

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 14.09.2012
Judgment pronounced on: 25.09.2012

+ CS(OS) 2132/2010 & IA 14025/2010 (O. 39 R. 1&2 CPC)

THE INDIAN PERFORMING RIGHT SOCIETY Plaintiff

Through: Mr. Pravin Anand, Advocate

versus

**AD VENTURE COMMUNICATION INDIA
PRIVATE LIMITED**

..... Defendant

Through: None

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. The plaintiff before this Court is a society of authors, composers and publishers of various literary and musical works and claims to be administering public performance/ communication to public rights in terms of Section 14(a)(iii) of the Copyright Act, 1957, which vest in its members and 200 other sister societies. The societies of authors and composers affiliated with the plaintiff form part of an International Federation called CISAC (Confederation Internationale des Societes des Auteurs et Compositeurs). By virtue of reciprocal contracts with other societies such as BMI, ASCAP, PRS etc plaintiff also claims to be vested with public performance rights of international music. It is also alleged that the authors, composers and publishers, who are members of the plaintiff, have assigned their

public performance rights in respect of their respective literary and/or musical works including future works to the plaintiff. The musical publishers who are members of the plaintiff are either the first owners of the copyright as employers under Section 17(c) of the Copyright Act or they have obtained ownership of copyright by virtue of assignment in their favour. Even de hors various assignments in its favour, the plaintiff claims to be entitled to sue as a Copyright Society, on behalf of its members.

2. The defendant is stated to be carrying on business of organizing live events in various cities in which the music is routinely communicated to the public as a background score, filler or otherwise. The defendant is also alleged to be involved in commercial activities such as organizing live performances, songs and providing DJs under whose supervision the music is performed at functions/ events such as monthly parties, singing reality shows auditions, DJ night at clubs etc. It is alleged that the defendant organized a live musical event (*Raghav Live in Concert*) on 28.08.2010 wherein literary/ musical work of the plaintiff society were communicated to the public without obtaining the requisite license. It is alleged that the defendant got performed musical/ literary works belonging to the members of the plaintiff and its sister societies in the above referred live concert. It is also the case of the plaintiff that Phonographic Performance Limited (PPL), which is also a copyright society is entitled to collect license fees from the users of the song

recordings, but the live performance of musical/ literary work does not involve PPL and a person singing a song recording for the purpose of public performance must take license from the plaintiff for public performance of the musical work and license from PPL for playing song recording.

A table containing the list of songs alleged to have been performed by the artist Raghav on 28.08.2010 at St. Joseph Ground, M.G. Road, Bangalore, along with details such as the name of the composers, publishers and authors is given below:

S.NO.	TITLE	COMPOSER	AUTHOR	ARTISTE	PUBLISHER
1.	ANGEL EYES	COWARD RICARDO	COWARD RICARDO		FAIRWOOD MUSIC LTD.
		DUNBAR SLY LOWELL	DUNBAR SLY LOWELL		UNIVERSAL MUSIC PUBLISHING LIMITED(GB)
		EVERTON BONNER	EVERTON BONNER		UNIVERSAL MUSIC PUBLISHING LIMITED(GB)
		JOHN CHRISTOPHE TAYLOR	JOHN CHRISTOPHE TAYLOR		WESTBURY MUSIC LTD.
		R. TAYLOR	R.TAYLOR		
		LLOYD OLIVER WILLIS	LLOYD OLIVER WILLIS		
		MATHUR RAGHAV	MATHUR RAGHAV		
2.	CAN T GET ENOUGH	DUANE MICHAEL DYER	MATHUR RAVHAV	RAGHAV	SAREGAM A INDIA LTD.
		ONKAR PRASAD NAYYAR	MAJROOH SULTANPURI		
		MATHUR RAGHAV			
		MAJROOH SULTANPURI			

3.	LET S WORK IT OUT	JAHAZIEL MICAH BEN ELLIOT	JAHAZIEL MICAH BEN ELLIOT	RAGHAV FEAT JAHAZIEL	FAMOUS MUSIC PUBLISHING LIMITED
		MATHUR RAGHAV	MATHUR RAGHAV		
		MUSTAQUDDIN	MUSTAQUDDIN		
		SAREGAMA	SAREGAMA		
4.	SO CONFUSED	COWARD RICARDO	COWARD RICARDO	2 PLAY FEAT RAGHAV	CASABLANCA MEDIA PUBLISHING IN
		DONALD ANTONY CAMPBELL	DONALD ANTONY CAMPBELL		
		MATHUR RAGHAV	MATHUR RAGHAV		
5.	BAD BAD BAD	MATHUR RAGHAV	MATHUR RAGHAV		BMG ENSIGN MUSIC
		MUSTAQUDDIN	MUSTAQUDDIN		
		SAREGAMA	SAREGAMA		
6.	NO NO	MATHUR RAGHAV	MATHUR RAGHAV	RAGHAV	
		MATHUR NINA	MATHUR NINA		
		UDDIN MUSHTAQ	UDDIN MUSTAQ		
7.	SO CONFUSED	COWARD RICARDO	COWARDO	2 PLAY FEAT RAGHAV	CASABLANCA MEDIA PUBLISHING IN
		DONALD ANTONY CAMPBELL	DONALD ANTONY CAMPBELL		
		MATHUR RAGHAV	MATHUR RAGHAV		

The case of the plaintiff is that defendant infringed its copyright by communicating the above referred works to the public. The plaintiff has accordingly sought an injunction restraining the defendant from organizing the events including communicating plaintiff's repertoire of musical works administered to the public without obtaining license from it or doing any other act

infringing its copyright. The plaintiff has also sought rendition of account and damages.

3. The defendant was proceeded ex parte vide order dated 31.05.2011. Ex parte evidence of the plaintiff has been recorded on affidavits.

4. Section 33 of the Copyright Act, 1957 empowers the Central Government to register an association of persons fulfilling the prescribed conditions to do business of issuing or granting licenses in respect of any work for which the Copyright subsists or in respect of any other right conferred by the Act, in accordance with the registration granted to such an association. Ordinarily, the Central Government is to register only one copyright society to do business in respect of the same class of work. Section 34 of the Act provides that a copyright society may accept from an owner of rights, exclusive authorization to administer any right in any work by issue of licenses or collection of license fees or both. It is also permissible for a copyright society to enter into an agreement with a foreign society or organization administering rights corresponding to the rights under the Act and to entrust to such foreign society or organization, the administration in any foreign country, of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organization. A copyright society can issue license under Section 30 of the Act, collect fees and distribute such fee among the owners of right after deducting its own expenses.

5. Ex.PW1/4 is the certificate of registration granted to the plaintiff under Section 33(3) of Copyright Act, 1957, whereby it was permitted to commence and carry on the copyright business in musical works and any words or any action intended to be sung, spoken or performed with the music. In its affidavit by way of evidence Mr. Hassan Kamal, Chairman of the plaintiff society has stated that the plaintiff administers relevant rights in India on behalf of the members of about 200 sister societies from different countries. Ex.PW1/5 is the list of such sister societies. Ex.PW1/6, PW1/7, PW1/8 are the agreements of the plaintiff with three such societies namely BMI, PRS and ASCAP respectively.

The list of members of the plaintiff society is Ex.PW1/9 and they are stated to be authors, composers and publishers of Indian literary and musical works. The tariff fixed by the plaintiff society is Ex.PW1/11.

6. Ex.PW1/13 (Colly) is the printout from the website of the defendant namely <http://adventurehouse.co.in>. which shows that the defendant is engaged in the business of organizing events and promotions and the services offered by the defendant including club gigs, concert, college fests and off sites.

Ex.PW1/14 (Colly) is the printout from the internet which shows that defendant proposed to organize 'Raghav Mathur Live Concert' at St. Joseph's Grounds in Bengaluru on August 28, 2010. The tickets of the show were priced at Rs.500/- and Rs.800/-.

7. A song comprises three elements lyrics, music and singing. As observed by a Division Bench of this Court in **Indian Performing Rights Society Ltd vs. Aditya Pandey & Ors.**, *FAO Nos. 423-424-425/2011*, decided on 08.05.2012 when a song is recorded there is homogenization of the lyrics with the musical score; where integration is articulated through the multi-level hierarchical system of inter-dependence. The question which came up for consideration before the Division Bench in the aforesaid case was as to whether communication to the public, including by way of broadcasting of a song recording also amounts to a communication to the public for literary and musical works embodied in the sound recording and if so whether a separate licence in respect of such literary and musical work can be asserted by the owner of copyright in such works, in addition to the licence secured from the copyright holder in the sound recording. The learned Single Judge from whose order the aforesaid appeal arose was of the view that once a licence is obtained from the owner or someone authorized to give it, in respect of a sound recording, for communication to the public, including by broadcasting, a separate authorization of licence is not necessary from the copyright owner or author of the musical work and/or literary work. The contention of the appellant IPRS, however, was that in addition to licence from the copyright holder in the sound recording a separate licence from the authors of the literary and musical works comprised in the song was also required. Noticing that the owner of

a copyright in a literary and musical work enjoys the right to communicate the said work to the public by way of live performance, whereas the owner of copyright and sound recording does not enjoy similar right to communicate the sound recording to the public by way of live performance, the Division Bench was of the view that communication of a sound recording to the public by the owner of the recording does not encroach upon the right of the owner of the underlying literary and musical works to perform the said underlying works in the public. In nutshell, the view taken by the Division Bench in this case is that no permission from a lyricist and music composer is required if licence is obtained from the copyright owner of the sound recording. It was further held by the Division Bench that copyright holder of sound recording does not have copyrights in live performance. As a necessary corollary, a separate licence from the lyricist and musical composer as the case may be is required in case of live performance.

8. The affidavits filed by Mr Hassan Kamal of the plaintiff-company show that the songs which were sung live by Mr Raghav to a live audience on 28.08.2010, included the works titled Angel Eyes, Can't Get Enough, Let's Work it Out, So Confused, Bad Bad Bad and No No. The Inlay Card Ex.PW-1/22 would show that the song Angel Eye is authored by four persons, namely, Dunbar Sly Lowell , Everton Bonner , Lloyd Oliver Willis, John Christopher Taylor and has music scores from Dunbar Sly Lowell, Everton Bonner , Lloyd Oliver Willis, John

Christopher Taylor. The Inlay Card further shows that the song Can't Get Enough was written by and has music by three persons, namely Duane Michael Dyer, Onkar Prasad Nayyar and Majrooh Sultanpuri. Ex.PW-1/23 is the Assignment Deed, whereby Dunbar Sly assigned his rights in the song and the music to a society called Performing Right Society (PRS). Everton Bonner, Lloyd Oliver Willis also assigned their respective rights in the song and the music to the same society vide Assignment Deeds Ex.PW-1/24 and PW-1/25 respectively. Duane Michael Dyer and Onkar Prasad Nayyar assigned their rights in the song and the music of the song Can't Get Enough to PRS and another society, IPRS vide Assignment Deeds Ex.PW-1/27 and Ex.PW-1/10 respectively. Majrooh Sultanpuri assigned his rights to the society-IPRS vide Assignment Deed Ex.PW-1/10 (Colly).

9. A perusal of Assignment Deed Ex.PW-1/23 executed by Lowell Dunbar in favour of PRS would show that the assigner assigned to PRS, all the performing rights and the film synchronization right to the extent prescribed in Article 7 (c) (iii) of the Articles of Association of the society. It further shows that the expression "musical work" used in the Assignment Deed means any musical work whether existing at that time or to be composed thereafter and such words if any as are associated with any musical work. The society was assigned all the rights mentioned in the deed in the musical work which belonged to the assignor as also the work which were to be thereafter acquired by or were to become vested in the

assignor during continuance of his membership of the society. Similar is the Assignment Deeds Ex.PW-1/24 executed by Everton Bonner and deed Ex.PW-1/25 by Lloyd Oliver Willis in favour of PRS.

10. A perusal of Ex.PW-1/27 which is the agreement between Duane Michael Dyer and PRS would show that Mr. Dyer has granted to PRS the right to licence non-remedie public performances of each musical work of which he is a copyright proprietor or which he either alone or jointly or in collaboration with others wrote, composed, published, acquired or owned or in which he had any right, title, interest or control or which thereafter was to be written, composed, acquired, owned, published or copyrighted by him alone, jointly or in collaboration with others or in which thereafter he was to have any right or interest or control in whole or in part.

A perusal of the agreement between Onkar Prasad Nayar and IPRS would show that Mr Nayar assigned to IPRS, all musical works and all performing rights and mechanical rights which belonged to him or which were to be thereafter acquired by or become vested in him. The expression “performing right” has been defined in the agreement to mean and include the right of performing in public, broadcasting and causing to be transmitted to subscribers to a diffusion service, in all parts of the world, by any means or in any manner, all musical works and the right of authorizing any of the said acts. Identical is the agreement Ex.PW-1/10 (Colly) between IPRS and Majrooh Sultanpuri.

11. Affidavit of Mr K.M. Nanjundaswamy shows that the live music concert titled “RAGHAV LIVE IN CONCERT” held at St. Joseph Ground on 28.08.2010 was attended by him. He made recording of the performance using NOKIA Express Music-5130c and saved the same to the hard disk of his personal computer which belongs to the plaintiff society and thereafter transferred the said recording on a compact disk. The said video has also been downloaded on the instructions of Shri Hassan Kamal and is Ex.PW-1/21. The plaintiff-society has thus been able to establish that live performance of various works, including Angel Eye and Can’t Get Enough were undertaken by Mr Raghav at Bangalore on 28.08.2010. Being a live performance of the aforesaid works, permission from the author and composer was necessarily required before undertaking any such performance. Since the rights which the author and composer of the songs “Angel Eyes and Can’t Get Enough” had in these works been assigned by them to PRS/IPRS, the requisite permission/licence in this regard could have been granted only by the above-referred societies. Ex.PW-1/8 is the agreement, between PRS and the plaintiff-society.

12. A perusal of clause 1.1 would show that subject to exceptions and reservations set out in clauses 2 and 2A and to the provisions of clauses 8 and 8A, PRS and IPRS each granted to the other non-exclusive licence and authority to exercise and enforce the performing rights in the repertoire within the territory in

accordance with the provisions of the agreement. The rights, so granted, to each other include the right to grant licence in respect of other's performing rights to persons requiring such licences. These rights include the right to collect royalties from licencees in consideration of the grants of such licences and to institute and prosecute proceedings against persons infringing the performing rights and to collect damages or compensation for the unauthorized doing of any part of the performing right. The rights granted to the plaintiff-society expressly include a right to bring an action in accordance with chapter XII and XIII of Copyright Act, 1957 for infringement of PRS's copyright in respect of doing or authorizing the doing of any act restricted by the performing rights in the repertoire for which IPRS has granted licence to PRS under the agreement. This power expressly includes the power to institute legal proceedings, sign and verify pleadings and appoint legal counsels before the Indian Courts. The exceptions and reservations mentioned in Clause 2 and 2A are not relevant for the purpose of this suit and, therefore, need not be discussed. The copyright of Dunbar Sly, Everton Bonner, Oliver Willis in the song Angel Eyes and the rights of Duane Michael Dyer in the song Can't Get Enough stood transferred to PRS and by virtue of the agreement between PRS and IPRS, the plaintiff has the legal right to grant licence for live performance, involving the aforesaid works. Therefore, the defendant infringed the copyright which the plaintiff holds and is entitled to enforce in respect of the work

Angel Eyes and Can't Get Enough. As regards the rights of Onkar Prasad Nayar in the song Can't Get Enough, the same stands assigned directly to the plaintiff-society vide Assignment Deeds Ex.PW-1/10 (Colly) and the plaintiff-society, therefore, is competent to grant licence in respect of live performance of the aforesaid work and is also competent to execute legal proceedings in case of infringement of the aforesaid work by the defendant.

13. For the reasons stated hereinabove, the plaintiff is entitled to an injunction, restraining the defendant from organizing events, involving live performance in respect of the lyrics(s), musical score(s) copyright in which are held by the plaintiff-company. It shall be obligatory for the defendant to ensure that no copyright of the plaintiff-company is infringed in any event organized by it by way of live performance.

14. Coming to damages, I find that no specific amount by way of damages has been claimed by the plaintiff though it has sought rendition of accounts in respect of profits unlawfully earned by the defendant by infringing plaintiff's repertoire. A specific prayer has also been made for award of damages to the plaintiff-company, though without specifying the amount sought by way of damages. In my view, considering the prayer made in the suit, punitive damages can be awarded to the plaintiff, subject to, of course, payment of requisite Court fee, despite no specific amount having been claimed by way of damages.

The question of granting damages in such cases came to be considered by me in **Autodesk, Inc. & Another v. Mr. Prashant Deshmukh & Others**: 183(2011)

DLT 411 and the following view was taken:

“Regarding punitive damages in the case of ***Time Incorporated v. Lokesh Srivastava & Anr.***, 2005 (30) PTC 3 (Del), this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of ***Hero Honda Motors Ltd. v. Shree Assuramji Scooters***, 2006 (32) PTC 117 (Del), this Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

In ***Microsoft Corporation v. Deepak Raval*** MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In ***Larsen and Toubro Limited v. Chagan Bhai Patel*** MIPR 2009 (1) 194, this Court observed that it would be

encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use the pirated software thereby depriving the copyright owner of the revenue to which he is entitled by sale of licence to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using the infringing mark/pirated software for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.”

15. In the case before this Court, the defendant has sold ticket of the event in which Raghav performed for Rs 500 each. Thus, they exploited the work in which copyright is held by the plaintiff, for their commercial advantage and to the detriment of the authors and composers of the works. As far as grant of damages is concerned, the live performance in an event organized on a commercial basis by

selling tickets needs to be treated differently from the live performance say in a family function. A soft view, while awarding damages against a person infringing copyrights of the others to earn unlawful profits, by organizing live events, would be wholly misplaced and uncalled for. If the damages awarded against such persons are token in nature and do not pinch the infringer that would only encourage the infringer to repeat such acts in future at the cost of some other copyright holder.

16. For the reasons stated hereinabove, the defendant is restrained from organizing any event involving live performance in respect of the lyrics(s), musical score(s) copyright in which are held by the plaintiff-company. It shall be obligatory for the defendant to ensure that no copyright of the plaintiff-company is infringed in any event organized by it. The defendant is also directed to pay Rs 5 lakh by way of punitive damages to the plaintiff. If the damages are not paid within four weeks, interest on the amount of damages would be payable at the rate of 6% per annum from the date of decree till realization of the amount.

Decree sheet be drawn accordingly.

V.K.JAIN, J

SEPTEMBER 25, 2012

RD/BG