

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2015

CORAM

THE HONOURABLE MRS.JUSTICE. S.VIMALA

Civil Suit No.244 of 2000

Asianet Communications (P) Ltd.
Represented by its DGM (Finance)
Mr.Srinivasa Raghavan ... Plaintiff

Vs.

1. Surya T.V.
A Unit of Sumangali Publications (P) Ltd.
Rep. By its Managing Director
Mr.Kalanidhi Maran

2. S.Venkatesan,
TC.37/1175,
Deekshidar Street, Fort,
Thiruvananthapuram - 23. ... Defendants

Plaint filed under Section 55 & 62 of the Copyright Act, 1957 read with Order IV Rule 1 of the O.S.Rules praying for the following relief:

(i) For a permanent injunction restraining the Defendants, their agents, men, representatives, agents, assigns and anyone whosoever claiming through the defendants from in any manner infringing the plaintiff's copyright in respect of the exclusive Satellite Television Telecast rights of the Malayalam Feature Film "KATTUKUTHIRA" directed by P.G.Viswambaran and enacted by Thilakan, Innocent and others, in whole or a reproduction thereof, by exploitation for public or private viewing by broadcasting on the First Defendant's channel or

on any other channel by satellite telecast;

(b) Directing the first defendant to pay to the plaintiff damages amounting to a sum of Rs.5,00,000/- (Rupees Five Lakhs Only) along with interest at 12% per annum from the date of plaint till the date of realisation;

(c) For costs of the suit.

For Plaintiff : M/s.Perumbulavil Radhakrishnan
For D1 : Mr.Y.Anil Kumar
For D2 : Mr.S.Sridhar

J U D G M E N T

The plaintiff, a company, dissipating information and providing Public entertainment, predominantly in Malayalam, on the Malayalam channel called 'Asianet channel', has filed the suit for injunction, against the defendants / others, restraining them from infringing the plaintiff's copyright in respect of exclusive satellite television telecast rights of the Malayalam feature film 'Kattukuthira', either by reproduction or by broadcasting or in any other way; (b) directing the defendants to pay a sum of Rs.5 lakhs as damages.

2. The claim of the plaintiff is that the plaintiff acquired the rights for the satellite telecast of the Malayalam film from the right holder Mr.S.Venkatesan, the second defendant, by virtue of the agreement, dated

the rights from one M/s. Pratheeksha Pictures by virtue of the letter, dated 09.12.1994 (Ex.P4)

2.1. According to the plaintiff, the second defendant has transferred the **"negative rights"** of the film Kattukuthira to him and the plaintiff has the exclusive right to transmit, retransmit, broadcast, rebroadcast, simulcast, either through direct broadcast satellite or point-to-point broadcasting system through satellite placed in extra terrestrial orbit for beaming down signals to the receiving units or apparatus or by any other system, method or technology.

2.2. **The further contention is that the broadcast through satellite includes the theatrical rights also.** The contract was for a period of ten years, expiring on the mid-night of 23.12.2004. The consideration was Rs.40,000/- which was paid by the plaintiff to the second defendant. The plaintiff has been exercising this telecast rights on its channel on 19.03.1995, 07.09.1995, 20.04.1996, 28.02.1997, 15.11.1997 and 06.08.1999.

2.3. The first defendant, without any right whatsoever, indulged in infringing the copyright vested in the plaintiff and the first defendant is telecasting the feature film 'Kattukuthira', in utter disregard of the sanctity of the contracts.

2.4. The plaintiff issued a notice calling upon the first defendant to desist from telecasting the suit film 'Kattukuthira'. In fact, the suit film was telecasted on 19.02.2000 in the first defendant's channel, called Suriya Channel and it was being done continuously.

2.5. The plaintiff has suffered damages on account of illegal telecast by the first defendant and the plaintiff values the damage at Rs.5 lakhs. The plaintiff has suffered loss of Revenue and Reputation. Hence, the plaintiff has filed the suit for injunction and damages.

3. The suit is resisted by the first defendant on the following grounds:-

3.1. The picture was produced by M/s.Arakkal Films, Trichur, of which, A.K.K.Bappu was the Proprietor. Censor certificate was granted on 30.12.1990. By an agreement, dated 08.06.1999, M/s. Arakkal Films, as copyright holder of the said film, i.e. Producer, assigned the terrestrial television and satellite Television broadcast rights in favour of M/s. Rasheena Associates, Rep. By its Proprietrix Mrs. Rasheena. M/s. Rasheena Associates assigned the rights in favour of P.K.Ravi. P.K.Ravi, by the assignment, dated 07.12.1999, assigned the rights in favour of the first defendant. This agreement was for a period of 24 years and 6 months from 07.12.1999.

3.2. M/s. Pratheeksha Pictures had at any rate acquired only distribution rights and not Satellite Television Broadcast Rights. Therefore, the plaintiff could not have acquired Satellite Television Broadcast Rights from M/s. Pratheeksha Pictures.

3.3. The relief for injunction is not maintainable after the expiry of the period for which the relief is claimed.

3.4. The first defendant has acquired the satellite broadcasting rights through competent person and they are entitled to exercise that right.

3.5. The claim for damages is unsustainable.

4. The following issues have been framed on 17.08.2009:-

(i) Whether the rights acquired by the 2nd defendant in the capacity of a producer from M/s. Pratheeksha Pictures by an Agreement dated 09.12.1994 in respect of the satellite Telecast of the Malayalam Film "Kattukuthira" is valid?

(ii) Whether the exclusive right to transmit, re-transmit etc. which was transferred from the 2nd defendant

to the plaintiff by an agreement dated 24.12.1994 for a period of 10 years, is valid in the eye of law?

(iii) Whether the rights acquired by the 1st defendant from one P.K.Ravi by an agreement dated 07.12.1999 during the subsisting period of plaintiff's right in respect of the film "Kattukuthira" amounts to trafficking in intellectual property of the plaintiff?

(iv) Whether the illegal telecast of the 1st defendant is an infringement of the plaintiff's copyright?

(v) Whether the plaintiff is entitled for a permanent injunction restraining the 1st defendant or their agents from in any manner infringing the plaintiff's copyright in respect of exclusive satellite Television Telecast rights of the Malayalam feature film "Kattukuthira" directed by P.G.Viswambaran and enacted by Thilakan, Innocent and others, in whole or a part thereof on the 1st defendant's channel or any other channel by satellite Telecast?

(vi) Whether the plaintiff is entitled to get the damages amounting to a sum of Rs.5,00,000/- (Rupees five lakhs) with interest at 12% p.a. from the date of plaint till the realization of the suit claim?

(vii) Whether the plaintiff is entitled to costs and other reliefs?

5. Before going into the merits of the case, it will be appropriate to consider the essential provisions / legal terms involved in this case in order to correctly appreciate the issues involved.

6. It is essential to consider what is copyright? What is copyright in respect of a cinematograph film? With whom the copy right vests with in respect of cinematograph film? When a copyright in a cinematograph film is infringed?

7. In order to appreciate the claim of respective parties, it is necessary to highlight the meaning of the words / phrases, cinematograph film, author, producer and broadcast rights, as assigned under the Section 2 of the Copy Right Act, 1957:

"2. Interpretation. -In this Act, unless the context otherwise requires,-

(f) "cinematograph film" means any work of visual recording includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films;

Under Section 2(d)(v) of the Act, the word "author" means, in relation to cinematograph film or sound recording, "the producer".

<https://hcservices.ecourts.gov.in/hcservices/> Under Section 2(uu), "producer" in respect of a cinematograph film or sound recording means a persons, who takes initiative and responsibility for

making the work.

Under Section 2(dd), "broadcast" means communication to the public-
 (I) by means of any wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images, or
 (ii) by wire
 and includes a rebroadcast

8. The copyright is a right to prevent others from exploiting the skill and labour of the concerned person without the consent or assent of the owner of the copyright. The object of the Copyright Act is to protect the author of the copyright work from the unlawful reproduction or exploitation of his work by others.

8.1. The Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation of the work and translation of the work. The scope and duration of protection provided under copyright law varies with the nature of the protected work.

9. Work in which the copy right subsists has been catalogued under Section 13 of the Act;-

subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,--

(a) original literary, dramatic, musical and artistic works;

(b) **cinematograph films**; and

(c) sound recording.

The meaning of copy right in respect of cinematograph film has been provided under Section 14(d) of the Act, which reads as under:

Meaning of copyright.-For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

(a) in the case of a literary, dramatic or musical work, not being a computer programme,

(i) to (iv)

(b) in the case of a computer programme,-

(i) to (ii)

(c) in the case of an artistic work,-

(i) to (vi)

(d) In the case of cinematograph film, -

(i) to make a copy of the film, including-

(A) a photograph of any image forming part thereof;
Or

(B) storing of it in any medium by electronic or by other means.

(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film,

(ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless whether such copy has been sold or given on hire on earlier occasion,

(iii) to communicate the film to the public.

Explanation : For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

51. When copyright infringed. -Copyright in a work shall be deemed to be infringed-

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this

Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person-

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

37. Broadcast reproduction right.-

(1)

(2)

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-

(a) re-broadcasts the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence;

or

(e) sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provisions of section 39, be

deemed to have infringed the broadcast reproduction right.

10. It is the case of the plaintiff that the plaintiff has the exclusive right to broadcast the feature film through satellite and the right was made available for ten years by the agreement, dated 24.12.1994, by the second defendant, and that the first defendant, who has no right whatsoever, should be prevented from interfering with the rights of the plaintiff.

11. But, it is the case of the first defendant that he has got the exclusive copy right over the film "Kattukuthira" having obtained the same from M/s.Rasheena Associates, who in turn, got the assignment of the copyright from M/s.Arakkal Films, who is the producer of the film. It is an admitted fact that M/s.Arakkal Films is the producer and thus, the author of the film. The Agreement between M/s.Arakkal Films and M/s.Rasheena Associates has been filed as Ex.D2. So far as the terms of Agreement is concerned, it is provided in clause 6 & 7, which reads as under:

"6. On the aforesaid representations and declarations and believing the same to be true, the Assignee hereby accepts the assignment of Terrestrial Television Broadcast, Satellite TV Broadcast of the said Films by any means of wireless diffusion and by wire in any one or more of the forms, signs, sound or visual images and communication to the public in whatever manner including communication through Satellite.

<https://hcservices.ecourts.gov.in/hcservices/> 7. The Assignor shall give to the Assignee as and when required on Positive/Negative prints of the said Films in very good condition. The above

said Positive/Negative Print will be returned immediately after transferring to U-matic/Betacam tape. The Assignor has given a lab letter directly from the producer."

12. Therefore, it is for this Court to find out, from M/s.Arakkal Films, who got the copyright, what is the extent of right and what is the duration of the right. In other words, whether the case of the plaintiff is true or the case of the defendant is true.

13. The plaintiff has relied upon Ex.P1-Agreement dated 24.12.1994, executed by S.Venkatesan, the second defendant, in favour of the plaintiff. It is stated in the agreement that the producer of the film is M/s.Arakkal Films and that the distribution rights vested with M/s.Pratheeksha Pictures have been transferred to the second defendant.

14. What is the right acquired and what is the nature and scope of the right acquired by M/s.Pratheeksha Pictures from M/s. Arakkal Films is not known. In other words, the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures is not filed into Court. No acceptable reason has been adduced as to why the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures is not produced.

15. The non-production of the agreement between the

<https://hcservices.ecopris.gov.in/hcservices/> i.e. M/s.Arakkal Films and M/s.Pratheeksha Pictures (from whom the plaintiff claims right), is fatal

to the case of the plaintiff, as the nature and extent of right transferred in favour of M/s.Pratheeksha Pictures from the producer M/s.Arakkal Films, is important.

15.1. It is appropriate to point out that the defendant has produced the agreement between M/s.Arakkal Films and M/s.Rasheena Associates, through whom the first defendant claims. Even though the agreement of the first defendant is dated 08.06.1999, i.e. Five years after the plaintiff's agreement, the non production of plaintiff's agreement has remained fatal, because the first defendant also claims through M/s.Arakkal Films.

16. The learned counsel for the plaintiff would submit that the second defendant who transferred the right has been given the negative rights which would encompass all rights available in respect of the feature film and therefore, the non-production of the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures is immaterial. No doubt, under Ex.P3, which is a letter, written by M/s.Pratheeksha Pictures to M/s.Jemini Colour Laboratory, it is mentioned that M/s.Pratheeksha pictures has given the telecasting rights to the second defendant in respect of the Kattukuthira film and print must be supplied to the second defendant or its authorized representative.

Enclosing this letter, the second defendant has given a

letter to the plaintiff authorising the Jemini Colour Lab to give delivery of negative to the plaintiff.

17. What is the implication of delivery of negative to the plaintiff is the next issue to be considered.

18. As contended by the learned counsel for the plaintiff, the negative right includes within it, the right of the owner of such negative right to exclude everyone else from using the negatives of the picture. But, the fact remains that under Ex.D2 also such negative rights has been given by M/s.Arakkal Films to M/s.Rasheena Associates, from whom the first defendant claims right. Therefore, in the absence of production of the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures, the plaintiff is not able to substantiate its claim.

19. By the legal maxim "**Nemo dat quod non habet**"- No party can transfer any title, better than what it itself possess, as held by the Hon'ble Supreme Court in AIR 1975 Madras 379. Therefore, the non-production of the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures through whom the plaintiff claims is fatal to the case of the plaintiff. Had the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures produced, it would have indicated the nature and extent of right transferred in

favour of M/s.Pratheeksha Pictures and the date and duration from / for which it was transferred.

20. The differences and clauses / species of communication with reference to cinematograph film has been highlighted in the case of Video Master vs. Nishi Productions 1998 PTC (18) 117, in which the Bombay High Court held that theatrical rights include the right to exhibit the cinematograph film in theatres, terrestrial rights is the right to exhibit the film on Doordarshan and satellite broadcasting rights is the right to exhibit/communicate the film by satellite signals to public with or without cable and through the satellite medium. While the cable TV right is right to exhibit a film by cable originated programme. One finds itself in respectful agreement of these pleas as projected by the defendants. It is true that in the agreement it has not specifically been mentioned that the rights exclude the cable television or any other satellite rights but the intention of the parties can easily be inferred from the nature of the transaction that had been arrived at.

21. Applying the dictum laid down in this case, it is contended that the theatrical rights is not excluded from negative rights and therefore, the plaintiff's rights should be upheld. But, it is not possible for this Court to

uphold the rights of the plaintiff in the absence of the production of the agreement between M/s.Arakkal Films and M/s.Pratheeksha Pictures.

22. The contention of the learned counsel for the first defendant is that it is mandatory to implead the owner of the copyright as contemplated under Section 61 of The Copyright Act and as the owner is not impleaded, the suit is liable to be dismissed.

22.1. This contention cannot be accepted and as it is not mandatory to implead the owner in a proceeding for infringement of broadcasting and reproduction right and the provision is limited to the cases where an exclusive licensee of a copyright institutes a suit or proceedings or infringement of copyright, as per the decision in the case of ESPN Star Sports v. Global Broadcast News Ltd. & Ors. reported in MIPR2008(3)257, 2008 (38) PTC 477 (Del). The relevant observation reads as under:

"31. The learned Single Judge in his judgment had held that the mandate of Section 61 (1) applies in case of claims for infringement of broadcast reproduction right and the non-impleadment of the owner of the copyright is fatal to the maintainability of the suit. Similarly, the non-joinder of the owner of the copyright was held to render the suit liable to be rejected. However, we are unable to approve the view taken by the learned Single Judge. Section 39A of the Act relating to "other provisions applying to broadcast reproduction right and performer's right" has not expressly included Section 61 which deals with owners of the copyright to be made party to the proceedings. The inclusion of specific Sections

of the Act in Section 39A and making them applicable to Broadcast Reproduction Right and Performer's Right clearly shows that the broadcast reproduction right is separate and distinct from copyright in a work. Thus, the Special Broadcast Reproduction Right conferred under Section 37 in Chapter VIII of the Act is a distinct and separate right conferred on every broadcasting organization and independent of the right of an owner of a copyright and the omission of Section 61 in Section 39A of the Act makes this position amply clear."

Therefore, the non impleadment of the owner of the copyright is not fatal in this case.

23. The case of the plaintiff is that his right must be protected from the date of agreement for a period of 10 years, i.e. From 24.12.1994. The period of 10 years expired on 23.12.2004. Therefore, when the period itself expired about one decade prior to the hearing of the case, the relief claimed has become infructuous.

24. The plaintiff has also sought for damages for infringement of his rights. Since the infringement is not proved, the plaintiff is not entitled to the relief of damages. Hence, the suit is liable to be dismissed.

25. In the result, the suit is dismissed with costs.

sd/.S.V.J

13.07.2015

//Certified to be true copy//

Dated at Madras this the day of 2015

R.s/15.10.2015

COURT OFFICER