

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.06.2017

PRONOUNCED ON : 03.07.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

C.S.No. 635 of 2011

Kajal Aggarwal ... Plaintiffs

Vs.

The Managing Director,
M/s.V.V.D.& Sons P.Ltd., defendants

For Plaintiff :: Mr. V.Manohar

For Defendant :: Mr. P.V.S.Giridhar, for
P.V.S. Giridhar Associates

JUDGMENT

Suit for compensation and permanent injunction.

2. The averments contained in the plaint are briefly stated as follows:

The plaintiff is a popular actress and based on her profile and potential in the public and various societies, the defendant approached her through their advertising agency to support their products to be marketed and accordingly, on the mutual negotiations, the terms for the said promotional participation was finalized and the plaintiff agreed to subject herself to be available to

shoot the required materials to use the same for the advertisements of the defendant. Accordingly, on the finalization of the terms, the plaintiff completed the shooting and photo sessions for two full days. However, the defendant did not keep up their commitment and violated the terms on which the plaintiff agreed to extend her profile for the promotion of their business. In fact, all the terms, which were agreed upon, were not incorporated with the full text in the agreement prepared and brought with the signature of the defendant to subscribe the signature of the plaintiff. The plaintiff made specific protest to incorporate all the agreed terms. However, the defendant had included by hand written words in the clause 2 of terms of agreement to restrict the advertisements to the place of Tamil Nadu and Andhra Pradesh only. The defendant promised to prepare and send the proper text with agreed conditions, but, failed to do so. The defendant started using the advertisement materials with plaintiff's profiles for their product's marketing even before furnishing the corrected agreement and the subscription of the signatures on either side and on coming to know the same, the plaintiff had protested and the defendant promised to rectify the issue. Despite the same, the defendant has not been bona fide and continued to exploit the popularity of the plaintiff through their advertisement materials without giving regards to the terms of agreement agreed to between the parties. In such situation, the plaintiff was constrained to issue legal notice dated 16.02.2009, giving the

brief facts bringing to the attention of the defendant to rectification aspect to be complied with by them and to the surprise and dismay, the defendant had issued a reply dated 24.03.2009, containing false averments and thereafter, the plaintiff had taken up the issue seriously through the agency, which had interacted in between the plaintiff and the defendant and through them, the defendant had promised to stop the advertisements and agreed to resolve the issue. In such view, the plaintiff did not proceed with further actions. Further, the plaintiff was also engaged in a busy schedule in her profession. It is a matter of convention and custom prevailing in the marketing field that any advertisement/endorsement allowed to be used is permissible only for a year unless and otherwise in clear terms provided or otherwise renewal is done in this regard. The defendant has no right to use the materials, which were produced in the year, 2008 to the subsequent years without the specific consent or renewal from the plaintiff. The attention of the plaintiff was drawn to the advertisements/Commercials released on T.V. by the defendant to promote their product on various dates, particularly on 01.09.2011 being Vinayagar Chaturthi day, in various channels including in Sun T.V., during the movie Audukalam telecast. In the said advertisements, the plaintiff's presence was made used, which were produced in the year 2008 and accordingly, the above exploitation of the plaintiff's profiles by the defendant are unauthorized and illegal. The defendant was allowed to use the profile only for the

prescribed period of twelve (12) months from 29.12.2008 to 28.12.2009 and hence, the defendant has no legal right, license, permission or renewal for them to make use of the profile of the plaintiff beyond the prescribed period and the defendant is prohibited from using such advertisements with the presence of the plaintiff's profiles. Meanwhile, the plaintiff's fame and popularity had increased multi fold and other reputed companies also approached the plaintiff for being their own Ambassador and on account of the conduct of the defendant in exploiting the plaintiff's profile much against the terms of the agreement, there were unwarranted queries and questioning of the plaintiff by the competitors of the defendant and thereby the plaintiff's future advertisement fortune was affected. Hence, the plaintiff issued the legal notice dated 12.09.2011, calling upon the defendant to immediately desist from using the materials and also claimed damages/compensation at the rate of Rs.2.50 crores. The defendant, on coming to know of the same, fearing interference by the legal forum kept on circulating more materials and advertisements to the prejudice of the plaintiff and the said conduct of the defendant only shows the adamant approach of the defendant in continuing to exploit the plaintiff's goodwill. The plaintiff was approached by M/s.Emami products for endorsing their oil products and they also pointed out the advertisements aired by the defendant, which had the prejudicial effect to the interest of their company and also to the plaintiff. Hence, the attitude and

the conduct of the defendant having become questionable both in civil and criminal forums and also amounting to transgressing on the privilege and personal rights of the plaintiff and the defendant having no manner of right to use the videos, photos, pictures, printed materials, wrappers or appearances or the figure of the plaintiff in any of their products beyond the agreed period and the action of the defendant in exploiting the plaintiff's profiles amounting to clear breach of trust and misuse of the earlier commitments, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

3. The averments contained in the written statement filed by the defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. It is true that the plaintiff had acted in an ad film and the defendant had been making use of the same for the purpose of marketing and promoting their products, particularly Coconut oil. At the time when the ad film was made, the plaintiff was only an ordinary model and she became an actor in films later. The popularity with countless fans claimed by the plaintiff is not admitted and disputed. The plaintiff was paid remuneration of Rs.3,00,000/- (Rupees Three Lakhs Only) by the defendant for the ad film. It is incorrect to state that any geographical limit was agreed upon for advertising the product using the plaintiff's name, image etc. It is true that an agreement recording all the terms agreed upon

between the parties was sent to the plaintiff, but she did not sign the same. It is denied that the defendant included handwritten words in clause 2 to restrict the advertisements to Tamil Nadu and Andhra Pradesh only. It is false to state that the defendant promised to prepare and send a revised text. The defendant has been using the advertisement material in accordance with the agreement and not in violation of the terms of the agreement. To the notice sent by the plaintiff on 16.02.2009 making false allegations, due reply was sent by the defendant by his reply noticed dated 24.03.2009 setting out the correct facts. It is necessary to state that the defendant holds copyright over the ad film and all rights in the said film vest in the defendant. The plaintiff has no manner of right over the same, since she has been paid the sum demanded by her for acting in the said ad film. The averments contained in paragraph - 4 of the plaint are denied and there is no convention or custom in the field of advertising that advertisement would be permissible only for one year. The claim of the plaintiff that the defendant cannot use the materials produced in the year 2008 for more than a year is incorrect and untenable. The averments contained in Paragraphs 5 & 6 of the plaint are not admitted. It is false to state that the plaintiff's reputation and fame had been affected on account of the advertisement given by the defendant. It is also false to state that there has been claim for the plaintiff's presence as brand ambassador from many of the reputed companies. It is false to state that the plaintiff has been put to

great damages on account of exploiting of her profile by the defendant as claimed in the plaint. To the legal notice dated 12.09.2011 containing false allegations, the defendant, through his reply dated 23.09.2011, had responded by correct facts and there is no illegal misuse or exploitation of the plaintiff's goodwill as claimed. It is denied that M/s.Emami had approached the plaintiff for endorsing their oil products. M/s.Emami is not a competitor of the defendant and the products of the two companies are different. M/s. Emami does not marketing Coconut oil or Herbal oil. There is no transgression of the privilege and personal rights of the plaintiff as alleged. There is no misuse of commitments or breach of trust on the part of the defendant as projected in the plaint. It is false to state that the plaintiff has been put to mental agony on account of the acts of the defendant. The plaintiff is not entitled to any compensation or other reliefs as claimed in the plaint. The Video film is a cinematography work over which the defendant holds a copyright having paid for and produced the same, in view of the provisions of Section 17 of the Copyright Act and has every right to exhibit the same in exercise of his rights under Section 14 of the said Act. As an actor, who had already received remuneration for her performance, no subsisting rights survive in the cinematograph work in favour of the plaintiff. The suit laid by the plaintiff having no cause of action and abuse of process of Court is liable to be dismissed.

4. On the basis of the pleadings set out above, the following issues are framed for determination:

- 1. Whether the plaintiff is entitled to compensation for a sum of Rs.2,50,00,000/- (Rupees two crores fifty lakhs only) or any sum for loss or damage caused to the plaintiff?*
- 2. Whether or not the defendant is restricted to use the profile of the plaintiff only to the period authorized in the agreement dated 29.12.2008?*
- 3. Whether or not the defendant exceeded the commitment and violated the condition in advertising their products with the appearance of the plaintiff's profile to cause prejudice?*
- 4. Whether or not the plaintiff is entitled to damages for the misuse and violation of terms of contract by the defendant?*
- 5. What extent the defendant is liable to compensate the plaintiff for their commission and omission on their part?*
- 6. Whether or not the plaintiff becomes answerable to the other contenders in the filed of marketing due to the conduct of the defendant?*

7. *Whether or not the plaintiff's right being transgressed and her privilege being affected and personal right of the plaintiff suffered?*
8. *Whether or not the defendant being vested with unscathed and absolute right over the advertisement materials of the plaintiff's presence to use it for eternity?*
9. *Whether there was consensus ad-idem on including territorial restrictions under clause 2 of the agreement?*
10. *Whether not the defendant the owner/author of the copyright in the commercial (cinematographic) film as per Section 17 of the Copyright Act, 1957 and Clause 4 of the Agreement dated 29.12.2008?*
11. *Whether not the term of copyright in the commercial (cinematography) film 60 years as stipulated under Section 26 of the Copyright Act?*
12. *Whether the plaintiff is entitled to permanent injunction to restrain the defendant or their person or the agents or the person acting on behalf of them using or publicizing or projecting or promoting or advertising the materials with the presence*

of the plaintiff's profile or her presence in any form?

13. Whether the plaintiff is entitled to future interest for the amount awarded as compensation from the date of the plaint?

14. To what other relief, the plaintiff is entitled to?

5. In support of the plaintiff's case, PW1 has been examined and Exs.P1 to 18 have been marked. On the side of the defendant, DW1 has been examined and Ex.D1 has been marked and MO1 has also been marked.

6. Issue Nos.1 to 13

The suit has been laid by the plaintiff seeking compensation and permanent injunction.

7. As seen from the pleadings, it is found that the plaintiff, complaining of violation and misuse of the terms of the agreement entered into between her and the defendant in respect of shooting of an Ad film on 29.12.2008 marked as Ex.P1, has instituted the suit against the defendant for the above said reliefs.

8. It is not in dispute that in respect of an Ad film for promoting the products of the defendant, the plaintiff and the defendant entered into an agreement on 29.12.2008 marked as Ex.P1 and accordingly, it is found that the defendant has employed the services of the plaintiff for shooting the film and accordingly, it is also noted and not disputed also that the plaintiff has been paid a sum of Rs.3,00,000/- for completing the shooting of the Ad film contemplated under Ex.P1 and it is also noted that even though the plaintiff as such has not signed the Ex.P1 agreement and only the defendant has signed the same, from the pleadings set out in the plaint, it is seen that the plaintiff has sought the reliefs claimed in the suit only by enforcing the above said agreement and therefore, as such, it is found that the agreement marked as Ex.P1 has come into existence between the parties after there has been a consensus *ad idem* with reference to the same in between the parties.

9. Briefly stated, according to the plaintiff, inasmuch as Ex.P1 agreement under clause - 9 stipulates that the agreement shall be in force for a period of 12 months from 29.12.2008 to 28.12.2009 and as the defendant, even after the period prescribed under Ex.P1 as above mentioned, continues to exploit the profile of the plaintiff for

promoting their product, according to the plaintiff, the defendant being not entitled to do so, she has been necessitated to lay the suit for appropriate reliefs. Therefore, the main crux of the plaintiff's case is that the defendant had misused the Ad film shot under the terms of Ex.P1 agreement beyond the period of one year stipulated therein and according to the plaintiff, despite the issuance of the legal notice calling upon the defendant to desist from exploiting the profile of the plaintiff beyond the stipulated period as mandated under Ex.P1., inasmuch as the defendant continued to onslaught the plaintiff's profile illegally and thereby, caused disrepute to the plaintiff's fame as such, according to the plaintiff, she has come forward with the suit for necessary reliefs.

10. Per contra, according to the defendant, there has been no violation of the terms and conditions of the agreement marked as Ex.P1 by the defendant and it is false to state that the defendant has misused the profile of the plaintiff beyond the stipulated period fixed under Ex.P1 and further according to the defendant, it is for the plaintiff to establish that the above case of misuse of her profile by the defendant beyond the stipulated period and further according to the defendant, as per the terms of Ex.P1 agreement, he has been granted

the copyright of the Cinematography film, Audio, video, cassettes, CDs and other promotional materials in the medium so developed between the plaintiff and the defendant pursuant to Ex.P1 and thus, according to the defendant, he being the owner of the copyright is entitled to use the same without any restriction or resistance by the plaintiff as provided under the Copyright Act, 1957 and therefore, according to the defendant, the plaintiff is not entitled to seek and obtain the reliefs sought for in the suit.

11. Considering the fact that the parties have agreed the existence of Ex.P1 agreement in between them for shooting the Ad film based upon the consensus ad idem entered into between them, it is not significant or necessary to go into the question as to whether who has incorporated the geographical limits contained in clause 2 of the agreement as such for the purpose of adjudicating the main issues involved in this suit. When it is found that the existence of Ex.P1 agreement between two parties is not in dispute and both parties had claimed and not in dispute that the ad film had been shot pursuant to the above said agreement and the plaintiff having come forward with the suit for enforcing the agreement on the footing that the defendant has violated the terms of the agreement beyond the stipulated period

mentioned therein and per contra, when according to the defendant, he has acted in terms of the above said agreement based upon the copyright conferred on him under the same, it has to be seen that whether the plaintiff is entitled to seek the reliefs sought for in the suit.

12. Clause 4 of Ex.P1 reads as follows:-

“ That the Cinematography Film, Audio, Video Cassettes, CDs and or any other promotional material in the medium so developed between both the parties will be the copyright of the party of the First part.”

Therefore, it is made very explicit that both parties are aware that under Ex.P1 the copyright had been conferred on the defendant in respect of the Cinematography film and other materials developed between the parties pursuant to Ex.P1. In this connection, the term Cinematography Film has been defined under Section 2 (f) of the Copyright Act 1957, as follows:

2(f). “Cinematograph film” means any work of visual recording and 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;

13. Further, as per the meaning of copyright given under Section 14 of the Copyright Act 1957, it is found that as regards the case of a Cinematograph film, it also includes the right, subject to the provisions of the said Act, to do or authorize the doing of any acts in respect of a work or any substantial part thereof and particularly, to communicate the film to the public. This is found in Section 14 (1)(d) (iii).

14. Chapter 4 of the copyright Act, 1957 deal with the ownership of copyright and the rights of the owner. As seen from the case of the parties and as adverted to earlier, it is found that in respect of shooting of an ad film for the promotion of the defendant's products, the defendant has employed the services of the plaintiff and accordingly, the film had been shot. Therefore, considering the nature of the work done by the parties, pursuant to Ex.P1 in conjunction with the ownership of the copyright in respect of the said work as seen from the definition of 2(f) of the cinematograph film and when it is not in dispute that the copyright of the film and other materials taken pursuant to Ex.P1 had been conferred on the defendant, it is found that it is only the defendant, as per Section 17 of the copyright Act 1957, who is the

first owner of the same. Reiterating the said position, the parties understanding the above position of the law and accordingly, incorporated the clause - 4 in Ex.P1 reiterating that it is only the defendant, who is the owner of the copyright of the Cinematography film and other materials taken or done pursuant to Ex.p1 agreement.

15. The conferment of the copyright of the cinematography film and other materials done or taken by the defendant pursuant to Ex.P1 on the defendant under Ex.P1 has not been controverted by the plaintiff. It is therefore evident that once the copyright of the cinematography film taken pursuant to under Ex.p1 had been granted to the defendant, unless the said right is divested from the defendant in the manner known to law, the plaintiff cannot seek any right in respect of the same. It is not the case of the plaintiff, as such, that after Ex.P1, the defendant has assigned the copyright conferred on him under Ex.P1 to her as per the provisions contained in the copyright Act namely, vide Sections 18 & 19 of the Copyright Act, 1957. Therefore, it is found that the copyright conferred on the defendant under clause 4 of Ex.P1 has not been transferred or assigned to the plaintiff thereafter as per the terms of Copyright Act, 1957.

16. As per Section 26 of the Copyright Act, 1957, it is found that in the case of a Cinematograph film, copyright shall subsist until 60 years from the beginning of the calendar year next following the year in which the film is published. Earlier, the term of copyright was 50 years and as per the Amendment Act 13 of 1992, it is found that the term had been enhanced to 60 years with effect from 28.12.1991. Be that as it may, now according to the defendant, when admittedly he has been conferred the copyright in respect of the Cinematography film in question and when as per the Act, the said right would subsist in his favour for a period of 60 years as provided under the Act, the plaintiff is not entitled to complain of any violation or misuse of the terms of the agreement Ex.P1 beyond the period fixed in the agreement. On the other hand, according to the case of the plaintiff, the conferment of the copyright under clause - 4 of Ex.P1 is also restricted for the period mentioned in the agreement. In other words, according to the plaintiff, the copyright given to the defendant under clause - 4 of Ex.P1 shall be valid only for the period from 29.12.2008 to 28.12.2009 and not beyond that. Therefore, the crucial question that remains to be decided in this lis is as to what is the term of the copyright conferred on the defendant, when it is 60 years as provided under the Copyright Act 1957, could be restricted for the period of one year as fixed under Ex.P1.

17. As seen from Section 17 of the Copyright Act, 1957, which deals with the first owner of the copyright, contained in chapter IV of the said Act, it is found that the defendant being the employer and having utilized the services of the plaintiff for promoting their products through the ad film pursuant to Ex.P1, the defendant shall be the first owner of the copyright thereof in the absence of any agreement to the contrary. Therefore, the term in the absence of any agreement to the contrary as found in Section 17 (b)&(c) of the Copyright Act has to be interpreted in the manner known to law. As regards the term of copyright in Cinematography film provided under Section 26, it is found that the same is couched in Chapter V of the Copyright Act, 1957. On the other hand, it is found that Section 17 of the Copyright Act which only deals with the first ownership of the copyright and therefore, it has to be seen that whether clause - 4 of Ex.P1 in conjunction of clause 9 of Ex.P1 would operate as an agreement to the contrary so as to deprive the defendant from claiming the copyright over the Cinematography film taken or done pursuant to Ex.P1. On a reading of the entire agreement marked as Ex.P1, it is found that various clauses have been incorporated under the same as agreed to between the parties and it is found that in respect of certain clause, the parties have specifically mentioned that it shall be operative for a period of 12 months from the date of agreement. No doubt, there is a general clause, namely, clause - 9 which shows that the agreement shall be for a period of 12 months from

29.12.2008 to 28.12.2009. If really, the intention of the parties was to confer restricted copyright of the Cinematography film taken pursuant to Ex.P1 only for a specific period, they would not have been prevented from incorporating the said period agreed to between them specifically in clause - 4 of the agreement as done by them in clause - 2 of the agreement. However, there is no such restriction found in clause 4 of the agreement as noted in clause - 2. However, it is strenuously argued by the plaintiff's counsel that when the agreement as a whole is seen, according to him, clause - 9 will also govern clause - 4 of the agreement and so viewed, it is contended on his part that the copyright conferred on the defendant under clause - 4 shall be operative only till 28.12.2009 and not beyond that. However, it is found that, as rightly argued by the plaintiff's counsel, when there is a conflict between the contractual provisions and statutory provisions, it is only the statutory provision that would prevail and not the contractual provisions agreed to between the parties. When, to the knowledge of the parties concerned, the cinematography film and other materials taken pursuant to Ex.P1 and the copyright in respect of the same had been granted to the defendant under Ex.P1, the question is whether, in particular, such a copyright conferred on the defendant would operate for a period of 60 years as provided under Section 26 of Copy Right Act, 1957 or could be restricted by the parties under Ex.P1 for a lesser period i.e. for a period of one year only. In this connection, the counsel

for the defendant relied upon the decision reported in ***AIR 2001 CAL 102(Universal Petrochemicals Ltd., Vs. Rajasthan State Electricity Board)***, wherein, it has been held that the statutory provision will override any agreement between the parties and a private contract cannot override a statute and the above position of law is explained by the above said decision in the following manner:

“This Court, with great respect to the learned Judge, cannot accept the aforesaid proposition. The proposition that a contract between the parties will prevail over an overriding statutory provision is contrary to basic norms of jurisprudence. A statutory provision is the sovereign will of the legislature and the same binds every one and certainly the parties who are coming under it unless the provision is made subject to contract or the law is repealed or declared unconstitutional by a competent Court. If the proposition laid down in Ganpatrai (supra) is followed the same will lead to disastrous consequences. Any two individuals would be allowed to contract out of a statutory liability. It is well settled that there can be no contract which could defeat the provision of any law. This is one of the important facets of

section 23 of the Contract Act. So this Court, with respect to the learned Judge holds that the interpretation given by the learned Single Judge is opposed to all cardinal principles of construction. Therefore, this Court is of the view that the decision in Ganpatrai (supra) case was not correct and it was wrongly decided and this Court is unable to follow the same.

18. Therefore, when it is found that the term of copyright provided under Section 26 of the Copyright Act, 1957 is contained in chapter - V of the Copyright Act, 1957 and when the term granted under the Act in respect of Copyright has no nexus as to who would be the first owner of the copyright provided under Section 17 of the Copyright Act, 1957 which is contained in Chapter - IV of the above said Act, it is found that the Copyright conferred on the defendant under Ex.P1 cannot be restricted to a lesser period than what had been given by the statute as discussed above. The term “ in the absence of any agreement to the contrary” as found in Section 17 (b) & (c) would be only with reference to the first owner of the copyright and so seen when the clause - 4 of Ex.P1 does not operate as agreement of the contrary and when the parties are not entitled to restrict the term of the copyright given under the statute as discussed above, it is found that the case of the plaintiff that the

copyright granted to the defendant under clause 4 of Ex.P1 is also governed by clause - 9 of the said agreement as such cannot be countenanced. The parties knowing very well about the implications of conferment of the rights on them under Ex.P1 cannot turn around and contend that the copyright granted to the defendant under Ex.P1 would be operative only for a period of one year ignoring the fact that once the copyright has been granted to a party, the said term would be for a period of 60 years as provided under Section 26 of the Copyright Act, 1957, and the same cannot be whittled down by any clause between the parties so as to defeat the provisions of the above said statute.

19. The counsel for the plaintiff, however, would contend that as per Section 38 of the Copyright Act, 1957, the plaintiff, as a performer of the ad film taken pursuant to Ex.P1 is entitled to certain rights as provided therein and in such view of the matter, according to him, her role in the ad film as a performer cannot be segregated as such from the film and so viewed, according to him, she is also entitled to the right over the Cinematography film taken pursuant to Ex.P1 as provided under Section 38 of the Copy right Act, 1957. As regards the exclusive right of performers, as seen from Section 38 (A) of the above said Act, clause - 2 of Section 38 (A) reads as follows:

“ (2) Once a performer has, by written agreement, consented to the incorporation of his

performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:

Provided that, notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial use.

20. The above provisions would only go to show that inasmuch as the plaintiff under Ex.P1 had agreed to give her performance for the ad film taken pursuant to the same, shall not thereafter object to the enjoyment of the said film by the purchaser unless there is a contract to the contrary. Admittedly, it is not in dispute that for the ad film shot pursuant to Ex.P1, the plaintiff has been paid the remuneration and the same is not disputed. Therefore, the plaintiff has been paid the remuneration for the services rendered by her and when admittedly, the plaintiff under Ex.P1 had conferred the copyright of the cinematography film on the defendant under clause - 4 of Ex.P1 without any restriction whatsoever and when as discussed above, the period governing the agreement cannot operate against the provisions of the statute, it is found that the clause - 4 of Ex.P1 cannot be equated to a contract to the contrary, as has been provided under clause - 2 of Section 38(A) of the Copyright Act, 1957.

Therefore, the plaintiff having conferred to the copy right of the film to the defendant absolutely without any restriction cannot complain that there is a contract to the contrary relying upon clause 4 of the agreement Ex.P1, when, as discussed above, the said clause will not in any manner curtail the entitlement of the defendant of his copyright. Therefore, the plaintiff's contention that her performance right cannot be isolated from the copyright as such also cannot be accepted in any manner. That apart, it is also noted that, as argued by the defendant's counsel, upon the completion of the production of the ad film, no rights or interest of the performer as such survives and in this connection, the decisions reported in ***AIR 1979 Bombay 17(Fortune Films International Vs. Dev Anand and Anr),(1977) 3 SCR 206*** (Indian Performing Right Society Ltd., Vs. Eastern Indian Motion Pictures Association and Ors.) and **(1974) 33 STC 335 (Mad) (State of Madras Vs. A.L.S.Productions)** are relied upon. A perusal of the above said decisions would go to show that on the completion of the production of Cinematography film, the copyright in the ad film would be vested only on the owner of the copyright i.e. purchaser of the film and it is only the purchaser, who can exploit the same and the performer as such cannot claim any individual right. In the light of the above discussions, when Ex.P1 particularly clause - 4 contained therein cannot operate as a contract to the contrary, particularly, curtailing the time or period of copyright conferred on the defendant thereunder, it is found that the

plaintiff cannot claim any right as such, known as performer's right, in respect of the cinematography film taken pursuant to Ex.P1.

21. Despite the above position of law, it is however contended by the plaintiff's counsel that the Division Bench of this Court, while dealing with the OSA preferred against the injunction application, had dealt with the matter elaborately and granted the relief sought for by the plaintiff in the original application as regards the relief of injunction and according to him, the said decision of the Division Bench would bind this Court and therefore, it is argued that this Court cannot take a different view other than what had been decided and determined by the Division Bench in the said decision. The above said decision of the Bench had been reported in **2012 -1-L.W.330 (KajalAgarwal Vs. The Managing Director, M/s. V.V.D & sons P.Ltd.,)**. It is found that the matter was taken up to the Division Bench by way of OSA by the Plaintiff on the declinment the relief of injunction sought for by her in the matter and accordingly, the Bench noting that the plaintiff has made out a prima facie case had allowed the original application filed by her granting necessary relief. A perusal of the above said decision of the Division Bench would go to show that the Division Bench has also noted that the merits of the contention of the respondent i.e. the defendant that clause - 4 is not to be restricted by the stipulated time in clause - 9 of Ex.P1 could be gone into only at the time of

trial, when the parties adduced oral and documentary evidence. In such view of the matter, when it has been left open by the Division Bench that the contention of the defendant as to the governing value of clause - 9 of the agreement to clause - 4 of the said agreement may be decided independently, at the time of trial, after the evidence had been adduced by the parties, the present contention of the plaintiff's counsel that even after the conclusion of the recording of evidence, the Court cannot go beyond the orders of Division Bench, as such, even in the light of the evidence adduced by the parties, cannot be accepted in any manner. Therefore, it is found that as rightly argued by the defendant's counsel, the order passed by the Division Bench reported in **2012-I-L.W.330 (KajalAgarwal Vs. The Managing Director, M/s. V.V.D & sons P.Ltd.,)** as such, is only in respect of interim relief based upon the prima facie case made out and would not as such be binding on this Court at the time of the disposal of the suit based on the evidence adduced by the parties concerned. In this connection, a usual reference may be made to the decision relied on by the defendant's counsel reported in **(2009) 5 SCC 694 (State of Assam Vs. Barak Upatyaka D.U.Karmachari Sanstha)**

22. In the light of the above discussions, it is found that the copyright conferred on the defendant by clause - 4 of Ex.P1 particularly the term of copyright cannot be restricted to the period stipulated under clause - 9 of the

said agreement as the same would be in conflict with the statutory provisions of the Copyright Act, 1957 and particularly, when clause - 4 read with clause - 9 of the agreement Ex.P1 as a whole, cannot be equated or read as an agreement to the contrary as provided under Section 17 (b) and (c) of the copyright Act 1957 and equally cannot be read or construed an agreement to the contrary as provided under clause - 2 of the Section 38 (A) of the Copyright Act, 1957, it is found that the copyright conferred on the defendant under Ex.P1 is absolute and could not be fettered by any time limit as agreed to between the parties, as the same would be in conflict with the statutory law.

23. In the light of the above position, it has to be now seen whether the plaintiff has established her case that the defendant has misused her profile contrary to the terms of Ex.P1 agreement. According to the plaintiff, the defendant has misused her profile and in this connection, as seen from the pleadings set out in the plaint, the plaintiff has cited one incident and according to her, on 01.09.2011, the same being Vinayagar Chathurthi day during the telecast of the movie Aadukalam in Sun T.V., the ad film involving the plaintiff taken pursuant to Ex.P1 had been exploited and thus, according to the plaintiff, the defendant had misused the ad film contrary to the terms of Ex.P1, particularly, beyond the period stipulated under Ex.P1. Whether the above case of the plaintiff, has been established as the essential cause of

action by the plaintiff, for instituting the suit, has to be seen. To establish the plaintiff's case, strangely, the plaintiff has not cared to enter into the witness box. No reason whatsoever has been adduced by the plaintiff for not tendering her evidence in person in support of her case. The plaintiff, in support of her case, has chosen to examine her father as PW1. It is found that the plaintiff, as such, has not given any power of attorney to enable her father to adduce evidence on her part. Be that as it may, it is found that the plaintiff has however given an authorization letter to enable her father to tender evidence on her behalf and the said authorization letter has been marked as Ex.P8. A perusal of the same, would go to show that it only recites that PW1 has been authorized by the plaintiff to depose on her behalf in the suit. It does not mention or state that he is conversant with the facts and circumstances of the case and so he is competent to depose on behalf of the plaintiff. Be that as it may, rightly or wrongly, the plaintiff has chosen to examine her father as PW1. As rightly contended by the defendant's counsel, a perusal of the evidence of PW1 tendered both during the course of chief and cross examination would go to show that he is not conversant with the facts and circumstances of the case and particularly, as to the basis or entitlement on which the case has been instituted by the plaintiff. In this connection, PW1, during the course of cross examination has admitted that he does not remember as to whom he had met in the defendant company relating to the

suit contract. It is not even the case of the plaintiff that Ex.P1 agreement had been entered into by her through PW1 with the defendant.

24. Further, as noted above, according to the plaintiff, as given in the plaint, the ad film shot under Ex.P1 had been telecasted by the Sun T.V. on 01.09.2011 during the telecast of the film Aadukalam. With reference to the above case of the plaintiff, it is not the case of PW1 that he was personally aware of the same. On the other hand, PW1 would only state that one of the staff members had informed him about the telecast of the advertisement in Sun T.V on 01.09.2011. It is therefore clear that PW1 is not aware of the said fact. Moreso, the concerned staff member, who had informed about the same, has not been examined as a witness. As indicated above, the plaintiff has not chosen to examine herself in support of her case. Therefore, for the proof of the basis on which the plaintiff has laid the case, there is nil material. It is found that the plaintiff has issued two notices before the institution of the suit i.e. on 16.02.2009 marked as Ex.P2 and legal notice dated 12.09.2011 marked as Ex.P6. Though PW1 would claim that the above said notices had been given as per his instructions, a reading of the above said notices would go to show that the same had been issued pursuant to the instructions of the plaintiff. Therefore, PW1 cannot claim to be instructor of the above said notices and in such view of the matter, it is found that PW1 is not even aware of the contents

of the above said notices as such. That apart, it is also found that PW1 is not aware of the suit transaction and when he was confronted with the same, at the first instance, he would claim that the plaintiff has averred in the plaint that he is aware of the said transaction but when the plaint copy was shown to him, he has admitted that it has not been so stated in the plaint. Therefore, it is found that PW1 is totally ignorant of the facts and circumstances of the case pleaded by the plaintiff. The plaintiff, in her plaint, has stated that when she was approached by M/s.Emami, the competitor of the defendant for the shooting of the film, on account of the misuse of her profile by the defendant, there were queries raised by M/s.Emami and other concerned and thereby, according to the plaintiff her reputation and fame had been tarnished by the defendant and therefore, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

25. The above said case of the plaintiff has been seriously disputed by the defendant. PW1 during the course of cross examination has claimed that the negotiation with Emami was through an advertising agency at Hyderabad. However, except the ipse dixit testimony of PW1, there is no material forthcoming to show that M/s.Emami had approached the plaintiff for the shooting of any film as such. In this connection, it has been admitted by PW1 that the plaintiff has not filed any document regarding negotiation held with

M/s.Emami. Therefore, the case of the plaintiff that her future prospects had been spoiled by the defendant's misuse of her profile contrary to the terms of Ex.P1, as such, also cannot be accepted in the absence of any evidence. To substantiate with reference to her above case, there is nil evidence on her part.

26. In this connection, the defendant's counsel relied upon the decisions reported in **(2007) 6 SCC 737 (RamchandraSakharamMahajan Vs. DamodarTrimbakTanksale (D) and Ors.)** and **2003 (3) CTC 229 (Saraswathy, Muthusenapathy and Angaiarkanni Vs. Tamizharasi and Vanathi)** to contend that the onus is always on the plaintiff to establish his/her case and the plaintiff cannot take advantage of the loopholes or weaknesses of the defendant's case to seek the relief sought for in the plaint without any proof, the above proposition of law is relied upon. Considering the evidence of PW1 and the documents marked on behalf of the plaintiff, it is found that there is no valid material as such to hold as alleged by the plaintiff, that her fame and reputation, as such, had been damaged by the defendant by telecasting the ad film, as alleged in the plaint. Be that as it may, when there is no material as such to show that the defendant had been using the ad film beyond the period stipulated under Ex.P1, it is found that the plaintiff has no case at all to sustain.

27. However, it is argued by the plaintiff's counsel that DW1 examined on behalf of the defendant during the course of cross examination has admitted that even beyond the period prescribed under Ex.P1, they had advertised the film taken pursuant to Ex.P1 and the above said admission on the part of DW1 by itself would be sufficient to hold that the defendant had acted contrary to the terms of Ex.P1 and misused the profile of the plaintiff. However, a reading of the evidence of DW1 in toto would go to show that though he has tendered evidence that the advertisements containing the plaintiff's profile had been used, he has stated that the same had been used as per the copyright conferred on the defendant under Ex.P1. So, it is found that when the defendant had been conferred admittedly the copyright of the Cinematography film taken pursuant to Ex.P1 and when the said right cannot be curtailed by the parties by restricting the time limit under Ex.P1 and when Ex.P1 cannot be termed as an agreement to the contrary as discussed above and when the parties are not entitled to contradict the prevailing provision or the statute, particularly, restricting the period of entitlement of the copyright conferred on the defendant, as such, it is found that the plaintiff has miserably failed to establish that the defendant has exploited her profile by exploiting the advertisement film beyond the period mentioned in Ex.P1, particularly, when it is found that the defendant has been granted the copyright and the

said copyright subsists in favour of the defendant for the period mentioned under Section 26 of the Copyright Act, 1957.

28. In the light of the above discussions, it is found that once the copyright had been vested with the defendant under Ex.P1, the same would operate as per law with all the statutory rights conferred under the Act and in such view of the matter, it is found that the defendant has absolute right to communicate the film to the public as provided under the Act and the same could not be considered to be in violation of the terms set out in Ex.P1 agreement.

29. In the light of the above discussions, I hold that the defendant is the owner of the copyright of the commercial cinematography film as per Section 17 of the Copyright Act, 1957 and clause - 4 of the agreement dated 29.12.2008. I further hold that the term of the copyright in the commercial cinematography film is 60 years as stipulated under Section 26 of the Copyright Act. I further hold that the defendant has been vested with the ownership and absolute right over the advertising material of the plaintiff profile to be used for the period prescribed under the Copyright Act, 1957. I further hold that the defendant is not restricted to use the profile of the plaintiff only to the period authorized in the agreement dated 29.12.2008. I hold that the defendant has

not exploited the commitment and violated the conditions in advertising their products with the appearance of the plaintiff's profile, so as to cause prejudice to the plaintiff. I therefore hold that the plaintiff is not entitled to damages for the so-called misuse and violation of the terms of the contract by the defendant and I further hold that the defendant is not liable to pay compensation to the plaintiff for any omission or commission on their part. I therefore hold that the plaintiff is not entitled to the relief of permanent injunction sought for in the plaint and also the plaintiff is not entitled to seek compensation of a sum of Rs.2,50,00,000/- or any sum for the alleged loss or damages caused to her and also future interest for the above said amount as claimed in the plaint. I further hold that the case of the plaintiff that she had become answerable to other competitors in the field of marketing due to the conduct of the defendant has not been established. I therefore, hold that the conduct of the defendant has not transgressed her right and her profile had not been affected. Considering the facts and circumstances of the case, the territorial restrictions given under clause - 2 of the agreement has also been incorporated based upon the consensus ad idem between the parties and accordingly, Issues 1 to 13 are answered.

30. Issue No.14

The suit is dismissed with costs.

03.07.2017

Index : Yes/No

Internet:Yes/No

sms/sli

T.RAVINDRAN,J.

sms

PRE-DELIVERY JUDGMENT
MADE IN C.S.No. 635 of 2011

03.07.2017

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