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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 08.03.2021

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Judgment Pronounced on: 09.11.2021

+ CS(COMM) 403/2017

SHRI RISHI RAJ

..... Plaintiff

Through Mr.Harish Malhotra, Sr.Adv. with
Mr.Rajender Agarwal, Adv.

versus

SAREGAMA INDIA LTD.

..... Defendant

Through Mr.Sanjeev Sindhwani, Sr.Adv. with
Mr.Ankur Sangal, Ms.Sucheta Roy
and Ms.Richa Bhargava, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (JUDGMENT)

IA No.6852/2017 & 1414/2020

1. This is an application filed by the plaintiff seeking an *ex-parte ad interim* injunction to restrain the defendant, its directors, officers etc. from licensing or exploiting in any manner, including through physical formats such as CDs, DVDs, magnetic tapes, pen drives and/or on the internet through their website www.saregama.com or any other websites/software application, the copyrighted works viz. sound recordings (songs) incorporated in various cinematographic films as well as audio visuals of such songs.

2. The accompanying suit is filed by the plaintiff stating that it is carrying on the business of film production, distribution and exhibition

under the name and style of 'RAJ RISHI FILM'. Apart from the film production, distribution and exhibition, the plaintiff is also said to be engaged in the business of acquiring negative rights of various films from different producers which are approximately 250 in number. However, it is stated that the present suit is confined to only infringement caused by the defendant to 144 films which are stated in para 2 of the plaint. It is urged that in terms of the agreements of the respective producers/negative right holders, it is only the plaintiff alone who is entitled to deal with the said films and is the copyright holder of the said films.

3. Regarding the defendant, it is stated that they have engaged in the act of piracy/copyright infringement, inasmuch as, it is involved in the unauthorised/unlicensed exploitation/licensing of sound recording as well as audio-visuals of such songs etc. It is stated that the plaintiff having acquired negative rights of such films, it is the plaintiff who alone is the recorded owner of the aforesaid films and is the copyright holder of all the rights flowing from the said films which includes the performing copyrights in its story, songs, music etc. It is stated that the defendant has been misrepresenting itself to be the owner/copyright holder of the sound recordings as well as audio visuals of such songs incorporated in the aforesaid films rights of which exclusively vest with the plaintiff alone. It is further stated that a notice dated 29.04.2017 was sent to the defendant to render accounts of the amount earned by the defendant by usage of composition in musical works and lyrics and other losses were also sought. The defendant sent a reply dated 19.05.2017 denying the stand of the plaintiff.

4. The defendant in the written statement states that the defendant is in the business of acquiring copyright in many sound recordings and literary, musical and dramatic works. The defendant possesses one of the richest catalogues of Hindi and other Indian language film and non-film music, especially old film soundtracks. It is stated that the plaintiff's rights are limited to assignment of alleged rights in the negatives of the impugned cinematograph films, which are only rights over the source material of the impugned cinematograph films and may extend to the rights of theatrical distribution, satellite broadcasting etc. of the cinematograph films as a whole. On a perusal of the agreements, it is stated that it is evident that the assignment of the rights by the producers/right holders of the impugned cinematograph films to the plaintiff do not extend to the separate right over the sound recordings which are a part of the impugned cinematograph films including the impugned works forming part of the aforesaid cinematograph films. In terms of some of the agreements filed by the plaintiff, the producers/right holders in the impugned cinematograph films have acknowledged the rights of the defendant in the impugned works incorporated in the aforesaid films. The producers have only assigned the right to receive royalties from realisation received from gramophone companies for records, discs, music, cassettes etc. to the plaintiff. No rights in the impugned works themselves have been assigned to the plaintiff.

5. It is stated that the rights in the sound recordings and cinematograph films as a whole can be assigned to different entities. Hence, it is urged that any alleged assignment of the negative rights in the impugned cinematograph films to the plaintiff does not affect the assignment of separate copyright in the impugned work, i.e. sound recordings to the

defendant. The defendant is the actual owner of the copyright over the impugned works by virtue of provisions of the Copyright Act, 1957.

6. I may note that when this application came up on the first date i.e. 30.05.2017 for hearing notice was issued in the matter. This court had framed the issues on 12.12.2019 and the matter had been sent for recording of evidence.

7. On 12.12.2019, the following issues were framed:

- i. Whether the plaintiff has any copyright over the sound recording and the underlying works of the cinematograph films forming the subject matter of the present dispute? OPP
- ii. Whether the defendant is infringing the copyright of the plaintiff in the sound recordings and underlying works of the cinematograph films forming the subject matter of the present suit? OPP
- iii. Whether the defendant is the actual owner and has copyright over the impugned works by virtue of the Copyright Act and the defendant is holding copyright in respect of the sound recording, literary, musical works to reproduce and communicate the same to the public by any mode or medium including TV, cable TV, radio, internet, mobile as claimed by the defendant? OPD
- iv. Whether the plaintiff is entitled for a decree of permanent injunction as claimed? OPP
- v. Whether the plaintiff is entitled to mandatory injunction as prayed? OPP
- vi. Whether the plaintiff is entitled for a decree for rendition of account and claim damages from the defendant, as claimed in the plaint? OPP
- vii. Relief.”

8. Issue No.1 is as to whether the plaintiff has copyright over the sound recording and the underlying works of the cinematograph films forming the subject matter of the present dispute. The onus to prove this issue is on the plaintiff.

9. Clearly, these are facts which will have to be gone into after the parties have led their evidence.

10. Further, reference may also be had to the 'List of Documents' filed by the plaintiff. As an example, I may have a look at the first agreement dated 01.05.1999, which pertains to the films, "Annkh Ka Tara", Hindi, "Nagin Aur Suhagn", Hindi etc. Narration reads as follows:

"The above negative rights include all rights which are existing at present or which may occur in future to be utilised through any source or media for all purposes and all sizes including TV, telecasting rights, satellite rights, cable TV rights, DVD rights for whole world including India.

WHEREAS the 2nd party has approached the First Party(PRODUCERS) to assign the 2nd party the negative rights which includes picture and Non - commercial, Theatrical, Non - Theatrical Rights of the Exhibition, Exploitation and Distribution of all GUAGE Standard (in 35 mm 16 mm super 8 and all other available non stand sizes) ALL DIMENSIONS and mediums (viz. all possible use and utilizations for Theatrical, Non - Theatrical, T.V Telecasting and Video or in any possible manner of its Exhibition in AIR, SEA & LAND) of the said PICTURE for ENTIRE INDIA AND OVERSEAS. Have irrevocably agreed to FILM TRADE, and WHEREAS the PRODUCERS have irrevocably agreed to assign the said RIGHTS of the VIDEO FILM to 2nd Party, on the terms and conditions as under"

11. A bare reading of the above clause shows that the issue raised by the plaintiff about its stated exclusive rights in the cinematographic films as compared to the separate right over sound recordings is an issue that would require closer and better examination after evidence is completed. At this stage, it cannot be said that *prima facie* a case has been made out in favour of this plaintiff.

12. The defendant will maintain true and appropriate accounts of all revenue/earnings generated from the songs of the films spelt out in para 2 of the plaint. If, at any stage, this court directs filing of the said accounts, the defendant will forthwith file the same on an affidavit.

13. With the above directions, the present application is disposed of.

IA.No.1414/2020

14. This application was filed by the plaintiff in January, 2020 after issues were framed stating that the plaintiff along with the plaint had filed copies of 58 agreements in respect of the films in support of its claim.

15. It is however claimed that at the time of further scrutiny of records in order to file an affidavit of evidence, the plaintiff noticed 9 more agreements which were entered into with various producers/negative right holders which were not filed due to inadvertence. Hence, the present application praying that the additional documents which have already been filed by the plaintiff along with an affidavit on 07.01.2020 be allowed to be taken on record.

16. However, in the reply, the defendant states that the plaintiff has not been able to provide sufficient and reasonable cause or explanation for filing the additional documents at this belated stage. It is stated that the additional documents would have been in power/possession/in custody of the plaintiff

at the time of the filing of the present suit. The suit is at the stage of evidence, the plaintiff cannot be allowed to produce any additional documents at this belated stage without giving a reasonable cause for non-filing of the same.

17. Order 11 Rule 1 CPC, as applicable to Commercial Suits reads as follows:

“ORDER XI DISCLOSURE, DISCOVERY AND INSPECTION OF DOCUMENTS IN SUITS BEFORE THE COMMERCIAL DIVISION OF A HIGH COURT OR A COMMERCIAL COURT

1. Disclosure and discovery of documents.—(1) Plaintiff shall file a list of all documents and photocopies of all documents in its power, possession, control or custody, pertaining to the suit, along with the plaint, including:—

- (a) documents referred to and relied on by the plaintiff in the plaint;
- (b) documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case;
- (c) nothing in this Rule shall apply to documents produced by plaintiffs and relevant only—
 - (i) for the cross-examination of the defendant's witnesses, or
 - (ii) in answer to any case set up by the defendant subsequent to the filing of the plaint, or
 - (iii) handed over to a witness merely to refresh his memory.

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(3) The plaint shall contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that

the plaintiff does not have any other documents in its power, possession, control or custody.

Explanation.—A declaration on oath under this sub-rule shall be contained in the Statement of Truth as set out in the Appendix.

(4) In case of urgent filings, the plaintiff may seek leave to rely on additional documents, as part of the above declaration on oath and subject to grant of such leave by Court, the plaintiff shall file such additional documents in Court, within thirty days of filing the suit, along with a declaration on oath that the plaintiff has produced all documents in its power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by the plaintiff and that the plaintiff does not have any other documents, in its power, possession, control or custody.

(5) The plaintiff shall not be allowed to rely on documents, which were in the plaintiff's power, possession, control or custody and not disclosed along with plaint or within the extended period set out above, save and except by leave of Court and such leave shall be granted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint.”

18. Hence, as per the scheme of the afore-noted provisions, the plaintiff has to file the list of all documents and photocopies of all documents in his power, possession, control or custody pertaining to the suit alongwith the plaint. He has to also file a declaration on oath that all documents in his power, possession, control or custody pertaining to the facts and circumstances of the proceedings have been disclosed and copies thereof have been annexed with the plaint and that the plaintiff does not have any other documents in his power, possession, control or custody. When the suit was filed the plaintiff did file the afore-noted declaration by way of affidavit.

19. The ground now given in the application is inadvertence, namely, that the plaintiff has filed 58 agreements in respect of the films, however, at the time of preparing affidavit by way of evidence, it is claimed that the plaintiff noticed 9 more agreements which were not filed due to inadvertence. Would this inadvertence constitute a reasonable cause for non-disclosure of these documents along with the plaint?

20. In the above context reference may be had to the judgment of the Supreme Court in the case of *Sudhir Kumar @ S. Baliyan vs. Vinay Kumar G.B.* being 2021 SCC OnLine SC 734, decided on 15.09.2021. The Supreme Court held as follows:

“33. It emerges from the record that the first suit was filed by the plaintiff in the month of October, 2018, bearing TM No.236 of 2018, restraining the defendant from infringing and passing off plaintiff’s Trade Marks. That an ex-parte interim injunction was passed in favour of the plaintiff by order dated 29.10.2018. It appears having realized and found that the earlier suit was not in consonance with the provisions of the Commercial Courts Act, the plaintiff withdrew the said suit being TM No.236 of 2018 on 27.07.2019 with liberty to file a fresh suit as per the Commercial Courts Act, 2015. Therefore, the second suit was filed on 31.08.2019 and within a period of thirty days from filing of the second suit the appellant herein – original plaintiff preferred the present application seeking leave of the court to file additional documents. In the application, it was specifically mentioned that so far as the invoices are concerned, the same were not in its possession at the time of the filing of the plaint and so far as the other documents are concerned they were not filed due to they being voluminous. Therefore, so far as the invoices sought to be relied on/produced as additional documents ought to have been permitted to be relied on/produced as it was specifically asserted that they were not in his possession at the time of filing of the plaint/suit.

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36. Now, so far as the other documents sought to be relied on/produced as additional documents other than the invoices are concerned the same stands on different footing. It is not disputed and in fact it was specifically admitted and so stated in the application that those additional documents other than the invoices were in their possession but not produced being voluminous and that the suit was filed urgently. However, it is to be noted that when the second suit was filed, it cannot be said to be urgent filing of the suit for injunction, as the first suit was filed in the month of October, 2018 and there was an ex-parte ad interim injunction vide order dated 29.10.2018 and thereafter plaintiff withdrew the said first suit on 27.07.2019 with liberty to file a fresh suit as per the Commercial Courts Act and the second suit came to be filed on 31.08.2019 after period of one month of the withdrawal of first suit. Therefore the case on behalf of the plaintiff that when the second suit was filed, it was urgently filed therefore, the additional documents sought to be relied upon other than the invoices were not filed as the same were voluminous cannot be accepted. And therefore as such Order XI Rule 1 (4) shall not be applicable, though the application was filed within thirty days of filing of the second suit. While seeking leave of the court to rely on documents, which were in his power, possession, control or custody and not disclosed along with plaint or within the extended period set out in Order XI Rule 1 (4), the plaintiff has to establish the reasonable cause for non disclosure along with plaint.

37. In view of the facts and circumstances narrated hereinabove and in view of the filing of the first suit in the month of October, 2018; the ex-parte ad interim injunction order in favour of the plaintiff dated 29.10.2018; withdrawal of the first suit on 27.07.2019 and subsequently the filing of the second suit on 31.08.2019, non filing of the additional documents other than the invoices on the ground of they being voluminous cannot be said to be a reasonable cause for non disclosure/filing along with plaint. There was sufficient time gap between the filing of the first suit and filing of the second suit i.e. approximately 10 months and therefore when the second suit

was filed the plaintiff was having sufficient time after filing of the first suit, to file the additional documents other than the invoices at the time when the second suit was filed. Therefore as such, both the courts below have rightly not permitted the plaintiff to rely upon the documents, other than the invoices as additional documents in exercise of the powers under Order XI Rule 1 (4) read with Order XI Rule 1 (5).”

It is clear from the above judgment that the Supreme Court did not accede to a request to allow filing of additional documents due to sufficient time gap between the filing of the first suit and the filing of the second suit i.e. approximately 10 months. In that case, the documents were not filed stating that they were voluminous but, the court did not accept such a ground.

21. In the facts of the present case, it is obvious that the documents which are now sought to be filed by the plaintiff were in the power and possession of the plaintiff. The only ground urged for not filing the documents with the plaint is that it was by an inadvertent error.

22. The suit was filed in 2017 and the application for filing additional documents had been filed three years later in 2020 merely stating inadvertent error. In my opinion, there is no reasonable cause given by the plaintiff for not filing the additional documents along with the plaint. The application is belated. The plaintiff cannot be permitted to rely on the documents as sought.

23. The application is accordingly dismissed.

JAYANT NATH, J.

NOVEMBER 09, 2021/v/st