

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

Date of Decision: August 07, 2015

+ **W.P.(C) 2316/2013**

SUPER CASSETTES INDUSTRIES LTD AND ANR. Petitioners

Through: Mr. Amit Sibal, Sr. Adv. with Mr. Neel
Mason and Mr. Ankit Relan, Adv.

Versus

UNION OF INDIA

..... Respondent

Through: Mr. Sanjay Jain, ASG with Mr. Jasmeet
Singh, Mr. Sanjeev Narula, Mr. Vikram Jetley &
Ms. Noor Anand, Adv.

Mrs. Prathiba M. Singh, Sr. Adv. with Mr. Chander
M. Lall, Ms. Archana Sahadeva & Ms. Jaya
Mandelia, Adv. for intervener Entertaining
Network India Ltd. & Indian Broadcasting
Foundation.

Mr. Sudhir Chandra, Sr. Adv. with Mr. Sagar
Chandra, Adv. for the intervener/MBPL.

Mr. Abhishek Malhotra, Adv. for the intervener
AROI.

W.P.(C) 2321/2013

BHARAT ANAND AND ANR

Petitioners

Through: Mr. Jagdish Sagar, Adv.

Versus

UNION OF INDIA

Respondent

Through: Mr. Sanjay Jain, ASG with Mr.
Jasmeet Singh, Mr. Sanjeev Narul, Mr. Vikram
Jetley & Ms. Noor Anand, Adv.

Mrs. Prathiba M. Singh, Sr. Adv. with Mr.
Chander M. Lall, Ms. Archana Sahadeva & Ms.
Jaya Mandelia, Adv. for intervener Entertaining
Network India Ltd. & Indian Broadcasting
Foundation.

Ms. Swathi Sukumar & Ms. Anu Paarcha, Advs.
for intervener MCAI.

Mr. Sudhir Chandra, Sr. Adv. with Mr. Sagar Chandra,
Adv. for the intervener MBPL.

+ W.P.(C) 2318/2013

VENUS WORLDWIDE ENTERTAINMENT
PVT. LTD AND ORS

....Petitioners

Through: Mr.Arvind Nigam, Sr. Adv. with Mr.
Neel Mason, Mr. Jagdish Sagar & Mr.Ankit Relan,
Advs.

Versus

UNION OF INDIA

Respondent

Through: Mr. Sanjay Jain, ASG with Mr.
Jasmeet

Singh, Mr. Sanjeev Narul, Mr. Vikram Jetley &
Ms. Noor Anand, Advs.

Mrs. Prathiba M. Singh, Sr. Adv. with Mr.
Chander M. Lall, Ms. Archana Sahadeva & Ms.
Jaya Mandelia, Advs. for intervener Entertaining
Network India Ltd. & Indian Broadcasting
Foundation.

W.P.(C) 2959/2013

DEVENDER DEV & ORS

....Petitioners

Through: Mr. Harsh Kaushik & Mr. Abhay
Chattopadhyay, Advs.

Versus

UNION OF INDIA

....Respondent

Through: Mr. Sanjay Jain, ASG with Mr.
Jasmeet

Singh, Mr. Sanjeev Narul, Mr. Vikram Jetley &
Ms. Noor Anand, Advs.

Mrs. Prathiba M. Singh, Sr. Adv. with Mr.
Chander M. Lall, Ms. Archana Sahadeva & Ms.
Jaya Mandelia, Advs. for intervener Entertaining
Network India Ltd. & Indian Broadcasting
Foundation.

Ms. Swathi Sukumar & Ms. Anu Paarcha, Advs.
for intervener MCAI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

: **Ms.G.ROHINI, CHIEF JUSTICE**

CM.No.6353/2015 (u/O 23 Rule 1(3) of CPC in WP(C) No. 2316/2013

CM.No.6352/2015 (u/O 23 Rule 1(3) of CPC in WP(C) No. 2318/2013

CM.No.6354/2015 (u/O 23 Rule 1(3) of CPC in WP(C) No. 2321/2013

CM.No.6387/2015 (u/O 23 Rule 1(3) of CPC in WP(C) No. 2959/2013

1. All these applications are filed seeking leave of the Court to withdraw the writ petitions with liberty to the petitioners to take appropriate steps before the appropriate forum to safeguard the rights of the petitioners.
2. The main writ petitions, i.e., W.Ps.(C) No.2316/2013, 2318/2013, 2321/2013 and 2959/2013 are filed questioning the vires of the provisions of the Copyright Act, 1957, as amended by the Copyright (Amendment) Act, 2012, (Act No.27 of 2012), namely, Section 11, Section 31(1)(b) and Section 31D as well as Rules 3(2), 7, 29, 30 and 31 of the Copyright Rules, 2013 (hereinafter referred to as “the Copyright Rules”).
3. It is pleaded in the applications for withdrawal that the petitioners came to know that W.P.(C) No.92/2015 titled Eskay Video Private Ltd. & Anr. Vs. Union of India & Ors., has recently been filed before the High Court of Calcutta challenging the constitutionality of various provisions of Copyright Act, 1957 (as amended in 2012), including the aforementioned Section 11, Section 31(1)(b) and Section 31D and Rule 3(2), 7, 29, 30 and

31 of the newly introduced Copyright Rules, 2013 and that the arguments are going on in the said writ petition. It is further pleaded that grave prejudice would be caused to their rights and business if W.P.(C) No.92/2015 is heard by the Calcutta High Court in the absence of the applicants/writ petitioners. Hence the present applications are filed under Order XXIII Rule 1(3) of CPC seeking leave of this Court to withdraw the writ petitions with liberty to approach the Calcutta High Court to be made a party in the aforesaid proceedings.

4. Though no counter affidavit is filed by the sole respondent – Union of India, the interveners, viz., M/s. Entertainment Network India Ltd. and M/s. Music Broadcast Pvt. Ltd. filed detailed counter affidavits opposing the applications for withdrawal contending that the applications are filed as a strategy of forum shopping and that the conduct of the petitioners is nothing but an abuse of process of the Court. It is also contended that since the writ petitions before this Court are being contested by every possible stakeholder, if the petitioners are permitted to withdraw the writ petitions and approach some other Court, the same would result in forcing all the other concerned parties and stakeholders to approach the other Court and contest the matter. The further contention is that the applications are a result of the apprehension of the petitioners that the Copyright Board may be constituted shortly in terms of the directions of this Court in W.P.(C) No.6255/2010 and in case the Copyright Board is constituted, the same would commence issuance of compulsory licenses. It is pointed out that the statutory provisions under which the compulsory licenses may be issued is challenged in the main writ petitions as unconstitutional. The further contention is that since the writ petitions before this Court are prior in point

of time and since this Court is already seized of the issue, permitting the petitioners to approach the Calcutta High Court would result in multiplicity of proceedings apart from causing serious prejudice to those parties, who are already before this Court.

5. Reiterating the above contentions, Ms.Pratibha Singh, the learned Senior Counsel appearing for the intervener-Entertainment Network India Ltd. and Sh. Sudhir Chandra, the learned senior counsel appearing for the intervener – M/s. Music Broadcast Pvt. Ltd. vehemently contended that the conduct of the petitioners evidently being forum shopping, the applications for withdrawal cannot be entertained and the same are liable to be dismissed in limine.

6. While bringing to the notice of this Court that Transfer Petitions (C) No.475/2015 filed by M/s Entertainment Network India Ltd. in the Supreme Court in which notice was already ordered to the other parties, stands posted to 06.07.2015, Ms.Prathibha Singh, the learned Senior Counsel submitted that in the alternative it would be appropriate to keep the applications pending till the Transfer Petition is decided in deference to the Supreme Court.

7. Shri Sudhir Chandra, the learned senior counsel placing reliance upon *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P. (1987) 1 SCC 5* contended that the petitioners who are indulging in Bench hunting tactics cannot be permitted to withdraw the writ petitions with liberty to institute fresh proceedings.

8. Though no counter affidavit is filed on behalf of the Union of India/sole respondent, Sh.Sanjay Jain, the learned ASG has also made his submissions on the same lines and opposed the withdrawal applications.

9. Rebutting the said contentions and denying the allegations of forum shopping and Bench hunting, Sh.Arvind Nigam and Sh.Amit Sibal, the learned senior counsels appearing for the applicants/petitioners submitted that the applicants who are the petitioners in the writ petitions have a right to abandon the proceedings initiated by them and that the objections raised by the interveners are untenable. It is also contended that the interveners have no locus standi to oppose the petitions for withdrawal.

10. Before adverting to the rival contentions advanced on behalf of the parties, it may be noticed that the petitioner in W.P.(C) No.2316/2013– Super Cassettes Industries Ltd., is a leading music company which owns and controls rights in several sound recordings, audio visual sounds and cinematography. Similarly, the petitioner in W.P.(C) No.2318/2013 – Venus Worldwide Entertainment Pvt. Ltd. is also the owner of the copyright in sound recordings. So far as W.P.(C) No.2321/2013 is concerned, the petitioners claim to be the corporate authors and owners of copyright in cinematograph fields whereas the petitioners in W.P.(C) No.2959/2013 claim to be the authors of the musical works and lyrics. It is primarily contended in the writ petitions that there is no public interest involved in statutorily licensing a work which is already available to public in abundance on reasonable terms through Government as well as private broadcasters. The further contention is that the Copyright Act does not define or delimit the meaning or scope of the term “Broadcasting Organization” anywhere and Section 31(D) has been framed in a manner that is likely to permit even broadcasting organizations guilty of infringement or unauthorized broadcast of copyright works and get a statutory license at terms and rates decided by the Copyright Board.

11. It is pleaded in the writ petitions that as a consequence of inserting Section 31(1)(b) and Section 31(D) by the Copyright Amendment Act, 2012 providing for compulsory/statutorily licensing, un-canalized and excessive powers have been conferred on the Copyright Board apart from depriving the Copyright Owners to have any control/say in who should be the licensees of their works. In other words, the grievance of the petitioners is that the impugned provisions have taken away the incentives from a copyright owner to create original works and to commercially exploit them to his likings. The further allegation is that the impugned provisions also created fetters on the rights of the copyright owners to refuse exploitation, right to negotiate a suitable rate of royalty for exploitation of their works, right to choose a licensee and most importantly the right to decide the terms and conditions of the exploitation of his works.

12. Coming to the interveners, they are private broadcasters who have been granted licenses for F.M. Radio Broadcasting in terms of Section 31(D) of Copyright Act, 1957 as inserted by the Copyright (Amendment) Act, 2012 and have been operating radio stations across the country. The applications filed by them for impleadment as party respondents to the writ petitions were disposed of by this Court by order dated 22.08.2013 declining to grant permission for impleadment, however allowing them to intervene in the proceedings and to file written submissions which shall not exceed seven pages.

13. It is not in dispute that one M/s Eskay Video Pvt. Ltd. has recently filed W.P.(C) No.92/2015 in the High Court of Calcutta challenging the validity of Sections 11, Section 31(D) and other provisions of the Copyright Act. By order dated 25.02.2015, the High Court of Calcutta passed an

interim order directing the Central Government to give at least 10 days' notice to the petitioners therein of the constitution of the Copyright Board and that the Board after its constitution will also give the petitioner similar notice about its intention to fix the rates specified in Section 31 and 31(D) of the Copyright Act, 1957 so as to enable the petitioners to seek an interim order in case the writ petition is not ready for hearing by that time.

14. It is also not in dispute that the petitioners as well as the interveners in the present petitions filed applications for intervening in W.P.(C) No.92/2015 on the file of the High Court of Calcutta. The said applications are stated to be pending as of today.

15. In March 2015, Entertainment Network (India) Ltd. (one of the interveners in the petitions pending before us) moved a Transfer Petition before the Supreme Court with a prayer to transfer the subsequently instituted writ petitions before the Calcutta High Court to this Court to be consolidated and tried with the instant petitions pending before this Court.

16. In the above background, the applications filed by the petitioners seeking permission to withdraw the writ petitions have been opposed contending that the Transfer Petition pending before the Supreme Court would become infructuous and to avoid the same it is necessary to keep the petitions pending.

17. The law is well settled that the general principles regarding withdrawal of suit under Order 23 of CPC are applicable to petitions under Article 226 of the Constitution of India. Order 23 Rule 1 of CPC may be reproduced hereunder for ready reference:

Withdrawal and Adjustment of Suits

1. Withdrawal of suit or abandonment of part of claim.-(1)

At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit to the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied, -

(a) that a suit must fail by reason of some formal defect,
or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff –

(a) abandons any suit or part of claim under sub-rule (1),
or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

18. A reading of Order 23 shows that under Rule 1(1) an absolute right of withdrawal or abandonment is conferred on the plaintiff, which is not the same as withdrawal with liberty to file a fresh suit on the same cause of action as provided under Rule 1(3). As explained in ***R. Rathinavel Chettiar and Anr. Vs V. Sivaraman and Ors.***; (1999) 4 SCC 89 Order 23 Rule 1 creates a right in favour of the plaintiff to withdraw the suit, at any time, after its institution. Once the suit is withdrawn or any part of the suit is abandoned against all or any of the defendants unconditionally, the plaintiff cannot bring a fresh suit on the same cause of action unless leave of the court is obtained as provided by Order 23 Rule 1(3)(b). It is not because of the principle of res judicata, since there has been no adjudication at all, but because of the principle that whoever waives, abandons or disclaims a right will lose it.

19. Again in ***K.S. Bhoopathy and Ors. Vs Kokila & Ors.***; (2000) 5 SCC 458, the legal position with regard to right of the plaintiff to withdraw the suit has been explained as under:-

“12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

- (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and
- (b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such direction is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided, first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the

claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action.....”

20. In *Hulas Rail Baij Nath Vs K.B. Bass and Co.*; (1967) 3 SCR 886, while observing that there is no provision in the Civil Procedure Code to refuse permission for unconditional withdrawal of the suit and to compel the plaintiff to proceed with it, it was further added that however, different considerations may arise where a set off or a counter claim have been made or in certain kinds of suits such as for partition or partnership where the competing rights of the defendants are involved.

21. It may also be added that under Rule 1(3) of Order 23 the court can give liberty to institute a fresh suit when (i) the suit must fail by reason of some formal defects; and (ii) when there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit claimed or part of the claim. The expression “sufficient grounds” would include many facets and the same need not be analogous to “formal defect”. It is the discretion of the court to decide what constitutes such sufficient ground for which purpose the court has to take into consideration all the attendant and relevant aspects of the matter.

22. In the instant case, the main writ petitions are filed challenging the vires of certain statutory provisions. Though pleadings are completed by both the parties, the hearing has not commenced till date. It is also pertinent to note that no interim relief has been granted to the petitioners. That being

so, we fail to understand as to how the sole respondent/Union of India suffers any prejudice if the petitioners are permitted to withdraw the writ petitions. Similarly no prejudice can be complained by the interveners who are not even entitled to raise points which are not canvassed by the petitioners in the pleadings.

23. It may also be added that though the prayer in the applications is to permit the withdrawal of the writ petitions with liberty to take appropriate steps before the appropriate forum to safeguard the rights of the petitioners, Sh.Arvind Nigam, the learned senior counsel appearing for the writ petitioners submitted that the relief sought in the applications to grant liberty to institute fresh proceedings is not pressed and that it would suffice if the question raised in the petitions is left open to be decided in appropriate proceedings.

24. The learned senior counsels appearing for the Interveners opposed the said prayer also contending that the withdrawal of the writ petitions is nothing but an attempt to render the Transfer Petition pending before the Supreme Court infructuous. The said contention on the face of it is fallacious in view of the consistent stand taken by the Interveners that they do not have any objection for unconditional withdrawal of the writ petitions.

25. Coming to the decision in *Sarguja Transport Services Case* (supra) relied upon by the counsel for the respondents, it is a case where the court was considering the question whether a petitioner after withdrawing a writ petition without the permission to institute a fresh petition can file a fresh writ petition in High Court under Article 226. While observing that the principle underlying Rule 1 of Order 23 of CPC should be extended in the

interest of administration of justice to cases of withdrawal of writ petition also not on the ground of *res judicata* but on the ground of public policy and that it would also discourage the litigant from indulging in Bench hunting tactics, the Supreme Court held that there is no justifiable reason to permit the petitioner to invoke the extraordinary jurisdiction of the High Court once again. It was further held that the remedy under Article 226 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.

26. The decision in Sarguja Transport Services Case (supra) was referred to in a later decision in ***Sarva Shramik Sanghatana (K.V), Mumbai Vs State of Maharashtra and Ors.***; (2008) 1 SCC 494 and it was held that it would apply only where the first petition was withdrawn in order to do Bench hunting or for some other malafide purpose.

27. Apparently in Sarguja Transport Services (supra) case, the writ petition was withdrawn by the petitioner therein without the permission to institute a fresh petition. However, in the petitions before us the petitioners are seeking permission to withdraw on the ground that the issue involved in the present petitions is also the subject matter of the writ petition pending before the High Court of Calcutta and since the same is likely to be heard, they intend to join the proceedings. In fact, they have already filed petitions for intervening in the writ petition pending on the file of High Court of Calcutta. In the facts and circumstances of the case, we are of the view that the purpose for which the petitioners are seeking to withdraw the main writ petitions constitutes ‘sufficient ground’ as provided under Order 23 Rule 1

CPC. We also do not find any justifiable reason to hold that the conduct of the petitioners is not bona fide. Admittedly, the petitioners are assailing the constitutional validity of the provisions of a statute and it is not as if the petitioners are seeking determination of their individual rights. Therefore, the allegations of forum shopping and Bench hunting are without any basis.

28. At any rate, the petitioners are not seeking liberty to file a fresh writ petition for the same relief but are only requesting to leave the questions raised in instant petitions open to be decided in appropriate proceedings.

29. Hence, we deem it appropriate to grant the permission as sought by the petitioners. Accordingly, all the applications are allowed permitting the applicants/petitioners to withdraw the writ petitions leaving open the issues raised in these writ petitions to be decided in appropriate proceedings.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J.

AUGUST 07, 2015

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