

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.03.2016

DATE OF DECISION: 30.03.2016

CORAM

THE HON'BLE Mr.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE Mr.JUSTICE M.M.SUNDRESH

W.P.No.6604 of 2015

South Indian Music Companies
Association, Having its
registered office at Flat No.3A,
3rd Floor, Vishesha Home,
Ramanujam Street, T.Nagar,
Chennai-600 017. Represented by its
Secretary, Mr.J.Swaminathan ... Petitioner

Vs.

1. Union of India,
Rep. by its Secretary,
Ministry of Human
Resource Development,
Shastri Bhavan,
New Delhi-110001.

2 . The Copyright Board,
Rep. by The Registrar of
Copyrights, 4th Floor,
Jeevan Deep Building,
Parliament Street,
New Delhi-110001

.. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying to issue a writ of Declaration, declaring Sections 11, 12, 31 and 31-D of the Copyright Act, 1957, Rule 3 of the Copyright Rules, 2013, and the Copyright Board Salaries and Allowances and the other terms and conditions of service of the Chairman and other Members Rules, 2014, as ultra vires Articles 14, 19 (1) (g), 50, 245 and 300-A of the Constitution of India in so far as this petitioner is concerned.

For petitioner:: Mr.M.V.Swaroop

For Respondents:: Mr.G.Rajagopal,
Additional Solicitor General,
assisted by Mr.Su.Srinivasan,
Assistant Solicitor General

JUDGMENT

The Hon'ble Chief Justice and M.M.Sundresh,J.

The petitioner association, having its members consisting of various music companies spreading over southern part of Peninsula, has laid a challenge to the provisions contained in Sections 11, 12, 31 and 31-D of the Copyright Act, 1957, Rule 3 of the Copyright Rules, 2013, Copyright Board Salaries and Allowances and other terms and conditions of service of the Chairman and other Members Rules, 2014 and the constitution of the Search cum Selection Committee meant for its recommendations for appointment of members of the Copyright Board, being violative of Articles 14, 19(1)(g), 21, 50, 245 and 300-A of the Constitution of India with a specific emphasis of the basic structure enunciated therein.

2. Heard Mr.M.V.Swaroop, learned counsel appearing for the petitioner and Mr.G.Rajagopal, learned Additional Solicitor General appearing for the respondents, assisted by Mr.Su.Srinivasan, Assistant Solicitor General.

Provisions of the Copyright Act, 1957:

3. With the onset of advanced means of communications like broadcasting, litho-photography, etc., it was felt that the then existing Copyright Act introduced in 1914 requires a fresh look. Thus, the need qua the registration of a Copyright was recognized through the Copyright Office. Therefore, a Copyright Office was sought to be established under the control of the Registrar of Copyrights. Certain duties have been prescribed for Registrar, who, in turn, is given the task of disposing of applications for compulsory licences, apart from making inquiries into the complaints of importation of infringing copies. An appeal memorandum is prescribed to the Copyright Board against the orders of the Registrar of Copyrights.

4. Section 6 of the Copyright Act deals with a reference to be made to the Copyright Board qua certain disputes. It further enables the Board to decide disputes regarding 'term of copyright and international copyright'. It also hears matters relating to rectification of Register involving disputes between private parties under Section 50. Under

Section 19A also, the Board hears disputes regarding assignment of copyright, which once again would encompass a private dispute between the parties.

5. Section 11 deals with the constitution of the Board, which shall consists of a Chairman and two other members. The salaries and allowances payable to the Chairman and two other members are to be prescribed by the Government. The proviso to Section 11(2) mandates that salary and allowances apart from the terms and conditions of service fixed for the Chairman or the members, as the case may be, shall not be varied to their disadvantage after appointment. The qualification for the Chairman shall be a person, who is, or who has been, a Judge of a High Court or is qualified for appointment as Judge of High Court.

6. The terms and conditions of the office of the Chairman and members of the Board was accordingly prescribed as per the rule making power available to the Central Government under Section 78(2) of the Copyright Act 1957. The rule also prescribes the qualification for the Chairman as well as members in the following manner as per Rule 3(2) of the Copyright Rules, 2013:

''3. Terms and conditions of the Office of the Chairman and members of the Board. -

(1)

(2) (i) A person shall not be qualified for appointment as Chairman unless he -

(a) is, or has been a Judge of a High Court, or

a) is, or has been a Judge of a High Court; or

(b) is qualified for appointment as a Judge of a High Court;

(ii) A person shall not be qualified for appointment as member unless he--

(a) is or has been a member of the Indian Legal Service and has held a post in Grade-I of that service for at least three years; or

(b) has, for at least ten years, held a judicial office; or

(c) is or has been a Member of a Tribunal or Civil Service not below the rank of a Joint Secretary to the Government of India with three years' experience in the field of Copyright; or

(d) has, for at least ten years, been an advocate of a proven specialised experience in Copyright Law;

7. The Chairman and the other members are to be appointed by the Central Government. However, Chairman has to be appointed after consultation of the Chief Justice of India. As the rules do not provide for the mode of appointment of the members, the same is sought to be filled up through an Executive act qua a search-cum-selection committee in accordance with the DoPT OM dated 30.7.2007. The following is the constitution of the Committee:

- | | |
|--|-----------|
| '(i) Secretary, Deptt. Of Higher Education | -Chairman |
| (ii) Secretary, Deptt. Of Legal Affairs | -Member |
| (iii) Secretary, Deptt. Of Industrial Promotion-
& Policy | -Member |
| (iv) Chairman, (Copyright Board) | -Member |
| (v) Shri Narender K.Sabarwal, IP Expert | -Member |

The said committee has been constituted in consultation with Department of Personnel and Training (DoPT) in accordance with DoPT OM dated 30.07.2007''

8. Section 12 of the Act deals with the powers and procedure of the Copyright Board. Though the proviso to section 12 speaks about reference by the Chairman to a Special Bench of five members, it is conceded by the respondents that the constitution is only the Chairman and two members. Thus, it was a legislative oversight, which would be adequately taken care of shortly. Section 12(3) speaks about the opinion of the majority in a case involving difference of opinion among the members to prevail. Where there is no such majority, the opinion of the Chairman is sought to prevail. As per Section 12(7), the Board shall be deemed to be a Civil Court for the purpose of Sections 345 and 346 of the Code of Criminal Procedure and its proceedings before the Board shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code.

9. An appeal would lie to the Board against the Registrar of Companies under Section 72(1). Section 72(2) prescribes an appeal against the final decision or Order of the Board, not being a decision or the order made in appeal under sub-section (1) of Act.

10. Thus, the above said provisions make it abundantly clear that the functions of the Copyright Board are predominantly judicial. Section 31 of the Act deals with granting of compulsory licence in works withheld from public. Such a work ought to have been published or performed in public. Thus, it must have come into the public domain. A complaint can be made to the Board when the owner of copyright has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work,

and by reason of such refusal the work is withheld from the public and similarly when such a owner has refused to allow communication to the public by (broadcast) of such work or in the case of a (sound recording) the work recorded in such (sound recording) on terms which the complainant considers reasonable. When such a complaint is made, the Board after giving to the owner a reasonable opportunity of being heard and after holding such an enquiry, which is required, if it is satisfied that the grounds of such refusal are not reasonable, then direct the Registrar of Copyrights to grant the complainant a licence to republish the work, perform the work in public or communicate the work to the public by (broadcast), as the case may be, subject to adequate payment to the owner of the copyright by way of compensation.

11. Therefore, once a Copyright is taken in public domain, then it becomes a commercial right. It is not as if the complainant is entitled to succeed in all cases of refusal to grant licence, but only when the Board is satisfied on the grounds being not reasonable. Therefore, the said provision makes a delicate balance between private and public interest.

12. Section 31D speaks about "statutory licence for broadcasting of literary and musical works on sound recording". Even here also, the applicability would arise when such a work has already been published, thus, coming to the public arena. The object is to keep on term the bargaining power between the parties qua the public interest.

Submissions of the petitioner:-

13. Learned counsel for the petitioner submitted that the Board, being a quasi-judicial body, the methodology adopted for appointment of the Chairman and the members would be an affront to the independence of the judicial function affecting the basic structure. It is the judiciary, which should have the primacy in the appointments, as against the Government. Such a power would mitigate against the concept of separation of powers, which is one of the foundation of the Constitution scheme, meant to be maintained between the three pillars. A member of a Tribunal cannot be appointed without the legal expertise. In the Selection Committee meant for the appointment of members, the Chairman has been relegated to a mere member. Thus, the said process is contrary to paragraph 120(viii) of the decision of the Supreme Court in Union of India Vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1). The prescription of qualification under Rule 3(2) (ii) qua the members would amount to excessive delegation of essential legislative functions. There is no distinction between Judicial and Technical Members. There is every possibility that two Technical Members would constitute a

Bench. Section 12(6), which prohibits the challenge of a decision of the Board on the ground of defect in the constitution, is unconstitutional in such a case. As per decision of this Court in Shamnad Basheer Vs. Union of India, (2015-2-L.W.941), which was affirmed by the Supreme Court in S.L.P.(C) No.18142 of 2015 dated 27.7.2015, one judicial member is mandatory. The Board has been placed under the control of the Ministry, Human Resources Development, which is contrary to the law laid down in Union of India Vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1), particularly, with reference to the salaries and allowances of Chairman and members of the Copyright Board. Section 31 is violative of Article 14 as it targets only broadcasting of "sound recordings alone" for compulsory licence. There are no adequate guidelines leading to granting of unanalysed power in the hands of the Board. Section 31D is violative of Article 19 (1)(g), as it provides for the royalties to be fixed for radio broadcasting by the Board directly. Thus, such a power cannot be termed as a reasonable restriction.

14. To buttress the submission, learned counsel for the petitioner has made reliance upon the following citations:

1. Union of India Vs. Shamnad Basheer (S.L.P. (C) No.18142 of 2015 dated 27.7.2011);
2. Division Bench decision of this Court in Shamnad Basheer Vs. Union of India, (2015-2-L.W.941);
3. Union of India Vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1);
4. Super Cassettes Industries Ltd. Vs. Music Broadcast Pvt.Ltd., (2012) 5 SCC 488''

Submissions of respondents:-

15. Learned Additional Solicitor General appearing on behalf of the respondents submitted that Copyright Board is not a Court. The Board is also performing other functions, which are of administrative and regulatory in nature, apart from judiciary. Therefore it cannot be equated with the Company Law Tribunal or the Intellectual Property Appellate Board. It is also not a substitute for the High Court. There is nothing wrong in the constitution of the Board. Section 11 of the Act is constitutionally valid. The appointment of the Chairman is made with the consultation of the Chief Justice of India. The word "consultation" can be taken as a recommendation to be made by the Chief Justice of India. The other members are appointed in consultation of the Chairman, who plays an important role in screening of the initial applications and in the final selection, being member of the Search-cum-selection Committee. The proviso to Section 11(2) takes care of the service conditions of the Chairman and the members. All the members are technically qualified except in one category,

wherein also, the qualification prescribed is three years experience in the field of copyright, that too, at the rank of Joint Secretary to Government of India and above. Section 31 provides for a level playing field. There is no arbitrariness involved in the said provision. It has been introduced from the point of view of public interest without affecting the private interest. The deprivation, if any, is only by an adjudicatory process by following the mechanism provided. It is further submitted that insofar as the hearing by the Board is concerned, there is no difficulty in following the procedure to make a mandatory presence of one Judicial Member in a Bench consists of two. Similarly, in a Bench consisting of Chairman and two members, one of them can be a Judicial Member as per Rule 3(2)(ii) (a) to (d) of the Copyright Rules, 2013. Coming to proviso to Section 12(2), it is submitted that it is a mistake committed through oversight and thus the same would be rectified. Thus, the learned Additional Solicitor General pleaded for the dismissal of the writ petition. In support of his contentions, he relied on the following decisions:

1. Entertainment Network (India) Limited Vs. Super Cassette Industries Limited, ((2008) 13 SCC 30) and
2. Super Cassettes Industries Limited Vs. Music Broadcast Private Limited, ((2012) 5 SCC 488)''

Discussion:-

16. The challenge has been made on the basic structure, being violated, apart from infringement of Articles 14 and 19 (1)(g). Coming to the basic structure and the independence of judiciary, we are of the view that the provisions, as they stand now, do not exhibit any such violation. There is no dispute that the Board performs its judicial functions. Under Section 11 of the Act, the Chairman is appointed, though by the Government, but 'in consultation with the Chief Justice of India'. The definition of the word 'consultation' has been dealt with by the Apex Court in various pronouncements and thus we do not reiterate the said settled principle by quoting the following paragraphs of our decision in Shamnad Basheer Vs. Union of India, (2015-2-L.W.941):

"9.18. We have yet another issue on hand. Learned counsel appearing for the petitioner submitted that an attempt is being made to sit over the decision of the Chief Justice of India by subjecting it to the approval of the appointment Committee of the Cabinet. Again, at the cost of repetition, we reiterate that the principle, as we understand in the decision rendered in R.Gandhi's case, would govern this issue as well. The word 'consultation' has got a different connotation on different fact

situations. If we are to interpret the same on the touchstone of separation of powers, judicial independence and basic structure, then the only irresistible conclusion that could be arrived at is that the view of the Chief Justice of India in the appointment of Chairman should be taken note of in the proper perspective.

9.19. The Supreme Court in N.Kannadasan Vs. Ajay Khose and others, ((2009) 7 SCC 1) held that meaning of 'consultation' may differ in different situations depending on the nature of statute. It was further held that the proposal for appointment of President of State Commission must be initiated by the Chief Justice. Before us, there is no material on the procedure governing the appointment of Chairman. Therefore, we are not in a position to go into its correctness. However, we have no hesitation in holding that the view of the Chief Justice of India on the choice of selection to the post of Chairman should be given due weightage. Thus, we hold that the procedure adopted in seeking 'approval' by the appointment committee of Cabinet is illegal. From the counter affidavit it is seen that the word 'consultation' has been taken as recommendations of the Chief Justice of India. Therefore, we can infer that the recommendations are being made by the Chief Justice of India. Thus, we hold that the recommendations of the Chief Justice of India should have primacy, subject to the approval of the President. Such a recommendation is required to be considered in its perspective in the normal circumstances."

17. Therefore, the words 'consultation' and 'recommendation' qua the appointment of Chairman by the Hon'ble Chief Justice of India would only mean its 'binding nature'. Therefore, the name for the appointment to the post of Chairman of the Board should emanate through the recommendation of the Hon'ble Chief Justice of India. For the above said purpose, there is no necessity to strike the provision except clarifying the law laid down in this regard.

18. Section 78(2) does not reflect the exercise of the rule making power of the Government. It is not necessary that the qualification of the members are to be incorporated in the parent Act. On a reading of Section 78(2) of the Act with rule 3 of the copyright Rules 2013, we do not find any excessive delegation involved. In the same way, we do not find that the

qualification prescribed for members would offend the basic structure, affecting the independence of the judiciary.

19. The only grievance of the petitioner is with respect to the inclusion of a Joint Secretary to the Government of India with three years of experience in Copyright.

20. As the dispute would involve a specialized knowledge in the field of copyright, we do not find anything wrong in the qualification prescribed. For the above said purpose, there is no necessity to divide a technical member from a judicial member. The aforesaid rule speaks about experience in the field of copyright. Therefore, it is not as if anybody in the cadre of Joint Secretary to Government of India would become eligible to be appointed as a member of the Board. Thus, Rule 3(2)(ii) (c) is constitutionally valid. However, we find force in the other submission made by the learned counsel for the petitioner that when the Board hears a case, it should necessarily constitute one member as per Rule 3(2)(ii) (a), (b) and (d) with the other could well be a Joint Secretary to Government of India with three years of experience in the field of Copyright. If the Chairman constitutes the Board with such a member when the other is in the rank of Joint Secretary to the Government of India, then, there would be no problem. Similarly, when the Board consists of three members during hearing, it would only be appropriate to have one Member as per Rule 3(2)(ii) (a), (b) and (d), other than the Chairman.

21. The learned Additional Solicitor General fairly submitted that there would be no difficulty in adopting such an yardstick. For that matter, we do not find anything wrong in Section 12(6) of the Act, which merely speaks about the existence of any vacancy or defect in the Constitution of the Board. Thus, it does not deal with the situation dealt with above. In other words, it merely deals with the lack of qualification of the constituents of the Board.

22. Coming to the challenge made on the ground of violation of Articles 14 and 19(1)(g) to a piece of legislation qua the power of judicial review available to this Court, the Courts are required to take a practical view and avoid absolute and inflexible concept. The grounds of challenge are also limited. A useful reference can be had to the decision of a Division Bench of this Court Anti Corruption Movement Vs. The Chief Secretary to Government of Tamil Nadu, (2015-2-L.W.97), in which one of us (Sanjay Kishan Kaul, Chief Justice) is a member, wherein, it was held as under:

'35. On appreciation of the submissions and the judicial pronouncements referred to aforesaid, we are of the view that the test to be

applied for determining the constitutional validity has been correctly set out by the learned senior counsel on behalf of private respondents 5 to 9. The dual test in this behalf is, (1) legislative competence and (2) violation of Fundamental Rights guaranteed under Part-III of the Constitution of India.

36. As far as legislative competence is concerned, there is really no quibble that the State Legislature actually had the competence to carry out the amendment in view of the matter falling under Entry 42 of List-III of the VII Schedule, being the Concurrent List. It is difficult to accept the submission of the learned counsel for the petitioner that since the subject matter of the Entry deals with acquisition and requisition of property, re-conveyance of property would not fall within the parameters of the Entry. Such acquisition in terms includes vesting as well as divesting of acquired land. This is also apparent from the fact that often, the land which is acquired for public purpose, is placed at the disposal of the authority for whose benefit the acquisition has been made. In fact, in V.Chandrasekarans case (2012-5-L.W. 724 = (2005) 2 CTC 721), while dealing with Section 48 of the said Act, it was observed that the land owner cannot seek de-vesting of land, but only has the right to receive compensation. The State was also held not to have requisite power to re-convey the land unless there is some statutory amendment to this effect. Section 48-B is this statutory amendment.

37. The judgments referred to in support of the pith and substance doctrine to be applied while examining issues of legislative competence have been set out in the various judicial pronouncements in Subrahmanyam Chettiar vs. Muthuswamy Goundan ((1941) 59 L.W. 61 = A.I.R. 1941 F.C. 47), A.S. Krishna vs. State of Madras (1957 Cri.L.J. 409) and Greater Bombay case ((2007) 6 S.C.C. 236).

38. In the catena of judgments referred to by the learned senior counsel appearing for private respondents 5 to 9, the discussion

proceeds on the basis that the compensation in India qua challenge to the constitutional validity of a provision of an enactment is similar to the United States of America, and apart from the two aspects referred to aforesaid, there is no third ground available. It is in this context, it has been observed that no enactment can be struck down by just saying that it is arbitrary or unreasonable, and the endeavour should not be to somehow or the other find a constitutional infirmity to invalidate on it. In fact, an enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, being the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court is not supposed to sit in judgment over their wisdom'' - vide State of A.P Vs. McDowell's case ((1996) 3 SCC 709)). Those views have been approved by the Constitution Bench of the Supreme Court in R.Gandhi, President, Madras Bar Association ((2010) 11 SCC 1).

39. The presumption in favour of constitutionality and the burden being on the person who attacks it to show that there has been transgression of the constitutional principles is thus founded on the number of judicial pronouncements discussed above as well as in Greater Bombay Co-op. Bank Ltd. Case ((2007) 6 SCC 236) as the Courts would be justified in giving a liberal interpretation in order to avoid constitutional invalidity. Even if very wide and expansive powers are given to an authority, they can be in conformity with legislative intent of exercise of power within the constitutional limitations. It is also the view in State of Bihar vs. Bihar Distillery Ltd. Case ((1997) 2 SCC 453) and State of Madhya Pradesh Vs. Rakesh Kohli ((2012) 6 SCC 312), the beginning of the principle of legislative competence being traced out in Subramanyan Chettiar vs. Muttuswamy Goundan case (AIR 1941 F.C. 47).

40. The challenge laid by the petitioner based on the plea of arbitrariness and unreasonableness on the touchstone of Articles 14 and 19 of the Constitution of India, on the first

blush, appeared to be attractive over the possibilities of how the provision may be used, but once the touchstone of constitutional validity in terms of the aforesaid principle is applied, it is difficult to accept the contention of the learned counsel for the petitioner.

41. The legislative wisdom cannot be gone into or sat in judgment over and thus, even what is perceived to be an erroneous legislation cannot be quashed unless it fails to satisfy the dual test of intelligible classification and rationality.'

23. For the violation of Article 14, it must be demonstrated in clear terms to the satisfaction of the Court on the negation of equality. A legislative arbitrariness, if any, should be probable and apparent. It is on the party, who alleges violation, to demonstrate that the classification is arbitrary, artificial or evasive, thus, not confining to rationality. The principle governing Article 14 qua the constitutionality of enactment is summarised by us in Hotel & Bar (FL.3) Association of Tamil Nadu Vs. The Secretary to Government & another, (2015-2-L.W. 497) as under:

'19. When a challenge is made to an enactment on the ground of Article 14 being violated, it must be demonstrated that there is an element of negation of equality. A mere discrimination per se cannot be termed as arbitrary, as a classification is meant for providing benefits to a group of persons. A differentiation must distinguish a group of persons or things identified as such from the things left out. While dealing with the classification, an accurate one is not possible. Revenue and economic considerations in taxing statute are permissible classifications. An objective must be a just one. It is a sine qua non for classification. A valid classification is a valid discrimination. A classification without reference to the object sought to be achieved would be hit by Article 14. Such a classification should not be arbitrary, artificial or evasive. In other words, it must confine to rationality.

20. While dealing with the classification qua the constitutional validity of a statute, a Court of law is required to deal with the facts which made the legislation in classifying a group. However, when the object of the classification itself is discriminatory, then there is no need to go into the classification. Courts are required to afford larger latitude to the legislature in its exercise of classification. In other words, what is reasonable is a question of practical approach. While testing the policy underlying the statute, the intended object is to be ascertained.

21. A legislation can be challenged on the ground of legislative arbitrariness. Such an arbitrariness as found by the Court should be palpable and apparent. It should rather be seen on the face of it. It cannot be done on the basis of hardship caused to a party, but on a total unreasonableness. The Court must satisfy that the statute contains substantive unreasonableness. The conclusion arrived by us is fortified by the decisions rendered by the Supreme Court in *Transport and Dock Workers Union and others Vs. Mumbai Port Trust and another*, ((2011) 2 SCC 575), *Catholic Syrian Bank Limited Vs. Commissioner of Income Tax, Thrissur*, ((2012) 3 SCC 784), *Joginder alis Jindi Vs. State of Haryana*, ((2008) (10) SCC 138), *Bharat Petroleum Corporation Limited vs. Sunil Bansal* ((2009) 10 SCC 446) and *Subramanian Swamy Vs. C.B.I.* ((2014) 8 SCC 682).

22. We would deem it appropriate to recapitulate the following passages of a decision of the Supreme Court in *State of Tamil Nadu and others Vs. K. Shyam Sunder and others*, ((2011) 8 SCC 737):

'50. In *Ajay Hasia v. Khalid Mujib Sehravardi*, ((1981) 1 SCC 722), this Court held that Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. Whenever therefore, there is arbitrariness in state action, whether it be of the legislature or of the executive, Article

14 immediately springs into action and strikes down such State action. (See also E.P.Royappa v. State of T.N. ((1974) 4 SCC 3) and Maneka Gandhi v. Union of India, ((1978) 1 SCC 248)).

51. In Sharma Transport v. Govt. of A.P. ((2002) 2 SCC 188), this Court defined arbitrariness observing that a party has to satisfy that the action was not reasonable and was manifestly arbitrary. The expression 'arbitrarily' means, act done in an unreasonable manner, as fixed or done capriciously or at pleasure without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

52. In Bombay Dyeing & Mfg. Co. Ltd., (3) v. Bombay Environmental Action Group, ((2006) 3 SCC 434), this Court held that: (SCC p. 511, para 205)

'205. Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness.'

53. In Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, ((2007) 6 SCC 668) and Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Ltd. ((2009) 5 SCC 342), this Court held that a law cannot be declared ultra vires on the ground of hardship but can be done so on the ground of total unreasonableness. The legislation can be questioned as arbitrary and ultra vires under Article 14. However, to declare an Act ultra vires under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute itself.'

Useful reference can also be made to a recent decision of the Apex Court in Rajbala Vs. State of Haryana, ((2016) 2 SCC 445)). The following paragraphs would be apposite:

'51. We first deal with the submission of violation of Article 14 on the ground of arbitrariness.

52. The petitioners argued that the scheme of the Constitution is to establish a democratic, republican form of Government as proclaimed in the Preamble to the Constitution and any law which is inconsistent with such scheme is irrational and therefore 'arbitrary'. In support of the proposition that the Constitution seeks to establish a democratic republic and they are the basic features of the Constitution, petitioners placed reliance upon His Holiness Kesavananda Bharati v. State of Kerala & Another, ((1973) 4 SCC 225), para 1159 and Indira Nehru Gandhi v. Raj Narain, ((1975) Supp SCC 1), paras 563 and 578. There cannot be any dispute about the proposition.

53. In support of the proposition that a statute can be declared unconstitutional on the ground that it is arbitrary and therefore violative of Article 14, the petitioners relied upon the judgments of this Court reported in Subramanian Swamy v. Director, Central Bureau of Investigation & Another, ((2014) 8 SCC 682), Indian Council of Legal Aid & Advice v. Bar Council of India, ((1995) 1 SCC 732), B. Prabhakar Rao & Others v. State of Andhra Pradesh & Others, (1985 (Supp) SCC 432) and D.S. Nakara & Others v. Union of India, ((1983) 1 SCC 305) and certain observations made by Justice A.C. Gupta in his dissenting judgment in R.K. Garg v. Union of India, ((1981) 4 SCC 675).

54. In our opinion, none of the abovementioned cases is an authority for the proposition that an enactment could be declared unconstitutional on the ground it is "arbitrary".

55. In Subramanian Swamy case, ((2014) 8 SCC 682)), the dispute revolved around the constitutionality of Section 6A of the Delhi Special Police Establishment Act 1946, which was introduced by an amendment in the year 2003. It stipulated that the Delhi Special Police Establishment shall not conduct any 'enquiry' or 'investigation' into any offence

falling under the Prevention of Corruption Act 1988, alleged to have been committed by certain classes of employees of the Central Government, etc. The said provision was challenged on the ground it was arbitrary and unreasonable and therefore violative of Article 14. The submission was resisted by the respondent (Union of India) on the ground that such a challenge is impermissible in view of the decision in State of Andhra Pradesh v. McDowell & Co., ((1996) 3 SCC 709). But the Constitution Bench eventually declared the impugned provision unconstitutional not on the ground of it being arbitrary but on the ground it makes an unreasonable classification of an otherwise homogeneous group of officers accused of committing an offence under the Prevention of Corruption Act without there being reasonable nexus between the classification and the object of the Act.

24. Similarly, when a challenge is made to Section 31D, being violative of Article 19(1)(g), it has to be demonstrated with clarity that the restrictions are not reasonable. Such a right is subject to implied limitations made explicit by Article 19(2) to 19(6) of the Constitution.

25. As discussed above, Section 31 and 31D provides for a mechanism to deal with the public interest vis-a-vis the private interest. It has been introduced by way of a public policy. It has got an in-built mechanism to take care of the interest of the owner. Guidelines have been provided for the purpose of fixing royalty under Rule 31(7) and (8). The owner would be given reasonable opportunity of being heard. There has to be satisfaction that the refusal is not reasonable. Section 31D was introduced taking note of Article 11(2) and 13 of Berne Convention and Article 15(2) of the Rome Convention (for sound recordings) and Article 9(1) of the TRIPS Agreement. It was meant to support the development and growth of private radio broadcasting. The object is also to strike at the monopoly to the detriment of the general public. While doing so, the provisions also take care of the interest of the owner. Though there was no direct challenge, the issues sought to be raised in this writ petition were raised and discussed before the Apex Court in Entertainment Network (India) Limited Vs. Super Cassette Industries Limited, ((2008) 13 SCC 30). The following paragraphs of the said judgment would be apposite:

'87. The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have

access to the works, on the other.

.....

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.

.....

93. 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. ...

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 therefor. An unreasonable demand if acceded to, becomes an unconstitutional 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.

....

124. The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. withholding the same from public may amount to unfair trade practice. In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large."

26. In Super Cassettes Industries Limited Vs. Music Broadcast Private Limited, ((2012) 5 SCC 488 = AIR 2012 SC 2144), it has been held as follows:

'81. However, Section 31 of the Copyright Act creates an exception to the above mentioned principle of the right of the owner of the copyright. In substance, the section deprives the 'owner' of the 'copyright' against his volition. In other words, by Section 31, the State is authorised, by its coercive powers, to deprive the owner of his copyright in a work, which is his property and the right to enjoy such property in the manner as the owner of the property pleases. Necessarily, in view of the constitutional mandate under Article 300-A, such a deprivation can only be by the authority of law and it is too well entrenched a principle in the constitutional law that such a law could be only for a public purpose.

.....

85. The power under Section 31 to grant a compulsory licence meant for avoiding the withholding of the republication or refuse to allow the performance in public of some "work" is, essentially, for the benefit of the public. Commercial benefit to "publisher" is incidental....."

27. Thus, the Apex Court has taken note of the various factors by adopting principles governing the interpretation of statutes including the doctrine of purposive construction, reading down and contextual interpretation. There is no legislative arbitrariness involved and the classification, being reasonable, has nexus to the object sought to be achieved. Hence we do not find any reason to hold that the provisions contained in Section 31 and 31D of the Copyright Act as unconstitutional.

28. Learned counsel for the petitioner has submitted that the constitution of the Search-cum-selection Committee for making recommendations for appointment to the members of the Copyright Board is totally contrary to the law laid down by the Apex Court in Union of India Vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1) as well as the decisions rendered by us in Shamnad Basheer Vs. Union of India, (2015-2-L.W.941). We find considerable force in the submissions made. In the counter affidavit filed, it has been stated that the Chairman of the Board will have an important role in the search-cum-selection Committee, but he has been reduced to a role of a member in the Committee. The qualification of Chairman is that of a High Court Judge, either working or retired. While we are not convinced with the elevated position assigned to the Secretary, Higher Education Department, the

Chairman of the Board has been drafted as a mere member. The jurisdiction qua his role defies logic and reason. The 1st respondent has failed to understand the fundamental role assigned to the Board and its object. We only reiterate our decision rendered in Shamnad Basheer Vs. Union of India, (2015-2-L.W.941) by quoting the following paragraphs:

'9.4. As the Constitution of the Committee, as referred above, is obviously loaded in favour of Executive, which is impermissible in law, as held by the Supreme Court in the judgments referred above, the then Chairman of IPAB raised an issue about the role assigned in the selection process. However, it was decided to stick on to the very same procedure notwithstanding the decision rendered in Union of India Vs. R.Gandhi, President, Madras Bar Association, ((2011) 10 SCC 1) with a justification that it does not have any bearing on the present case. Resultantly the selection process has been left entirely to the Executive, though the functions of the Tribunal are judicial. This act is a direct affront to the basic structure, which is fundamental to the Constitution of India. The 1st respondent has totally overstepped and acted in disregard to the law laid down by the Supreme Court in Union of India Vs. R.Gandhi, President, Madras Bar Association, ((2011) 10 SCC 1) by turning a blind eye. The directions issued therein are meant to be applicable to all the Tribunals. The 1st respondent cannot take a stand that for one enactment they can maintain basic structure by their action and violate through another. The need to protect the independence of judiciary has been dealt with and decided in all the decisions referred supra. It has been consistently held that the judiciary should have a substantial role in the selection. It was also held that the process of appointment should substantially be that of members of judiciary. We also note that under the Constitutional Scheme for the State Subordinate Judiciary, it is the High Court, which has got the primacy along with its administrative control. The directions issued in paragraphs (viii), (xii) and (xiii) of its conclusion in Union of India Vs. R.Gandhi, President, Madras Bar Association, ((2011) 10 SCC 1) with regard to the composition are binding on the 1st respondent and therefore

they ought to have followed the same. The Committee as it exists today is packed with an over-dose of Executive with the lone voice of the Chairman of IPAB is restricted to that of a member.

9.5. Apropos recommendation of search cum selection committee required to be approved by the appointment Committee of the Cabinet for the post of Vice-Chairman and other members, we hold that the said methodology is also totally unconstitutional as it impinges upon the independence of the judiciary. Therefore, such an yardstick prescribed is also struck down in the light of the decisions of the Supreme Court referred supra. This exercise is done to alleviate the concern and to see that the independence of the judiciary is not destroyed by an indirect method. We also draw our support from the following passage of the judgment of the Supreme Court in the case of State of Maharashtra v. Labour Law Practitioners' Association, ((1998) 2 SCC 688).''

We also note that though Sub-rules (2) to (5) of Rule 3 of the Copyright Rules, 2013 speaks about appointment to the post of Chairman with the consultation of Chief Justice of India, the rules are silent qua the procedure for appointment to the members. Thus, an attempt is being made to fill up the same with an executive order. Though we do not find anything wrong in the process, the Committee constituted with the overdose of Executive cannot be sustained in the eye of law.

29. Accordingly, the search-cum-selection Committee in accordance with DoPT OM dated 30.7.2007 is hereby set aside, being violative of basic structure enunciated in the Constitution of India. We leave the whole exercise of re-constitution of the Copyright Board to the 1st respondent, whose official apathy was already taken note of in the above said judgment despite the earlier pronouncement of the Apex Court. We only suggest that the 1st respondent can explore the possibility of leaving the final say to the Chairman on the recommendations with the search-cum-selection committee by duly excluding him from that.

30. The only question for our consideration is, the emoluments of salary and allowances including terms and conditions of the Chairman and other Members of the Copyright Board. We do not find any need to declare the Copyright Board Salaries and Allowances and other terms and conditions of service of the Chairman and members Rules 2014 as ultra vires. The proviso to Section 11(2) of the Act takes care of the

situation. The said proviso mandates the Central Government not to vary the salary and allowances apart from the terms and conditions of services of the Chairman and the members to their disadvantage, after the appointments having been made. It is nobody's case that what has been fixed is not adequate. Therefore, we do not find any reason to declare the Rules as unconstitutional. We are of the view that the decision rendered in Union of India Vs. R.Gandhi, President, Madras Bar Association, ((2011) 10 SCC 1) on this issue does not have any application to the case on hand. It is not as if the Board is dealing with an instrumentality of the Government on the one hand and a private party on the other hand, as substantial litigation is between the private parties.

31. In the result, the writ petition stands disposed of in the following manner:

(i) The provision contained in Section 11, 12, 31 and 31D of the Copyright Act, 1957 and Rule 3 of the Copyright Rules, 2013 are declared as constitutionally valid.;

(ii) The Copyright Board Salaries and Allowances and other terms and conditions of service of the Chairman and other members Rules, 2014 is declared as constitutionally valid.;

(iii) The Copyright Board shall consists of atleast one Member having the qualification under Rule 3(2)(ii)(a), (b) and (d) of the Copyright Rules, 2013, out of the two. In case it consists of Chairman and two others, one of the two members will have to be one having qualification aforesaid.;

(iv) The Constitution of Search-cum-selection Committee for making recommendations for appointment of members of the Board is declared as unconstitutional.; and

(v) The 1st respondent is directed to re-constitute the Board in the light of the observations made in paragraph No.29 of this order.

There is no order as to costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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Copy to:

1. The Secretary, Ministry of Human
Resource Development,
Union of India,
Shastri Bhavan,
New Delhi-110001.

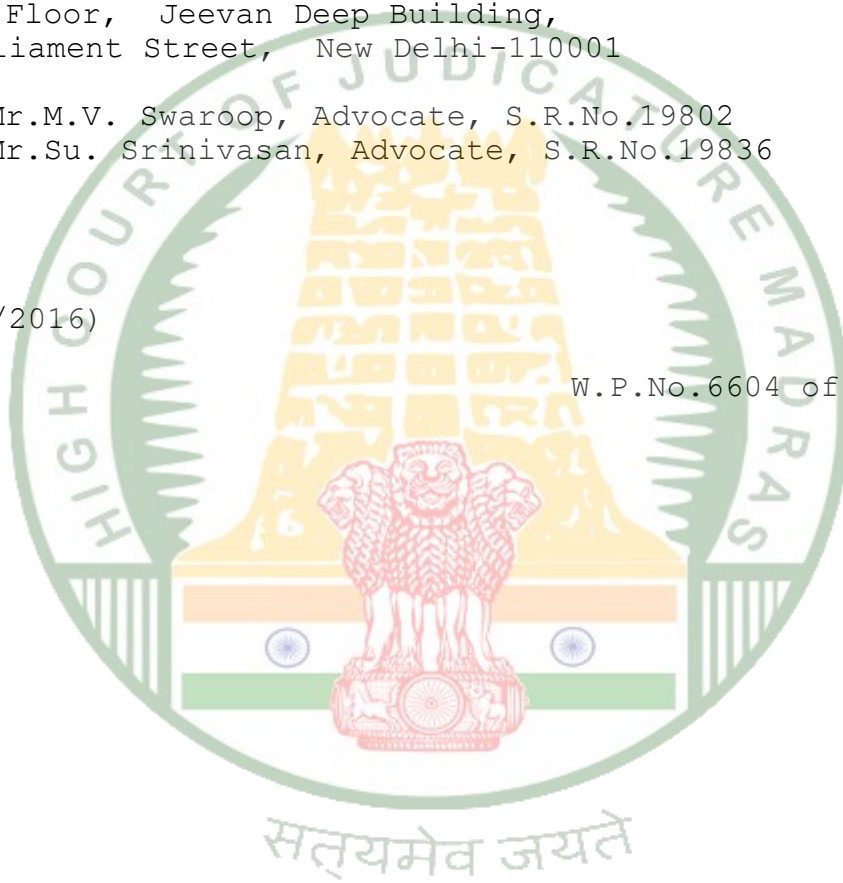
2 . The Registrar of Copyrights,
Copyright Board,
4th Floor, Jeevan Deep Building,
Parliament Street, New Delhi-110001

+1cc to Mr.M.V. Swaroop, Advocate, S.R.No.19802

+1cc to Mr.Su. Srinivasan, Advocate, S.R.No.19836

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EU(13/04/2016)

W.P.No.6604 of 2015



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