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Court : Kolkata

Decided On : Mar-26-2004

Reported in : 2004(2)CHN595

Judge : Ashim Kumar Banerjee, J.

Acts : [Copyright Act, 1957](#) - Sections 31 and 60

Appeal No. : G.A. Nos. 4314 of 2001 and 2286 of 2003 and C.S. No. 480 of 2001

Appellant : Bennett Coleman and Co. Ltd. and anr.

Respondent : Phonographic Performance Ltd.

Advocate for Def. : Sanjeev Banerjee and ;S.K. Ash, Advs.

Advocate for Pet/Ap. : S.N. Mukherjee, ;Ranjan Bachawat and ;Ravi Kapoor, Advs.

Judgement :

Ashim Kumar Banerjee, J.

1. The plaintiff is a licensee to broadcast the FM Channel in All India Radio. The defendant is the copyright holder of various phonographic performance. The respondent is a copyright society registered under Section 33 of the [Copyright Act, 1957](#) (hereinafter referred to as the 'said Act, 1957').

2. In or about 1993 the plaintiff No. 1 was given the right to broadcast 'Times FM'. After the plaintiff No. 1 was allotted time slots for 'Times FM' the respondent Remanded broadcasting fee @ Rs. 1,500/- per time slot per hour for the music of which the respondent was holding copyright.

3. The disputes arose between the parties which resulted in a suit filed before this Court being Suit No. 304 of 1993 (Phonographic Components Pvt. Ltd. v. Midday Publication Pvt. Ltd. and Anr.). In the said suit a settlement was arrived at between the plaintiff No. 1 and the defendant by which rate was agreed @ Rs. 160/- per needle hour. The other terms and conditions were also agreed upon and stipulated in the terms of settlement. According to the defendant the said agreement was to expire by efflux of time on March 31, 2000.

4. The disputes further arose in 1999 when the plaintiff was allotted a complete FM Channel throughout the day in 40 cities. The plaintiff wanted to continue the arrangement of playing music of which the defendant was holding copyright at the same rate being Rs. 160/- per needle hour. The defendant did not agree to the said proposal and demanded Rs. 1,500/- per needle hour. This gave rise to the present suit. The plaintiff also approached the Copyright Board on the identical issue. According to the plaintiff the rate comes to Rs. 191/- by giving 5% increase as stipulated in the earlier agreement and as such they should be permitted to continue to play the said music upon payment of Rs. 191/- per needle hour.

5. The application when initially moved this Court passed an order directing payment of Rs. 400/- per needle hour as and by way of interim measure by an order dated September 28, 2001. An appeal was preferred by the respondent which was unsuccessful. Special Leave Petition filed by the defendant was also unsuccessful. The Supreme Court of India by its order dated July 10, 2002 requested the learned Single Judge to dispose of the said application on merits after hearing. Despite the request made by the Apex Court the matter could not be heard by the regular Bench. In the meantime the respondent also approached the learned Single Judge who passed the interim order for a modification and/or clarification which was also rejected by His Lordship. During the pendency of the said application the Copyright Board heard the matter and by detailed order fixed

the interim rate for different slots the aggregate of which comes to Rs. 661/- per needle hour. On June 26, 2003 the respondent made an application for vacating the interim order on the plea that since the Copyright Board by their order dated November 19, 2002 fixed a particular rate of royalty this Court should modify the interim order by giving effect to the rate prescribed by the Copyright Board.

6. The said application for vacating the interim order came up for hearing before me on March 3, 2004 when after hearing the learned Counsel for the parties I decided to take the hearing of the main matter and I directed the same to appear before me on the next adjourned date. On the next adjourned date I heard both the matters and kept my judgment reserved.

7. Mr. S.N. Mukherjee, learned Counsel appearing on behalf of the plaintiff/petitioner, contended that since the rate was fixed by and between the parties in terms of settlement filed in the earlier suit the parties were bound to adhere to the said terms of settlement, Since the defendant refused to act in terms of the said agreement the plaintiff was constrained to file the instant suit. Reference was made in this regard to Section 60 of the [Copyright Act, 1957](#) which reads as follows :

'60. Remedy in the case of groundless threat of legal proceedings.--

Where any person claiming to be the owner of copyright in any work, by circulars, advertisement or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may notwithstanding anything contained in Section 34 of the Specific Relief Act, 1963, institute a declaratory suit that the alleged infringement to which the threats related was not in fact in infringement of any legal rights of the person making such threats and may in any such suit--

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any, as he has sustained by reason of such threats :

Provided that this section shall not apply if the person making such threats, with the diligence, commences and prosecutes an action for infringement of the

copyright claimed by him'.

8. According to Mr. Mukherjee that since the defendant claiming to be the owner of the copyright threatened the plaintiff for an alleged infringement the plaintiff was entitled to initiate a declaratory suit claiming that such allegation was not in fact an infringement. Since the parties agreed to a particular rate and since the plaintiff was ready and willing to pay at the said rate they were entitled to take a pre-emptive action under Section 60.

9. Mr. Mukherjee also contended that the amount demanded by the defendant was astronomical and already the plaintiff suffered huge loss and it would not be possible for them to accede to the unreasonable demand of the respondent.

10. Mr. Sanjeev Banerjee, learned Counsel appearing for the respondent, contended that the suit was not maintainable save and except under Section 60 of the Act. Mr. Banerjee contended that since the defendant was owner of the Copyright the proper action to be brought by the plaintiff was under Section 31 of the said Act of 1957 which was before the Copyright Board. Mr. Banerjee contended that in case a Copyright holder refuse to republish or allow republication of its work a complain can be made to the Copyright Board under Section 31 of the said Act and the Copyright Board on such complain may determine the issue and direct that the registrar of the Copyright Board would grant licence to the complainant in accordance with the direction of the Copyright Board on payment of such fee as may be prescribed. Since the defendant being the owner of the copyright refused to grant licence at a lesser rate the plaintiff was only entitled to make a complain under Section 31 and nothing else. The plaintiff in fact approached the Copyright Board. Hence, the suit on the identical issue being a parallel proceeding was not maintainable.

11. On the issue of interim order Mr. Banerjee contended that since the Copyright Board upon hearing the respective contention of the parties by a detailed order prescribed a particular rate average of which comes to Rs. 661/-per needle hour this Court should modulate the interim order by giving effect to the order of the Copyright Board. Mr. Benerjee also informed that from the order of the Copyright Board appeals were preferred by both the parties which are pending for disposal.

12. Mr. Banerjee also contended that the running of the parallel proceeding are contrary to public policy as also the same is barred by Section 10 of the Code of Civil Procedure.

13. In support of the respective contentions the parties cited the following decisions :

(i) : AIR1952 Cal124 (Satyanarayan Prosad v. Diana Engineering Co.)

(ii) 1994, RPC, page 143 [Association of Independent Radio Companies Ltd. (AIRC) and Anr. v. Phonographic Performance Ltd. and British Broadcasting Corporation (Intervener)].

(iii) : AIR 1998 SC3118 (M. Muthuswami Gounder v. N. Palaniappa Gounder)

(iv) 2004, Volume 28, PTC, page-131 [Entertainment Network (India) Limited, Mumbai v. Super Cassette Industries Ltd., Noida]

14. Let me first discuss the decisions cited by the parties.

(i) : AIR1952 Cal124 (Satyanarayan Prosad v. Diana Engineering Co.) : Paragraph 10 of this judgment was relied upon. In this case the Division Bench observed that a decision liable to appeal may be final until the appeal is presented. Once the appeal is presented it loses the character of finality.

(ii) : AIR 1998 SC3118 (M. Muthuswami Gounder v. N. Palaniappa Gounder): Here also the Apex Court expressed the similar view as of the Calcutta High Court judgment in paragraph 12 of the said judgment. Citing the above two decisions being the Calcutta High Court judgment and the Apex Court judgment Mr. Mukherjee contended that since the decision of the Copyright Board is under challenge before the appellate authority the said order lost its finality and the same should not be taken into account.

(iii) 2004, Volume 28, PTC, page 131 [Entertainment Network (India) Limited, Mumbai v. Super Cassette Industries Ltd., Noida]: The extract of the head note being relevant herein are quoted below :

'The Board does not have the power to pronounce whether a person has committed an infringement or not. The Civil and Criminal Courts are respectively entitled to give a finding whether the civil wrong or offence of infringement had taken place or not. The Board would not like to venture to a territory which is out of bounds for it. The respondent wanted the Board to come to a finding that the complainant has committed infringement and then disqualify him for grant of a licence. But such a Court is not allowed by law. Admittedly, even the respondent does not consider that the complainant has committed an offence; otherwise he would have filed a complaint before a competent Court seeking for him the punishment provided under Section 63 of the Copyright Act. It has only moved the appropriate Court for civil remedies. The Board would be committing a mistake to presume that the High Court would come to certain conclusion and on that basis consider the complainant as an infringer and consequently disqualified.....

The complainant is entitled to move the Copyright Board under Section 31 having satisfied all the conditions imposed by the statute.

The matter regarding infringement and grant of damages is pending in a competent Court and the Court will consider and decide the matter in due course. There is no provision in the Copyright Act which debars the Board from considering a complaint under Section 31 during the pendency of an infringement proceeding in a Court of law. The equitable principle of clean hands is not applicable to the facts of the complaint'.

15. In the 1994 suit the parties entered into an agreement prescribing a particular rate. Whether the said agreement is still binding upon the parties or not is a question to be decided in the present suit. The present suit in other words is for interpretation of the earlier agreement between the parties. This Court has no expertise to fix the particular rate of royalty. This is within the domain of the Copyright Board under Section 31. The plaintiff instituted the suit on the plea that the defendant was not entitled to withhold permission to play such music and as such they were entitled to have declaration in terms of Section 60.

16. It is true that both the proceedings under Section 31 as well as under Section 60 emanated from a single cause of action. It would be difficult for me at this stage to opine that two parallel proceedings were not maintainable at the same time. Neither the Copyright Board is empowered to give a true purport and meaning of the said agreement between the parties nor this Court is competent to decide the rate under Section 31. Hence, in my prima facie view, the suit filed by the plaintiff in this Court is maintainable and the submission of Mr. Banerjee on that score is rejected.

17. Now comes the question as to whether I should continue the interim order passed at the initial stage and not altered upto the Supreme Court level in view of the changed circumstances. To decide the issue I will have to discuss the true purport of Section 31. Section 31 relates to the competence and power of the Copyright Board to fix a particular rate of royalty. Once the Copyright Board although as and by way of interim measure fixed a particular rate I cannot ignore the same without having any expertise to find out whether such rate was adequate or not.

18. In my view, in the changed circumstances, I have two options left open either to allow the plaintiff to go on making payment in terms of the agreement of 1994 holding prima facie that they were entitled to continue with the same or implement the order of the Copyright Board.

19. To opt for the first option I would have to go into the terms of the agreement to find out the true purport thereof. I feel that such attempt should be made at the appropriate stage after calling for the written statement from the defendant specially when I have a ready course available for me being the Copyright Board order.

20. To decide the interim application I would have to consider the balance of convenience. Since the plaintiff is allowed to play the music of the defendant, the defendant should be adequately protected. Copyright Board as and by way of interim measure with their expertise and competence fixed a particular rate. If I allow the plaintiff to play the music I should in all fairness allow the defendant to claim the rate fixed by the Copyright Board.

21. In such view of the matter I dispose of the application for interim injunction by permitting the plaintiff to continue to play the music of which the defendant was claiming copyright upon payment of royalty @ Rs. 661/- per needle hour as fixed by the Copyright Board. The interim order passed earlier fixing the rate @ Rs. 400/- per needle hour is thus modified. With the above modifications the ad interim order passed on 28th September, 2001 is confirmed and would continue till the disposal of the suit.

22. Since the lone defendant is represented before me I expedite the hearing of the suit. Written statement be filed within four (4) weeks from date. Cross order for discovery within four (4) weeks thereafter. Inspection forthwith. Let the suit appear in the monthly list of August, 2004 for hearing before the appropriate regular Bench.

23. I further make it clear that in case the rate fixed by the Copyright Board is altered by the appellate authority this interim order would also stand altered and the parties would be bound by the order of the appellate authority under the [Copyright Act, 1957](#) subject to the result of this suit.

24. G. A. No. 4314 of 2001 and G. A. No. 2286 of 2003 are disposed of accordingly.

25. There would be no order as to costs.

26. There would be an order of stay of operation of the order for a period of three (3) weeks from date.

27. Urgent xerox certified copy would be given to the parties, if applied for.