

Phonographic Performance Ltd. and Ors. Vs. Uoi and Ors

Phonographic Performance Ltd. and Ors. Vs. Uoi and Ors

SooperKanoon Citation : sooperkanoon.com/25269

Court : Delhi

Decided On : Jan-09-2015

Judge : Suresh Kait

Appellant : Phonographic Performance Ltd. and Ors.

Respondent : Uoi and Ors

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on: January 09, 2015 + W.P.(C) No.8144/2011 & CM. No.18341/2011 PHONOGRAPHIC PERFORMANCE LTD. & ORS. Petitioners Represented by: Mr. N.B. Joshi and Mr. Neeraj K. Gupta, Advocates. Versus UOI AND ORS Represented by: Respondents Mr. Sanjeev Narula, CGSC with Mr. Ajay Kalra, Advocate for Respondent No.1. Mr. Rajiv Nayar, Sr. Advocate with Ms. Meghna Mishra, Ms. Manmeet Kaur, Mr. Akhil Sachar and Mr. Dheeraj P. Deo, Advocates for Respondent No.3. AND + W.P.(C) 7724/2011 & CM. Nos. 17493/2011, 19273/2011 and 3719/2012 PHONOGRAPHIC PERFORMANCE LTD. & ORS. Petitioners Represented by: Mr. N.B. Joshi and Mr. Neeraj K. Gupta, Advocates. Versus UOI AND ORS Represented by: W.P.(C) Nos. 8144 & 7724 of 2011 Respondents Mr. Ripudaman Singh Bhardwaj, CGSC with Mr. M.P. Singh and Mr. T.P. Singh, Advocates for Respondents No.1 and 2. Page 1 of 34 Mr. Rajiv Nayar, Sr. Advocate with Mr. Kartik Yadav, Advocate for Respondent No.3. CORAM: HON'BLE MR. JUSTICE SURESH KAIT SURESH KAIT, J.

1. In W.P.(C) No.8144/2011, the petitioners seek setting aside of 15 (fifteen) impugned licences dated 03.09.2010 issued by the respondent No.2 for the Radio Stations of the respondent No.3 for the cities of Ahmedabad, Ahmad Nagar, Chennai, Coimbatore, Hyderabad, Jaipur, Sholapur, Sangli, Pune, Surat, Vadodara, Vishakhapattanam, Nanded, Jalgaon and Akola, being licences No.1, 2, 4, 5, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19 and 20 of 2010.

2. In W.P.(C) No.7724/2011, the petitioners seek setting aside of 6 (six) impugned licences dated 16.09.2010 issued by the respondent No.2 for the Radio Stations of the respondent No.3 for the cities of Ahmedabad, Bangalore, Chennai, New Delhi, Kolkata and Pune, being licences No.83 to 88 of 2010.

3. The issue raised in both petitions is that whether the respondent No.2/Registrar of Copyrights has power to grant licences over and above directed by the Copyright Board. Therefore, both the petitions are being decided by this common judgment.

4. The first petitioner is a Company, registered as a Copyright Society under the provisions of Section 33 of the Copyright Act, 1957 (hereinafter referred as the said Act). This registration entitles the first petitioner to commence and carry on the copyright business in sound recordings. In pursuance of such registration, the first petitioner is entitled to obtain exclusive authorization to administer any right in the copyright in sound recordings owned by its members by issuance of a licence to third parties and to charge and collect licence fee from users of sound recordings which is defined under Section 2 (xx) of the said Act for which rights vests in its members. Being a Copyright Society for licencing of sound recordings works in India, the first petitioner enters into appropriate mandates with its members wherein these members grant an exclusive authorization in favour of the first petitioner to administer their copyrights in the sound recordings.

5. The petitioner No.2 is a Limited Company engaged in the business of acquiring or creating sound tracks, hence, is owner of copyrights in sound recordings of various music albums, both film and non-film; and further the petitioner No.2 is a member of the first petitioner and accordingly, administers the broadcasting rights through the first petitioner and not directly.

6. Petitioner No.3 is the shareholder of petitioner No.2. The petitioners No.2 and 3 share a common grievance with the first petitioner which in turn is agitated in these petitions.

7. Respondent No.1 is Union of India, who by exercising powers under the said Act, has constituted the Copyright Board and has appointed the respondent No.2, who for the relevant purpose is the Secretary of the respondent No.1.

8. The respondent No.3 is a Company engaged in the business of FM Radio Broadcasting having been initially granted licence by the Government of India for its Radio Stations for the Cities of Bangalore, Mumbai, Delhi, Lucknow, Patna and Nagpur under the Phase-I Policy. The aforementioned respondent is using the brand identity Radio City 91.1FM and had filed application/complaint for grant of compulsory licences under Section 31(1)(b) of the said Act against the first petitioner before the Copyright Board for its FM Radio Station for the cities of Bangalore, Mumbai, Delhi, Lucknow, Patna and Nagpur, which comes under the authority of respondent No.1. However, the respondent No.2 issued multiple licences by exceeding its authority under Section 31 of the said Act read with order of the Copyright Board dated 25.08.2010, whereby respondent No.2 was directed to issue compulsory licences to respondent No.3 based on an application for grant of compulsory licences for communicating the work recorded in sound recordings in the Repertoire of the first petitioner which administers the rights in relation to its members, of communication to the public of sound recordings on a revenue sharing basis subject to certain terms and conditions.

9. The respondent No.3 had filed application/complaint dated 21.06.2001 under Section 31(1)(b) of the said Act for grant of compulsory licences in relation to the works being administered by the first petitioner, including that of the petitioner No.2. The said application in paragraph 6 states:

purpose for which licence is required: for communicating music, being sound recordings, including songs, sound tracks and music/sound recordings, to the public via Radio FM Stations in the cities of Bangalore, Mumbai, Delhi, Lucknow, Patna, Nagpur.

10. Accordingly, the Copyright Board vide its order dated 19.11.2002 had fixed an interim rate, based on per niddle hour. Being aggrieved, the first petitioner filed an appeal before the High Court of Bombay in relation to the grant of licence as well as the rates. The respondent No.3 also filed an appeal before the aforesaid High Court in relation to the rates fixed by the Copyright Board. Vide order dated 13.04.2004, the High Court of Bombay set aside the order of the Copyright Board determining the amount of compensation and licence fee and remit the matters back to the Copy Right Board for determining the amount of compensation/licence fee.

11. Being aggrieved again, the first petitioner filed an SLP before the Honble Supreme Court, same was disposed of vide order dated 16.05.2008, whereby the Honble Supreme Court remanded the matter to the Copyright Board for reconsideration of the matter afresh on merits.

12. Meanwhile, on 13.07.2005, the Government of India announced its Phase-II Policy for allotment of FM Bandwidth for various new cities across India. The respondent No.3, pursuant to said Policy, secured licences for the cities of Ahmedabad, Ahmad Nagar, Chennai, Coimbatore, Hyderabad, Jaipur, Sholapur, Sangli, Pune, Surat, Vadodara, Vishakhapattanam, Nanded, Jalgaon and Akola from the Government alongwith other Broadcasters. However, some of the Broadcasters again approached the Copyright Board, which took up the complaints/applications filed by the respondent No.3 along with other new applications that were filed in the interim period between 2002 and 2008 when the case was pending before High Court of Bombay and then Supreme Court.

13. Learned counsel appearing on behalf of the petitioners submitted that the respondent No.3 did not file any complaint/application under Section 31 of the said Act for issuance of compulsory licence to include the new Stations set up during this period or amended pending application. Accordingly, respondent No.3 confined to the complaint No.1 of 2002 for its Radio Station only for the cities of Bangalore, Mumbai, Delhi, Lucknow, Patna and Nagpur. Therefore, the Copyright Board by its order dated 25.08.2010 directed the Registrar of Copyrights/respondent W.P.(C) Nos. 8144 & 7724 of 2011 No.2 to grant licence

the complainant/respondent No.3 in relation to the works being administered by the petitioners.

14. It is pertinent to mention here that the first petitioner has filed a statutory appeal challenging the order dated 25.08.2010 passed by the Copyright Board before the High Court of Madras, which is pending for adjudication.

15. However, on 03.09.2010, i.e., within one week from the order dated 25.08.2010 passed by the Copyright Board, the respondent No.2 issued five compulsory licences in favour of the respondent No.3 as sought in the aforesaid application and also for the cities of Ahmedabad, Ahmad Nagar, Chennai, Coimbatore, Hyderabad, Jaipur, Sholapur, Sangli, Pune, Surat, Vadodara, Vishakhapattanam, Nanded, Jalgaon and Akola, for which no licence was prayed for by the respondent No.3.

16. Being aggrieved, for the licences granted for 15 new cities in favour of the respondent No.3, the first petitioner addressed letters dated 10.11.2010 and 29.11.2010 to the respondent No.2, for rectification of the error committed, however, there was no response.

17. The case of the petitioners before this Court is that the respondent No.3 filed a complaint before the Copyright Board in the year 2002 for grant of compulsory licences only for its 6 (six) FM Radio Stations located in six different cities. Accordingly, the Copyright Board in its order dated 25.08.2010 allowed the complaint, fixed the compensation and directed the respondent No.2 to issue compulsory licences to respondent No.3. However, the respondent No.2 not only granted compulsory licences for 6 (six) FM Radio Stations and Cities but also granted additional 15 (fifteen) compulsory licences, which are the subject matter of W.P.(C) No.8144/2011.

18. Similarly, respondent No.2 issued 6 (six) licences in favour of the respondent No.3, whereas the respondent No.3 had applied for only one licence, i.e., FM Radio Station for the city of Mumbai, which are subject matter of W.P.(C) No.7724/2011.

19. Learned counsel appearing on behalf of the petitioners submitted that as per the Scheme of the Copyright Act, as prescribed in Section 31(1)(b) of the said Act, the Copyright Board may, if it is of the view that a compulsory licence is liable to be granted after hearing parties willdirect the Registrar of Copyrights to grant to 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 payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

20. Learned counsel further submitted that the respondent No.3 had filed the complaint/application for a compulsory licence for only five Stations as noted above before the Copyright Board. Phase-II Policy of radio licencing was announced by the Government on 13.07.2005, i.e., much after filing of the complaint/application by the respondent No.3. However, the respondent No.3 was granted licences for the cities of Ahmedabad, Ahmad Nagar, Chennai, Coimbatore, Hyderabad, Jaipur, Sholapur, Sangli, Pune, Surat, Vadodara, Vishakhapattanam, Nanded, Jalgaon and Akola, only pursuant to Phase-II Policy. It is significant to note that the respondent No.3 neither filed a separate application under Section 31 of the said Act for issuance of compulsory licence for aforementioned new Stations set up during this period nor filed any amendment or any affidavit to the application regarding fifteen Stations mentioned above. Thus, the impugned licences were not subject matter of complaint No.1 of 2002.

21. Moreover, the Copyright Board in its order dated 25.08.2010 recorded as under:

Copyright Board in its sitting held on 29.07.2008 directed the parties on both sides to file the paper books along with the list of the witnesses of the respective parties.

Further, in its sitting held on 26.05.2009, the Board set up a deadline up to 30.06.2009 for filing of further documents and furnishing list of witnesses to be examined. Thus, there were opportunities with the respondent No.3 to include its

fifteen new stations which were not the subject matter of its original complaint. However, it did not do so.

22. The Copyright Board, upon remand from the Apex Court, while adjudicating the matter in relation to the Complaint Nos. 1 of 2002 and 6 of 2002 filed by the respondent No.3, directed the respondent No.2 to issue licences as per the terms and conditions set up in its order dated 25.08.2010. The respondent No.2 is the Secretary to the Copyright Board under Section 11(4) of the said Act and is required to perform ministerial functions under the directions of Copyright Board set out under Section 31 of the said Act. Thus, it is outside the scope of jurisdiction or authority of respondent No.2 to grant any licence beyond what was sought for, and adjudicated upon, by the Copyright Board and also beyond the order dated 25.08.2010. However, the respondent No.2 acted beyond his authority and scope of duties and on 03.09.2010 proceeded to grant compulsory licences to the respondent No.3 in respect of the Radio Stations which were not even a part of the aforementioned complaints filed by the respondent No.3.

23. Learned counsel for the petitioners further submitted that in the complaint filed by the respondent No.3 before the Copyright Board, in the column description of works, it is stated that they seek compulsory licence with respect to all sound recordings within the Repertoire of the first petitioners. Learned counsel submitted that the Repertoire of the petitioners contains thousands of sound recordings which are distinct from each other and owned by its members. The petitioners Repertoire contains around 302, 875 of Indian sound recordings.

24. Learned counsel further submitted that Section 31 of the said Act provides that respondent No.2 can grant licences as directed by the Copyright Board on payment of such fee as may be prescribed. Rule 26 sub-clause (1) of the Copyright Rules, 1958, provides that all the fees payable under the said Act shall be as specified under the Second Schedule. Serial No.4 of the Second Schedule prescribes a fee of Rs.200/- per work for a licence to communicate the work to the public by broadcast. The term work is defined under the said Act, which provides that work in the present case means, a sound recording. It is, therefore, imperative that fee of Rs.200/- is to be paid per sound recording in the Repertoire of the

petitioners. The respondent No.3 has not paid the prescribed fee for the compulsory licences granted by the impugned order for any of its Radio Stations.

25. Learned counsel for the petitioners submitted that without prejudice to their rights and contentions that the impugned licences are illegal, void ab initio and are issued by the respondent No.2 having no authority to do so. The respondent No.3 is otherwise not entitled to these licences for non-payment of the prescribed fee. Moreover, respondent No.2 does not have any authority or jurisdiction to waive the prescribed fee.

26. Learned counsel for the petitioners submitted that vide these petitions the petitioners have not challenged the order dated 25.08.2010 passed by the Copyright Board, however, challenged the orders dated 03.09.2010 and 16.09.2010 passed by the respondent No.2 without jurisdiction and authority. Therefore, these petitions have nothing to do with the order passed by the Copyright Board. The respondent No.2 has granted 15 licences in question pursuant to order dated 25.08.2010, which are not appealable under Section 72 of the said Act. The order passed by the respondent No.2 becomes appealable only when the said respondent conducts inquiry under Section 45(2) of the said Act.

27. Learned counsel for the petitioners submitted that the Act constitutes and recognizes certain authorities, the authorities relevant for the present matters are the Registrar of Copyrights and the Copyright Board. The constitution of the Copyright Board has been envisaged under Section 11 of the said Act and the procedure of the Copyright Board has been defined under Section 12 of the said Act. However, Chapter X of the said Act pertains to registration of copyright and contains Sections 44 to 50A. The Act also provides for a compulsory licence to be issued by the Copyright Board in terms of the Section 31 of the said Act as it stood at the time when impugned licences are issued.

28. Mr.Joshi, learned counsel appearing on behalf of the petitioners argued that in any proceedings parties are bound by their pleadings and relief cannot be granted beyond what has been prayed for. For this, the counsel for the petitioners has relied upon the case of *The Municipal Committee, Tauru Vs. Harpal Singh & Anr.*, AIR 1999 SC843 wherein the Supreme Court held in para 9 as under:

9. Even in labour matters as claimant goes before the court or tribunal with a case and it is upon the merits of the case that relief is to be granted or refused to him. To look to his case is not to look at technicalities. There is no substantial justice when the court or tribunal gives relief to a workman which is on a basis that is totally contrary to the basis upon he approached it, which indeed is the employers case. Substantial justice must be done both to the employer and the employees.

29. Learned counsel further argued that not only was the action of the Registrar of Copyrights of granting additional or extra licences ultra vires, even the Copyright Board could not have granted licences more than what were prayed for in view of the judgement of the Honble Supreme Court in Entertainment Network India Limited Vs. Super Cassettes Industries Limited, 2008 (13) SCC30 wherein the Supreme Court has observed that:

The tribunal exercises a limited jurisdiction in India. Different cases are required to be considered on its own merits. What would be reasonable for one may not be held to be reasonable for others.

30. On maintainability, learned counsel appearing on behalf of the petitioners submitted that for any decision or order to be final, there must be application of mind; there must be determination of a lis; such proceedings must confer to the rules of procedure and also the rules of natural justice; must be passed after a hearing and must, therefore, be of a nature which finally decides an issue. The present case is not a matter of appeal before Copyright Board under Section 72(1) of the said Act. Section 74 of the said Act is in respect of such determination which the Registrar makes under Section 45(2) of the said Act. An order passed by the Registrar under that provision is appealable before the Copyright Board under Section 72(1) of the said Act and the Copyright Board upon hearing such appeal exercises its powers under Section 50 of the said Act.

31. In this regard, counsel for the petitioners has relied upon the counter-affidavit of the respondents No.1 and 2, the authors of the impugned licences, who have themselves stated that the action of the respondent No.2, viz, the Registrar of Copyrights, while issuing the licences was only an administrative or ministerial act and further stated that while issuing the licences, the Registrar was only carrying

out the directions of the orders of the Copyright Board of merely issuing the compulsory licences.

32. It is argued by the counsel for the petitioners that the additional licences granted by the Registrar was only an administrative or ministerial act which could not form the subject matter of an appeal before the Copyright Board under Section 72(1) of the said Act. Under Sections 44 of the said Act, a Registrar was to be maintained of all material in which a copyright subsists and that under Section 48, there is a dealing provision attached to such a Registrar to the extent that the entries would be prima facie proof of correctness of evidence. Thus, the authority empowered to enter particulars into such Register was the Registrar of Copyrights acting under Section 45 of the said Act and particularly in view of Section 45(2) of the Act, the Registrar was required to make such entries, after holding such inquiries, as may deem fit. In case any error crept into the Register, an aggrieved person could approach the Copyright Board under Section 50 of the said Act for rectification of the Register and that the Copyright Board while acting under Section 50 of the said Act would be exercising its appeal powers under Section 72 (1) of the said Act. Therefore, mere ministerial act of issuing licences is neither a final decision nor a final order of the Registrar of Copyrights and accordingly, not appealable under Section 72 (1) of the said Act. Eventually, the writ petition is the only remedy.

33. Learned counsel further submitted that the wording of licence themselves show that the Registrar was acting only on the directions contained in para 30.27 of the order of the Copyright Board and that, therefore, there was no application of mind that the Registrar was called upon to do so. The subject matter of the appeal before the Madras High Court, is an appeal filed under Section 72(2) of the said Act, whereby challenged the correctness of the order passed by Copyright Board and in particular the determination of compensation rates at 2%. Not even a single licence is the subject matter of that appeal. It is submitted that even if aforesaid appeal is dismissed by the Madras High Court, only those licences would continue to remain valid for which a specific prayer had been made to the Copyright Board and not the additional licences issued by the Registrar.

34. Learned counsel for the petitioners has referred the judgment dated 15.09.2010 passed by this Court in W.P.(C) No.6255/2010, titled Super Cassettes Industries Vs. Union of India, wherein held as under:

8. It appears to this Court that Section 31(1) of the Copyright Act, 1957, mandates that the owner of copyright should be given a reasonable opportunity of being heard before deciding on whether refusal by such owner to grant licence to the complainant was reasonable and if held unreasonable, determining the compensation to be paid to such owner. This procedure which encapsulates the principles of natural justice is non-negotiable. Since admittedly, the petitioner was not a party to the proceedings in which the impugned order came to be passed, prima facie it appears that the impugned order cannot be relied upon by any of the respondents herein or any other to insist on the issuance of the compulsory licence viz-a-viz the copyright work of the petitioner or to even rely upon the impugned order as regards the rates fixed for the purpose of grant of compulsory licence.

9. It was contended by the learned counsel for the respondents that the petitioner was watching the whole proceedings by being present before the Copyright Board throughout and, therefore, the petitioner was aware of the consequences of the impugned order. This Court is unable to expect the above submissions being an answer to the requirement of Section 31(1) of the Act of giving the owner of the Copyright an opportunity of being heard.

35. Learned counsel for the petitioners also referred the order of this Court dated 11.05.2011 passed in LPA No.448 of 2011 in case titled as Entertainment Network India Limited Vs. Super Cassettes Industries Limited, and held as under:

9. We need not enter into any debate or decide any cavil on merits. What we intend to clarify is that assuming a factual matrix is similar and other factors have some kind of similitude (on which we make no comment), there cannot be an interdiction with regard to a previous order passed by the tribunal. What will be the value of that order has to be judged by the tribunal. We hasten to clarify that it should not be treated as a precedent, as if the hands of the tribunal are closed to render a different decision. We may also clarify if there is dissimilarities, on facts,

the verdict has to be dissimilar because factual matrix invites a decision in law. Whether the facts are dissimilar or not are left to the adjudicatory decision of the tribunal. It is further added that citation of an order passed by an authority before a legal Forum is absolutely different than a precedent. We say no more on this score, as we expect the tribunal will be assisted by the counsel, who shall argue on the legal position of the law relating to the precedent, etc.

36. Learned counsel for the petitioners submitted that the fact prior to obtaining compulsory licences, the respondent No.3 had taken the voluntary licences for the very same Radio Stations; it meant that unless there was a validly issued licence either voluntary or compulsory, a Radio Station could not exploit the Repertoire of the petitioners.

37. On the issue of the petitions being hit by latches, learned counsel for the petitioners argued that the licences were issued in September, 2010, and the petitioners protested the issuance of such extra licences to the Registrar by filing its two letters in November, 2010, and an affidavit in opposition was filed before the Bombay High Court on 03.03.2011, which is at pages 63 to 85 in W.P.(C) No.8144/2011 and the present writ petitions were filed before this Court in October, 2011, shows that there was no tardiness on the part of the petitioners, thus, the petitions are not barred by latches.

38. On the issue of suppression by the petitioners, learned counsel submitted that full disclosures of the facts have been made and even relevant orders are annexed in the present petitions.

39. While concluding his arguments, Mr. Joshi submitted that for substantial justice each application has to be decided on its merit. In case of compulsory licences, number of witnesses were examined before the Copyright Board whereas for the licences granted by respondent No.2, no inquiry has been held in these cases. The keystones are orders dated 03.09.2010 and 16.09.2010, whether the said orders are pursuant to order dated 25.08.2010. Moreover, the Bank Guarantees accepted by the petitioners were under protest and from the very beginning the petitioners have challenged the licences issued by the respondent No.2.

40. On the other hand, Mr. Rajiv Nayar, learned Senior Advocate appearing on behalf of the respondent No.3 submitted that the respondent No.3 has 20 Radio Stations in India in various cities such as Mumbai, Bangalore, Delhi, Lucknow, Hyderabad, Chennai, Ahmedabad, Pune, Nagpur, Jaipur, Surat, Jalgaon, Ahmad Nagar, Sangli, Vishakhapatnam, Coimbatore, Akola, Sholapur, Vadodara and Nanded. The Copyright Board, pursuant to order dated 25.08.2010 passed in Complaint Nos.1 of 2002 and 6 of 2002, directed the Registrar of Copyrights to grant the separate licences to respondent No.3 for communicating the work recorded in sound recordings in the Repertoire, present and future, of the respondent No.3 to the public by broadcast on revenue sharing basis subject to terms and conditions as enumerated in order dated 25.08.2010. Accordingly, compulsory licence was granted to each complainant company and was not restricted to any one Radio Station. The Registrar of Copyrights/respondent No.2 issued the said licence to the complainants twenty (20) Radio Channels on 03.09.2010, which are valid upto 30.09.2020, i.e., for about ten years. However, fifteen out of twenty are subject matter of W.P.(C) No.8144/2011.

41. Mr. Nayar further submitted that under Section 31 of the said Act, a compulsory licence has been granted by the Copyright Board to a particular entity who is the applicant before it and the licence is qua the Repertoire of the petitioners work, and is not limited to any particular city. Section 31(1)(b) of the said Act provides for compulsory licences of the copyright works to a particular entity/applicant. While making an application under Section 31(1)(b) of the said Act, the respondent No.3 sought a licence for the complete Repertoire of the petitioners. Therefore, only Mumbai was mentioned as respondent No.3 at that time operating the Radio Station only in the city of Mumbai. Accordingly, the respondent No.2 has granted licences for the Radio Stations in the cities of Bangalore, Mumbai, Delhi, Lucknow, Patna and Nagpur.

42. The counsel for the respondent No.3 has taken preliminary objection that the present petitions are not maintainable as there is an alternate and efficacious remedy available to the petitioners under Section 72 of the said Act, which specifically provides that any person aggrieved by any final decision or order of the Registrar of Copyrights may file appeal, within three months from the date of the

order or decision, to the Copyright Board. The present petitions have been filed on 13.10.2011 and 11.11.2011 respectively, belatedly after a period of more than 13/14 months from the date of grant of compulsory licences by the Registrar of Copyrights. Therefore, the present petitions are not maintainable.

43. To strengthen his arguments, learned senior counsel for the respondent No.3 relied upon the case of R.P.Khosla & Anr. Vs. Connaught Plaza Restaurant Pvt. Ltd., (2014) 184 Company Cases 305 (Delhi), wherein this Court observed that the impugned orders, even if they are considered to be administrative orders, are subject to the appeal jurisdiction of the Court.

44. Also relied upon the case of The Federation of Hotels and Restaurants Association of India Vs. Union of India & Ors., 2011 (46) PTC169(Delhi), wherein the Division Bench of this Court has held that Section 72(1) of the said Act provides for an appeal to the Copyright Board in respect of any final decision of the Registrar of Copyrights except in cases where the Registrar of Copyrights is itself the Appellate Forum.

45. Mr.Rajiv Nayar further submitted that the petitioners have deliberately filed these petitions before this Court to circumvent the statutory period of limitation as prescribed under Section 72 of the said Act. Section 72(1) of the said Act clearly provides a statutory period of three months to file an appeal against the order of the Registrar of Copyright Board. Since the petitioners are barred by the time to file the appeal, therefore, the petitioners have deliberately filed these petitions before this Court.

46. Learned senior counsel further submitted that order of the Copyright Board is an order in rem, applicable to all music owners. The Copyright Board has passed a well reasoned order after taking into consideration universal factors such as public interest and massive financial losses being suffered by the Radio Broadcasters along with the capacity of the licencees to pay the royalty. The Copyright Board has taken into consideration that the survival and growth of the Radio Broadcasters is essential for the society and the same is in public interest. Accordingly, the principles by which the Copyright Board has fixed the terms and conditions and the royalty payable shall, inter alia, apply to the petitioners as well.

It is submitted that India is in a peculiar position where there are more than one entity which owns the songs and are played on the Radio. In this respect, the Copyright Board has determined a royalty payable for all music owners and not just respondent No.3, since Radio Stations do not play their music alone, therefore, as there are music companies which are not members of any industry association or society, it became imperative to formulate a one stop window for payment and collection of royalties. Thus, the Copyright Board with a view to arrive at a logical scheme of tariff determination and implementation thereof has fixed payment of royalty of 2% net advertisement earnings of each FM Radio Stations, which was to be proportionately distributed between all the music providers.

47. The petitioners have also preferred an appeal against the order dated 25.08.2010 passed by the Copyright Board before the High Court of judicature at Madras and said appeal is pending adjudication. The petitioners also filed an application for interim relief; same was dismissed by High Court of Madras and the Supreme Court as well. Therefore, the petitioners through the present petitions are trying to circumvent the order of the Honble Supreme Court.

48. To strengthen his arguments, learned senior counsel for the respondent No.3 has relied upon the case of State of H.P. Vs. Surinder Singh Banolta, 2006 12 SCC484 wherein the Apex Court held that two parallel proceedings cannot be allowed to continue at the same time and a construction of a statute which may lead to such a situation must be avoided.

49. Learned senior counsel further submitted that the principle of res judicata would apply since the present petitions are merely a reassertion of the same cause of action for which appeal is pending in the High Court of Madras.

50. To strengthen his arguments, learned senior counsel has relied upon the case of State of U.P. Vs. Nawab Hussain, 1977 2 SCC806 wherein the Apex Court has held that the same set of facts may give rise to two or more causes of action. If in such case, a person is allowed to choose or sue upon one cause of action and to reserve the other for subsequent litigation that would aggravate the burden of litigation. The petitioners by filing the present petitions are now only seeking to

have a second bite at the cherry. Accordingly, the present petitions are not maintainable being an afterthought, which are the result of petitioners unsuccessful challenge to the order dated 25.08.2010 passed by the Copyright Board.

51. The petitioners have acquiesced to the licences granted by the Registrar of Copyrights by accepting the Bank guarantees furnished by the respondent No.3 in compliance of the order dated 25.08.2010 with respect to the impugned licences.

52. Learned senior counsel further submitted that the Copyright Board vide order dated 25.08.2010 had granted a licence to the respondent No.3 to broadcast the sound recordings of the petitioners. There was no limitation on the issuance of licence except further terms and conditions as were laid down in the said order. There was also no limitation on the number of Radio Stations for which a licence may be issued to the respondent No.3 as directed in para 30.27 of order dated 25.08.2010 as noted above.

53. Learned senior counsel further submitted that prayer in the applications/complaints before the Copyright Board was as under:

Grant the applicant a compulsory licence of the complete Repertoire of P.P.L. on terms and conditions considered just and equitable by this Honble Copyright Board.

54. This clearly shows that the licence was sought for the respondent company in entirety and was not restricted to any particular number of Radio Stations. The reason why the purpose indicates only certain number of Radio Stations is that at the time of making the applications there were only these Radio Stations taken by the respondents in the first phase of licencing and thereafter, in the second phase, more Stations were allotted to the respondent No.3.

55. The trial before the Copyright Board commenced on 28.07.2009 and was followed through subsequent sittings ending on 12.07.2010. The fact that there were twenty Stations of respondent No.3/MBPL have been mentioned during the cross-examination its witnesses, for example in cross of Ayaan Chakrabarty and

Apurva Purohit. In fact, the affidavit of Ms.Purohit also deals with the first and second phase of licencing whereas affidavit of Mr. Chakrabarty deals with Station wise brake up of income and royalty payment of each of the twenty Stations.

56. Moreover, the petitioners and the respondent No.3 had entered into twenty licence agreements for separate Radio Stations including the stations qua which the grant of compulsory licences has been assailed. A bare perusal of Voluntary Licence Agreements executed between the parties makes it absolutely clear that the tariff which was being paid was subject to adjustment as per the final order passed by the appropriate courts/tribunals. There was a clear understanding that the final order of the tribunal, i.e., Copyright Board would be adhered and complied with by both the parties and, therefore, PPL (1st petitioner) is stopped from taking the instant stand as averred in the writ petitions. Reliance is placed on Clauses 6, 7 and 8 of Licence Agreements entered into between the petitioners and the respondent No.3. Accordingly, the petitioners have entered into Twenty Voluntary Licence Agreements for twenty Radio Stations with the respondent No.3 wherein the petitioners have specifically assented to be bound by the order passed by the Copyright Board, i.e., order dated 25.08.2010, which now precludes the petitioners to challenge the licences issued by the Registrar pursuant to order dated 25.08.2010 passed by the Copyright Board.

57. Mr. Ripudaman Singh Bhardwaj, learned standing counsel for the Central Government appearing on behalf of the respondents No.1 and 2 submitted that on 25.08.2010, the Copyright Board has disposed of some cases relating to licence fee in respect of musical works. In pursuance of the said order, the respondent No.2 issued licences vide its orders dated 03.09.2010 and 16.09.2010. The petitioners had already challenged order dated 25.08.2010 before the High Court of Madras and same is pending hearing. The conduct of the petitioners by resorting to approach multiple Forums, thereby seeking to challenge the orders passed by the Copyright Board and the Registrar of Copyrights is mala fide and, therefore, this Court should not exercise its extra ordinary jurisdiction to entertain the present petitions.

58. Moreover, as per Section 31 of the said Act, fee of Rs. 200/- per work is prescribed for a licence to perform an Indian work in public or to communicate the work by broadcast. Said fee is prescribed in the Second Schedule (Rule

26) of the Copyrights Rules, 1958. Accordingly, Rs. 200/- per work, means per Station filed by the applicant. For instance, if the Radio Broadcaster seeking licence for 20 Stations, then he has to file licence fee of Rs.200/- each Station. Therefore, the interpretation of Rs.200/- per work per song given by the petitioners is incorrect. This kind of interpretation is only used for filing application for registration of copyright for song recording.

59. Learned standing counsel further submitted that duty of the Registrar of Copyrights is administrative regarding implementation/ compliance of the order passed by the Copyright Board on 25.08.2010. The Registrar has issued licences for 88 Stations and for each Station Rs. 200/- is prescribed, hence, the Government has received licence fee of Rs.17,600/- for 88 Stations. Moreover, at the time of final arguments before the Copyright Board, the matter in issue was referring to work which means for each Station and not as per number of songs used by them, in absence of which no verdict was given by the Board in this regard. Moreover, when some cases relating to musical works licencing fee were decided by the Copyright Board in 2002, the verdict was given on niddle time per hour used by Broadcasting Stations and not by per song. Thus, the orders passed by the respondent No.2 are legal and proper 60. I have heard the learned counsel for the parties.

61. Vide order dated 25.08.2010, the Copyright Board passed order in para 30.27 as under:

30.27. Accordingly, in exercise of powers conferred under section 31(1)(b) of the Copyright Act, 1957, the Copyright Board hereby directed the Registrar of Copyrights to grant to the complainants separate licences for communicating the work recorded in sound recordings in the repertoire, present and future, of the respondent to the public by broadcast on revenue sharing basis subject to the following terms and conditions: (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 rate 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; (b) Complainants shall furnish within a week of grant of licence by the Registrar of Copyrights a bank guarantee for Rs. 10,000 in favour of the respondent for each radio station. However, the sum of such bank guarantees shall be revised which complainant was liable for payment of compensation for that quarter. Quarter of a year means a period of three months ending on the last day of March, June, September and December of the relevant year; (c) If the complainant fails to revise the bank guarantee in terms of clause (b), respondent shall be at liberty to cancel the licence without giving any notice and recover the remaining dues from the available bank guarantee; (d) Payment of compensation by the complainant to the respondent for a month shall be made by 7 th day of the month following the month to which payment relates. Complainant shall also furnish alongwith the payment the date wise details of the periods for which the music relating to the respondent and all other music providers has been used for the month. However, payment for the period beginning with the grant of licence and ending on 30th September, 2010 shall be made in lump sum by 7th October, 2010; (e) For any delayed payment for a month beyond 7 th of the following month, interest at the rate of 1% per month or a part of month shall be payable; (f) In case payment is not made by the complainant for a radio station for consecutive two months, respondent herein shall be entitled to cancel the licence by giving notice of one month and recover the remaining dues from the bank guarantee (g) A complainant may for one or more radio stations, by giving notice of one month and after making payment of all sums due, cancel the licence; (h) The validity of the licence granted by the Registrar of Copyright shall come to end on 30 th September, 2020.

62. Accordingly, respondent No.2/Registrar of Copyrights granted compulsory licences to each complainant company. The said licenses are valid upto

30.09.2020, i.e., for about ten years. Under Section 31 of the said Act, a compulsory licence qua the Repertoire has been granted by the Copyright Board to a particular entity, who was applicant before it, thus, the same was not limited to any particular City. While making an application under Section 31(1)(b) of the said Act, the respondent No.3 sought licence for the complete Repertoire of the petitioners, therefore, the reason for mentioning the cities by the respondent No.3 was that at that point of time, they were operating Radio Stations in those cities only.

63. During the pendency of the complaints/applications filed by the respondent No.3, on 13.07.2005, the Government of India announced its Phase-II Policy for allotment of FM Bandwidth for various new cities across India. Accordingly, the respondent No.3 pursuant to said Policy, secured licences for the cities of Ahmedabad, Ahmad Nagar, Chennai, Coimbatore, Hyderabad, Jaipur, Sholapur, Sangli, Pune, Surat, Vadodara, Vishakhapatnam, Nanded, Jalgaon and Akola from the Government alongwith other Broadcasters. However, some of the Broadcasters again approached the Copyright Board, which took up the complaints/applications filed by the respondent No.3 along with other new applications that were filed in the interim period between 2002 and 2008 when the case was pending before High Court of Bombay and then Supreme Court.

64. The Copyright Board vide its order dated 25.08.2010 directed the Registrar of Copyrights to grant the separate licences to respondent No.3 for communicating the work recorded in sound recordings in the Repertoire, present and future of the respondent No.3 to the public by broadcast on revenue sharing basis subject to terms and conditions as enumerated in Para 30.27 of order dated 25.08.2010 as noted above. Accordingly, compulsory licence was granted to each complainant company and was not restricted to any one Radio Station.

65. Chapter X of the said Act deals with the procedure of registration of copyright. However, as per Section 72 of the said Act, if any person is aggrieved by any final decision or order of the Registrar of Copyrights, that can be challenged by filing appeal to the Copyright Board within three months from the date of the order or decision. The impugned orders passed by the respondent No.2 are final, therefore,

the petitioners ought to have filed appeals before the Copyright Board or sought clarification from the Copyright Board whether order dated 25.08.2010 was confined to any particular city. However, the petitioners neither filed appeal nor sought clarification. It is pertinent to mention here that the order dated 25.08.2010 is under challenge in the appeal before the High Court of Madras, which is pending adjudication.

66. In case of *R.P.Khosla & Anr. (supra)*, this Court held that the impugned orders, even if they are considered to be administrative orders, are subject to the appeal jurisdiction of the Court.

67. In case of *The Federation of Hotels and Restaurants Association of India (supra)*, the Division Bench of this Court held that Section 72(1) of the said Act provides for an appeal to the Copyright Board in respect of any final decision of the Registrar of Copyrights except in cases where the Registrar of Copyrights is itself the Appellate Forum.

68. Admittedly, the impugned orders were passed by the respondent No.2 on 03.09.2010 and 16.09.2010, however, the present petitions have been filed in October/November, 2011. The Copyright Board had passed a well reasoned order dated 25.08.2010, after taking into consideration the universal factors such as public interest and massive financial losses being suffered by the Radio Broadcasters along with the capacity of the licencees to pay the royalty. The Copyright Board has taken into consideration that survival and growth of the Radio Broadcasters is essential for the society and the same is in public interest. Moreover, the Copyright Board has fixed the terms and conditions and the royalty payable to the petitioners. Further, the Copyright Board has determined a royalty payable for all music owners and not just respondent No.3, since Radio Stations do not play their music alone. Therefore, as there are many other music companies which are not members of any industry association or society, it became imperative to formulate a one stop window for payment and collection of royalties. Thus, the Copyright Board with a view to arrive at a logical scheme of tariff determination and implementation thereof has fixed payment of royalty of 2% net advertisement earnings of each FM Radio Stations, which is to be

proportionately distributed between all the music providers.

69. Moreover, the trial before the Copyright Board commenced on 28.07.2009 and was followed through subsequent sittings ending on 12.07.2010. During cross-examination of the witnesses of respondent No.3, twenty Stations of the respondent No.3 have been mentioned. Affidavit of Ms. Purohit deals with the first and second phase of licencing whereas the affidavit of Mr. Chakrabarty deals with the Station wise break up of income and royalty payment of each of the twenty Stations.

70. In addition, the petitioners and the respondent No.3 had entered into twenty licence agreements for separate Radio Stations including the stations qua which the grant of compulsory licences has been assailed. The Voluntary Licence Agreements executed between the parties make it absolutely clear that the tariff, which was being paid, was subject to adjustments as per the final order passed by the appropriate courts/tribunals. Thus, there was a clear understanding that the final order of the tribunal, i.e., Copyright Board, would be adhered to and complied with by both the parties.

71. The issue raised by the petitioners that Section 31 of the Act provides that respondent No.2 can grant licences as directed by the Copyright Board on payment of such fee as may be prescribed. Rule 26 sub-clause (1) of the Copyright Rules, 1958, provides that all the fees payable under the said Act shall be as specified under the Second Schedule. Serial No.4 of the Second Schedule prescribes a fee of Rs.200/- per work for a licence to communicate the work to the public by broadcast. Therefore, it is imperative that fee of Rs.200/- is to be paid per sound recording in the Repertoire of the petitioners. The respondent No.3 has not paid the prescribed fee for the compulsory licences granted by the impugned order for any of its Radio Stations.

72. Since petitioners have challenged the order dated 25.08.2010 passed by the Copyright Board before the High Court of Madras and in case the petitioners succeed therein, then, that decision qua the licences issued by the respondent No.2 vide its orders dated 03.09.2010 and 16.09.2010 would be applicable.

73. In view of the above discussion, I find no merit in the instant petition.

74. Accordingly, both the petitions and the pending applications are dismissed with no order as to costs. SURESH KAIT (JUDGE) JANUARY09 2015 sb

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com