

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 604 OF 2018**

The Indian Performing Right Society Ltd.,
having its registered office at 208,
Golden Chambers, New Andheri Link Road,
Andheri (W), Mumbai – 400 053.
and having its Branch Office at T-5, 3rd floor,
Mala, Panaji, Goa- 403001, and represented
herein by its Senior Manager – Legal, Data &
Distribution, Ms. Sheetal D. Madnani.

.... Petitioner

V e r s u s

1. Kala Academy,
through its Member Secretary,
Campal, Panaji, Goa-403001.

2. Mr. Abhishek Soman,
Major of age, Flat No.501,
Sea Wing, Rizvi Tower,
Near Pharmacy College,
Panaji-Goa-403 001.

.... Respondents

Shri Yogesh Nadkarni with Adv. D. Shirgam for the Petitioner.

Shri H. D. Naik, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.
DATE: 31st July, 2018.

Oral Order;

On 5/7/2018 a notice for final disposal was issued to the respondents

in this petition. I have accordingly heard the learned counsel for the parties and the petition is being disposed of finally.

2. The petitioner is the plaintiff in Civil Suit No.18/2012 filed against the respondents before the learned District Judge at Panaji-Goa. That is a suit filed under section 62 of the Copy Rights Act 1957 for a declaration as to infringement of the copy right, for injunction, damages and accounts. In short, the case made out by the petitioner in the plaint is that there was a dance musical event held on 27/2/2012 in the auditorium within the premises of the respondent no.1, which was organized by the respondent no.2 wherein there was a breach of the copy rights of the petitioner in the musical work. The petitioner has inter alia sought a declaration that the respondents by holding and organizing the event dated 27/2/2012 had committed infringement of the Copy Right of the petitioner and for a permanent injunction restraining the respondents from infringing the Copy Right and from holding of any events in future without the permission/licence from the petitioner as the owner of the Copy Right. Incidentally the petitioner also sought for recovery of an amount of Rs.36,750/ towards the "Royalty licence fee" as per invoice dated 27/1/2012.

3. It appears that during the pendency of the suit the respondent no.2

paid an amount of Rs.36,750/- as claimed by the petitioner which led the petitioner to file an application (Exhibit 53) before the learned trial court purportedly under Order XXIII Rule 1 (3) of C.P.C. seeking permission to withdraw the suit with liberty to institute a fresh suit, in the event the respondent infringes the copy right of the plaintiff in future. The record discloses that both the respondents gave their no objection for allowing the application. The learned trial court, however, by the impugned order dated 16/3/2018 has dismissed the application inter alia on the ground that the petitioner has not made out any case of there being any formal defect in the suit as is required under Order XXIII Rule 1(3) (a) of C.P.C. for granting permission to withdraw the suit, with liberty to file a fresh suit. Notwithstanding the fact that the application has been dismissed, the learned trial court has observed in para 5 of the impugned order that a blanket order for grant of liberty cannot be granted as the petitioner has every right to file a suit in case there is a fresh cause of action if it arises in future.

4. I have heard Shri Nadkarni, the learned counsel for the petitioner and Shri Naik, the learned counsel for the respondents. Perused record.

5. Order 23 Rule 1(3) of C.P.C. which is relevant for the purpose reads thus:

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

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

(1) -

(2) -

(3) Where the Court is satisfied-

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

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks for, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

It can thus be seen that the aforesaid provision envisages two situations where the Court can grant such permission allowing the plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit or part of a claim. Clause (a) of Rule 1 (3) of Order XXIII speaks of a situation where the Court is satisfied that the suit must fail by reason of some formal defect. Clause (b) of Rule 1(3) of Order 23 envisages that where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the “subject matter of a suit” or “part of a claim”, the Court can allow to withdraw the suit or such part of the claim with liberty to

institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

6. As observed by the learned trial court, nothing prevents the petitioner from instituting a fresh suit in the event there is a fresh cause of action namely if there is a breach of infringement of the copy right of the petitioner in the musical works in future.

7. Shri Nadkarni, the learned counsel for the petitioner however submits that the petitioner in that event may encounter a defence of withdrawal of the suit, operating as a constructive res judicata, if the petitioner is required to file a suit for such future infringement. In my considered view the suit filed by the plaintiff is sought to be withdrawn only on account of the fact that the claim as to the damages towards the royalty licence fee has been satisfied by the respondent no.2. It is significant to note that sub rule 3 (b) of Rule 1 of Order 23 speaks about the subject matter of the suit or a part of the claim. Here is a case where a part of the claim as to the licence fee has been satisfied. However the learned counsel for the petitioner is right in contending that the present suit is also for injunction and thus permission needs to be granted to the petitioner to withdraw the suit, with leave to institute a fresh suit, if necessary and as prayed. Thus I find that the

application needs to be granted as prayed. For the aforesaid reasons, the petition is allowed. The impugned order is hereby set aside. The application (Exhibit 53) stands allowed as prayed. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

Ap/