, that is, defendant no. 6 as also the performing rights, including rights of publication, sound and television broadcasting, public performance and mechanical reproduction in respect of "producer's films". Work has been defined in Clause 2 of the agreement as literary, dramatic, musical or artistic work as defined in the Act. Producers' films have also been defined in Clause 2, which provides that the producers' films shall mean all cinematograph films commenced and/or under production during the period of the agreement but may have been completed after expiry of the agreement. Clause 11 further indicates that the defendant no. 5 had agreed that the agreement shall even govern the films which were under production; meaning thereby that the copyright in respect of the films which had commenced even in the month of October, 1984 but not completed, defendant no. 6 was given full right to exploit such films in the manner as detailed in the agreement. The Clauses of the agreement appears to be ambiguous and, thus, it is all the more necessary to give a harmonious construction thereof.

4. Learned counsel appearing on behalf of the appellant has mainly argued the appeal on the following points:-

(a) That there is no clause in the agreement dated 29th September, 1983 in which it is stated that the assignment of the copyright by respondent No.5 to respondent No.6 was in perpetuity. The term of assignment, if any, for three years could not exceed more than the term of assignment for five years as provided u/s 19(5) of the Copyright Act, 1956 and after the said expiry of period, the work will revert back to the appellant, even if the contention of the other side is accepted.

(b) That reading of various clauses of the agreement would show that the said clauses limit the rights to manufacture and sell the record of the musical works contained in the contract works, particularly, clause 12 which provides the mode of consideration payable to the producer by the company.

(c) That the learned Single Judge has erroneously interpreted the clauses 3A and 11 of the agreement dated 29th September, 1983, as the learned Single Judge has wrongly come to the conclusion that there is an ambiguity in the said clause and the interpretation in the said clauses are given well beyond the plain

language of the said agreement. Clause 3 of the agreement has to be read with clause 12 and other terms and agreement which specifically speak of the right to manufacture and sell records only by the company.

5. Learned counsel for the appellant has submitted that in paras-17, 20 and 21 of plaint, the specific statements are made in this respect wherein it was averred by the appellant that defendant No.6 does not have any rights to grant any licence in the original song or any part thereof, as none of the respondents have any right to utilize the lyric of the original song or any part of the suit film "Namak Halal". The said lyric vests exclusively with the appellant. By virtue of the said agreement, respondent No.5 might have granted rights to the other respondents to make records of the film "Namak Halal" and literary, dramatic and musical works embodied in the said film without having any authority in this regard. Respondent No.6, therefore, did not have any right to use the lyric of the original song separately, hence the respondents are not entitled to use the part of the appellant's suit song.

6. Mr. Neeraj Kishan Kaul, learned Senior counsel appearing on behalf of respondent No.2 and Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of respondent No.6 have also made their respective submissions for some time. Before any further discussion, it is necessary to extract few relevant clauses of the agreement which read as under:-

1. This Agreement shall be for an initial period of one year (s) commencing on the 17th day of November, 1981 and shall continue for two successive periods of one year each on the same terms and conditions as are herein laid down unless the Company terminates the Agreement by giving notice in writing to the Producer 60 days before the expiration of the initial or extended period.

2. For the purposes of this Agreement the following words shall have the meanings 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 include a gramophone disc record magnetic tape record (whether 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 be used in conjunction with or part of a contrivance or appliance bearing or used for giving visual images but shall exclude a cinematograph film as immediately hereafter defined.

"CINEMATOGRAPH FILM" shall include soundtrack and 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 defined herein) provided that it shall only include such recordings as aforesaid as are used for presentation through cinema theatrical or television

transmission or diffusion media or by any gauge of film derived from such recordings so presented and shall not include any such recordings as are used for presentation in any other manner whatsoever.

"PERFORMANCE" shall include speech dialogue monologue recitation acting singing playing an instrument or instruments conducting or directing either alone or with another or others or any other sound and visual effects of any kind.

"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, whether or not the production thereof may have been completed after the expiry of this Agreement, which contain performances of any work(s) in respect of which the Producer directly or indirectly:

(i) is or shall be the producer or owner or

(ii) otherwise owns or controls or shall own or control the right to make available license and assign the rights granted to the Company under this Agreement.

"CONTRACT RECORDINGS" shall mean recordings of performances comprising the Producer's Films whether or not they are incorporated in final versions of the Producer's Films.

"CONTRACT WORKS" shall mean all works of a literary dramatic or musical nature performed in contract recordings.

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

(i) The copyright for making records of all contract works which are made available to the Company under the terms of this Agreement and the copyright, performing right and all other rights title and interest in and to the literary dramatic and musical works embodied in the Producer's Films including all rights of publication, sound and television broadcasting, public performance and mechanical reproduction of the said works.

(ii) The sole and exclusive right to make or authorize the making of any record embodying the contract recordings, either alone or together with any other recordings.

The Producer undertakes to execute or obtain the execution of such further assignments or assurances as may be required to safeguard the parties' rights.

(B) It is hereby declared that the rights hereby assigned and transferred or agreed to be assigned and transferred in pursuance of this Agreement include but are not limited to:

(i) the sole right of production reproduction sale (under such trademarks as the Company may select) use and public performance (including sound and television broadcasting) throughout the world by any and every means whatsoever of records made in pursuance of this Agreement.

(ii) the sole right to decide based on market demand whether and/or when to discontinue or recommence the said production and sale of records and to fix and alter the prices of such records and the irrevocable right and licence at all times to use and publish the names and photographs of artists, musicians, lyric writers, music directors and other persons associated with and/or engaged in the Producer's Films in any manner whatsoever and the Producer's trademarks and logos for labeling cataloguing promoting and marketing the said records.

(iii) the right to grant licences for publication, sound and television broadcasting public performance and mechanical reproduction of the contract works or any of them.

(iv) the right to use and public performance (including sound and television broadcasting) throughout the world by any and every means whatsoever of the contract works or any of them. And the Company shall have the irrevocable right to authorize any other person, firm or corporation to do any and all such acts and things.

9. The Producer:

(a) shall not directly or indirectly supply or make available to any individual firm company corporation or other person for the purposes of manufacturing and selling records the whole or any part of the soundtrack or recorded tape thereof or any other materials made or to be made available to the Company under this Agreement.

(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 soundtrack(s) and performances are or are intended to be recorded in any form from which a record may be offered to the public provided that such soundtrack(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 intended to be offered to the public except by or with prior written consent of the Company.

(c) shall not do any act which derogates from the grants to the Company in this Agreement or exercise any rights granted to the Company in this Agreement.

11. The Producer agrees that all the rights and obligations under this Agreement shall 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.

12(A) Subject as hereinafter mentioned the Producer shall be entitled in respect of all records made in pursuance of this Agreement (excluding records for promotional purposes) and sold by the Company and its Licenses in any part of the world and not returned to a royalty calculated on the Company's domestic

dealer price per record (excluding any taxes levied or leviable in respect of such sale by the Company and its Licenses and then less a packaging allowance at 20% on tape records) at the following rates:

(a) on a record reproducing:

(i) Contract recordings alone 7½% (seven and a half per cent) per record.

(ii) Contract recordings together with other recordings a proportion of 7½% (seven and half per cent) per record according to the number or duration of other proceedings.

(b) The Producer shall also be entitled to additional royalty in respect of records sold by the Company, but not by its Licensees, calculated as follows:

(i) When the total value of records sold by the Company appearing in the Producer's royalty statement during a half-year exceeds Rs.2½ lakhs but does not exceed Rs.10 lakhs - 1% (one per cent) of total half-yearly sales value on the basis of the Company's domestic dealer price.

(ii) When the total value of records sold by the Company appearing in the Producer's royalty statement during a half-year exceeds Rs.10 lakhs - 1½% (one and a half per cent) of total half-yearly sales value on the basis of the Company's domestic dealer price.

For arriving at the total half-yearly sales value proportionate value will be taken where contract recordings are combined in a record with other recordings.

(B) 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 purposes of this Clause 12 be considered as having been manufactured in India and to have been sold when sold by the Company; similarly records manufactured other than by the Company for any of its Licensees outside the country in which such Licensee has its main operating office may be deemed to have been manufactured in such country and to have been sold when sold by such Licensee.

(C) In addition to the royalty provided for in Clause 12(A) hereof the Producer shall also be paid an all-inclusive copyright royalty at the rate of 5% (five per cent) in respect of sales by the Company and its Licensees of records containing performances of contract works and the provisions of Clause 12 (A) shall apply to the calculation of such copyright royalty.

(D) Royalty as above shall be payable as long as records covered by the Agreement continue to be sold by the Company and/or its Licensees, but not beyond the period for which the copyright in records and in contract works is legally protected in each country in which such records are sold.

7. On the conjoint reading of clause 1, definitions contained in clause 2 and clause 3A, it is clear that the rights assigned by the respondent 5 to respondent

6 included "all other right title and interest in and to the literary, dramatic and musical works embodied in the producer's film", the definition of producer's film is provided under the definition clause which reveals all cinematograph films commenced and/ or under production during the period of this agreement and the extensions thereof, whether or not the production thereof may have been completed after the expiry of this agreement.

8. Thus, the right assigned in the "producer's film" which is defined to include all cinematograph films made during the period of the agreement include three rights which are literary, dramatic and musical works. The said clause 3A further uses the expression "All other right, title and interest", likewise it also uses the expression "All rights of publication, sound, television, public performance". Furthermore, the said clause 3A while assigning the rights uses the expression "absolutely" and "worldwide". All these wordings used in clause 3A are prima facie indicators of the intent of the parties to the agreement which is to assign the rights absolutely and worldwide and all the rights available with the producers.

9. The said clause 3A when read with clause 1 which relates to term of the agreement alongside with the definition of the producer's film under the definition clause which means all cinematograph films made during the said period of the agreement, the same may construed to mean that though the term of the agreement dated 29th September, 1983 was intended to operate for 3 years, the said agreement assigned all the rights in the cinematograph films made during the said periods which is called Producer's films absolutely and on worldwide basis. Thus, the said agreement may be construed to mean that term of the operation of the agreement may be distinct from the term of the assignment of the copyright which uses the distinct wordings in assignment clause in clause 3A which reads "all the rights", "worldwide", "absolutely".

10. The parties do not dispute that the said cinematograph film NAMAK HALAL was released during the said period of 3 years as defined under the agreement. It is only the term of copyright which has been disputed by the appellants. The said term according to us upon reading of the clauses of the agreement would be governed by clause 3 A which reflects the intention to assign the copyright absolutely and worldwide. Thus, the said agreement prima facie appears to assign the copyright absolutely for the cinematograph film or producer's film made during the term of 3 years in the agreement.

11. The same view has been also adopted by the learned Single Judge in his order by recording the finding as under:

In terms of Clause 3A defendant no. 6 has been given copyrights for making records of all "contract works" which are made available to the company, that is, defendant no. 6 as also the performing rights, including rights of publication, sound and television broadcasting, public performance and mechanical reproduction in respect of "producer's films". Work has been defined in Clause 2

of the agreement as literary, dramatic, musical or artistic work as defined in the Act. Producers" films have also been defined in Clause 2, which provides that the producers" films shall mean all cinematograph films commenced and/or under production during the period of the agreement but may have been completed after expiry of the agreement. Clause 11 further indicates that the defendant no. 5 had agreed that the agreement shall even govern the films which were under production; meaning thereby that the copyright in respect of the films which had commenced even in the month of October, 1984 but not completed, defendant no. 6 was given full right to exploit such films in the manner as detailed in the agreement. The Clauses of the agreement appears to be ambiguous and, thus, it is all the more necessary to give a harmonious construction thereof.

12. The said view if not conclusive one but can be a prima facie one of plausible view which can be formed on the basis of the meaningful reading of the clauses of the agreement

13. Accordingly, we find that upon reading the agreement dated 29th September, 1983, the said view adopted by the learned Single Judge as the one which can be prima facie a plausible one, if not conclusive which make the clauses of the agreement workable and operative in their field.

14. We do not find merit in the submissions advanced by the learned counsel for the appellant challenging the impugned order and the same are dealt with as under:

a) Firstly, we do not find merit in the submissions of the appellant that the term of the copyright is missing in the agreement and is confined to three years. We think that the term of the copyright is defined by the wordings used as "absolutely", "worldwide" and similarly the royalty clause 12 D provides for payment of royalty for the period not exceeding the term of legally protectable copyright in the country. The usual term of copyright is for 60 years after the death of the author. Thus, if the royalty is intended to be paid for such period, coupled with the usage of the word "absolutely" and "worldwide", for prima facie view, it can be said that the said agreement is not the one which assigns the rights for limited period but assigns the rights absolutely. Thus, the clause 1 as well as section 19 would have no bearing on the term of the copyright which is distinctly provided under clause 3A. Therefore, the submission of the learned counsel for the appellant is rejected.

b) We also do not accede to the submission of the learned counsel for the appellant that the reading of the clauses reveal that the rights assigned are confined to right to manufacture and sell the records in the musical work. We have already analyzed the clauses especially clause 3 A which explicitly reads "all rights", "literary", "dramatic" and "musical". Accordingly, the said submission of the learned counsel for the appellant is rejected as incorrect.

c) Similarly, learned counsel"s submission that the learned single judge has erroneously interpreted clause 3 A and 12 of the agreement can also not be

accepted. This is due to the reason that clause 3 A assigns number of rights and clause 12 talks about only one of the kind of eventuality relating to dealing with the manufacture of the records. There is no incongruity or inconsistency between the two clauses and clause 3 A as it stands in a broader sense can be a standalone clause unaffected by presence of clause 12.

d) The submission of the learned counsel for the appellant that the "lyric" rights may not be said to be vesting in the respondent no. 6 and as such could not have granted the license to respondent no. 1 and 2. As it is seen above in clause 3 A, the right assigned included "literary", "musical" and "dramatic", thus, it is difficult to visualize a scenario where under the lyric right is separately retained when no such exclusion, proviso or exception exists in the assignment clause. Thus, the said submission is equally meritless.

There is no other submission raised by the learned counsel for the appellant.

15. It is now time to recite the principle of law which guides us while dealing with the challenge laid to the orders passed in the interim stage by way of appeal. It is well settled that the challenge to the grant or decline of the ad interim order is an appeal against the principle and the said findings arrived at by the court of the first instance ought not be upset solely to substitute the appellate court's own view or also to arrive at the finding which could have been arrived had the matter been dealt with by the said appellate court as the court of first instance. The findings against the grant or negation of the interim orders can only be reversed when the discretion is exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction. (see *Wander Ltd. v. Antox India P.Ltd*: 1990 (Supp) SCC 727)

16. We therefore find that the view adopted by the learned Single Judge while refusing the interim order is prima facie a plausible one especially considering the clauses of the agreement and collective reading thereof. We also do not find learned Single Judge ignoring any settled principle of law regulating grant or refusal of the interim injunction. Therefore, the findings of the learned Single Judge are unexceptionable and do not warrant interference by this court. Accordingly, the appeal and all pending CMs are dismissed.