

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No.250/2011 & CM No.8977/2011

Music Broadcast Pvt. Ltd.

...Appellant through
Mr. C.A.Sundaram, Sr. Adv.,
Mr. Sandeep Sethi, Sr. Adv.
with Mr. Sagar Chandra,
Mr. Rupesh Gupta, Mr. Zafar
Inayat and Ms. Rohini Musa,
Advs.

versus

Super Cassette Industries Ltd.

...Respondent through
Mr. Amit Sibal, Mr. Neel
Mason, Mr. Harsh Kaushik,
Mr. Sankalp Dalal,
Mr. K.K.Khetan and
Mr. Abhay Chattopadhyay,
Advs.

Date of Hearing : July 05, 2011

% Date of Decision: September 01, 2011

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

- | | |
|--|-----|
| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. This Appeal, which has been argued in minute detail and with great vehemence by learned counsel for the adversaries, raises a neat legal nodus, viz. whether the Copyright Board possesses power to pass interim orders in proceedings under Section 31 of the Copyright Act, 1957 ('Act' for short). Section

31 provides for the grant of a compulsory licence in respect of copyrighted works. The contention of Mr. Akhil Sibal, learned counsel for the Respondent, is that interim orders or arrangements are not postulated by the said provision of the Act, whereas Mr. C.A. Sundaram and Mr. Sandeep Sethi, learned Senior Counsel for the Appellant, contend to the contrary. By the impugned Order, the Copyright Board has come to the conclusion that it was powerless to grant any interim relief, that is, permit the exploitation of a copyrighted work on appropriate terms, during the pendency of proceedings under Section 31 of the Act. If the answer to the first question is that the Board is competent to pass interim orders, then we would have to consider, contemplate and formulate the terms on which interim relief can be granted.

2. Succinctly stated, the Appellant, Music Broadcast Pvt. Ltd., had entered into a Memorandum of Understanding (MoU) with Super Cassette Industries Limited (SCIL), the owner of the copyright in the sound recording as well as literary work in various popular music. The Respondent, therefore, is the holder of rights which may otherwise fall within the repository and ownership of the Phonographic Performance Limited with regard to sound recording and Indian Performance Rights' Society (IPRS) in respect of music and literary works. The grant of licences to private FM Channels, such as the Appellant before us, has greatly

enhanced the financial significance of both these rights, leading to an exponential explosion of litigation.

3. The parties before us have executed an MoU, *inter alia*, agreeing to pay/receive royalty at the specified rates on a “per needle hour” computation. For the purposes of answering the controversy before us, we think it necessary to reproduce the following clause in the MoU:-

9. The Parties to this MOU undertake that if any Court/Copyright Board whether in any interim or final order where both SCIL and MBPL are parties, stipulates a rate different from what is agreed by the parties as contained in Annexure A, then MBPL shall make payments to SCIL at such modified rate so stipulated by the Court/Copyright Board, with effect from the date so stipulated in such order. If the rate at which the Fees as per clauses 2 and 3 above is modified or revised pursuant to any provision of this MOU, then the parties may adjust its rights and obligations and payment/refund/adjustment of License fee shall be made accordingly.

4. It appears that in the year 2001, the Appellant had approached the Copyright Board, alleging that the royalty claimed by the Respondent was unreasonable. The Copyright Board, by Order dated 19.11.2002, granted a compulsory licence to the Appellant/Applicant at ₹ 661/- per needle hour. The Respondent Company owns and controls the largest repertoire of contemporary Hindi songs and licenses its works for broadcast through radio stations, independent of any registered copyright society. This

adjudication was challenged in the Bombay High Court by the adversaries before us. The Orders of the Copyright Board were set aside and the matter was remanded back to the Copyright Board for a fresh adjudication of the amount of royalty.

5. In separate proceedings, in which the Respondent was the Defendant, the Copyright Board, in terms of its Order dated 20.10.2003, had directed the Registrar of Copyrights to grant a compulsory licence under Section 31(1)(b) of the Act to Entertainment Networks (India) Limited [ENIL]. That decision was assailed before the Division Bench of the Delhi High Court in *Super Cassette Industries Ltd. -vs- Entertainment Network (India) Ltd.*, AIR 2004 Delhi 326 which set aside the said compulsory licence. ENIL was restrained from infringing the copyright of Respondent/SCIL. The matter was remanded back to the Copyright Board. An Appeal from the Order of the Division Bench came to be decided in ***Entertainment Network (India) Limited -vs- Super Cassette Industries Limited***, (2008) 13 SCC 30. For facility of reference, we shall reproduce some salient paragraph from the said Judgment which must form the bedrock for all subsequent decisions touching upon the nature of a compulsory licence under Section 31 of the Act:-

90. The freedom to contract is the foundation of economic activity and an essential aspect of several Constitutional rights including the freedom to carry on trade or business guaranteed under Article 19(1)(g) and

the right to property under Article 300A of the Constitution of India. But the said right is not absolute. It is subject to reasonable restrictions.

91. Section 30 enables the owner of the copyright to grant any interest in the copyright by a license in writing signed by him or by his duly authorized agent.

92. The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee. The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful.

93. The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2(j). But, that does not mean, as would be noticed from the discussions made hereinafter, that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is

subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.

...

108. The meaning of a word must be attributed to the context in which it is used. For giving a contextual meaning, the text of the statute must be kept in mind. An act of refusal depends upon the fact of each case. Only because an offer is made for negotiation or an offer is made for grant of license, the same per se may not be sufficient to arrive at a conclusion that the owner of the copyright has not withheld its work from public. When an offer is made on an unreasonable term or a stand is taken which is otherwise arbitrary, it may amount to a refusal on the part of the owner of a copyright.

109. When the owner of a copyright or the copyright society exercises monopoly in it, then the bargaining power of an owner of a copyright and the proposed licensee may not be same. When an offer is made by an owner of a copyright for grant of license, the same may not have anything to do with any term or condition which is wholly alien or foreign therefore. An unreasonable demand if acceded to, becomes an unconstitutional (sic. unconscionable) contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording. A de jure offer may not be a de facto offer.

.....

116. Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of license are unreasonable. It, no doubt, provides for a mechanism but the mechanism is for

the purpose of determination of his right. When a claim is made in terms of the provisions of a statute, the same has to be determined. All cases may not involve narrow commercial interest. For the purpose of interpretation of a statute, the court must take into consideration all situations including the interest of the person who intends to have a licence for replay of the sound recording in respect whereof another person has a copyright. It, however, would not mean that all and sundry can file applications. The mechanism to be adopted by the Board for determining the right of a complainant has been provided under the Act.

117. Explanation appended to Section 31 also plays an important role as it seeks to make a distinction between an artistic work on the one hand and a cinematographic films or sound recording on the other. We are not concerned therewith at this stage. Admittedly in terms thereof the principles of natural justice are required to be complied with and an enquiry has to be held. The extent of such enquiry will depend upon the facts and circumstances of the case. A finding has to be arrived at that the grounds of refusal by an owner of a copyright holder is not reasonable. Only upon arriving at the said finding, the Registrar of copyright would be directed to grant a license for the said purpose. The amount of compensation payable to the owner of the copyright must also be determined. The Board would also be entitled to determine such other terms and conditions as the Board may think fit and proper. Registration is granted only on payment of such fees and subject to compliance of the other directions.

6. ENIL was not concerned with the principal conundrum before us which is whether interim orders can be passed in proceedings under Section 31 of the Act. Their Lordships had disapproved of the Board's refusal to examine witnesses who were then present before it. Importantly, the ratio of *Phonographic Performance Ltd. -vs- Maitra*, 1998 FSR 749, which is to the effect that the owner of a copyright has complete discretion to exercise and exploit proprietary rights by licensing some and not others, was held not to apply in India.

7. We must immediately consider a Single Bench decision of the Bombay High Court reported as ***Music Choice India Pvt. Ltd. -vs- Phonographic Performance Limited***, 2009(39) PTC 597 (Bombay). It appears that a Civil Suit had been filed praying for interim relief which was intrinsically relatable to Section 31 of the Act. The Court was of the opinion that Section 31 was a pandect, and, therefore, it alone could be resorted to. Consequently, a civil suit seeking relief which was contemplated by Section 31 was not maintainable. The learned Single Judge had also rejected the argument that the suit was maintainable since interlocutory or interim relief could not be obtained under Section 31 of the Act. According to him, the Act did not prohibit the "Copyright Board from passing any interim order of determination of reasonable fees by way of royalty or compensation payable by the plaintiff, if an application in that behalf is made and a prima facie case is made

out". Support was garnered by the learned Single Judge from the decision in ***Hotel Imperial –vs- Hotel Workers’ Union***, AIR 1959 SC 1342 wherein it had been enunciated that interim relief was admissible under Section 10(4) of the Industrial Disputes Act, 1947, being a matter incidental to the main question referred to the Tribunal. The decision of the learned Single Judge in ***Music Choice*** was upheld by the Division Bench in *Music Choice India Pvt. Ltd. –vs- Phonographic Performance Limited*, (2010) Vol. 112(1) Bom. LR 470(DB). A frontal attack had also been made to the conclusion of the learned Single Judge, vis-à-vis the capacity and powers of the Copyright Board to grant interim relief, which the Division Bench refrained from overturning.

8. Several Judgments have been cited before us on the question whether interim orders can be passed even where the concerned statute does not explicitly grant this power. ***Hotel Imperial*** has already been referred. In *Grindlays Bank Ltd. –vs- Central Government Industrial Tribunal*, 1980 (Supp.) SCC 420, one of the contentions was that neither the Industrial Disputes Act, 1947 nor the Rules framed thereunder conferred any power on the Tribunal to set aside an *ex parte* award. In this context, Their Lordships opined that the “Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule

of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties". In *Sakiri Vasu -vs- State of Uttar Pradesh*, (2008) 2 SCC 409, the Supreme Court considered it "well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective." In *Savitri -vs- Govind Singh Rawat*, (1985) 4 SCC 337, the Apex Court held that the Magistrate has implied powers under Section 125 of the Code of Criminal Procedure, 1973 to pass interim orders of maintenance. Their Lordships had also reiterated that "if two views are possible, one advancing the object of the legislation and the other causing hardship, the former should be preferred." In *Income Tax Officer, Cannanore -vs- M.K. Mohammed Kunhi*, AIR 1969 SC 430, the Supreme Court thought it doubtful whether the power to grant a stay could be found in Section 255(5) of the Income Tax Act, 1961. Nevertheless, Their Lordships were of the opinion that the "Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is

particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf. It could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory."

9. Reference was made to *Polini -vs- Gray*, (1879) L.R. 12 Ch. D. 438 where the Court of Appeal had cautioned against the refusal or failure to grant interlocutory relief so as to ensure that "the ultimately successful party is to reap the fruits of that litigation, and not obtain merely a barren success". The question that arose in *Dorab Cawasji Warden -vs- Coomi Sorab Warden*, (1990) 2 SCC 117 was whether the Court had the power to grant an *ad interim* injunction and the Supreme Court held that failure to do so would cause irreparable injury and would run counter to the balance of convenience.

10. Reliance has been placed by Mr. Sibal on ***Morgan Stanley Mutual Fund -vs- Kartick Das***, (1994) 4 SCC 225. The Calcutta District Forum had granted an *ex parte ad interim* injunction restraining the subject Public Issue from being floated. One of the contentions, which found favour with Their Lordships, was that

Section 14 of the Consumer Protection Act, 1986 does not provide for the grant of any interim relief but contemplates only a final relief. After reproducing the Section, it was held that the said provision postulated only the grant of final relief. A perusal of four instances enumerated in Section 14 would make it manifestly clear that interim relief in their context was not possible since that would tantamount to “disregarding even the balance of convenience”. Accordingly, we are not persuaded by Mr. Sibal to interpret ***Morgan Stanley*** as indicating that the Supreme Court had categorically stated that interim relief could not be granted because this was not explicitly vested in the Forum; this is especially so since the Court referred to the facet of “balance of convenience.”

11. The origins of the circumstances in which *ad interim* injunctions can and should be granted are obscure, as these principles are shrouded in legal antiquity. Our research has led us to *Johnson -vs- Goldswaine*, (1795) 3 Anstruther 749 145 E.R. 1027 where the Court declined to pass an injunction as it was of the opinion that the lifting of straw and manure was merely a breach of contract and not a case of irreparable waste (injury). In *Field -vs- Jackson*, (1782) Dickens 599 21 E.R. 404, the Court did not find the existence of a *prima facie* case and, therefore, declined an injunction. In *Hills & Al’ -vs- Universitat. Oxon. & Al’*, (1684) 1 Vernon’s Cases in Chancery 275 23 E.R. 467, an injunction was not

granted as the balance of convenience was found to be against the applicant. We mention these cases only to emphasise that the grant of interim relief is not dependent upon a specific statutory empowerment to this effect. In *Manohar Lal Chopra -vs- Seth Hiralal*, AIR 1962 SC 527, one of the questions which had arisen was that since Section 94 of the CPC contemplated the issuance of interlocutory orders “if it is so prescribed” and since Order XXXIX of the CPC laid down certain circumstances in which temporary injunctions could be granted, the Court was powerless to issue injunctions if the facts of the case did not fall within those parameters. This argument was repelled, *inter alia*, because Their Lordships were of the opinion that “the courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order XXXIX CPC. It is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power”. Law enjoins that where a court or tribunal or quasi judicial authority finds firstly existence of a *prima facie* case in favour of plaintiff, secondly that the balance of

convenience is also in favour of the plaintiff and thirdly that the plaintiff will suffer irreparable injury if protection is not extended, it must grant *ad interim* relief. This is a common law principle and is not founded on any statute or legislation. The only exception which readily comes to our mind is Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC for short), which provision has been held in ***Seth Hiralal*** not to be exhaustive of the circumstances in which an *ad interim* injunction can be granted.

12. Section 31 of the Act postulates the grant of a compulsory licence. In ***Entertainment Network (India) Limited***, it has indubitably been observed that a compulsory licence is not an inherent right, obviously in the sense and to the extent that prevails in Australia, China, Japan and the United Kingdom. One of the objects of the Copyright (Amendment) Bill, 2010 is to bring the law obtaining in India in consonance with the aforementioned countries. This, however, does not mean that interim orders cannot be passed by the Copyright Board even as the law presently stands. This is despite the contention of Mr. Sibal that Section 52(1)(j) of the Act specifically invests the power to pass interim orders.

13. It is beyond cavil that under Section 31 of the Act, the Copyright Board must return a final finding that the holder of the copyright has unreasonably refused a licence. Mr. Sibal contends that there may be myriad reasons for the refusal. While that may

be so, it is facially obvious that in the case before us, the dispute had arisen because of a disagreement on the quantum of fees demanded or offered to be paid. If interim relief is not granted, the immediate and direct consequence will be the complete frustration of the rights under Section 31 of the Act. We have already mentioned litigation which has been pending for almost ten years and which has been remanded back to the Copyright Board by the Bombay High Court. If interim relief is impermissible, the broadcasters will be disentitled to play any part of the repertoire of music owned by the copyright holder because of the latter refusing to grant a licence. This will, in effect, compel the broadcaster, or any party similarly placed, into succumbing to the demands of the owners. Litigation does not come to an end in days or months but is protracted over years and sometimes decades. If during this period, a party is unable to play or broadcast music, even though it is willing to pay a reasonable fee for it, and even though there is no other reasons for the refusal to grant a licence, it will have no alternative but to eventually give up its action under Section 31 of the Act. The purpose of the enactment will, therefore, be rendered futile and nugatory. It, therefore, appears plain to us that the Board must, after giving the parties a meaningful opportunity of being heard, return an opinion on all the three factors mentioned above viz. *prima facie* case, balance of convenience and irreparable loss. If it finds that all the three factors are in favour of

the applicant, it should grant interim relief. It seems to us that where the controversy concerns only the quantum of licence fee, an interim protection should be granted. Let us conceptualize a litigation where A has been granted a licence by B upto 2015 at a fee of ₹ 500/- per needle hour, which A thinks is unfair or exorbitant. If A were to approach the Board immediately, B may cancel the contract and thereby cause irreparable loss to A. Interim protection must be extended to A else it would not be able to seek a compulsory licence ever. This protection can easily be made subject to the payment of the fee of 500/- per needle hour, thus preserving and protecting the interests of both sides. Assume that the contract period has expired, then also a reasonable decrease or increase can be ordered, awaiting the final determination of the grant or refusal of a compulsory licence.

14. We must now consider the terms on which interim relief should be made available to the Appellant. One obvious criteria would be to permit exploitation of the copyright on the basis of licence fee, last paid. We have already mentioned that there has been a plethora of litigation on the subject leading to the decision of the Supreme Court in *Phonographic Performance Ltd. -vs- Entertainment Network (India) Ltd.*, 2011(4) SCALE 591 wherein the payment of two per cent of the net advertisement earnings of each FM radio station accruing from the radio business only, as was fixed by the Copyright Board by an Order dated 25.8.2010,

was not interfered with by the Hon'ble Supreme Court. We reproduce relevant paragraphs of the said Judgment for facility of reference:-

6. Pursuant thereto, the Copyright Board took up various matters and after a detailed discussion and upon taking evidence, it indicated that though the Government in the second phase of its policy had gone for a percentage of gross revenue, it preferred linkage with advertisement revenue over gross revenue. Accordingly, in exercise of the powers conferred on it under Section 31(1)(b) of the Copyright Act, 1957, the Board directed the Registrar of the Copyright Board to grant to the complainants separate licenses for communicating the work recorded in sound recordings in the repertoire, present and future, of the Respondent to the public by broadcast on revenue sharing basis, subject to certain conditions, including payment of 2% of the net advertisement earnings of each FM Radio station accruing from the radio business only for that radio station.

7. Having considered the submissions made on behalf of the respective parties, and taking into consideration the fact that the subject-matter of challenge in these Special Leave Petitions is an order passed by the High Court refusing to grant interim stay of the order of the Copyright Board and the subject-matter of the appeal pending before the High Court is the method to be adopted for assessing the compensation payable, we are of the view that no interference is called for at this stage in these Special Leave Petitions. This Court had on the earlier occasion set aside the earlier fixation of compensation and the entire matter was at large before the Copyright Board. The relief

sought for by the Petitioners herein in the application for interim orders before the High Court was only for a stay of the order passed by the Copyright Board and not for any direction to pay compensation at any particular rate. In our view, expressing any opinion in the matter at this stage, would be improper on our part since the aforesaid question is pending decision in the High Court. At the same time, since the matter involves a large number of stake-holders, it will be in the interest of all concerned if the appeals are decided early by the Madras High Court. We, therefore, request the High Court to take up these pending appeals on an urgent basis and to ensure that the same are disposed of, if possible, within two months from the date of communication of a copy of this order.

15. It is contended by Mr. Sibal, learned counsel for the Respondent, that the Respondent is not bound by the quantum of two per cent as determined by the Copyright Board and affirmed by the Hon'ble Supreme Court since they were not *privy* to those proceedings. In our opinion, SCIL being similarly placed, it will be appropriate for them to receive two per cent of the net advertisement revenue for their copyright in sound recordings. In the present case, the Respondent is the holder/owner of not merely sound recording, but also the music and literary work. It should, therefore, be entitled to an additional two per cent of the net advertisement earnings of the Appellant accruing from its radio business only. Accordingly, the interim payment for exploitation of

these two distinct rights, pending a final determination by the Copyright Board, aggregates four per cent.

16. Ordinarily, we would have remanded the matter to the Copyright Board for fixation of interim fees. Keeping in perspective inordinate delay that has elapsed in which the Appellant has not enjoyed the advantage of broadcasting any part of the repertoire of popular music owned by the Respondent, we have thought it fit to temporarily fix the charges payable by the Appellant to the Respondent. We, however, remand the matter back to the Copyright Board for passing interim orders, which, in our opinion, it ought to have, on terms which it considered appropriate and fair to both. We make it clear that the Copyright Board is free to come to its own conclusion in respect of an interim arrangement as well as final terms of a compulsory licence, if it finds no impediment in doing so, without being influenced in any manner by the interim arrangement devised by us.

17. The Appeal and pending application stands disposed of.

18. Parties to appear before the Copyright Board on 5.9.2011.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

September 01, 2011/tp