



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
O. O. C. J.

APPEAL NO.206 OF 2012  
IN  
NOTICE OF MOTION NO.563 OF 2007  
IN  
SUIT NO.272 OF 2007  
WITH  
NOTICE OF MOTION NO.961 OF 2012

Ashwin Management Sawani & Ors.  
Vs.

...Appellants.

M/s.Raj Enterprises & Ors.

...Respondents.

....

Mr.Ravi Kadam, Senior Advocate with Mr.H.N.Thakore and Ms.Jyhoti Ghag i/b. Thakore Jariwala and Associates for the Appellants.

Mr.V.R.Dhond, Senior Advocate with Mr.Farhan Dubhash i/b. Sita Kapadia & Associates for Respondent No.1.

Dr.Virendra Tulzapurkar, Senior Advocate with Mr.Anil Menon and Ms.Smruti Karande i/b. Anil Menon & Associates for Respondent Nos.4 and 5.

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**CORAM : DR.D.Y.CHANDRACHUD AND  
A.A. SAYED, JJ.**

**June 12, 2013.**

**ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :**

The appeal by the Third, Fourth and Eighth Defendants arises from a judgment and order of a Learned Single Judge, dated 14 December 2011 on a motion for interlocutory reliefs.

2. The First Respondent is the original Plaintiff. The Second and Third Respondents are the original First and Second Defendants. The Second Defendant was a producer of a film titled "Hum Hai Rahi Pyar Ke". An agreement was entered into between the First and Second Defendants on

7 February 1991, under which the Second Defendant as producer, assigned to the First Defendant, described as World Right Controllers, sole, exclusive and perpetual rights in the motion picture, including copyrights and rights of distribution, exhibition and exploitation of the film. The First Defendant was to procure and arrange for distributors of the film to the satisfaction of the producer. The agreement provided for a guaranteed payment to the producer, described as a minimum coverage, of a sum of Rs.1 crore for the sale and disposal of all rights in the film, including distribution, exhibition and exploitation for all territories of the world.

3. On 30 October 1992, an agreement was entered into between the Plaintiff and the First Defendant to which the Second Defendant as producer of the film, was a confirming party. The recitals to the agreement stated that on the request of the First Defendant, the Plaintiff had agreed to assist in the discharge of obligations of the First Defendant as World Right Controllers by arranging for advances to the extent of an amount of Rs.45 lakhs. The agreement provides that the First Defendant had already received an amount of Rs.38 lakhs prior to the execution of the agreement. Clause 3 of the agreement stipulated the consideration that was payable by the First Defendant to the Plaintiff and was as follows:

“3. In consideration aforesaid and of the various terms and conditions hereof the party of the First Part hereby agrees to pay to the Party of the Second Part the following amounts:

(a) commission at the rate of 6% (six per cent) of the total amount of coverage, as defined in clause (4) of the said agreement, of the said picture in 35 m.m. size for all the territories of the world and All India Home Video rights of the said picture payable under all agreements and/or arrangements in respect of

the grant or disposal of the rights, for the first release, of the said picture in all the territories of the world;

(b) Overflow at the rate of 12% (Twelve per cent) of the first overflow of Rs.35,00,000/- (Rupees Thirty Five Lakhs only) and 50% (fifty per cent) of the further overflow of the said picture. It is agreed that the term "overflow" in this agreement shall have the same meaning as defined in the said agreement;

(c) 50% (fifty per cent) of all income or proceeds of and from T.V.rights, Air and High Seas and non-commercial grant or disposal of standard or substandard distribution rights anywhere in India;

(d) 50% (fifty per cent) of all further net income, recoveries and realisations of all kinds whatsoever in respect of or arising from the said picture or any of its rights or properties and attached thereto and that may be attached thereto for all the territories of the world other than what is mentioned above and other than income or proceeds from sale of Gramophone records and cassettes of songs of the said picture."

Clause (4) inter alia stipulated that all monies that would be received by the Plaintiff would be appropriated firstly towards the return or recoupment of the amounts paid and arranged to be paid to the First Defendant and thereafter for the payment of commission and towards all costs, charges and expenses and other monies payable to the Plaintiff under the agreement. The balance was to be paid to the First Defendant. Under Clause (5), towards the payment of the amount of Rs.45 lakhs, commission on coverage and towards the share in the overflow and other amounts payable to the Plaintiff, a security was created in favour of the Plaintiff. Under clause (5) the security created was in respect of: (i) The film while under production as well as after completion together with all other rights which were charged and hypothecated; (ii) The negatives and other material of or in connection with the film which were to be held by the laboratory in the name of the Plaintiff by

way of pledge. In addition, it was agreed that the First Defendant (i) shall not transfer, mortgage, charge or create any security on or dispose of the negatives or any other rights in respect of the film or enter into any agreement for distribution, exhibition or exploitation without the prior consent of the Plaintiff; (ii) would not be entitled to remove negatives or prints from the laboratory or issue instructions for removal of the prints without the consent of the Plaintiff. The First Defendant covenanted in clause (8) of the agreement that the amounts due and payable to the Plaintiff, including Rs.45 lakhs, the commission, costs, charges and expenses and other monies would be paid by 31 May 1993, which was to be the due date. Clause (8) provided as follows:

“8. The party of the First Part hereby covenants to pay to the Party of the Second Part the said sum of Rs.45,00,000/- and commission at the rate of 6% of the total amount of coverage of the said picture as mentioned in clause 3(a) above and all costs, charges and expenses and other moneys, if any, payable to the Party of the Second Part by virtue of this agreement on or before 31<sup>st</sup> May 1993, hereinafter referred to as “the due date”. It is agreed that out of the said sum of Rs.45,00,000/- the Party of the Second Part shall retain with themselves the amounts advanced by them and pay off the remaining amounts to such third parties from whom any advances are arranged by the Party of the Second Part in terms of this agreement. The Party of the First Part may pay to such third parties directly the said advances arranged by the Party of the Second Part in terms of this agreement.”

The First Defendant was not liable to pay interest on the sum of Rs.45 lakhs until the due date, after which, interest became payable at the rate of 18% per annum.

4. A suit was instituted by the Plaintiff seeking the following reliefs: (i)

A permanent injunction restraining the First and Second Defendants from assigning or granting any licence in respect of or dealing with or disposing of or exploiting the film or any of its copyrights or other rights, including satellite rights, Pay TV rights, DBS, DTH and Cable TV rights; (ii) An injunction restraining the Third, Fourth, Fifth, Sixth and Eighth Defendants from assigning or transferring satellite rights purported to have been acquired by them and from exhibiting the satellite rights or any other rights; (iii) Impounding, seizing and delivering up and destroying by and under the orders and directions of the Court material relating to the film in the possession, power or control of the Third, Fourth, Fifth, Sixth and Eighth Defendants; (iv) A decree against the Third, Fourth, Fifth, Sixth and Eighth Defendants to pay over to the Plaintiff the consideration received for the alleged assignment of the film; (v) For accounts and other consequential reliefs.

5. The Plaintiff has restricted its claim in the suit to satellite rights, Pay TV rights, DBS, DTH and Cable TV rights claimed by an entity by the name of Kunal Overseas and by the Fourth, Fifth, Sixth and Eighth Defendants. According to the Plaintiff, the agreement dated 30 October 1992 was modified by an arrangement recorded by a letter dated 15 April 1993. The Plaintiff has averred that the picture negatives and sound negatives were transferred in its name with effect from 19 September 1992 following which it was constituted as Negative Rights Holders. The film was released on 23 July 1993. The Plaintiff claimed that in view of the terms of the agreement, the First Defendant was not entitled to deliver prints for the purposes of exploitation of any of the rights. On 18 December 1995, it was agreed

between the Plaintiff and the First and Second Defendants that the negatives and all other material pertaining to the film should be transferred in the name of the Plaintiff and the First Defendant and that all instructions for delivery of the prints would be acted upon by the laboratory (the Seventh Defendant) only if issued by the Plaintiff and the First Defendant jointly. This was recorded in a joint communication to the Seventh Defendant. On 19 April 2002, a public notice was issued by the Fifth Defendant in a Film Weekly stating that it had negotiated to acquire from Kunal Overseas certain rights in respect of the film. The Plaintiff objected on 23 April 2002 contending that Kunal Overseas had no right in respect of the film. On 29 April 2002, the Fifth Defendant in an Advocate's reply assured the Plaintiff that it would not conclude the deal until the matter was legally resolved between the Plaintiff and Kunal Overseas.

6. On 1 February 2003, the Plaintiff received from the First Defendant a statement of accounts for a share due to the Plaintiff in the overflow for the period between 1 August 1999 and December 2002, reflecting an amount of Rs. 3.52 lakhs as due and payable to the Plaintiff. By a further letter dated 3 May 2003, the Plaintiff was informed that its share in the overflow for the period between 1 August 1999 and 3 May 2003 was Rs. 10.87 lakhs. The case of the Plaintiff is that a few months before May 2006, it was informed that the film was telecast by satellite transmission on three or four occasions.

7. The cause of action set up in the plaint is that a fraud has been

perpetrated on the Plaintiff by the First and Second Defendants, Kunal Overseas, as well as by the Fourth and Fifth Defendants. According to the Plaintiff, though the Fifth Defendant upon being apprised of the rights of the Plaintiff, had assured it that it would not conclude any transaction for the acquisition of satellite rights, these rights have been secretly dealt with, keeping the Plaintiff in the dark. According to the Plaintiff, under the agreement dated 7 February 1991 between the First and Second Defendants, the sole, exclusive and perpetual rights in the film were assigned by the Second Defendant to the First Defendant. The Second Defendant had hence divested itself of all rights and was not competent to assign the satellite rights and the transactions which have been entered into are void and unenforceable. According to the Plaintiff, the covenants in the agreement dated 7 February 1991 continue to subsist and are valid and binding and the Second Defendant was not entitled to create any security on the rights in the film or to deal with or dispose of the satellite rights. The Plaintiff has submitted that the covenants contained in the agreement dated 30 October 1992 are valid and binding and the First and Second Defendants were not entitled to create any security in favour of Kunal Overseas and the Fourth Respondent in respect of the rights in the film. The assignment of satellite right is, hence, claimed to be unlawful. The plaint has been amended so as to impugn the further dealings that have taken place in respect of the rights in the film.

8. When the motion came up for hearing before the Learned Single Judge, a preliminary objection was raised on behalf of the Fifth Defendant on

the ground that the suit is barred by limitation. Accordingly, a preliminary issue was framed in view of the provisions of Section 9A of the Code of Civil Procedure, 1908. The Learned Single Judge answered the preliminary issue by holding that the suit was within limitation. With the consent of Counsel, the motion was thereafter heard on merits and a common judgment has been delivered dealing with the preliminary issue and the merits of the motion. The Learned Single Judge has made the Notice of Motion absolute in terms of prayer clauses (a), (b), (c), (e) and (e1). Briefly stated, the reliefs which have been granted by the Learned Single Judge are as follows: (i) An injunction restraining the First and Second Defendants from assigning or granting any licence in respect of or transferring or exploiting the film or any of its copyrights or other rights, including satellite rights, Pay TV rights, DBS, DTH and Cable TV rights and delivering the prints or copies of the film to the Fourth, Fifth, Sixth and Eighth Defendants or to any other distributors without the prior consent of the Plaintiff; (ii) An injunction restraining the Third, Fourth, Fifth, Sixth and Eighth Defendants from assigning or transferring satellite rights in respect of the film purported to have been acquired by them and from exploiting those rights or any other rights in respect of the film; (iii) An order directing that the prints, copies and material in relation to the film which are in the possession, power and control of the Third, Fourth, Fifth, Sixth and Eighth Defendants be impounded, seized and delivered up and destroyed by and under the directions of the Court; (iv) A direction to the Third, Fourth, Fifth, Sixth and Eighth Defendants to render true and faithful accounts in respect of the telecast, exhibition, distribution and exploitation of the film; (v) A direction to pay to the Plaintiff the amounts realized and

recovered together with interest at 18% per annum; and (vi) A direction to the Defendants to disclose all dealings from and after 15 May 1996 with respect to the motion picture.

9. For convenience of reference, it would be appropriate to deal with the issue of limitation which has been framed and answered as a preliminary issue and the merits of the motion separately.

**Preliminary issue :**

10. The submission on the preliminary issue is that in substance, the suit is for enforcement of the security which was created in favour of the Plaintiff without claiming a money decree. The submission is that the Plaintiff ought to have instituted a suit for the enforcement of the security within three years of the due date prescribed in the agreement which is 31 May 1993. The Plaintiff is – it has been urged - not the owner of the copyright and the claim for enforcement of the security is hence barred by limitation.

11. In order to answer the issue of limitation, it is necessary to comprehend the case of the Plaintiff on a reading of the plaint as a whole. It is with that object that we have adverted to in a considerable amount of detail to the basis of the action which has been instituted by the Plaintiff. The case of the Plaintiff is that under the agreement dated 7 February 1991, the Second Defendant as producer of the film assigned to the First Defendant, for a consideration of a minimum coverage of Rs.1 crore, sole, exclusive and perpetual rights in respect of the film, including copyrights or all other rights,

including the right to distribute, exhibit and exploit the film for all the territories of the world. The case of the Plaintiff is that in pursuance of the agreement dated 30 October 1992 that it entered into with the First Defendant and to which the Second Defendant was a confirming party, the Plaintiff was entitled to the payment of various amounts, including (i) Commission at the rate of six percent in respect of the first release of the film; (ii) Overflow as stipulated in clause 3(b); (iii) Fifty percent of all income or proceeds of the nature stipulated in clause 3(c); and (iv) Fifty percent of all further net income, recoveries and realizations of all kinds whatsoever in respect of or arising from the picture or any of its rights or properties attached thereto and that may be attached thereto for all the territories of the world as stipulated in clause 3(d). The Plaintiff has relied upon the covenants which enured to its benefit under clause 5 of the agreement. Under those covenants, according to the Plaintiff, the film both when it was under production as well as after completion together with the world negative rights, copyrights and all other rights came to be charged and hypothecated in its favour and the prints and negatives were recorded in its name by way of a pledge. According to the Plaintiff, the First and Second Defendants could not have transferred or created any right in respect of the film and its prints without the prior consent in writing of the Plaintiff. The case of the Plaintiff is that though the Second Defendant had divested itself of all its rights by the first agreement dated 7 February 1991, a fraud has been perpetrated upon the Plaintiff by the subsequent dealings with the film to the detriment of the Plaintiff. These averments in the plaint would indicate that the suit that has been instituted, is not for the enforcement of the security or charge which has been held by the Plaintiff. The Learned

Single Judge has, in our view, correctly adverted to the averments in the plaint, the nature of the claim in the suit and to the reliefs which have been claimed. The case of the Plaintiff is that it was kept in the dark in relation to the subsequent dealings with the film and that there were collusive dealings on the part of the Defendants by the creation of rights in favour of Defendants 3 to 6 and 8. No written statement has been filed by those Defendants and the averments against them remained to be controverted. Even as against the Fifth Defendant, the Plaintiff has, in the amendment which was made by the insertion of paragraph 20A of the Plaint, referred to the purported agreement in favour of the Fifth Defendant which was alleged to have been clandestinely entered into in order to deprive the Plaintiff of the right which was created in its favour. Both before the Learned Single Judge and in appeal before this Court, it has not been submitted or even urged that the Plaintiff was made aware of the rights which have been created in favour of the Fifth Defendant.

12. In this view of the matter, the basis and foundation of the submission on the issue of limitation that was urged on behalf of the original Fifth Defendant is erroneous. Clearly the suit is not barred by limitation and the Learned Single Judge was not in error in coming to that conclusion.

**Merits of the Motion :**

13. On merits, it has been urged on behalf of the Appellants that: (i) The Plaintiff is not the owner of the copyright in the film; (ii) The right of the Plaintiff under its agreement dated 30 October 1992 was to enforce the

charge which was created in its favour; and (iii) The Plaintiff has failed to institute proceedings within a period of three years for the enforcement of the charge of the due date of 31 May 1993. In sum and substance, the judgment has been sought to be assailed on the ground that the agreement between the Plaintiff and the First Defendant constituted a financial transaction under which in pursuance of the monies which were lent and advanced by the Plaintiff in the amount of Rs.45 lakhs, a series of rights was conferred upon the Plaintiff by way of security. According to the Appellants, clause 8 of the agreement stipulated that the amounts, which were due and payable under the agreement, fell due on 31 May 1993 and the rights of the Plaintiff stood crystallised on that day. The Plaintiff, it has been submitted, chose to stand by thereafter and is disentitled to reliefs.

14. While dealing with those submissions, it would, for the purposes of a prima facie evaluation, be necessary to construe the terms of the agreement dated 30 October 1992 between the Plaintiff and the First Defendant. The agreement contemplated that the Plaintiff had agreed to assist the First Defendant in the discharge of its obligation as World Right Controllers to the Second Defendant which was producing a motion picture. Evidently, the production of the motion picture was not complete on the date of the agreement and it is not in dispute that the film was released on 23 July 1993. Clause 3 of the agreement stipulated that in consideration of the assistance that was rendered by the Plaintiff to the First Defendant, the First Defendant agreed to pay to the Plaintiff the amounts as reflected therein. These amounts included: (i) Commission at the rate of six percent of the total amount of

coverage for all territories of the world and All India Home Video Rights with the first release of the picture; (ii) The payment of overflow at the rate of twelve percent for the first overflow of Rs.35 lakhs and fifty percent of the further overflow; (iii) Fifty percent of all income or proceeds of and from TV rights, Air and High Seas and non-commercial grant or disposal of distribution rights; and (iv) Fifty percent of all further net income, recoveries and realizations “of all kinds whatsoever”. Clause 3(d) contemplates the payment of fifty percent of “all further net income”. The expression “further” would clearly mean income which was to be realised in future. This also covers “recoveries and realisations of all kinds whatsoever in respect of or arising from the said picture or any of its rights or properties and attached thereto and that may be attached thereto for all the territories of the world”. These are words of the widest amplitude and were designedly introduced by the parties. A business sense would have to be attributed to those words in order to read the agreement in consonance with the business understanding between the parties. The Learned Single Judge was correct in holding that if the intent of the parties was that the Plaintiff was to be entitled only to the amount of Rs.45 lakhs or if parties intended that the rights of the Plaintiff would be crystallised on the due date of 31 May 1993, the agreement would have been differently worded. Clause 3 of the agreement has to be harmoniously construed with the provisions of Clause 8. The film was under production when the agreement was entered into and was released on 23 July 1993 which is after the due date of 31 May 1993 mentioned in Clause 8. The contention of the Appellants would lead to an absurd conclusion, as a result of which the Plaintiff could expect no more than a return of the amount of

Rs.45 lakhs together with interest after the due date. Prima facie the due date of 31 May 1993 was for the repayment of the amount of Rs.45 lakhs. This is evident from the fact that the agreement itself stipulated that the interest should be payable from the due date until payment.

15. The contemporaneous conduct of the parties is a matter of significance because it throws light on the manner in which parties themselves construed the agreement. On 18 December 1995, a communication was addressed by the Plaintiff to the laboratory which was holding the prints of the film by which the laboratory was informed that the negatives, positives and all other materials of or pertaining to the film should be transferred to the joint names of the Plaintiff and the First Defendant. The letter which is addressed by the Plaintiff and which was confirmed by the First and Second Defendants also provided that all instructions pertaining to the film, including deliveries of prints should be acted upon only if they were issued jointly by the Plaintiff and the First Defendant and that neither the Plaintiff nor the First Defendant would be entitled to remove the negatives or any other material or deal with or dispose of the same without the prior consent of both the parties. Parties understood in that communication that neither of them would be entitled to deal with or dispose of the picture or any of its rights without the prior consent in writing of the Plaintiff and the First Defendant. If the Plaintiff was not entitled to any further amounts after the due date of 31 May 1993, there would have been no occasion to address such a communication. On 16 May 1996, a letter was addressed by the Laboratory to the Plaintiff and the First Defendant stating and confirming that

it had in its records transferred the final picture and negatives to the joint names of the Plaintiff and the First Defendant and that in future all instructions would have to be issued jointly by the parties in writing. Parties therefore, understood that the Plaintiff would be entitled to the benefit of the covenants contained in the agreement even after 31 May 1993.

16. After the film was released, the Plaintiff addressed a notice on 23 April 2002 through its Advocate to the Fifth Defendant recording that under its agreement dated 30 October 1992, the Plaintiff had a first and paramount charge and lien on the picture then produced or that may be produced thereafter. The Plaintiff while relying upon the terms of its own agreement denied that Kunal Overseas had any right or interest in the motion picture and placed on record that it had not furnished any consent for the assignment or transfer of any rights whatsoever. In response, the Fifth Defendant by its reply dated 29 April 2002 informed the Plaintiff that it shall not conclude any deal with Kunal Overseas until the matter is legally resolved between the Plaintiff and Kunal Overseas. Despite this, it is evident prima face, that the rights in respect of the film were dealt with to the detriment of the Plaintiff and without the consent of the Plaintiff.

17. On 1 February 2003, the First Defendant furnished to the Plaintiff a statement of account for the share of the overflow due to the Plaintiff between 1 August 1999 and December 2002, which showed that an amount of Rs. 3.52 lakhs was due and payable. The First Defendant assured the Plaintiff that the payment which had been delayed would be effected within a

period of one month. By a further communication dated 3 May 2003, the First Defendant informed the Plaintiff that its share in the overflow for the period 1 August 1999 to 3 May 2003 was Rs. 10.87 lakhs for which payment would shortly be made. These letters which have been addressed by the First Defendant clearly militate against the submission that the rights of the Plaintiff stood crystallised on 31 May 1993, after which the Plaintiff was not entitled to any further sum. On 15 July 2006, a letter was addressed by the Plaintiff to the First and Second Defendants recording that it had been agreed between the parties that a payment of Rs.50 lakhs was to be made to the Plaintiff by the First Defendant inter alia for the losses suffered by the Plaintiff on account of the aforesaid decision not finalising the transactions for sale of satellite rights of the film to Zee Telefilms Limited and Software Suppliers International Limited for the Asian Region and for the whole world. Paragraph (f) of the letter stipulated that the agreement dated 31 October 1992 would stand modified by the letter and would continue to be in full force as modified. The First and Second Defendants confirmed their acceptance at the foot of the letter. The submission of the Appellants that the Plaintiff was not entitled to any amount after 31 May 1993 is, therefore, clearly belied by the clear and consistent course of conduct of the parties.

18. For these reasons we have come to the conclusion that on the basis of the material on the record, the Plaintiff made out a strong prima facie case for the grant of interlocutory reliefs. The rights which enured to the benefit of the Plaintiff under its agreement dated 30 October 1992 were within the knowledge of the Defendants. In breach of those rights, the Defendants

created rights among themselves in respect of different aspects of the picture and for different periods. The Learned Single Judge has recorded that the facts as disclosed indicate that some of the Defendants have in turn transferred some of their rights for certain periods to parties who are not before the Court. Hence, the Single Judge clarified that their rights will not be affected in any manner whatsoever. Liberty has, however, been granted to apply for reliefs in respect of the other prayers after giving notice to and/or impleading or adopting proceedings against those third parties. The balance of convenience was clearly in favour of the Plaintiff and it is evident that irreparable injury would be caused unless the rights of the Plaintiff are protected by an injunctive order. We, however, find on perusing the record that the relief which has been granted in terms of prayer clause (e) by the Learned Single Judge is in the following terms:

“(e) that pending the hearing and final disposal of the suit, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants may be directed to render true and faithful accounts to the Plaintiffs in respect of telecast, exhibition, distribution and exploitation of the said picture and recoveries made/to be made by them in relation thereto and be ordered and directed to pay to the Plaintiffs the amounts realized and recovered as per the said accounts together with interest at 18% p.a. till payment and realization.” (emphasis supplied)

The latter part of prayer (e) directing the Third to Sixth and Eighth Defendants to pay to the Plaintiff the amounts realised and recovered together with interest would not be warranted at the interim stage. The aforesaid direction for payment together with interest shall hence stand set aside. We, however, confirm the grant of reliefs by the Learned Single Judge in terms of prayer clauses (a), (b), (c), (e) (with the modification noted above) and (e-1).

19. The appeal shall accordingly stand disposed of. There shall be no order as to costs.

20. In view of the disposal of the appeal, the Notice of Motion in the appeal does not survive and is hence, disposed of.

( Dr.D.Y.Chandrachud, J.)

( A.A. Sayed, J. )