Supercassette Industries Vs. Nirulas Corner House (P) Ltd.

Supercassette Industries Vs. Nirulas Corner House (P) Ltd.

SooperKanoon Citation : sooperkanoon.com/692613

Court : Delhi

Decided On : Mar-17-2008

Reported in : 148(2008)DLT487; LC2008(3)171; 2008(37)PTC237(Del)

Judge : S. Ravindra Bhat, J.

Acts : Copyright Act - Sections 2, 14, 37, 51, 51(1), 52, 52(1) and 55; Code of Civil Procedure (CPC) , 1908 - Order 7, Rule 11 - Order 39, Rules 1 and 2

Appeal No. : I.A. Nos. 6882 and 10742/2007 in CS (OS) No. 1096/2007

Appellant : Supercassette Industries

Respondent : Nirulas Corner House (P) Ltd.

Advocate for Def. : Mudit Sharma, Adv.

Advocate for Pet/Ap. : Ameet Dutta,; George Thomas and; Himanshu Bagai, Advs

Judgement :

S. Ravindra Bhat, J.

1. This order shall dispose off I.A. No. 10742/2007 preferred under Order VII Rule 11 by the applicant defendant seeking the rejection of the plaint and also I.A. No. 6882/2007 under Order XXXIX Rule 1 and 2 of Code of Civil Procedure, 1908.

2. According to the plaint averments, he plaintiff is copyright holder of a variety of literary and musical works, sound recordings, music videos and cinematographic videos. It plaintiff manufactures and sells VCDs, DVDs and Cassettes containing these works and also licenses the right to exploit its works. The defendants are engaged in the business of hotels/restaurants in New Delhi.

3. The plaintiff avers that after coming to know about alleged infringement of its copyright in variety of works it asked an investigator to visit the premises of the defendant in order to ascertain the extent of viewing of those works. The said investigator visited the said premises of the defendant in May 2007 and found that few audio clippings of songs in which the plaintiff owned copyright where being played in different channels on the television in a room of the defendant's hotel. The investigator also filed an affidavit in this regard. The plaintiff alleges that such transmission of works in which the plaintiff has copy right, without a license in that regard, amounts to infringement of the copy right as the defendants perform/communicate the works of the plaintiff to the public. The plaintiff thereforee seeks an injunction against the defendants restraining it from the alleged public performance and also seeks damages.

4. By order dated 31st May 2007, this Court granted ex parte ad interim injunction restraining the defendant from infringing in any manner the copyright of the Plaintiff in its works by playing the same at their hotel premises and restaurants. In support of the averments, the plaintiff has filed a copy of the DVD recorded in the defendant's hotel premises.

5. The defendant filed its written statement also present application for rejection of the suit. The defendants submit that the plaintiff is unable to establish that the copyright in its works are being infringed and failed to put on record any document in this regard. It also submits that no infringement of the plaintiff's works has in fact being committed by it. The plaint according to it is, thereforee, liable to be rejected under Order VII Rule 11 Code of Civil Procedure, 1908 read with Section 55 of the Copyright Act (hereinafter referred to as 'the Act') for non disclosure of cause of action.

6. Mr. Ameet Datta, learned Counsel on behalf of the plaintiff, relying on the affidavit of the investigator contended that titles in which it had copyright were in fact being played in the hotel rooms, without a proper license. He states that such usage would amount to public performance/communication to public of the work, the exclusive rights to which were granted only to the copyright holder or a duly licensed person under the Act. He submitted that one of the exclusive rights prescribed by Section 14 of the Act, in the case of literary works, musical works, sound recordings and cinematograph works (films) is the right to communicate the work to the public, which is being infringed by the defendants. He also drew the attention of the Court to Section 2(ff) that defines 'communication to the public' as occurring when a work is made available to the public directly or by any means of display or diffusion, regardless of whether the work has been seen or heard. The Explanationn to Section 2(ff) inserted in 1995 specifically mandates that making a work available by simultaneous means of communication in hotels rooms would amount to a communication to the public. Relying upon the statement of Objects and Reasons of the Amendments of 1995 he submitted that the intent of the Explanationn was to clarify the statute about the meaning of 'public' and thereforee in effect the Explanationn clarifies that the guests in the rooms of the hotel are a distinct public audience. Further, he argued that since Section 51 states that any act in contravention of the exclusive rights conferred under Section 14 amounts to infringement, the communication to the public, of the works of the plaintiff, prima facie amounts to infringement of its rights. He placed reliance on Section 51(a)(i) and (ii) of the Act and contended that the defendant was liable both for primary and secondary infringement of the copyright in the works of the plaintiff.

7. It was submitted that guests in the defendant's hotel rooms would amount to a distinct 'public' audience, since as the defendant provides the service directly to the customers and not the cable operator. The television sets installed in the rooms by the defendant are the means through which electronic signals are converted into audio and video signals, and thereforee constitute a separate act of communication to the public distinct from the act of the cable operator. He relied on the judgment reported as Performing Right Society v. Hammond's Bradford Brewery Co. Ltd. (1934) Ch. 121. In that case the hotel had installed a wireless set and loudspeaker that made available musical works to person visiting the hotel. In

the appeal field by the hotel, while holding that the hotel was liable for infringement of copyright, Lawrence LJ held as follows:

The question thereforee resolves itself into whether the defendants, by operating their wireless set, were causing an acoustic representation of the works to be given at their hotel. In my judgment that question must be answered in the affirmative. The wireless receiving set by means of which alone the sounds were produced at the hotel belonged to and was under the control of the defendants, who operated it for the purpose of giving to their customers at the hotel an acoustic representation of the musical works being performed at Hammersmith; but for the defendants having put their wireless set into operation there would have been no acoustic representation of the works at the hotel at all, I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation cause an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is thereforee himself performing or authorizing the performance of the musical work within the meaning of the Copyright Act, 1911.

8. Reliance was also placed on Moorhouse, Angus and Robertson Ltd. v. University of New South Wales [1976] RPC 151, where the court was called upon to determine the liability of the University for alleged breach of copyright by a student who had photocopied the claimants books, to support his argument about the defendant having authorized or permitted or approved the watching of the plaintiffs works. He also cited the judgment reported as Garware Plastics and Polyester Ltd. v. Telelink : AIR1989 Bom331 , where the Court held that broadcasting of content through cable channels to various households etc. amounted to public performance and submitted that a similar analogy could be drawn in the present case.

9. Mr. Mudit Sharma, learned Counsel submits that through the affidavit of the investigator, the plaintiff has admitted that the content was being provided by the cable operator through various channels and not by the defendant. In relation to direct content being provided by the defendant in the restaurant, bar etc. by playing recorded music, the investigator had not disclosed whether the defendant

was in fact playing the plaintiff's works. thereforee, he argued that no cause of action has been established against the defendant. According to him, the plaintiff has neither made any averment in relation to the broadcast itself being unlicensed nor has he made the broadcaster a party to the present proceeding. If the broadcast itself were not illegal, he contended that broadcaster would be entitled to the broadcast reproduction right under Section 37, which allows the broadcaster to communicate the work to the public. The broadcast itself and the receiving of such broadcast, he submitted would not amount to infringement under Section 51 of the Act. He submitted that the defendant was merely receiving the signals transmitted by the cable operator, and because the plaintiff does not dispute the legality of the cable operators content, the defendant itself could not be held liable for infringement of the work through communication to the public, since it has obtained the consent of the cable operator to receive such content. He also submitted that the plaintiff has intentionally not disclosed the details of their arrangement with Broadcasting Organizations and has intentionally not disclosed the channels, if any, from which the songs were recorded on the CDs, as the same would have falsified the plaintiff's contention. It is alleged that the CDs filed on record do not disclose any infringement on the contrary it does not even demonstrate as to how, when and where they were recorded.

10. Counsel for defendant next submitted that the plaintiff has no locus standi to file the present suit as an independent copyright of the Broadcaster subsists in a broadcast and the later is owner of the Copyright. He submitted that Section 55 of the Act categorically states that the sina qua non for filing a suit for infringement of a copyright is that the plaintiff's copyright should have been infringed. thereforee, the cause action would arise only when the defendant infringes plaintiff's copyright. In this suit, the plaintiffs have failed to demonstrate that their copyright was infringed and as to how a right to sue i.e., cause of action arose in its favor against the defendant. Further, it was submitted that irrespective of whether the guests view the televisions or not, same fare is charged, and the Defendant does not profit from the guest viewing or not viewing the television. thereforee the Defendant would not fall within the ambit of Section 51(1)(ii).

11. Section 2(ff) of the Act defines a public performance as follows:

(ff) ``communication to the public'` means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation.-For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel.

'Copyright' has been defined in Section 14 as follows:

14. MEANING OF COPYRIGHT.

For the purposes of this Act, ``copyright'` means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:

(a) in the case of a literary, dramatic or musical work, not being a computer programme,:

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in Sub-clauses (i) to (vi);

(b) in the case of a computer programme,:

(i) to do any of the acts specified in Clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,:

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v)to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in Sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,:

(i) to make a copy of the film including a photograph of any image forming part thereof;

(ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public;

(e) in the case of a sound recording,:

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

Explanation.- For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

12. Section 52 defines what is copyright infringement; it reads as follows:

51. WHEN COPYRIGHT INFRINGED.

Copyright in a work shall be deemed to be infringed:

(a) when any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act:

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person:

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work:

Provided that nothing in Sub-clause (iv) shall apply to the import of one copy of any work, for the private and domestic use of the importer. Explanationn.-For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an ``infringing copy'`.

13. Certain acts are deemed not to be infringements, under Section 52; they include, under Section 52(1)(k) use of recordings of musical works. There is also another exception, where the use is for a religious occasion, (Section 52(1)(ka). Those provisions read as follows:

(k) the causing of a recording to be heard in public by utilising it,-

(i) in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

(ii) as part of the activities of a club or similar organisation which is not established or conducted for profit?

xxxxxx xxxxxx

(za) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony of an official ceremony held by the Central Government or the State Government or any local authority.

Explanation.-For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage.

14. The copyrights conferred under Section 14 of the Act consist of a bundle of rights. The owner of a copyright is entitled to assign and license each of those rights separately or in bundles. The bundle of rights could vary in complexity depending upon the nature of the work-literary, dramatic, musical recording or cinematographic films. In the case of music videos, which is essentially a

cinematographic film, rights could subsist in the following works: lyrics of the song (literary), music composition (musical), choreography and performance (dramatic), the sets (artistic), the capturing of the musical work on tapes (sound recording) and the capturing of it all on a film (cinematographic film). Under Section 14, the rights to reproduce, perform, adapt, translate, make copies of these works exists. Each of these rights could be assigned, reassigned and licensed. For example, the owner of the rights in a cinematographic film, can license the literary and musical rights in the lyrics to a radio channel to be aired, and also assign the license to make copies of the cinematographic films on cassettes and CDs etc to a person and so on. The work thus follows a trail of licenses.

15. We are here concerned with rights of the plaintiffs in such cinematographic films. In relation to cable channels the plaintiff would convey the right to broadcast the work to public, they in turn would convey the right to re-broadcast the work to cable operators and what is conveyed to the customer is a license to watch the work. This trail of conveyance of the rights have to be kept in mind.

16. One of the earliest cases on the issue appears to have been decided by the US Supreme Court, in Jewell-La Salle Realty Co. v. Buck 1931 283 US 191. The court acknowledged that the owner of a private radio receiving set, who in his home invites friends to hear a musical composition which is being broadcast would not be liable for infringement, for, even if this be deemed a performance, it is neither public nor for profit. It was held however, that the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constituted a performance of such composition within the meaning of the Copyright Act, and thus vocative of the owner's rights.

17. Copinger and Skone James on Copyright, Volume One, (Fifteenth Edition, 2005; published by Sweet and Maxwell), in Para 7-96A says this:

It has been decided by the Exchequer Court of Canada (Canadian Admiral Corporation Ltd. v. Rediffusion Inc 1954 ECR 382) that the performance of

material by way of television in private homes, the material having been received by subscribers to a cable service, did not amount to public performance on the ground that the character of the audience was purely domestic and even a large number of 'private' performances could not be in public. It might thereforee be argued that the character of the audience in separate hotel bedrooms is similar, each hotel bedroom being the occupant's 'home' for the night, and each performance being 'private'. (See e.g. Mellor v. Australian Broadcasting Commission (1940) AC 491; but cf. Messaer v. British Broadcasting Co. Ltd. 1927 (2) KB 543. In a decision of the Supreme Court of New South Wales (Rank Film Production) v. Dodds 1983 (2) NSWLR 533; see also Hotel Mornington AB v. Forenigen Svenska Tonsattares Internationellla Musikbyr (STIM) 1982 (2) ECC 171 (Sup. Ct. of Sweden); Teosto v. A Taxi Driver (2004) ECDR 3 (Sup. Ct of Finland) (provision of music by taxi driver to his customers') the issue arose whether the watching of television sets by the occupants of motel rooms, to which films were relayed by means of a video cassette recorder and cables, amounted to public performance. The plaintiff's case was argued primarily on the basis that presentation of a film in a single room, even to only one person, amounted to public performance. It was held that such presentation was in fact public since the character of the audience was as guests of the motel and not as individuals in a private or domestic situation. In that capacity the guess were paying for the accommodation and the benefits which went with it. It is thought that for the same reasons the performance of works to inmates of prisons is in public

18. The expansive definition under Section 2(ff) in this case would mean that broadcast is deemed to be communication to the public. The question is, what is copyright deemed infringed. As noticed earlier, the plaintiff claims copyright in the music recordings as well as the video recordings. The objection that the plaintiff has not disclosed whether and to what extent, it parted with any of those rights to the broadcaster cannot really be gone into; the plaintiff has in any case asserted these rights. Under Section 51(ii) infringement occurs, if anyone permits for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright. The exception

to this definition of infringement is contained in Section 52.

19. In terms of Section 52(1)(k) the causing of a recording to be heard in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein, is not deemed an infringement. Similarly an exception, involving the communication of a work the public, or of a sound recording, in the course of any bona fide religious ceremony is not a public performance (Section 2(1)(za)). These provisions are pointers to the legislative intent of treating use of televisions and sound recordings, in hotels as communications to the public; the intention appears to be reinforced by specific exception, from Section 52 to the category of what is not infringement, the use of recording to be heard in a hotel.

20. While on the subject, it may not be out of place to observe that the two categories 'hotels' and 'similar commercial establishment' gives a clue to Parliamentary intention to exclude the operation of such categories of establishments from the benefit of what are obviously deemed not infringements. Such provisions should receive a restricted interpretation, having regard to the nature of the expressions used. Thus, the Court will not extend the law beyond its meaning to take care of any perceived broader legislative purpose. Here ``strict'` means merely that the Court will refrain from exercising its creative function to apply the rule announced in the statute to situations not covered by it. (See Bipinchandra Parshottamdas Patel v. State of Gujarat : [2003]3SCR533 ; Thampanoor Ravi v. Charupara Ravi : AIR 1999 SC3309 . Obviously thereforee, all establishments cannot come within the fold of the expression. There can even be a class of situations where it can conceivably be argued that the service provided is so integrally connected with the communication to the public, that it may not fall within Section 51. As held in Hubbard v. Vosper 1972 (1) All ER 1072 the court must consider the question of proportions, in the case of a copyright infringement action. thereforee, for instance, the placing of a common television in a motel reception, accessible to all but without keeping a television set, in each hotel room, or placing such a set in a grocery shop for the recreation of the owner, or a wayside restaurant, may not fall within the mischief of the definition of

infringement. Proportion in this context, would necessarily imply the nature of the activity of the establishment and the integral connection the infringement complained of has with it. Likewise, the use of television or radio in a city bus can be contrasted with such use in an aircraft.

21. In the light of the above discussion, it cannot be said that the plaint does not disclose any cause of action; equally, the court cannot go behind the pleadings to hold that the materials or pleadings do not disclose any triable cause of action (Ref. Popat and Kotecha Property v. State Bank of India Staff Association : (2005)7SCC510 . It has also been held that there cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. The court cannot reject a part of the plaint, if defects are noticed in it for any reason : Raptakos Brett and Co. Ltd. v. Ganesh Property : AIR 1998 SC3085 . thereforee, the defendant's application for rejection of plaint cannot succeed; it has to fail.

22. The plaintiff has been able to show that the defendants are using cable connection and extending facilities of television to their patrons in the hotel rooms, for payments are received. In this view, prima facie, the content of songs and videos broadcast are communications to the public. The defendant's contention that the plaintiff has not said that it has not licensed any rights to the broadcaster, is a matter of defense; the extent of license, if any and the terms of those licenses, are matters which have to be gone into at the trial. The plaintiff's right to the titles and video recordings as owner of copyright is alleged; there is material on record to substantiate it. The defendant is a hotel. In the circumstances, the plaintiff has established a strong prima facie case of infringement. The balance of convenience too would be in its favor, since refusal to confirm the injunction would mean the defendant is free to continue infringing the copyright, and profit from it.

23. In the light of the above discussion, I.A. No. 6882/2007 has to be allowed; the injunction made in the earlier course of the proceedings is hereby confirmed.

24. Accordingly, I.A. No. 6882/2007 is allowed and I.A. No. 10742/2007 is dismissed. No costs.