

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 440/2009**

Judgment reserved on: March 04, 2010

% Judgment pronounced on: April 07, 2010

M/S. PHONOGRAPHIC PERFORMANCE LTD

Having its registered Office at
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Veera Estate, Off New Link road
Andheri (W), Bombay-400 053

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Through it authorized representative
Debasrita Das Biswas.

...Appellant

Through Mr. Ashwani K. Mata, Sr. Adv.
with Mr. Himanshu Bagai, Mr. Thomas
George and Ms. Manmeet Sethi, Advocates

Versus

M/S. RADIO MID DAY(WEST) INDIA LTD

156 D, J. Dadajee Road
Tardeo Road
Mumbai-34.

...Respondent

Through Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Neil Hildreth, Advocate

Coram:

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Yes

- | | |
|---|-----|
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MADAN B. LOKUR, ACJ

Three issues that arise for our consideration are: First, whether this appeal under Section 72(2) of the Copyright Act, 1957 is maintainable against interlocutory orders passed by the Copyright Board. In our opinion, the answer to this question must be in the negative and we rely, inter alia, upon *Shah Babula Khimji v. Jayaben D. Kania & Anr*, (1981) 4 SCC 8 for our conclusion.

Second, assuming this appeal to be competent, whether the impugned orders passed by the Copyright Board are sustainable in law. In our opinion, the answer to this question must be a qualified affirmative.

Third, whether the helplessness expressed by learned counsel for the parties with regard to the administrative support given to the Copyright Board (for which, admittedly, the Board is not to be blamed) can be ameliorated. We propose to take up this issue altogether separately since we find that though there is a great deal that needs to be remedied it is beyond our jurisdiction in this appeal.

2. The Appellant is aggrieved by two orders passed by the Copyright Board. They are dated 25th August, 2009 and 26th August, 2009. The first grievance is that the Appellant was not allowed by the Copyright Board to confront Ms. Aarti Kathariya, witness for the Respondent / Complainant in Case No.6/02 with the annual report of the Respondent during her cross examination. The second grievance of the Appellant is that though the Copyright Board permitted cross-examination of Ms. Aarti Kathariya on 24th, 25th and 26th August, 2009 she was inexplicably discharged without giving an opportunity to the Appellant to complete her cross examination on 26th August, 2009. The third grievance of the Appellant is that it was not given a copy of the deposition of Ms. Aarti Kathariya recorded on 24th and 25th August, 2009 and, therefore, her cross-examination could not be effectively conducted on 25th and 26th August, 2009.

The Facts:

3. The Appellant is a non-profit organization and it administers the broadcasting rights of music companies who are its members. In this capacity, the Appellant is entitled to charge and collect licence fees from users of sound recordings (such as the Respondent). The Respondent is running an FM radio channel and in the course of its business it

broadcasts music for which it is liable to pay a licence fee to the Appellant.

4. As regards the quantum of licence fee payable, it appears that the parties could not reach any mutually satisfactory agreement. Accordingly, the Respondent (and several other similarly placed entities) made a complaint to the Copyright Board, under Section 31(1)(b) of the Copyright Act, 1957 for a compulsory licence of the complete repertoire of the Appellant. By way of an interim arrangement, the Copyright Board passed a “best judgment” order on 19th November, 2002 determining, inter alia, the standard rate royalty of Rs.1,200/- per needle hour payable to the Appellant by the Respondent during prime time and reduced rates during other times of the day. The decision of the Copyright Board is reported as *Music Broadcast Pvt. Ltd. v. Phonographic Performance Ltd., 2003 (26) PTC 70.*

5. The interim decision of the Copyright Board was challenged in the Bombay High Court which passed an order on 13th April, 2004. The decision of the Bombay High Court is reported as *Phonographic Performance Limited v. Music Broadcast (P) Limited, 2004 (29) PTC 282.* The effective order passed by the Bombay High Court, which is what we are concerned with in this appeal, set aside the “best judgment”

determination and required the radio stations including the Respondent to produce before the Copyright Board their audited accounts and other materials to enable it to arrive at a just figure for payment to the Appellant. The Bombay High Court was informed that the audited accounts of the complainants would be available and that they would be willing to produce them before the Copyright Board. Accordingly, the Bombay High Court remitted back the matter to the Copyright Board for re-determination of the compensation in terms of the provisions of Section 31 of the Copyright Act and on the basis of the material produced by both the parties.

6. Feeling aggrieved by the order of the Copyright Board, the Appellant approached the Supreme Court and its decision is reported as *Entertainment Network (India) Limited v. Super Cassette Industries Limited, (2008) 13 SCC 30*.

7. The Supreme Court endorsed the view of the Bombay High Court remanding the matter back to the Copyright Board for evaluating the compensation or licence fee payable to the Appellant.

8. After remand, the Copyright Board passed an order dated 28th July, 2009 indicating, inter alia, the progress made (or lack of it) during

the past year. The order passed by the Copyright Board makes for some interesting reading and is reproduced below:

“Matters after being remanded by the Supreme Court were listed for the first time on 29th July, 2008 and continued to be adjourned six times for hearing at an interval of every two months on the request of both the parties (30th September, 2008, 26th November, 2008, 28th January, 2009, 31st March, 2009 and 26th May, 2009) for the sake of filing pleadings and paper books, affidavit of oral witnesses etc. After one year, the evidence started in the forenoon of 28th July, 2009. Two witnesses for the Petitioner, namely, Ashish Shah and Ayan Chakraborty have deposed before the Board and have been examined & discharged. Shri Ameet Dutta, Counsel for the Respondent in all the cases relating to PPL has brought to our notice that certain evidences by affidavit were sent to the Registry of the Copyright Board on 27th July, 2009. In this regard attention is drawn to our Order dated 26th May, 2009 wherein it has been very specifically provided that list of witnesses, evidence by way of affidavit, name of the expert witnesses and their affidavit by way of evidence by the respondents need to be filed by 30th June, 2009. Since the above said evidence by affidavit has been filed belatedly by the Respondent, namely, Phonographic Performance Ltd., the same is not allowed and is not being taken on record.”

9. Feeling aggrieved by the latter portion of the above order declining to take on record the evidence by way of an affidavit, the Appellant preferred appeals in this Court under the provisions of Section 72 of the Act. The appeals were registered as RFA Nos. 264 to 272/2009.

10. The appeals came up for consideration before a Division Bench of this Court on 4th August, 2009 when an order was passed noting that the

dispute raised with regard to the interpretation of the order dated 28th July, 2009 is in respect of procedural aspects about leading evidence by the parties. To resolve the controversy, the Division Bench directed that all evidence by way of affidavits filed by 28th July, 2009 should be taken on record but no further evidence by way of affidavits or documents should be entertained. It was further observed that the evidence should be recorded expeditiously. Learned counsel for the parties was agreed that no adjournment would be taken on this account.

11. Pursuant to the order dated 4th August, 2009 cross-examination of the witnesses continued on 24th, 25th and 26th August, 2009. As mentioned above, the only witness whose evidence was recorded was Ms. Aarti Kathariya. We were told that on 24th August, 2009 learned counsel for the Appellant asked for a copy of her deposition but that was not supplied to him. He has made a grievance in this regard but that really pertains to the management of the affairs of the Copyright Board and we shall deal with it separately.

12. Be that as it may, on 25th August, 2009 recording the evidence of Ms. Aarti Kathariya continued and during the course of her cross examination learned counsel for the Appellant wanted to confront her with certain documents to disprove the assertions made in her affidavit

by way of examination-in-chief. This was disallowed by the Copyright Board on the basis of the order passed by the Division Bench of this Court on 4th August, 2009. It was noted in the order passed on 25th August, 2009 that the Appellant produced a computer printout of the annual report of the Respondent and wanted to confront the witness with this document. Two objections were raised by the Respondent in this regard: first, it was submitted that the computer printout was not an authentic copy of the annual report and second, it was not admissible in terms of the directions given by this Court on 4th August, 2009. The dispute regarding the authenticity of the document appears to have been resolved later but the Copyright Board did not permit the witness to be confronted with the document since it was not “admissible” in terms of the directions of this Court passed on 4th August, 2009.

13. As regards the contents of the order dated 26th August, 2009 we find that at about 3.00 pm the Copyright Board noted that Ms. Aarti Kathariya had been examined throughout the day on 24th and 25th August, 2009 as well as on 26th August, 2009. The Copyright Board suggested to learned counsel for the Appellant to conclude her cross-examination but he submitted that he intended to cross-examine her for one more day. The Copyright Board noted that there was much repetition in the questions asked and that there was another witness of

the Respondent who could be examined on the financial aspects. In fact the inputs of all the witnesses would contribute towards understanding the financial viability of the Respondent specifically, the FM radio industry as a whole and the reasonableness of the royalty to be settled. It was noted that the cross-examination had covered all the relevant issues. In view of all this, the cross-examination of Ms. Aarti Kathariya was closed and she was discharged at about 3.30 pm.

14. It is under these circumstances that the Appellant has preferred this appeal against the aforesaid two orders dated 25th and 26th August, 2009.

Preliminary Objection:

15. Learned counsel for the Respondent raised a preliminary objection regarding the maintainability of the appeal. It was submitted that an appeal against an interlocutory order on a procedural matter does not lie and, therefore, this appeal should be rejected at the threshold. Reliance was placed on the word “order” occurring in Section 72(2) of the Copyright Act. It was submitted that an appeal would lie only against an order that vitally affects the interests of a party. The submission was that the Copyright Board has merely declined to take on record a document, which is a procedural matter, and that refusal does not vitally affect the

interests of the Appellant. Section 72(2) of the Copyright Act reads as follows:

72. Appeals against orders of Registrar of Copyrights and Copyright Board.— (1) xxx xxx xxx.

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal under sub-section (1), may, within three months from the date of such decision or order, appeal to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain:

Provided that no such appeal shall lie against a decision of the Copyright Board under Section 6.

(3) xxx xxx xxx.

16. The issue of the maintainability of an appeal against an interlocutory order is not so vexed as it appears even though it has come up for consideration on several occasions.

17. The first decision cited before us to resolve the controversy was *Central Bank of India Ltd. v. Gokal Chand*, (1967) 1 SCR 310. That decision concerned itself with the meaning of “order” occurring in Section 38(1) of the Delhi Rent Control Act, 1958 which reads as follows:

“An appeal shall lie from every order of the Controller made under this Act to the Rent Control Tribunal (hereinafter referred to as the Tribunal) consisting of one person only to be appointed by the Central Government by notification in the Official Gazette.”

While interpreting this provision, the Supreme Court held:

“The object of Section 38(1) is to give a right of appeal to a party aggrieved by some order which affects his right or liability. In the context of Section 38(1), the words “every order of the Controller made under this Act”, though very wide, do not include interlocutory orders, which are merely **procedural** and do not affect the rights or liabilities of the parties. In a pending proceeding, the Controller may pass many interlocutory orders under Sections 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties. The legislature could not have intended that the parties would be harassed with endless expenses and delay by appeals from such procedural orders. It is open to any party to set forth the error, defect or irregularity, if any, in such an order as a ground of objection in his appeal from the final order in the main proceeding. Subject to the aforesaid limitation, an appeal lies to the Rent Control Tribunal from every order passed by the Controller under the Act. Even an interlocutory order passed under Section 37(2) is an order passed under the Act and is subject to appeal under Section 38(1) provided it affects some **right** or **liability** of any party.” (emphasis supplied)

18. *Parmeshwari Devi v. State, (1977) 1 SCC 169* was a case under the provisions of the Criminal Procedure Code. The Supreme Court relied on *Mohan Lal Magan Lal Thacker v. State of Gujarat, AIR 1968 SC 733* wherein the controversy centered round the meaning of Article 134(l)(c) of the Constitution. The Supreme Court held that no single test

can be applied to determine whether an order is final or interlocutory. It was then held:

“An interlocutory order, though not conclusive of the main dispute may be **conclusive** as to the subordinate matter with which it deals. It may thus be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person, who is not a party to the enquiry or trial, against whom it is directed.” (emphasis supplied)

19. In *V.C. Shukla v. State through CBI, 1980 Supp SCC 9* the question that arose was whether an appeal would be maintainable against an order framing a charge. The Supreme Court summed up the law relating to interlocutory orders in relation to the Criminal Procedure Code in paragraphs 24 and 34 of the Report. In so far as they are relevant to the case in hand, they are reproduced below:

“To sum up, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment.”

“Thus, on a consideration of the authorities, mentioned above, the following propositions emerge:

(1) that an order which does not **determine the right of the parties** but only one aspect of the suit or the trial is an interlocutory order;

(2) that the concept of interlocutory order has to be explained in **contradistinction to a final order**. In other words, if an order is not a final order, it would be an interlocutory order;

(3) that one of the tests generally accepted by the English courts and the Federal Court is to see if the order is decided in one way, it may **terminate the proceedings** but if decided in another way, then the proceedings would continue, because, in our opinion, the term ‘interlocutory order’ in the Criminal Procedure Code has been used in a much wider sense so as to include even intermediate or quasi-final orders;

(4) xxx xxx xxx

(5) xxx xxx xxx” (emphasis supplied)

20. The leading case on the subject (though it pertains to the Letters Patent) still remains *Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8*. In paragraph 113 of the Report, the Supreme Court makes a distinction between a final judgment, a preliminary judgment and an intermediary or interlocutory judgment. While dealing with an intermediary or interlocutory judgment, the Supreme Court held:

“Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1[of the Code of Civil Procedure] and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the **characteristics and trappings of finality** in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be **direct and immediate** rather than indirect or remote.” (emphasis supplied)

Similarly, paragraphs 114 and 115 of the Report are important and they read as follows:

“114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

“115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide **matters of moment or affect vital and valuable rights** of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.” (emphasis supplied)

21. The principles that may be culled out from the various judgments cited before us clearly suggest that for an interlocutory order to be appealable:

1. It must not be procedural in nature.
2. It must determine not only the rights or liabilities of the parties but their valuable rights or liabilities. In other words, it must decide a matter of moment.
3. It must have the characteristics or trappings of conclusiveness or finality or must result (in a sense) in the termination of proceedings.
4. An interlocutory or intermediary order is to be contradistinguished with a final order.

5. The effect of an appealable interlocutory order must be direct and immediate and not indirect and remote.

Examples of interlocutory orders have been given in *Gokal Chand* and *Shah Babulal Khimji* and are not repeated here.

22. Looked at in the light of the above principles, it is difficult to accept the view canvassed by learned counsel for the Appellant that this appeal would be maintainable. Clearly, the attempt to introduce the annual report on 25th August, 2009 is a off-shoot of the failure of the Appellant to take advantage of a procedural matter. The Appellant could very well have filed the document as per the requirement of the Copyright Board – sufficient time was given to the parties to place all their documents on the record. Since the Appellant failed to do so, it cannot be allowed to collaterally introduce the annual report by confronting a witness in cross-examination. Having failed to take advantage of the procedure laid down, the Appellant cannot be permitted to argue that a substantive and valuable right has been violated. The matter still remains in the domain of procedure and no amount of argument to the contrary can change the situation.

23. We also find that the order passed by the Copyright Board declining permission to the Appellant to confront the witness with the

annual report is not a decision on a matter of moment. No rights or liabilities of anybody have been decided in this regard. All that has happened is that the Appellant has not been allowed to place on record a document that it considers to be relevant and important. Even if the Copyright Board erred in its decision, it is not as if the Appellant is left without any remedy. On the facts of this case, as already noted by the Tribunal in its order dated 26th August, 2009 there is at least one more witness who can also deal with the financial aspects of the Respondent and who can appropriately be cross-examined by learned counsel for the Appellant. Therefore, discharging Ms. Aarti Kathariya from further cross-examination is of little consequence. That apart, additional evidence can be introduced, if permissible and necessary at a later stage and even at the appellate stage, so that no injustice is done to the parties. Clearly, therefore, it is not as if the matter would come to an end insofar as the Appellant is concerned if it is not allowed to bring the annual report on record.

24. In our opinion, there is also no finality attached to the decision rendered by the Copyright Board declining permission to the Appellant to collaterally place the annual report on record or discharging Ms. Aarti Kathariya. There is no conclusiveness attached to the decision of the Copyright Board nor would the proceedings terminate in the sense of a

final decision being more or less immediately inevitable. The proceedings can very well go on and, at worst, there may be some prejudice caused to the Appellant due to the non-placement of the annual report on record but then that situation is of the own making of the Appellant.

25. The sum and substance of the above discussion clearly brings out that not only are both the orders dated 25th and 26th August, 2009 interlocutory in nature as contradistinguished from a final order but that the impact of these two orders on the case of the Appellant before the Copyright Board is neither direct nor immediate. To our mind, there can be no doubt that not only are the two orders procedural in nature, but they are also interlocutory and not appealable in terms of the law laid down by the Supreme Court.

26. We, therefore, uphold the preliminary objection taken by the Respondent and conclude that an appeal against the impugned interlocutory orders is not maintainable.

27. Nevertheless, since we heard learned counsel for the parties in detail on the merits of the controversy, we proceed to discuss the substantive matter raised before us.

On merits:

28. The first question that we are required to answer is whether the Copyright Board was right in refusing to permit the Appellant to confront Ms. Aarti Kathariya with the annual report to disprove the case made out in her affidavit by way of examination-in-chief.

29. Before we answer this question, it is necessary to appreciate the underlying principles of Section 31(1)(b) of the Copyright Act, which reads as follows: -

“31. Compulsory licence in works withheld from public.- (1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work-

(a)

(b) has refused to allow communication to the public by broadcast of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable,

the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed.”

(emphasis supplied)

30. In this regard, paragraph 2(2) of the Statement of Objects and Reasons for the Copyright Act gives us an indication of what Parliament intended when this provision was enacted. This paragraph reads as follows: -

“2. Though the draft Bill follows generally, in a re-arranged form the main principles of the existing law, it has introduced several new features which are briefly indicated below:

(1) xxx xxx xxx

(2) Provision is made for setting up a Copyright Board which will determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, consider applications for general licences for public performances of works and will assess compensation payable under the Bill in certain circumstances. An appeal will lie to the High Court against the decisions of the Copyright Board.”

31. The jurisdiction of the Copyright Board can be invoked under Section 31(1)(b) of the Copyright Act by a complainant who considers that the owner of a copyright has offered unreasonable terms for the broadcast of a sound recording. When that happens, the Copyright Board is required to give the copyright owner a reasonable opportunity of being heard before directing the complainant to pay compensation to him (and determining other terms and conditions) for the broadcast. As a part of the “reasonable opportunity of being heard” the Copyright Board may hold such inquiry as it deems necessary.

32. The question is: what is the nature of inquiry contemplated? It appears to us that the inquiry postulated is quasi-judicial and quasi-adversarial in nature. We say this because the Copyright Board is not a Court nor is it a Tribunal. Two facts are significant in this regard and they are that the Copyright Board does not have the powers of a civil court to summon and enforce attendance of a witness or to require the discovery or production of a document, nor does it pass a decree (it only passes a final decision). Therefore, when the Copyright Board conducts an inquiry it does so with very limited powers.

33. What does such an inquiry entail? Frankly, we were unable to find any precedent in this regard. But, on first principles, there can be no doubt that the Copyright Board may devise its own procedure and while doing so, it is expected to adhere to the principles of natural justice. In *Union of India v. Delhi High Court Bar Assn.*, (2002) 4 SCC 275, the Supreme Court was concerned with tribunals set up under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It was noted in paragraph 17 of the Report:

“The very purpose of establishing the Tribunal being to expedite the disposal of the applications filed by the banks and financial institutions for realisation of money, the Tribunal and the Appellate Tribunal are required to deal with the applications in an expeditious manner. It is precisely for this reason that Section 22(1) stipulates that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure. **Therefore even though the Tribunal can regulate its**

own procedure, the Act requires that any procedure laid down by it must be guided by the principles of natural justice while, at the same time, it should not regard itself as being bound by the provisions of the Code of Civil Procedure.” (emphasis supplied)

34. While dealing with the issue of examining a witness, the Supreme Court observed in paragraph 22 of the Report:

“The reason for establishing Banking Tribunals being to expedite the disposal of the claims by the banks, Parliament thought it proper only to require the principles of natural justice to be the guiding factor for the Tribunals in deciding the applications, as is evident from Section 22 of the Act. **While the Tribunal has, no doubt, been given the power of summoning and enforcing the attendance of any witness and examining him on oath, but the Act does not contain any provision which makes it mandatory for the witness to be examined, if such a witness could be produced.**” (emphasis supplied)

Consequently, it is clear that the examination of a witness is not an essential requirement of adjudication by a Tribunal.

35. It was, thereafter, held in paragraph 23 of the Report as follows:

“In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order that the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same.... [I]t would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, **if it appears to the Tribunal, that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not**

appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226 and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before them ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it.”
(emphasis supplied)

Therefore, if a witness is summoned, then a party would be entitled to cross-examine him and if the witness does not appear, then his affidavit by way of evidence may be disregarded. The necessity of summoning a witness is best left to the discretion of the Tribunal.

36. Subsequently, in *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*, (2009) 8 SCC 646 the Supreme Court clearly expressed the view that in a Tribunal, the examination and cross examination of a witness should be an exception and not the rule.

This is what is said in paragraph 86 of the Report:

“The Debts Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act.] The power of the Tribunal to grant interim order is attenuated with circumspection. [See *Dataware Design Labs (P) Ltd. v. SBI*, 30 Comp Cas at p.184.] Concededly in the proceeding before the Debts Recovery Tribunal detailed examination, cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. **Taking recourse to such proceedings would be an exception.** Entire focus of the proceedings before the Debts Recovery Tribunal centres round the legally recoverable dues of the bank.”

(emphasis supplied)

37. Applying these principles, it is quite clear that an inquiry by the Copyright Board entails a decision, rather than an adversarial adjudication. In arriving at its decision the Copyright Board need not necessarily examine a witness. It may take a decision on affidavits, depending upon the requirements of the matter in hand. Only if it is necessary to cross examine the deponent of an affidavit (as an exception rather than as a rule) the Copyright Board may require the attendance of such a person and then permit cross examination. If the deponent does not enter the witness box, then his affidavit may be disregarded. It is also quite clear that an inquiry by the Copyright Board is not a trial resulting in a decree, nor does the Board have the trappings of a Court or even a Tribunal. The proceedings before the Copyright Board, therefore, cannot be converted into a trial or transformed into a formal adjudicatory process through some indirect process.

38. It is in this background that it is necessary to examine the contention of learned counsel for the Appellant that he should have been allowed to confront Ms. Aarti Kathariya with the annual report of the Respondent. Learned counsel first relied upon *Niranjan Kumar v. Poonam Chawla*, 135 (2006) DLT 39. That case arose out of a suit for possession, recovery of arrears of rent and mesne profits in which the defence of the petitioner therein was struck off. A learned Single Judge

of this Court took the view, relying upon *Modula India v. Kamakshya Singh Deo*, (1988) 4 SCC 619 that in a case where the defence is struck off, there is nothing which precludes the parties from confronting a witness of the other party in cross examination with documents that are not on record. It is difficult to see the relevance of this case.

39. Reliance was also placed on *Subhash Chander v. Shri Bhagwan Yadav*, MANU/DE/3343/2009. In this decision, it was held by a learned Single Judge of this Court:

“The legislative intent behind Order 7 Rule 14(4) and Order 8 Rule 1A(4) and Order 13 Rule 1(3) [of the Code of Civil Procedure] appears to be to permit an element of surprise, which is very important in the cross examination of witnesses. A litigant may well be of the opinion that if the document on the basis whereof he seeks to demolish the case of the adversary is filed on the court record along with pleadings or before framing of issues, with resultant knowledge to the adversary, the adversary may come prepared with his replies thereto. On the contrary, if permitted to show/produce the document owing to element of surprise, the adversary or witness, may blurt out the truth.”

40. *Surinder Kumar Bajaj v. Sheela Rani Pasricha*, MANU/DE/3264/2009 expresses the same view and according to learned counsel, this would include an “element of surprise” that might make the witness “blurt out the truth”. In other words, the witness should not be forewarned or made aware of the material sought to be introduced in the cross examination.

41. Broadly speaking, what the learned counsel says may be correct in respect of a trial. But in this case, the Copyright Board is conducting an inquiry only for determining the amount of compensation payable. In such a situation, there is really no question of an “element of surprise” postulated and both the parties are expected to place before the Copyright Board all the available material so that a fair determination of the amount of compensation payable, is made. If the entire controversy is viewed in this light, which in our opinion it should be, then it is clear that both the parties ought to have placed the entire relevant material on record to enable the Copyright Board to arrive at a just compensation. For this purpose, the Copyright Board, while devising its procedure in conformity with the principles of natural justice, gave exactly one year’s time to the parties from 29th July, 2008 till 28th July, 2009 to place their material on record and as many as six adjournments were granted for this purpose at an interval of every two months. Surely, this was adequate time for the parties to place on record whatever material they desired.

42. Admittedly, Ms. Aarti Kathariya filed her affidavit by way of evidence sometime in March, 2009. This being so, the Appellant was fully aware of the contents of her affidavit when she was first produced in the witness box on 24th August, 2009. It was also clear what the

witness was going to say. Indeed, her affidavit was already on record and the Appellant knew what she in fact had said. Therefore, to disprove her assertions in an inquiry, what was required for the Appellant was to place on record all necessary documents to show that she was not necessarily telling the truth or the complete truth. The annual report of the Respondent was admittedly a published document and was available on the internet and the Appellant could surely have placed this on record by filing an affidavit. By attempting to confront the witness during her cross examination with this document by way of an “element of surprise” to make her “blurt out the truth” is really an attempt to convert an inquiry into a trial which, in our opinion, is not postulated by the Act.

43. To conclude the discussion on this issue, we may refer to two decisions cited by learned counsel for the Respondent. In ***Liberty Footwear Co. v. Force Footwear Co., MANU/DE/2574/2009*** a learned Single Judge of this Court took the view that in procedural matters, quasi judicial tribunals are entitled to adopt a just and fair procedure. It was observed that every procedure is acceptable and permissible until it is shown to be prohibited by law. This is what was said:

“It is well settled that quasi judicial tribunals on procedural matters are entitled to adopt a procedure which they feel is just and fair. Unless there is a specific or implied bar or prohibition by the statute, a quasi judicial tribunal has flexibility and can follow procedure, which is fair and compliant with the principles of

natural justice. Every procedure is acceptable and permissible until it is shown to be prohibited by law. See, *Hansraj Harjiwan Bhate v. Emperor*, AIR 1940 Nag. 390 following *Narasingh Das v. Mangal Dubey* ILR 1882 All 583. Further quasi judicial tribunals have ancillary and incidental powers to ensure that there is effective adjudication and decision. In *Suresh Jindal v. BSES Rajdhani Power Ltd.* (2008) 1 SCC 341, the Supreme Court has observed that a statutory authority while exercising statutory powers may do all things, which are necessary for giving effect thereto.”

44. In *Union of India v. T.R. Varma*, AIR 1957 SC 882 the Supreme Court held in paragraph 14 of the Report as follows:

“Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry, and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law. **Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed.** Vide the recent decision of this Court in *New Prakash Transport Co. v. New Suwarna Transport Co.* [1957] S.C.R. 98, where this question is discussed.”

(emphasis supplied)

45. All the decisions mentioned above have been cited in the context of the procedure to be followed by Tribunals. We have, however, made a clear distinction between the procedure that ought to be followed by an adjudicating Tribunal and an inquiring Copyright Board. Based on this distinction, we are of the opinion that the Copyright Board did not commit any procedural error in declining to permit the Appellant from trying to surprise Ms. Aarti Kathariya. The extent of powers and the jurisdiction of the Copyright Board, in a case such as the present, is rather limited and it would not be appropriate to expand it to such an extent that an inquiry becomes a prolonged trial.

46. Having said this, we would like to add that any Court, Tribunal or authority dealing with a matter in its original jurisdiction is always confronted with the difficult task of when to include or exclude “evidence”. A case like the one that we are dealing with suggests that it is advisable to err on the side of inclusiveness rather than to be exclusionary. The reason, quite clearly is that erroneously included “evidence” can be excluded at any time while erroneously excluded “evidence” (if it has to be included at a later stage) causes inconvenience and delay. It is true that at the appellate stage the Code of Civil Procedure and the Criminal Procedure Code do provide for the rectification of such errors by permitting additional evidence to be

adduced (Order XL Rule 27 and Section 391 respectively) but that would be, in a sense, a poor substitute for evidence being available for decision-making at the original stage.

47. Indeed, this aspect was adverted to by the Supreme Court a few years ago in *State v. Navjot Sandhu*, (2003) 6 SCC 641 in which *Shantilal Panchal v. State of Gujarat* (2001) 3 SCC 1 was extensively quoted. The following passages from paragraph 13 and 14 of *Shantilal Panchal* are worth repeating:

“Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If

the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)”

48. If the view expressed by the Supreme Court is placed beside the case that we are dealing with, it would be clear that if the annual report sought to be introduced in the cross examination of Ms. Aarti Kathariya were to be taken on record, even erroneously, then it could be excluded from consideration by the Copyright Board at the time of passing final orders, or even at the appellate stage. But if at some later stage, if the annual report is found to have been erroneously excluded, it will cause immense inconvenience to the parties in bringing it on record. However, we need say nothing more on this subject, except that on the facts of this case, the Copyright Board did not err in declining permission to the Appellant to bring the annual report on record by confronting Ms. Aarti Kathariya. Whether the annual report can be brought on the record at the appellate stage is not an issue before us and so we do not pronounce upon it.

49. The second question that we are required to consider on merits is whether the Copyright Board was correct in holding that the annual

report and other documents were “inadmissible” in view of the order dated 4th August, 2009 passed by a Division Bench of this Court in the earlier appeals [RFA Nos. 264 to 272 of 2009] filed by the Appellant.

The order dated 4th August, 2009 reads as follows:

“We have heard counsel for the parties. With their consent, we have taken up these appeals for disposal straight-away.

The dispute is with regard to the impugned order passed by Board in respect of procedural aspects qua leading of evidence by the parties. We are of the view that the entire controversy can be sorted out if we issue appropriate directions. The directions are: -

1. The evidence-affidavits of parties, which have already been filed or served upon opposing counsel by the 28.07.2009 shall be taken on record. All such witnesses whose affidavits have been either filed or served upon opposing counsel prior to 28.07.2009 may be cross examined by the parties. No further evidence affidavits or documents shall be entertained.

2 & 3. xxx xxx xxx

We make it clear that we have not examined the allegations against the Board nor have we expressed any view on the question of maintainability.

The appeals are disposed of, accordingly, with the above directions.”

50. We are not called upon to interpret the order dated 4th August, 2009. All that we need say is that the Division Bench felt concerned by the time taken by the Copyright Board to complete the procedural matters. It is to cap this wavering that had been going on for more than a year that prompted the Division Bench to issue the direction that it did. It

was obviously felt that more than sufficient time had been granted to the parties to put all relevant material on record and that the procedural issues did not brook any further delay. It was for this reason that a direction was given to complete the recording of evidence expeditiously. In our opinion, the Copyright Board misunderstood or misinterpreted the order dated 4th August, 2009.

51. The issue before the Division Bench or before the Copyright Board was not regarding the admissibility in evidence or otherwise of the annual report and other documents. The controversy before the Division Bench was with regard to “procedural aspects qua leading of evidence”. This was resolved by the Division Bench and the Copyright Board was only expected to follow the directions given by the Division Bench. The issue of admissibility of the documents was a matter entirely independent of the order passed by the Division Bench. The Copyright Board, therefore, could not have relied on that order (as it did on 25th August, 2009) to declare whether any document was admissible in evidence or not. To this extent, we are of the opinion that the Copyright Board erred in its conclusion. However, we do not propose to pronounce on this issue but leave it to the parties to take such steps at the appropriate stage, as may be advised, to make their submissions

regarding the “admissibility” of those documents adverted to in the order of the Copyright Board dated 25th August, 2009.

52. Learned counsel sought to tie up his submission in this regard with the order passed by the Bombay High Court to the following effect:

“We also find considerable force in the submission made on behalf of the complainants that what is to be determined by the Copyright Board is compensation payable to the PPL [the Appellant before us] and therefore the PPL was also under an obligation to produce entire material on its behalf to justify the rates at which it is claiming the compensation. The PPL will also have to show how much loss it has suffered because of fall in sale of cassettes. Similarly, the FM stations [like the Respondent before us] will also have to produce before the Copyright Board their audited accounts and other materials so that the Copyright Board can arrive at a just figure. We have been informed that now the audited accounts of the complainants will be available and that they are willing to produce them before the Copyright Board.”

The submission of learned counsel was that since the Respondent did not produce the audited accounts on record, the Appellant had no option but to introduce material in this regard through the cross examination of Ms. Aarti Kathariya. There are two clear answers to this submission. Firstly, the order of the Bombay High Court was available with the parties and if one of them chose not to abide by the terms of that order, and chose not to produce relevant material before the Copyright Board, then it did so at its own peril. Secondly, in a given situation, the Copyright Board is

empowered to draw an adverse inference against either party if it withholds relevant material. Either way, the interests of both parties are safeguarded.

53. One grievance voiced by learned counsel for the Appellant was that the cross-examination of Ms. Aarti Kathariya was suddenly closed on 26th August, 2009 by the Copyright Board. A perusal of the order passed on that date shows that the witness was examined for two and a half days on financial aspects concerning the Respondent. By all standards, the cross-examination was rather lengthy. The Copyright Board observed that there was even some repetition in the questions asked. Of course, learned counsel for the Appellant says that the repetition was occasioned by the fact that the deposition of the witness recorded on 24th and 25th August, 2009 was not available but even discounting that, the cross-examination of Ms. Aarti Kathariya was quite prolonged. The Copyright Board felt, in its discretion, that the cross-examination had gone on for too long and that any further information on the financial aspects of the Respondent could also be obtained by cross-examining other witnesses. We do not think the exercise of discretion by the Copyright Board is perverse in any manner. On the contrary, it was exercised for curtailing what was perceived to be unnecessary cross-examination of the witness and in the interest of

expeditious termination of the enquiry. In our opinion, these are relevant and weighty considerations.

54. We may note that the grievance expressed by learned counsel for the Appellant appears to us to be occasioned more by the summary manner in which the cross-examination was terminated rather than the fact of its termination but that is hardly a reason to set aside the order dated 26th August, 2009 passed by the Copyright Board.

Administrative issues:

55. The final submission of learned counsel for the Appellant is that he was prejudiced in conducting the cross examination of Ms. Aarti Kathariya since he was not supplied, even on demand, a copy of her cross examination conducted on 24th and 25th August, 2009. To us, this appears to be an issue concerning the administrative support available to the Copyright Board. It is not the contention of learned counsel that the Copyright Board deliberately or for some inexplicable reason did not supply the deposition of the witness. It appears that adequate secretarial assistance and technical facilities are not available with the Copyright Board and it is for this reason that it was unable to provide the deposition on a daily basis, as asked for. It is possible that due to this shortcoming, learned counsel may have been handicapped to some

extent, but this cannot be adequate ground to set aside the impugned orders. It seems to us that learned counsel would have faced the same problem when the witnesses who had earlier entered the witness box were examined. No issue was made of this at that time or even before us. The “hindrance” caused to learned counsel was not of the making of anybody in particular, but due to a generally poor quality of facilities made available with the Copyright Board. That apart, no specific grievance was made by learned counsel in this regard – the grievance was made in a general vein. For the present, therefore, we leave it at that.

Conclusion:

56. We uphold the preliminary objection of learned counsel for the Respondent that this appeal is not maintainable.

On the merits of the case, we hold that the Copyright Board did not err in declining to permit the Appellant from introducing the annual report of the Respondent at the stage of the cross-examination of Ms. Aarti Kathariya. However, we have not expressed any opinion whether this document can be introduced on the record of the case at the appellate stage because that issue was not before us.

We hold that the Copyright Board erred in its order passed on 25th August, 2009 in relying on the order dated 4th August, 2009 passed by a Division Bench of this Court for coming to the conclusion that the annual report of the Respondent and other documents were “inadmissible” in evidence. The admissibility or otherwise of those documents was not before the Division Bench at all. To this limited extent we set aside the order of the Copyright Board dated 25th August, 2009 leaving this issue to be decided at some appropriate stage, as may be advised.

Since the order of the Division Bench suggests its anxiety to have the complaint before the Copyright Board expeditiously disposed of, we would request the Copyright Board to try and quickly dispose it off, keeping in mind at all times the procedural practice suggested by the Supreme Court in *Navjot Sandhu* and the law laid down by us.

57. The appeal is partly dismissed.

(MADAN B. LOKUR)
ACTING CHIEF JUSTICE

April 07, 2010
mv/ncg

(MUKTA GUPTA)
JUDGE