IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.28 OF 2021
AND
INTERIM APPLICATION (L) NO.14020 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO.42 OF 2021

Phonographic Performance Limited ...Plaintiff
vs.
Reliance Broadcast Network Limited ...Defendant

Mr. Virendra Tulzapurkar, Senior Advocate a/w. Mr. Sandip Parikh, Mr. Ayaz Bilawala and Ms. Disha Mehta i/b. Bilawala & Co., for the Plaintiff.
Mr. Abhishek Malhotra a/w. Ms. Sapna Chaurasia, Mr. Raunak Samdani i/b. TMT Law Practice, for the Defendant.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 15th NOVEMBER, 2021
PRONOUNCED ON : 6th JANUARY, 2022

(THROUGH VIDEO CONFERENCING)

ORDER

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 1,63,70,640/- along with further interest at the rate of 12% p.a. on the principal amount of Rs. 1,55,61,382/- from the date of the institution of the suit till realization.

2. In response to the service of writ of summons, the defendant entered appearance.

3. Thereupon, the plaintiff has taken out this Summons for Judgment. The defendant has filed an application seeking leave to defend the suit. The plaintiff has filed an affidavit in reply to the application seeking leave to defend the suit.

4. The material averments in the plaint can be summarized as under:

The plaintiff is a company registered under Companies Act, 1956. It was originally registered as a Copyright Society under the provisions of Section 33 of the Copyright Act, 1957. The plaintiff has been granted assignments of Copyright in various sound recordings by its members for, inter alia, broadcasting through FM radio channels. The defendant is a radio broadcasting company operating FM radio stations.

5. The defendant had entered into Voluntary License Agreement (VLA) for their Phase II FM stations with the plaintiff and has been using the plaintiff's sound recordings since 2006. On 12th April, 2018 the plaintiff has executed 1st VLA with the defendant for broadcast of its repertoire through 44 radio stations run by defendant in various cities across India. The 1st VLA was executed for a term of one year from 1st April, 2018 to 31st March, 2019,

under which standard license fee was fixed at Rs. 2,400/- per needle hour or 20% of net advertising revenue (NAR), whichever was higher. Another agreement was executed on 12th April, 2018 for 14 other FM radio stations established under Phase III licensing regime. The license fee payable under 2nd VLA was Rs. 6 lakhs per month as indicated in schedule III appended thereto.

6. On 11th April, 2019 the parties executed a renewal agreement seeking to extend the term of 1st VLA for a further period of two years from 1st April, 2019 to 31st March, 2021 subject to certain modifications. The renewal agreement provided for a flat rate towards license fees being Rs. 34 lakhs per month for each radio station from 1st April, 2019 to 31st March, 2020 and Rs. 35 lakhs per month exclusive of GST and other levies for each radio station from 1st April, 2020 to 31st March, 2021. The license fee payable was in respect of 44 radio station under 1st VLA. Another separate renewal agreement was executed on 11th April, 2019 in respect of 2nd VLA to extend the arrangement under 2nd VLA for a period of two years from 1st April, 2019 to 31st March, 2021. The license fees was retained at Rs. 6 lakhs per month exclusive of GST and other levies in respect of radio stations referred to in 2nd VLA.

7. The plaintiff asserts that the defendant abided by the contractual obligations under the 1st and 2nd VLA and the corresponding renewal agreements and made the payments against the invoices raised from April, 2018 to March, 2020. In May, 2020 defendant sought, inter alia, a huge concession of 75% in the license fee from April, 2020 to September, 2020 on account of the situation faced by the radio industry due to Covid 19 pandemic. The plaintiff declined to accede to the request of the defendant. Yet, the defendant deposited a sum of Rs. 18 lakhs per month as license fee for the months April, May and June, 2020. The defendant took a stand that though the contract provided for a lump sum payment, the understanding between the parties has always been that the calculation is a close approximation of the 2% rate that has been decided in 2010 by the Copyright Board and which was likely to be reviewed. The plaintiff categorically declined to agree with the said stand of the defendant. There were exchange of correspondence between the parties. Nonetheless, the defendant continued to broadcast the plaintiff's repertoire through all 58 radio stations until the end of September, 2020.

8. Vide communication dated 8th October, 2020 the defendant claimed that it had stopped playing the plaintiff's repertoire from

1st October, 2020. Eventually, the plaintiff addressed a legal notice, contesting legality and validity of the purported termination and also called upon the defendant to pay the outstanding license fee to the tune of Rs. 1,58,87,987/- as of 15th October, 2020 along with interest @ 12% p.a. Instead of complying with the demand in the said notice, the defendant raised false and baseless contentions. Hence, the plaintiff was constrained to institute this suit for recovery of the sum of Rs. 1,55,61,382/- being an amount of outstanding license fee, due and payable under 1st and 2nd VLA, as modified by the renewal agreements dated 11th April, 2019, along with interest @ 12% p.a.

9. The defendant sought an unconditional leave to defend the suit by raising multi fold defences. First and foremost the tenability of the suit under the provisions of Order XXXVII of Code of Civil Procedure, 1908 (the Code) was sought to be questioned. Secondly, the claim of the plaintiff that the license fee was agreed to be paid in the lump sum as stipulated in the 1st and 2nd VLA and renewal agreements was stated to be incorrect and in complete derogation of the long standing understanding between the parties as regards the formula for determination of the license fee. Thirdly, it was contended that the defendant suffered a sharp decline in the

revenue in the year 2020. The situation which arose on account of Covid 19 pandemic has further impacted the advertising revenue for the radio industry and the situation was unlikely to improve soon. The defendant further asserts that while executing the 1st and 2nd VLA and the renewal agreements, it was expressly agreed between the parties that the method and manner of arriving at the sum payable by the defendant to the plaintiff for all 58 stations shall be as under:

> "a. the relevant executives of the plaintiff and the defendant would meet, and the defendant's executives would provide the plaintiff's executives with an estimate of projected advertisement revenue for the forthcoming year.
>
> b. the plaintiff and the defendant would then calculate 2% of the said amount of projected revenue across all 58 stations to arrive at a mutually agreeable amount as license fee/royalty for the forthcoming year. The aforesaid rate i.e. 2% of NAR had been fixed by the Copyright Board by way of its order dated 25th August, 2010 as the rate of royalty payable to the plaintiff by radio broadcasters till 30th September, 2020 in compulsory license applications filed by several radio broadcasters (detailed para 6.4(a) below).
>
> c. The amount so arrived at would be divided amongst all the defendant's stations to arrive at a monthly sum payable by the defendant."

10. The defendant contended that the aforesaid exercise was mutually agreed to by and between the plaintiff and the defendant since it addressed the concern of the defendant that the pay-out

should not exceed 2% of NAR pro-rated to usage and it also addressed the plaintiff's concern that 2% NAR calculation is not mentioned in the agreements executed between the plaintiff and defendant as the order passed by the Copyright Board on 25th August, 2010, was challenged before the Madras High Court by the plaintiff, in appeal bearing No. 3293 of 2010. Adverting to the outcome thereof and the further orders passed in Special Leave Petition No. 5727- 5735 of 2011 by the Supreme Court, the defendant avers that the issue still awaits adjudication before the Madras High Court. Therefore, as the plaintiff could not openly accept 2% NAR methodology as a basis for the determination of license fee payable by the defendant, it was agreed between the plaintiff and defendant that the rate of royalty agreed to be paid to the plaintiff would be such that the monthly license fee does not exceed 2% of NAR. According to the defendant, the fixed license fee stipulated in the 1st and 2nd VLA and the renewal agreement adhered to the norm of license fee not exceeding 2% of NAR.

11. The defendant contended that with the substantial reduction in revenue, the defendant was justified in offering to pay the license fee @ Rs. 18 lakhs per month. Since the revenue decline faced by the defendant in the first quarter of 2020-21 was almost 90%, the claim

of the plaintiff for the fixed license fee, which was far in excess of the norm of 2% of NAR, was legally unsustainable. Therefore, the defendant was not liable to pay the amount of license fee, claimed under the invoices (S1 to S2) annexed to the plaint. Hence, the defendant be granted unconditional leave to defend the suit.

12. In the affidavit in reply filed on behalf of the plaintiff, the contentions raised on behalf of the defendant were sought to be controverted. The plaintiff avers that the parties were fully cognizant of the orders passed by the Copyright Board on 25th August, 2010 under section 31 of the Copyright Act, 1957 and, yet, consciously agreed to fixed license fee regime. Therefore, the defendant cannot draw any mileage from the order passed by the Copyright Board and the proceedings which arose therefrom.

13. In the backdrop of the aforesaid pleadings, I have heard Mr. Virendra Tulzapurkar, learned Senior Advocate, and Mr. Abhishek Malhotra, learned counsel for the defendant at some length. The learned counsel for the parties have taken me through the pleadings and the 1st and 2nd VLA and the renewal agreements and the correspondence exchanged between the parties.

14. Mr. Tulzapurkar, learned senior counsel for the plaintiff,

submitted that the defence sought to be raised by the defendant can neither be said to be fair nor *bonafide*. The claim of the defendant that there was an implied understanding between the parties that the license fee would be so worked out as not to exceed the norm of 2% of NAR fixed by the Copyright Board, in its order dated 25th August, 2010, is not at all borne out by the express terms of the contract between the parties. On the contrary, it was specifically recorded in the 1st and 2nd VLA that in the event any order is passed in the statutory appeals pending before the Madras High Court, the parties would mutually renegotiate the license fee for the remaining term of the license period of the said agreements. Mr. Tulzapurkar would thus urge that the aforesaid stipulation worked out retribution of the contention of the defendant that there was an implied understanding between the parties that the license fee would not be in excess of 2% of NAR.

15. Taking the Court through schedule II, appended to 1st VLA, wherein the license fee was fixed at Rs. 32 lakhs per month exclusive of GST and other levies, and schedule III, appended to the 2nd VLA, wherein license fee was fixed at Rs. 6 lakhs per month exclusive of GST and other levies, Mr. Tulzapurkar, submitted that the defence of implied understanding between the parties is

frivolous and moonshine. The said fact is reinforced by the execution of first renewal agreement on 11th April, 2019 under which the license fee in respect of 1st VLA was revised to Rs. 34 lakhs from 1st April, 2019 to 31st March, 2020 and Rs. 35 lakhs from 1st April, 2020 to 31st March, 2021, in addition to GST and other levies.

16. In any event, according to Mr. Tulzapurkar, since the defendant has agreed and in fact paid the license fee at the rate of Rs. 18 lakhs per month, the said amount of fee constitutes an admitted liability and, therefore, a decree be passed in respect of the license fee at the admitted rate of Rs. 18 lakhs per month up to the period of September, 2020 and the defendant be granted conditional leave to defend the suit subject to deposit of the balance amount.

17. In opposition to this, Mr. Malhotra, learned counsel for the defendant, would submit that in the backdrop of controversy over the entitlement of the plaintiff to collect amount in excess of 2% of NAR, towards the license fee, in the face of the order of Copyright Board, appeal against which is still subjudice, the defence raised by the defendant cannot be said to be either frivolous or moonshine.

18. In essence, the legality of the claim in excess of maximum percentage of royalty fixed by the Copyright Board, warrants determination. Thus, according to Mr. Malhotra, the question of entitlement cannot be decided only on the basis of agreements executed between the parties. The understanding between the parties and the attendant circumstances must enter into the judicial verdict. Mr. Malhotra would further urge that it is a common knowledge that Covid 19 pandemic had a devastating consequences across sectors and industries. In the circumstances, the offer made by the defendant to pay the sum of Rs. 18 lakhs per month by ways of license fee in the exigency of the said situation can only be said to be bonafide and reasonable. However, the defendant cannot be bound down by the said payment, as if the defendant thereby admitted the liability.

19. Evidently, there is no controversy over the execution of the 1st and 2nd VLA. Nor the execution of the renewal agreements is in dispute. The controversy essentially revolves around the rate at which the license fee was to be paid by the defendant to the plaintiff for the use of the sound recordings, in which the plaintiff claims copyright. It is not the case that there was no stipulation in the contract executed by and between the parties regarding the amount

and periodicity of the payment of license fee. The defendant, however, contends that the amounts so fixed under 1st and 2nd VLA as well as the renewal agreements was with a clear understanding that the outer limit would be 2% of the NAR.

20. In order to properly appreciate the controversy, in the light of the aforesaid submission canvassed across the bar, it may be apposite to note as to what the parties provided for in the contract executed by and between them. In the 1st VLA, (in respect of 44 FM station), Clause 4 dealing with license fee provided as under:

> *4. LICENSE FEE:*
>
> *4.1 Standard License fee:*
> *The standard license fee of the Licensor is as follows irrespective of the class of cities:*
> *Rs. 2,400/- per needle hour or 20% of net advertising revenue whichever is higher.*
> *4.2 Applicable License Fee:*
> *Licensee has represented to Licensor that (I) the radio industry advertisement revenue is under pressure and going through difficult and challenging times; (2) in life with listener expectations and advertisers' expectations, the Licensee is intending to increase the air-time for new songs as compared to "retro" songs. (3) Licensor has represented to the Liensee that Eros Multimedia music label has ceased to be a member of Licensor w.e.f. 1.4.2016.*
>
> *4.3 After discussions and concurrence, Licensee agrees to pay for the term of this Agreement, to the Licensor fee as specified in Schedule II hereto.*
>
> *4.4 License fee shall be payable in Indian currency and be paid by way of demand draft/ Account Payee Cheque/ NEFT/RTGS/Post Dated Cheques.*

4.5 The License Fee exclusive of any GST, Lease Tax and/or other such taxes as may be levied on the license Fee payable, by any government authority and regulations. All taxes, duties, or other similar payments and the increase in taxes shall be borne by the Licensee and is neither deductible nor reimbursable by the Licensor who shall be responsible solely for his income related taxes, the payment made by the Licensee to the Licensor shall be net of any applicable withholding taxes and the Licensee shall supply to the Licensor the withholding tax receipts evidencing payments of withholding tax, within 3 months from the date of deductions.

4.6 Both the parties have mutually agreed to enter into this Voluntary License Agreement. Hence, in the event any order is passed in the Statutory Appeals pending before the Madras High Court the parties agree to mutually re-negotiate the Licensee Fee for the remaining term of the License period of this agreement. Parties agree that the re-negotiation of the License Fee shall totally depend on Party's discretion.

4.7 Late Payment Charges:

If any payment to the Licensor hereunder is not received on the due date, interest at the rate of 12% per annum shall be payable by the Licensee on the sum due compounded with quarterly rests calculated from the due date until the date of actual payment, Licensee shall pay the amount within 10 days of receipt of intimation/ debit note from the Licensor. This is without prejudice to the right of the Licensor to terminate the License as per clause 5.

Notwithstanding the foregoing, upon consecutive 3 delays in making full payment on a timely basis, Licensor is at liberty, after giving a prior notice of 48 hours (emails permitted), to terminate the Agreement, upon which the Licensee shall forthwith cease broadcast of the licensed repertoire, and if the Licensee fails to cease broadcast of the licensed repertoire within 48 hours of such termination, it shall be copyright infringement.

21. It would be contextually relevant to note that Schedule II

appended to 1st VLA fixed the amount of license fee at Rs. 32 lakhs, exclusive of GST and other levies, and further provided as under:

> Schedule II
>
> License fees in respect of all stations under this License Agreements are agreed at Rs. 32 lakhs per month. GST and other levies, if any, extra, PPL shall raise invoices on every calendar month end and the same shall be paid on or before the last day of the following month, irrespective of the date of PPL's invoice; for example, payment for the broadcast in April, 2018 shall be paid, under any and all circumstances, by 31.5.2018. Any re-scheduling of the launch of stations or any other event shall not constitute a ground for reduction or re-negotiation of this amount. This fee is a one-off rate and does not set any precedent for future.

22. The second VLA (in respect of 14 FM stations) contained identical provisions with the change that the standard license fee and the applicable license fee were provided in schedule II and III appended thereto. They read as under:

> Schedule II
>
> Phonographic Performance Ltd., Mumbai
> TARIFF FOR PRIVATE F.M. RADIO PHASE 3
>
> BROADCASTING in respect of PPL sound recordings:
>
> (1) Tariff : For metro cities: Rs. 750/- per needle hour. For non-metro towns. Rs. 650/- per needle hour.
>
> (2) Refundable, non- interest bearing security deposit of Rs. 1 (one) lacs per station.
>
> Note : Above rates are valid upto 31.3.2019 and are subject to revision thereafter. Above rates already incorporate "early-bird" concession for newly set up Phase 3 FM radio stations.

Schedule III

> License fees in respect of all stations in respect of this licence are agreed at Rs. 6 lakhs only per month. GST and other levies, if any, extra, PPL shall raise invoices on every calender month end and the same shall be paid on or before the last day of the following month, irrespective of the date of PPL's invoice; for example, payment for the broadcast in April, 2018 shall be paid, under any and all circumstances, by 31.5.2018. Any re-scheduling of the launch of stations or any other event shall not constitute a ground for reduction or re-negotiation of this amount. This fee is a one-off rate and does not set any precedent for future.

23. The 1st VLA was renewed by the renewal agreement dated 11th April, 2019 and the license fee was revised in terms of annexure II thereto, which read as under:

Annexure II

> License fees for the term of this Agreement in respect of all stations are agreed as follows:
>
> (i) For the period beginning from the 1st April, 2019 to 31st March, 2020 the license fee is payable at the rate of Rs. 34 lakhs per month.
>
> (ii) For the period beginning from the 1st April, 2020 to 31st March, 2021 the license fee is payable at the rate of Rs. 35 lakhs per month.
>
> GST and other levies, if any, extra, PPL shall raise invoices after every calender month end and the same shall be paid on or before the last day of the following month, irrespective of the date of PPL's invoice; for example, payment for the broadcast in April, 2019 shall be paid, under any and all circumstances, by 31.5.2019. Any re-scheduling of the launch of stations or any other event shall not constitute a ground for reduction or re-negotiation of this amount. This fee is a one-off rate and does not set any precedent for future.

24. The 2nd VLA was renewed by another renewal agreement dated 11th April, 2019 and license fee was retained at Rs. 6 lakhs per month with the following provision in Annexure II.

> Annexure II
>
> License fees for the term of this Agreement in respect of all stations are agreed at Rs. 6 lakhs per month. GST and other levies, if any, extra, PPL shall raise invoices after every calender month end and the same shall be paid on or before the last day of the following month, irrespective of the date of PPL's invoice; for example, payment for the broadcast in April, 2019 shall be paid, under any and all circumstances, by 31.5.2019. Any re-scheduling of the launch of stations or any other event shall not constitute a ground for reduction or re-negotiation of this amount. This fee is a one-off rate and does not set any precedent for future.

25. Evidently, the parties had agreed for the two types of license fee. In the 1st VLA clause 4.1 (extracted above) provided, that the standard license fee of the licensor shall be Rs. 2,400/- per needle hour or 20% of net advertising revenue whichever is higher. In addition, the parties agreed that the applicable license fee would however be as specified in Schedule II (extracted above), under which the license was to pay Rs. 32 lakhs per month, exclusive of GST and other levies. This amount of license fee stood revised to Rs. 34 lakhs from 1st April, 2019 to 31st March, 2020, and Rs. 35 lakhs from 1st April, 2020 to 31st March, 2021, under the renewal agreement. Under 2nd VLA agreed standard license fee was Rs. 750/- and Rs. 650/- per needle hour for metro cities and non-metro towns, respectively, along with interest free security deposit of Rs.

1 lakh per station, which was refundable. The applicable license fee under the second VLA was capped at Rs. 6 lakhs per month excluding GST and other levies. Under the renewal agreement, the said amount of license fee remained unchanged.

26. In the backdrop of the aforesaid express stipulations in the 1st and 2nd VLA and renewal agreements, the submission on behalf of the plaintiff that the parties had expressly agreed for payment of lump sum license fee appears factually impeccable. As observed above, the agreements envisaged two regimes; one, the standard license fee, and two, the applicable license fee. It is trite that in the matter of construction of commercial contracts, the Court has to construe the terms of the contract as borne out by the stipulations therein and the intention of the parties to be gathered therefrom. What assumes significance, in the facts of the instant case, is an indisputable position that the obligation as regards the payment of license fee, was adhered to by defendant from April, 2018 to March, 2020. It can not be urged that defendant understood the contract to be otherwise and the parties had not acted upon the contract.

27. Evidently, the trigger for the dispute seems to be the decline in the revenue generated by the radio industry, in general, and the

defendant, in particular. Consequent thereto, the defendant sought reduction in the license fee. Mr. Tulzapurkar was justified in advancing the submission that in Schedule-II appended to 1st VLA and the Schedule III appended to 2nd VLA as well as the renewal agreements, it was expressly agreed that "any re-scheduling of launch of stations or any other event shall not constitute a ground for reduction or re-negotiation of the amount of license fee". It is trite that in any commercial contract, on account of certain developments, foreseen or otherwise, decline in the revenue generated by a party is essentially a matter of risk in the business. Thus, decline in revenue per se cannot be a ground to relieve a party of its contractual obligations.

28. Nonetheless, the submission on behalf of the defendant linking the quantum of license fee with the percentage of the net adverting revenue (NAR) cannot, be said to be wholly irrelevant or unfounded. Indisputably, the Copyright Board had passed an order on 25th August, 2010 on the application under section 31(1)(b) of the Copyright Act, 1957, inter alia, directing the Registrar of Copyright to grant the complainants separate licences for communicating the work recorded in sound recordings in the repertoire, present and future, of the respondent therein (plaintiff

herein) to the public by broadcast on revenue sharing basis subject to certain terms and conditions. Clause (a) thereof, which is material, reads as under:

> (a) 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station shall be set apart by each complainant for pro rata distribution of compensation to all music providers including the respondent herein in proportion to the music provided by the respective music providers and broadcast by the complainant. Complainant shall be deemed to be a music provider for the music provided by it or received by it free of cost and broadcast. For arriving at "net advertisement earnings", all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded.

29. Indubitably, the Madras High Court refused to stay the execution and operation of the aforesaid order and the statutory appeals are still subjudice.

30. The fact that in the 1st and 2nd VLA, the parties had expressly adverted to those statutory appeals pending before the Madras High Court and further agreed to mutually renegotiate license fee in the event any order was passed in those statutory appeals, cannot also be lost sight of. Whether the order passed on application under section 31, which apparently deals with compulsory license, governs the case of voluntary licensing agreement is one of the questions which may crops up for consideration.

31. However, in the face of express stipulation as to payment of license fee, in the contract executed by and between the parties, the defence sought to be raised on behalf of the defendant of existence of an implied understanding to determine the amount of license fee, does not merit categorization of a 'substantial or strong' defence. Moreover, there is no qualm over the fact that the defendant discharged the contractual obligation upto March, 2020, and continued to enjoy the repertoire of the plaintiff till 30th September, 2020.

32. In this view of the matter, though the defendant can be said to have raised an issue as regards the legality of the levy of license fee in excess of the percentage of NAR stipulated by the Copyright Board in the matter of compulsory licensing, yet the defendant does not deserve an unconditional leave to defend the suit.

33. In the circumstances, it would be expedient in the interest of justice to grant leave to defend the suit subject to condition of deposit of principal amount of license fee claimed under invoice (S1 to S12) as particularized in the particulars of the claim (T). In my view, it may be appropriate to leave the matter of entitlement to

interest on the said amount for trial.

Hence, the following order:

ORDER

1] Leave to defend the suit is granted to the Defendant subject to deposit of the sum of Rs. 1,55,61,382/- in this Court within a period of six weeks from today.

2] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendant shall file written statement within a period of six weeks from the date of deposit;

3] If this conditional order of deposit is not complied with, within the aforesaid stipulated period, the Plaintiff shall be entitled to apply for an *ex-parte* decree against the Defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

4] Summons for Judgment stands disposed of in the aforesaid terms.

(N. J. JAMADAR, J.)