* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : February 08, 2012*
Judgment Pronounced on : May 08, 2012

\+ FAO(OS) No.423-424/2011

INDIAN PERFORMING RIGHT SOCIETY LTD. ..... Appellant
Represented by: Mr.P.V.Kapur, Senior Advocate instructed by Mr.Ameet Datta, Mr.Udit Sood, Mr.Himanshu Bagai, Mr.Jagdish Sagar, Mr.Aman Anand, Mr.Siddhant Kapur, Mr.Mayank Mikhail Mukherjee, Mr.Vimal Nagrath, Mr.Thomas George, and Mr.Hari Shankar, Advocates.

versus

ADITYA PANDEY & ORS. ....Respondents
Represented by: Mr.C.A.Sundaram, Senior Advocate and Mr.N.K.Kaul, Senior Advocate instructed by Mr.Abhishek Malhotra, Mr.Harsh Vardhan, Mr.Zafar Inayat, Mr.Yogesh Kotemath, Ms.Rohini Musa, Ms.Sahana Basavapatna and Mr.Bhuvan Mishra, Advocates.

AND

FAO(OS) No.425/2011 and CM No.19128/2011

INDIAN PERFORMING RIGHT SOCIETY LTD. ..... Appellant
Represented by: Mr.P.V.Kapur, Senior Advocate instructed by Mr.Ameet Datta, Mr.Udit Sood, Mr.Himanshu Bagai, Mr.Jagdish Sagar, Mr.Aman Anand, Mr.Siddhant Kapur, Mr.Mayank Mikhail Mukherjee, Mr.Vimal Nagrath, Mr.Thomas George, and Mr.Hari Shankar, Advocates.

versus

CRI EVENTS PVT. LTD. & ORS. ....Respondents
Represented by: Mr.S.K.Bansal, Advocate for R-1 to R-2 (Cross Objectors in CM No.19128/2011).
Mr.Neel Mason, Advocate for R-4.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

PRADEEP NANDRAJOG, J.

1. What we commonly understand as a song consists of three elements: lyrics, music and singing. There are three players. The lyricist who provides the words; the musician who provides the music score; and the singer who provides the sound to the words. The trinity join: a song is created. Thus, a song is music which is vocal in character. It is but natural that in a song, the words and the music have a special relationship. Words affect the melodic line, even the rhythmic structure. The inflection of the language in the lyrics leaves an imprint on the melody and the rhythm; on style and phrasing. When a song is sung there is a moving romance between the words and the music.

2. Do the identities break when their fusion creates a synthesized product i.e. when a song is recorded?

3. Undoubtedly, when a song is recorded there is homogenization of the lyrics with the musical score; where integration is articulated through the multi-level hierarchical system of inter-dependence.

4. But integration is not fusion just as differentiation is not fission.

5. Can it be said that the development process i.e. creation of a song is based neither on integration without differentiation nor on differentiation without integration? Can it be said that the process of creating a song unfolds itself through the simultaneous

integration of the differentiated and the differentiation of the integrated?

6. None could doubt that the discernable coloration of words (literature) and music, gives a song a consciousness of its own, and thus a song may exist as an independent entity but not separated from the consciousness of the words and the music.

7. A song which is recorded is the result of the merger of the creative talent of three: the composer of the lyrics, the composer of the musical score and the voice of the singer. When played, it is dichotic i.e. it simultaneously stimulates the ear - the lyric and the music score. It has to be. Because the singer and the musician play simultaneously upon the words and thus create a dichotic effect.

8. Integration is a difficult concept and has been used in different contexts and senses: totalization, aggregation, unification, fusion, assimilation, synthesis, composition etc.

9. It is rightly said that nothing exists in isolation, neither the problem nor the solution: all is an inextricable part of a complex multi-dimensional reality of existence.

10. While studying a problem or trying to solve it, habitually, we seize hold of a '*constitutive*' element, or a number of such elements, but seldom realize that the whole of the reality in which a specific problem arises, and in which it has its continued existence, eludes our grasp. We then seize the whole in its flow and onward movement, as an un-fragmented reality, and try to focus on specific issues as they merge from the fabric, and in which they are deeply interwoven.

11. We then realize, that the integrated whole, retains its *gene-identity* and thus has to make allowances for partial disintegration of its constitutive elements.

12. But, like revolution, integration is not a regular visitor in life; when it visits, just as a revolution, it evokes and calls for an answer to the sharing of the fruits of the co-operative venture.

13. To recall the profound statement of Sri Aurobindo: *'Our way of knowing must be appropriate to that which is to be known.'* Thus, if the data which we have to analyze reveals to us that reality is of the nature of an organic, multi-dimensional whole, in which a play of dynamic patterns constitute all the substances, then the method to seize such reality must be of a corresponding measure and rhythm. A method whose steps are not those of a reductionism, to be pursued to the last constitutive element, but a method that is akin to the rhythm: a movement that swells and coincides with the whole or reality and the dynamism inherent in it.

14. It is such a sense of totality which gives to the perspective at hand, a dimension of its own.

15. The complex issue which arises for consideration before us is: *Whether the Communication to the Public, including by way of Broadcasting of a Sound Recording also amounts to a Communication to the Public of Literary and Musical Works embodied in the Sound Recording under the Copyright Act 1957 post the said Act being amended by the Copyright (Amendment) Act 1994?* If yes: *Whether a separate license in respect of such Literary and Musical Works can be asserted by the owner of*

copyright in such works in addition to the license secured from the copyright holder in the Sound Recording?

16. The fabric in which the constitutive elements are deeply interwoven is the Copyright Act 1957 as amended by the Copyright (Amendment) Act 1994 and as would be evident from our discussion, the data i.e. the Sections which we were called upon to analyze reveal a reality of the whole being multi-dimensional, and before we proceed to analyze the same, not as reductionists, but by seizing the dynamic patterns which constitute all the substances, and applying the corresponding measure and rhythm by ensuring that the dynamism inherent in the reality is not isolated, we list the fabric - Section 2(d), Section 2(dd), Section 2(ff), Section 2(q), Section 2(qq), Section 2(xx), Section 2(y), Section 13 and Section 14 of the Copyright Act 1957. They read as under:-

> **2(d).-** "author" means,-
>
> (i) in relation to a literary or dramatic work, the author of the work;
>
> (ii) in relation to a musical work, the composer;
>
> (iii) in relation to an artistic work other than a photograph, the artist;
>
> (iv) in relation to a photograph, the person taking the photograph;
>
> (v) in relation to a cinematograph film or sound recording, the producer; and
>
> (vi) in relation to any literary, dramatic, musical or artistic work which is computer-

generated, the person who causes the work to be created;

2(dd).- "broadcast" means communication to the public-

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or
(ii) by wire,
and includes a re-broadcast;

2(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 or hostel shall be deemed to be communication to the public;

2(q).- "performance", in relation to performer's right, means any visual or acoustic presentation made live by one or more performers;

2(qq).- "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;

2(xx).- "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such

recording is the method by which the sounds are produced;

2(y).- "Work" means any of the following works, namely;

(i) a literary, dramatic, musical or artistic work;
(ii) a cinematograph film;
(iii) a sound recording;

13. Works in which copyright subsists. – (1) Subject to the provision of this section and the other provision of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, -

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,-,

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;
(ii) in the case of an unpublished work other than work of architecture, the author is at the date of the making of the work a citizen of India, or domiciled in India; and
(iii) in the case of work of architecture, the work is located in India.

Explanation.- In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

a)in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;
b)in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made.

(5) In the case of work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

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 authorize 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(1) 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 programme 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 occasion;
(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."

17. Since the voyage undertaken by us, as navigated by learned senior counsel for the parties took us to the United Kingdom, the provisions of the Copyright, Designs and Patents Act, 1988 which were referred to by learned counsel, as a light-house, may also be noted. They read as under:-

"5A Sound recordings

(1) In this part "sound recording" means-

(a) a recording of sounds, from which the sounds may be reproduced, or
(b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

(2) Copyright does not subsist in a sound recording which is, or to the extent that it is, a copy taken from a previous sound recording.

6 Broadcasts

(1) In this Part a "broadcast" means an electronic transmission of visual images, sounds or other information which-

(a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or,

(b) is transmitted at a time determined solely by the persons making the transmission for presentation to members of the public.

and which is not excepted by sub-section (1A); and therefore to broadcasting shall be construed accordingly.

16 The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provision of this Chapter, the exclusive right to do the following acts in the United Kingdom;

(a) to copy the work (see section 17);

(b) to issue copies of the work to the public (see section 18);

(ba) to rent or lend the work to the public (see section 18A);

(c)to perform, show or play the work in public (see section 19);

(d) to communicate the work to the public (see section 20);

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);

and those acts are referred to in this Part as the "acts restricted by the copyright".

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorizes author to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly;

and it is immaterial whether any intervening acts themselves infringe copyright.

(4) This Chapter has effect subject to

(a) the provisions of Chapter III (acts permitted in relation to copyright works), and

(b) the provisions of Chapter VII (provisions with respect to copyright licensing).

17 Infringement of copyright by copying

(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.

(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.

(3) In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work.

(4) Copying in relation to a film or broadcast includes making a photograph of the whole or any substantial part of any image forming part of the film or broadcast.

(5) Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.

(6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.

19 Infringement by performance, showing or playing of work in public

(1) The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.

(2) In this Part "performance", in relation to a work-

(a) includes delivery in the case of lectures, addresses, speeches and sermons, and
(b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work.

(3) The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film or broadcast.

(4) Where copyright in a work is infringed by its being performed, played or shown in public by means of apparatus for receiving visual images or sounds conveyed by electronic means, the person by whom the visual images or sounds are sent, and in the case of a performance the performers, shall not be regarded as responsible for the infringement.

20 Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in –

(a) a literary, dramatic, musical or artistic work,
(b) a sound recording or film, or
(c) a broadcast.

(2) References in this Part to communication to the public are to communicate to the public by electronic transmission, and in relation to a work include –

(a) the broadcasting of the work;
(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them."

18. The appellant, Indian Performing Right Society Ltd. (IPRS – for short) is a Copyright Society registered under Section 33 of the Copyright Act 1957 as per the Certificate of Registration dated March 27, 1996. As per a list published on March 08, 2006

it has 1478 members who are either authors of the lyrics or composers of the musical score. Undisputably, as per certain sample IPRS Assignment Deeds, the appellant has the locus to maintain an action with reference to copyright in the lyrics as also the musical score, if the copyright is violated. Its fight is with the broadcasters of Private FM Radio Channels, and Event Organizers for the reason the Private FM Radio Channels broadcast recorded songs and the Event Organizers organize either live musical performances or recorded musical performances. The Phonographic Performance Ltd. (PPL – for short) is also a copyright society registered under Section 33 of the Copyright Act 1957 and its members are copyright holders in sound recordings.

19. Whereas IPRS contends that by virtue of Section 17 of the Copyright Act 1957, the authors of literary and musical works; 'work' as defined in Section 2(y) of the Act, are the first owners of the copyright therein i.e. the lyrics and the musical score respectively and by virtue of Section 18 of the Act can assign the copyright, as per mode of assignment contemplated by Section 19 of the Act, the rights vested in them under Section 14 of the Act. The licensing provisions as per Section 30, Section 30A and Section 31 of the Act being the source of the power of IPRS to prevent infringement of the copyright in the lyrics and the musical score of its members, who have assigned the copyright to IPRS in the lyrics and the musical score. It is the assertion of IPRS that these authors, being the original owners of the works, are entitled to exploit their works, to the exclusion of all others, on the subjects enumerated in sub-clauses (i) to (vii) of clause (a) of Section 14 of the Copyright Act 1957. Highlighting sub-clause (iii) and sub-clause (iv), IPRS argues that the authors of the lyrics

and the musical scores have the exclusive right to *perform the work in public or communicated to the public* and also *to make a sound recording in respect of the work,* and dove-tail the twin rights, to sub-section 4 of Section 13 of the Act by highlighting that if the author of the musical score and the lyric exploit their right under sub-clause (iv) of clause (a) of Section 14 of the Act by permitting a third party to make a sound recording, the copyright in the sound recording (as per sub-section 4 of Section 13) shall not affect the separate copyright in their works; and thus IPRS highlights that the creation of a sound recording i.e. a derivative copyrightable work does not affect, in any manner, the right in the underlying (lyric and musical score) works. IPRS urges that the right of the owners of the underlying works to perform the work in public or communicate the work to the public (a right conferred by Section 14(a)(iii) of the Act) is distinct from and not a sub-set of the right to make a sound recording (a right under Section 14(a)(iv) of the Act) and enlist the effect of the argument to mean that once the owners of the lyrics and the musical scores exploit their right to permit a sound recording, it would not mean that their works have become a sub-set of the sound recording, in that, he who obtains a permission or a license from the owner of the copyright in the sound recording, can either perform in public by an acoustic presentation or a live performance or by broadcasting the sound recording, without obtaining a parallel permission from the owner of the copyright holders of the underlying works i.e. the lyricist and he who set the musical score, and for which IPRS highlights the definition of the word 'broadcast' as per Section 2(dd) of the Act, the definition of the expression 'communication to the public' as per Section 2(ff) of the Act, the definition of the word 'performance'

as per Section 2(q) and the definition of the word 'performer' as per Section 2(qq) of the Act. IPRS highlights that broadcast has been defined in the broadest term to mean any mode of communication of a sign, sound or a visual image by wire or wireless diffusion and linking the broadcast to the expression 'communication to the public' highlights that if a work is made available for being seen or heard or otherwise enjoyed by the public directly by means of display or diffusion, logic demands to infer that, pertaining to a song, when a sound recording is communicated to the public the underlying musical score and the lyrics are simultaneously communicated and thus an acoustic or a visual presentation of a lyric and the musical score as also a sound recording, makes available to the public each of the three works and there is a communication to the public of each such work. IPRS asserts that with respect to performing a work in public or communicating it to the public, the Copyright (Amendment) Act 1994 has not changed the legal position. It asserts that the amendment brought into the statute book in the year 1994 introduced Performers' Rights in the context of performance which was live Section 2(q) and in the context of communication by display or diffusion 2(ff), which hitherto-fore found themselves integrated in the definition of the word 'performance' in Section 2(q) of the Act, when brought in force in the year 1957, and for which IPRS places reliance upon the Notes on Clauses to the 1994 Amendment which undisputably bring out that the Performers' Rights introduced by the 1994 Amendments, required a division of the subject pertaining to live performances while communicating the work to the public and when the communication was by way of diffusion.

20. With reference to a sound recording in the form of a song, conceding that by virtue of the definition of the word 'work' as per Section 2(y) of the Act, the sound recording of the song would be a work, author whereof as per Section 2(d) would be the producer of the sound recording, and that this distinct derivative copyrightable work comes into existence, as a protectable work, by virtue of clause (c) of sub-section (1) of Section 13 of the Act, IPRS concedes that by virtue of sub-clause (iii) of clause (e) of Section 14 of the Act, the owner of the sound recording has a right to communicate the sound recording to the public, but, as noted herein above, urge that he who obtains the permission from the owner of the sound recording to broadcast or communicate to the public or convey by an acoustic presentation the sound recording to the public must obtain a similar permission from the owner of the underlying copyrightable works.

21. To give substance to the aforesaid submissions, IPRS urges with reference to clause (b) of sub-section 3 of Section 13 and clause (iv) of clause (a) of Section 14, that a sound recording embodying a literary and/or musical work can only be created with the authority of the owner of the copyright in the literary and/or the musical work, otherwise the sound recording would be an infringement. IPRS refers to Section 17, 18 and 19 of the Act to bring home the argument that it is only pertaining to films that copyright in a literary/musical work would belong to the producer (Section 17(b)). This is not so with respect to sound recordings. IPRS highlights, with reference to Section 17(c) that it embodies pure employment conditions with reference to the ownership of the copyright being with the employer. IPRS highlights that by virtue of Section 18 and 19 the author of a literary and/or a musical work may assign his copyrightable work to the producer

or who makes the sound recording and that this assignment may be full or partial with restrictions.

22. Highlighting that the right to communicate to the public is distinct from the right to make a sound recording, IPRS asserts that each right may be assigned or licensed individually and therefore, it is urged that exploitation of a literary and/or musical work as part of a sound recording will always depend on the terms of the license or the assignment. The decision reported as 1937 BLR 654 (Bom.) *Wellington Cinema vs. The Performing Right Society* was relied upon.

23. It was asserted by Sh.P.V.Kapur, learned senior counsel for IPRS that any contrary view would be on the '*merger principle*' i.e. the underlying copyrights would merge in the sound recording, if the right of the owner of the sound recording under Section 14(e) is held to communicate the sound recording to the public irrespective of the rights accorded to the literary and musical works under Section 14(a) of the Act. It was asserted that the interpretation as projected by IPRS would not render the rights under Section 14(e) otiose for the reason the producer who owns the copyrights in the sound recording would exploit, by granting a license, to a third party which third party would simultaneously have to obtain a license from the owner of the copyright in the literary and the musical work. On this argument, it was asserted that the respondents' contention of Literary Works, Musical Works and Sound Recordings being distinct classes of works under Section 13 with distinct rights under Section 14 would mean that when owner of a Literary and/or Musical Works allows the making of a sound recording would give birth to a distinct right, unhampered by any other obligation,

would run contrary to a harmonious interpretation of the various provisions of the Copyright Act, 1957.

24. Navigating the voyage to the United Kingdom, IPRS highlighted that the definition of the expression 'Sound Recording' under Section 5(a) of Copyright, Designs and Patents Act, 1988 in the United Kingdom was *pari materia* with the corresponding definition in Section 2(xx) in the Copyright Act, 1957, notwithstanding the difference in the language used, and for which learned senior counsel Sh.P.V.Kapur made us read the debates on the subject by the House of Lords. Contrasting Section 19(2) of the U.K. Act, with reference to the word '*performance'* and the concept of 'communicate to the public' as per Section 2(ff) of the Act in India, it was highlighted that this position is the same in both the countries inasmuch as both provisions envisage literary/musical works being performed when there is a visual or acoustic presentation to the public.

25. We were read passages from treaties on the subject of reputed international commentaries, such as C*opinger, Nimmer and Sterling* to bring home the point that the principle of 'co-existence of copyrights' is well recognized and is as projected by the appellant. Referring to the decision of the Chancery Division Court, reported as (1934) 1 Ch. 450 *Gramaphone Co. Ltd. vs. Stephen Carwardine & Co.* it was highlighted that the Chancery Division Court held that the Special Copyright under Section 19 of the Imperial Copyright Act, 1911 pertaining to phonograms also allowed for the 'public performance' of phonograms and that this special right was *in addition* to the copyright in the underlying works and *not to their detriment or prejudice*, for the reason law recognizes the concept of co-existing copyrights. It was urged

that the principle of co-existence of copyrights is clearly discernable in various provisions of the Copyright Act 1957; sub-Section (4) of Section 13 was highlighted wherein it stands legislated that the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made. Section 52(1)(y), it was asserted states that if the term of protection in a cinematograph film has expired the exhibition thereof would not amount to an infringement of the copyright in the literary and musical works incorporated in the film; it was highlighted that this restriction on the exploitation of the literary and musical works is restricted only to cases of exhibition of a cinematograph film. To put it simply, it was urged that if in exhibiting a cinematographic film there was a simultaneous in-built mechanism of exhibiting the underlying copyrights, there was no need for the legislature to so specify in Section 52(1)(y). In relation to the term of copyright protection, with reference to Section 22, 26 and 27 it was urged that a sound recording is protected for a period less than the underlying literary and musical work and if the argument of a sound recording resulting in merger of the underlying works in the sound recording was to be accepted, once a sound recording comes in public domain, the term of copyright in the underlying works as protected under Section 22 would stand curtailed.

26. Since the learned Single Judge has heavily relied upon the decision of the Supreme Court reported as 1977 (2) SCC 820 *Indian Performing Rights Society Vs. Eastern India Motion Pictures Association*, it was urged that the decision dealt with a contest between authors and composers on the one hand and film

producers on the other with respect to ownership of copyright in the literary and the musical works incorporated in the '*Sound Track*' of the film and not with the issue of exploitation, and of how many copyrights would be exploited when a cinematograph film is communicated to the public. It was urged that the Supreme Court was dealing with the question of ownership in the context of the music and the lyrics being composed by persons engaged to compose the same i.e. the works being commissioned, and needless to state, it was urged that it was a case of Clause (c) of Section 17 and Clause (b) of said Section being the subject matter of the debate, and for which paragraph 17 of the opinion of the Supreme Court was highlighted, where the Supreme Court had referred to the '*Central question*' being answered by it.

27. The argument was concluded by urging that the contra view would be contrary to International Conventions to which India was a signatory and thus would result in the law in India being in disharmony with the world order.

28. Vide impugned order dated 28.07.2011 the learned Single Judge has concluded that once a license is obtained from the owner or someone authorized to give it, in respect of a sound recording, for communicating it to the public, including by broadcasting, a separate authorization or license is not necessary from the copyright owner or author of the musical and/or literary work. However, this does not mean that the musical and/or literary work can be otherwise "performed" in the public, (as opposed to communication of a sound recording to the public) without authorization. In coming to the said conclusion, the reasoning adopted by the learned Single Judge is as: - (i) in

Eastern MPA's case (supra) it was categorically held by the Supreme Court that if the author of any musical work parts with a portion of his copyright, authorizing a film producer to make a cinematograph film in respect of his work and have his work incorporated or recorded on the sound track of a cinematograph film, the copyright owner of the film acquires a copyright which gives him the exclusive right, inter alia, of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission from the author (composer) of the lyric or musical work for the performance of the work in public. Since sound recording copyright was carved out of pre-existing cinematographic film copyright in the year 1994 a similar treatment should be afforded to sound recording copyright as afforded to cinematographic film copyright; (ii) in view of considerable difference between Sections 16, 19 and 20 of UK Copyrights, Patents and Designs Act, 1988 and the provisions of Indian Copyright Act the ratio of the judgments of UK courts relied upon by IPRS cannot be applied in the present case; (iii) in view of the fact that sound recording copyright has been carved out of cinematographic film copyrights the acceptance of the arguments of IPRS would lead to 2 different kinds of copyrights. Whereas, the copyright proprietor of a film, who happens to own the sound recording can authorize the broadcast or communication to the public of the film, including the sound recording part, (as a composite work) without license from the author of the lyrics or the composer; on the other hand if the copyright owner of a sound recording is different from the owner of the copyright in the film, a separate authorization from

the lyricist or the composer would be necessary. The acceptance of the arguments of IPRS would lead to a further anomaly, inasmuch as the sound recording in a film, the communication of which is authorized by the film copyright owner, would not require separate authorization from the author of the musical or literary work. Whereas in the case of an owner of the copyright in the sound recording, an identical authorization by the sound recording copyright owner (for communicating the sound recording to the public) would be insufficient, and two more authorizations, or licenses from the lyricist and/or the composer would be required. Thus, the acceptance of arguments of IPRS would lead to discrimination in regard to identical content of copyrights of two different "works" which undermines the purposes of the Act and is also illogical. Two different approaches to identically phrased rights, one carved out of a pre-existing right, would render the quality of the license obtained from the sound recording copyright owner inferior; (iv) when a sound recording is communicated to the public-by whatever means, it is the whole "work" i.e. the lyrics, the score, the collocation of sounds caused by the equipment and the capturing of the entire aural experience which is communicated. The musical or literary work, which is the subject matter of the copyright under Section 14(a) of the Act, per se is not communicated or broadcast; nor is there a method of separating that element, while communicating the entire work, i.e. the sound recording, to the public. The recognition afforded by the Parliament to the content of sound recording itself suggests that that the content of a sound recording is perceived in law, as different from that of a musical or literary work, though there may be a coalescence of the two, but not necessarily so, all the time. It is, therefore, unjustified to

say that when a sound recording is communicated to the public by way of a broadcast the musical and literary work is also communicated to the public, through the sound recording.

29. The infirmities in the impugned decision containing the opinion of the learned Single Judge were questioned on 6 counts as under:-

(i) Referring to paragraphs 40, 41 and 48 of the impugned decision, it was urged that the learned Single Judge has erroneously held that a sound recording right came into existence in the year 1994. Conceding that the same had no bearing upon the issue, it was urged that this misconception has led the learned Single Judge to conclude that sound recording copyright was carved out of the cinematograph film copyright and thus must result in similar protection, a line of reasoning which was on an incorrect interpretation of the law.

(ii) The learned Single Judge erroneously opined that the decision of the Supreme Court in *Eastern India Motion Picture Association*'s case (supra) concluded the matter against the appellant and thus failed to address the decisions reported as 2010 (42) PTC 752 *Indian Performing Right Society Vs. Muthooth Finance* and the decision in OSA No.64/2010 *Muthooth Finance Vs. Indian Performing Rights Society* which dealt with a challenge by radio operators to the right of IPRS to collect royalty for the performance of underlying works in a sound recording.

(iii) The learned Single Judge failed to appreciate that the only modes of assigning or licensing literary and musical works were as envisaged by Section 17, 18 and 30 of the Act and the exploitation of the right under Section 14(a)(iv) would not and

cannot be in derogation of the right under Section 14(a)(iii), or to put it differently that the right under Section 14(a)(iii) cannot be a right which is tagged with the right under Section 14(a)(iv). (Refer para 12 of the impugned decision)

(iv) The learned Single Judge, with reference to the 1994 amendment has not appreciated the relationship between the un-amended Section 2(q) and Section 2(ff) brought on the statute book in the year 1994. (Refer para 16 of the impugned decision)

(v) The learned Single Judge has noted, but failed to address the contentions urged pertaining to sub-Section 4 of Section 13 of the Act.

(vi) The impugned order leads to derogations of India's obligations under the International Conventions which were incorporated in the Copyright Act 1957.

30. Copyright Act, 1957 as it originally stood enacted recognized three classes of work viz. (a) literary, dramatic, musical or artistic work; (b) cinematographic film and (c) record. Whereas musical and literary works are original works, record is a derivative work. "Recording" was defined in Section 2(x) of the Copyright Act, 1957 to mean the aggregate of the sounds embodied in and capable of being reproduced by means of a record. Section 13(4) of the Copyright Act, 1957 prescribed that copyright in a cinematographic film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film or record is made. To put it simply, Section 13(4) prescribed that the copyright subsisting in a derivative work (record) shall not prejudice the copyright subsisting in original works (literary and musical).

31. In the year 1994 the Copyright Act, 1957 was amended to strengthen the copyright law in India. One of the significant changes made in the old Act was to extend protection to the performers by means of a special right, to be known as the 'performer's right', in respect of the making of sound recordings or visual recordings of their live performances, and of certain related acts. Another change made was to replace the term 'record' with 'sound recording' as the former term had become outdated through association with an obsolescent technology of sound reproduction. Vide Section 2(xx), 'sound recording' was defined, to mean a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced; obviously to include piano rolls and mechanical instruments from which jingles are produced. The amended Act recognizes three classes of work viz. (a) literary, dramatic, musical or artistic work; (b) cinematographic film and (c) sound recording. Whereas musical and literary works are original works, sound recording is a derivative work. It is significant to note that Section 13(4) of the unamended Act was retained in the post amendment, with the only difference being that Section 13(4) of the amended Act provided that the copyright subsisting in a sound recording shall not prejudice the copyright subsisting in literary and musical work i.e. the only amendment incorporated in Section 13(4), on the subject was to replace the word 'record' with the words 'sound recording'.

32. Chapter IV of the Copyright Act deals with ownership of copyright and the rights of the owner. Section 14 stipulates the exclusive right to do or authorize doing of the acts mentioned therein in respect of a work or any substantial part thereof.

Rights which may be exercised in respect of each class of work are stipulated in Section 14. It is noteworthy that Section 14 does not indicate any order of priority between the different classes of works. Nor does it place any particular work above the others. It merely prescribes the rights that can be exercised in respect of each class of work.

33. In the decision reported as *Entertainment Network (India) Limited v Super Cassette Industries Limited* (2008) 13 SCC 30 following pertinent observations were made by the Supreme Court:-

> "63. A statute as is well known must be read in its entirety. It is required to be read chapter by chapter, section by section and clause by clause. The definition of the term "broadcast" as also "sound recording" must be given a wide meaning. Clause (a) of Section 13 protects original work whereas clauses (b) and (c) protect derivative works. It provides for commercial manifestation of original works and the fields specified therein. Clause (a) of sub-section (1) of Section deals with original work. It is extremely broad. In contrast thereto, the copyright on films or sound recording work operates in restrictive field; they provide for a restrictive rights as would appear from the provisions contained in Section 14(1)(e) of the Act.
>
> 64. For a proper construction of the provisions, will it be necessary to keep in mind the difference between the right of the original work and right of sound recording? Should we also bear in mind that there are various forms of intellectual property rights. Section 16 provides that a right, inter alia, in respect of any work must be claimed only under and in accordance with the provisions of the Act unlike trade mark and passing off rights can be enforced even though they are not registered. It must also be noticed that whereas the term of a copyright in original literary, dramatic and musical and artistic works not only remains protected in the entire lifetime of the author

> but also until 60 years from the beginning of the calendar year next following the year in which the author dies, the term of copyright in sound recording subsists only for 60 years, but as indicated hereinbefore, the same would not mean that the right of an owner of sound recording is in any way inferior to that of right of an owner of copyright on original literary work, etc" *(Emphasis Supplied)*

34. From the above observations of the Supreme Court and the wordings of Sections 13 and 14 of the Copyright Act, 1957 it emerges that the rights of an owner of a sound recording are, in no way, inferior to those of an owner of copyright in the original literary or musical works. This was a proposition which was not challenged by either learned counsel.

35. The area of dispute is: what happens to the copyright in an underlying work (literary and musical works) when the derivative work (sound recording) is exploited. Does he who obtains a permission from the copyright owner of the derivative work to broadcast by way of communicating to the public said derivative work, additionally requires a similar permission from the owner of the underlying works i.e. the literary and musical works?

36. The three classes of works referred to in Section 2(y) of the Copyright Act, 1957 viz. (a) literary, dramatic, musical and artistic works; (b) cinematographic films and (c) sound recording are mutually exclusive. As already noted hereinabove, Section 13(4) recognizes that there is separate copyright in the underlying musical and literary works which are embodied in a cinematographic film or sound recording. Such underlying works do not lose their existence upon a sound recording or any number of sound recordings being made. Upon a sound recording being made, the said three works remain mutually exclusive and

the ownership therein can be exercised to the extent prescribed by the Act.

37. As observed in paragraph 3 above by us, when a song is recorded, there is homogenization of the lyrics with the musical score where integration is articulated through the multi-level hierarchical system of interdependence. There may be no fusion of the musical score and the lyrics, but there certainly is integration. The Act, recognizing the separate existence of the three copyrights, requires it to be held that creating of a sound recording is through the simultaneous integration of the differentiated and notwithstanding the constituent differentials existing, the integrated whole i.e. the sound recording when broadcasted to the public is an exercise of the ownership right on its own strength. The situation may be dichotic, but it has to be so. The three works exist, independent of each other, and do not co-exist – joined by an umbilical cord.

38. In view thereof, the argument predicated upon Section 13(4) and Section 22 with reference to the difference in the terms of copyrights in literary and musical works on one hand and sound recording on the other advanced by the learned senior counsel appearing for IPRS which proceed on the premise that to hold to the contrary would result in merger, in the sound recording, of the underlying copyrights and hence lose their separate existence is incorrect.

39. Section 14(a) of the Act authorizes the owner of copyright in literary and musical works to perform the work in public or communicate it to the public. On the other hand Section 14(e) of the Act authorizes the owner of copyright in sound recording only

to communicate the work in public. This subtle distinction between the rights of owners of literary and musical works on one hand and sound recording on the other has to be seen in the backdrop of the definition of the expression 'performance' as defined under Section 2(q) of the Copyright Act, 1957 as it was originally enacted and definitions of various expressions under the amended Copyright Act viz. 'broadcast', 'communication to the public', 'performance' and 'performer' contained in Sections 2(dd), (ff), (q) and (qq) of the Act respectively. Section 2(q) in the Copyright Act as originally enacted defined 'performance' to mean any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematographic film, or by means of radio-diffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture. The expression 'communication to the public' was not defined when the Act was promulgated. The amendment in the year 1994, significantly changed the definition of the expression "performance". The amended Section 2(q) defines "performance" to mean any visual or acoustic presentation made live by one or more speakers. Section 2(dd) defines the expression 'communication to the public' to mean: 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. The definitions of the words 'broadcast' and 'performer' were also introduced vide Sections 2(dd) and (qq) in the amended Act. A combined reading of the definition of the said expressions, when seen in the light of difference in the definition of the expression "performance" under the unamended

and amended Acts, brings out that the Copyright Act draws a distinction when communication to the public is by way of live performance and when it is by way of diffusion. Thus, whereas the owner of copyright in literary and musical works enjoys the right to communicate said works to the public by way of live performance the owner of copyright in sound recording does not enjoy similar right to communicate the sound recording to the public by way of live performance. A necessary corollary to the aforesaid is that the communication of a sound recording to the public by the owner of the recording in no way encroaches upon the right of the owner of the underlying literary and musical works to perform said underlying works in the public, as correctly held by the learned Single Judge and therefore, nothing turns upon the arguments predicated upon the definition of the expressions "performance" and "performer" advanced by the learned senior counsel appearing for IPRS.

40. It may be true that the reasoning of the learned Single Judge pertaining to a copyright in a sound recording being carved out of from the pre-existing copyright in cinematographic film, noted by us in at serial nos. (i) and (iii) of paragraph 28 above may not be sound reasoning, but when corrected and as interpreted by us hereinabove, the same conclusion is reached.

41. Much emphasis was laid by the learned senior counsel appearing for IPRS on the judgments of UK courts and commentaries dealing with UK Copyrights, Patents and Designs Act, 1988 to urge that the learned Single Judge erred in holding that neither the commentaries nor the decisions were relevant inasmuch as there was a material difference in the statutory provisions of the Statute in India and United Kingdom.

42. After noting Sections 5A, 9, 16, 19 and 20 of UK CDP Act, 1988 and Sections 2(ff), 2(xx), 13, 14 and 51 of the Copyright Act, 1957, albeit with an erroneous assumption that a new species of copyright i.e. sound recording was introduced in the Indian law for the first time in the year 1994, in paragraph 46 of the impugned decision the learned Single Judge has opined that there is considerable difference in the structure of the enactments in India and United Kingdom on the subject of copyright.

43. One has to be careful while importing and applying the ratio of law declared in a foreign judgment. The language of the Statute interpreted in a foreign judgment needs to be carefully compared and contrasted with the language of municipal Statutes.

44. Section 5A(1) of UK CDP Act defines 'sound recording' to mean, (a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced. Section 2(xx) of the Copyright Act, 1957 defines 'sound recording' to mean a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced.

45. A first blush reading of the aforesaid two sections would suggest that there is difference in the definition of the expression 'sound recording' in under UK CDP Act and Copyright Act, 1957. However a careful reading of the two sections shows to the contrary. Clause (a) of sub-section 1 of Section 5A reads that a

sound recording is a recording of sounds. Sub-section (1) continues to read that sound recording means, (b) a recording of the whole or any part of a literary, dramatic or musical work. But that is recording of sounds only, which is largely embraced in clause (a). Clause (b) of Section 5A(1) of UK CDP Act (which does not exist in the definition of sound recording in India) makes no difference to the definition of sound recording in UK CDP Act, for what is prescribed in clause (b) is largely embraced under clause (a) (which corresponds to the definition of sound recording in India). Indeed, a debate in the House of Lords at the sitting held on 30.11.1987 would reveal that Lord Beaverbrook who piloted the Copyright Designs and Patents Bill in the House of Lords conceded to the argument of Lord Kilbracken, when it was pointed out that what was intended to be conveyed by clause (b) was already a part of clause (a). The following debate between the 2 Law Lords brings out as aforesaid:-

> "Lord Kilbracken Can the Minister explain why paragraph (b) is necessary at all? We read in paragraph (a) that a sound recording means a recording of sounds. The subsection continues, 'or (b) a recording of the whole or any part of.' But that of course, is a recording of sounds. Surely paragraph (b) is already embraced by paragraph (a).
>
> Lord Beaverbrook Perhaps I can take the noble Lord's point of view. There is obviously a very great overlap between the two paragraphs. But there are things in paragraph (b) that are not in paragraph (a). Paragraph (a) refers to a recording of sounds; paragraph (b) covers all recordings of works for which way sounds may be reproduced, whether made by recording sounds or not. Old fashioned piano rolls and modern electronic recordings may both be works made without recording sounds. So they must be covered by the definition."

46. We may highlight that whereas clause (a) of Section 5A(1) of UK CDP Act, 1988 refers to only a recording of sounds, from which the sounds may be reproduced and clause (b) refers to anything from which a sound may be produced, the definition of sound recording in India embraces both elements under one head. Thus, notwithstanding the difference in the expression used in the 2 Acts, the meaning conveyed is pari materia.

47. So far so good. Let us go further. We have observed in para 9 above that nothing exists in isolation. Neither the problem nor the solution. We have undertaken, as per the roadmap set out in paragraphs 10, 11 and 13 above, not to solve the problem as reductionists but by analyzing the dynamic patterns which constitute all the substances i.e. in the form of a movement that swells and coincides with the whole of the reality with the dynamism inherent in it. Copyright Act, 1957 recognizes three classes of works viz. (a) Literary, dramatic, musical or artistic works; (b) cinematographic film and (c) sound recording. UK CDP Act also recognizes the said three classes of works. Under Copyright Act 1957, the owner of copyright in sound recording is authorized to communicate the sound recording to the public. (See Section 14(e)(iii) of the Copyright Act, 1957). Under UK CDP Act, 1988 the owner of copyright in literary and musical works is prohibited from presenting said works to the public by means of a sound recording. (See Section 19 of UK CDP Act). More importantly, the owner of copyright in sound recording is prohibited from communicating the sound recording to the public. (See Section 20 of UK CDP Act). The prohibitions contained in the law in the United Kingdom are a conscious omission in the Indian

statutes and this explains the rhythmic difference between the flow of river Thames and Yamuna.

48. The matter does not rest here. The aforesaid material difference in the rights enjoyed by the owner of copyright in sound recording in India and UK helps to resolve the controversy in the present case. The communication of a sound recording (derivative work) to the public results in exploitation of literary and musical works (original works). Had the intention of Indian legislature been that the owner of a sound recording (derivative work) should not communicate the sound recording to the public without obtaining the prior authorization of the owner of the copyright in literary and musical works (original works) or that 2 permissions had to be obtained, it should have specifically manifested such intention in the Copyright Act, 1957, as has been manifested the legislature in the United Kingdom in the CDP Act, particularly when CDP Act, 1988 prohibits the owner of copyright in sound recording from communicating the sound recording to the public stood enacted, at the time when provision relating to copyright in sound recording was amended in India in the year 1994.

49. Faced with such situation, it is difficult to accept the stand of IPRS that 2 separate permissions would be required.

50. We now proceed to examine the judgment of the Supreme Court in *Eastern MPA*' case (supra), which forms the basis of the decision of the learned Single Judge.

51. It is indeed true that the controversy involved in *Eastern MPA*'s case (supra) was whether a producer of cinematographic film who commissions a composer of music and lyricist for reward

or valuable consideration for the purpose of composing music and writing songs for his film becomes the first owner of such music and songs and that whether a copyright subsists in the writer of the songs and composer of music. Having regard to the provisions of Sections 17 (b) and (c) of the Copyright Act, 1957 the Supreme Court resolved the said controversy by holding that a producer of cinematographic film who commissions a composer of music and lyricist for reward or valuable consideration for the purpose of composing music and writing songs for his film becomes the first owner of such music and songs and that no copyright subsists in the writer of the songs and composer of music. However, while resolving the controversy, the Supreme Court had an occasion to examine Section 13(4) of the unamended Copyright Act and made following pertinent observations in said regard:-

> "5. The copyright law in our country being fairly complicated because of the involved language in which some of its provisions are couched and the case being of first impression, learned Counsel for the parties have tried hard to help us in solving the knotty points by advancing copious and able arguments. Appearing on behalf of the appellant, Mr.Ashok Sen has urged that the author (composer) of a literary or musical work has copyright which includes inter alia the exclusive right (a) to perform the work in public and (b) to make any cinematograph film or a record in respect of the work; that copyright in a literary or musical work is infringed by any person if without a licence granted to him by the owner of the copyright, he makes a cinematograph film in respect of the work or performs the work in public by exhibiting the cinematograph film; that if a person desires to exhibit in public a cinematograph film containing a musical work, he has to take the permission not only of the owner of the copyright in the cinematograph film but also the permission of the owner of the copyright in the literary or musical work which is incorporated in

the cinematograph film as according to Section 13(4) of the Act, the copyright in a cinematograph film or a record does not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be the record is made; that the provisions of Section 17(b) of the Act have no application to a literary or musical work or the separate copyright therein and do not take away the copyright in a literary or musical work embodied in a cinematograph film; that the only modes in which the author of a literary or musical work ceases to be the owner of copyright in the work are (a) by assignment, (b) by relinquishment and (c) by the composer composing the work in the course of his employment under a contract of service with an employer in which case, the employer becomes the owner of the copyright in the musical work; that in the case of an assignment of copyright in future work and the employment of the author to produce a work under a contract of service, the question of priorities will be decided according to the principle "where equities are equal, the first in time shall prevail.

6. Mr.Sachin Chaudhary, learned Counsel for respondents 1, 2 and 3, as well as Mr.J.C. Bhat, learned Counsel for respondents 6, 7 and 8, and Mr.J.L. Nain, learned Counsel for respondent 19, who followed Mr.Chaudhary have on the other hand submitted that the dispute in the instant case that as the Act confers a separate copyright on a cinematograph film as a film, the producer can exercise both the rights conferred on him under Section 14(1)(c)(ii) of the Act and all that Section 13(4) of the Act (when applicable) provides is that the rights created by Section 14(1)(a) and (b) shall co-exist with those created by Section 14(1)(c) and (d) of the Act, e. g. under Clause (a), the copyright in a literary work such as a novel entitles its author to make a cinematograph film in respect of the work, and to exercise the remaining rights created by Section 14(1)(a) of the Act. But once he has licensed someone to make, a cinematograph film, the licensee shall have the rights provided in Clauses (c) and (d) of Section 14(1) of the Act in respect of the film.

....

15. .....Section 13 recognises 'cinematograph film' as a distinct and separate class of 'work' and declares that copyright shall subsist therein throughout India. Section 14 which enumerates the rights that subsist in various classes of works mentioned in Section 15 provides that copyright in case of literary or musical work means inter alia (a) the right to perform or cause the performance of the work in public and (b) to make or authorise the making of a cinematograph film or a record in respect of the work. It also provides that copyright in case of cinematograph film means among other rights, the right of exhibiting or causing the exhibition in public of the cinematograph film i. e. of causing the film in so far as it consists of visual images to be seen in public and in so far it consists of sounds to be heard in public. Section 13(4) on which Mr.Ashok Sen has leaned heavily in support of his contentions lays down that the copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made. Though a conflict may a first sight seem to exist between Section 13(4) and Section 14(1)(a)(iii) on the one hand and Section 14(1)(c)(ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of Section 14(1)(c) of the Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public. In other

words, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric or musical work recorded on the sound track of the film to be heard in public and nothing contained in Section 13(4) of the Act on which Mr. Ashok Sen has strongly relied can operate to affect the rights acquired by the author (owner) of the film by virtue of Section 14(1)(c) of the Act. The composer of a lyric or a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising; such sound track or from communicating or authorising the communication of the film by radio-diffusion, as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the express provisions of Clauses (f), (m), (y) of Section 2, Section 13(1)(b) and Section 14(1)(c) of the Act otiose but would also defeat the intention of the legislature, which in view of the growing importance of the cinematograph film as a powerful media of

> expression, and the highly complex technical and scientific process and heavy capital outlay involved in its production has sought to recognise it as a separate entity and to treat a record embodying the recording in any part of the sound track associated with the film by utilising such sound track as something distinct from a record as ordinarily understood....." *(Emphasis Supplied)*

52. The aforesaid observations relating to Section 13(4) of the unamended Copyright Act, 1957 made by the Supreme Court may be obiter, but we remind ourselves that an obiter dicta, more so when it is with reasons, in a decision of a court having higher position in the pyramidic structure must ordinarily be followed by a court lower in the pyramidic structure, unless there are very good reasons for not doing so. No good reasons have been shown to us by the learned senior counsel appearing for IPRS which would lead us to not to follow the interpretation given by the Supreme Court to Section 13(4) of the Copyright Act, 1957.

53. We now proceed to examine the 2 decisions relied upon by the learned senior counsel appearing for IPRS.

54. In the decision reported as *IPRS v Muthoot Finance Pvt Ltd & Ors* 2010 (42) PTC 752 (Mad) IPRS had filed a suit before a learned Single Judge of Madras High Court against Muthoot, a FM channel which had obtained license from PPL for broadcasting songs of the members of IPRS, inter-alia, praying therein that Muthoot be restrained from broadcasting the songs of its members till the time it obtains a separate license from IPRS. While dealing with an "interim" application under Order XXXIX Rules 1 and 2 CPC filed by IPRS, it was held by the learned Single Judge that IPRS has been *"prima facie"* able to

establish that Muthoot has no right to broadcast the songs of members of IPRS through its FM station without obtaining separate license from IPRS. In coming to the said conclusion, it was held by the learned Single Judge that the definitions of 'broadcast' and 'communication to the public' contained in Sections 2(dd) and (ff) of the Copyright Act respectively show that broadcasting of songs by a FM station involves communication of music to the public which is heard and enjoyed by them. The owner of copyright in literary and musical work has an exclusive right to communicate the same to the public and in view of such exclusive right of the owner of copyright in literary and musical work, Muthoot has no right to communicate the songs of members of IPRS to the public by way of broadcasting of songs.

55. The aforesaid decision was carried in appeal by Muthoot before a Division Bench of Madras High Court in OSA No.64/2009 titled as *Muthoot Finance Pvt Ltd v IPRS & Ors.* After noting that the license granted to Muthoot by PPL recorded that Muthoot has no right to use literary or musical works embodied in sound recordings licensed to it and the legal position that the Court has to only examine whether a prime facie case has been made out by the applicant while dealing with an application under Order XXXIX Rule 1 and 2 CPC the Division Bench dismissed the appeal filed by Muthoot.

56. Notwithstanding that the aforesaid decision (s) was rendered in respect of application under Order XXXIX Rule 1 and 2 CPC filed by IPRS and in no way finally determined the controversy involved in the suit filed by IPRS, we have examined the said decision (s) and have found a fundamental fallacy

therein. While holding that owner of copyright in literary or musical works has the exclusive right to communicate the said works to the public the learned Single Judge failed to note the rights conferred upon the owner of the copyright in sound recording by Section 14(e) of the Copyright Act, particularly his right of communicating the sound recording to the public.

57. With respect to the argument of learned senior counsel appearing for IPRS predicated upon international conventions suffice would it be to state that it is settled law that unless an international convention finds itself legislated in municipal law it would be impermissible to import the principle deducted from an international convention. In any case, if the Legislature has legislated the intention has to be gathered from the Statute, and while so doing guidance may be had from international conventions, on the presumption that the Legislature had kept the international conventions in mind, but where the unambiguous language of a Statute admits of no 2 meanings, the golden rule of interpreting the Statute has to be resorted to. It is always open to a Legislature keeping in view the socio-economic conditions in a country to confer lesser or larger rights. This would not mean that the said country sits in isolation.

58. For our reasons hereinabove, we find in the cross-objections filed pertaining to the view taken by the learned Single Judge with respect to live performances. We have already discussed the same. The appeals and cross-objections are accordingly dismissed and while so doing, we would place on record our appreciation of the high quality arguments advanced by Shri P.V.Kapur, learned senior counsel who appeared for IPRS

and Shri Neeraj Kishan Kaul, who opposed the debate set in motion by the appellants; and needless to state the valuable assistance provided to them by junior members of the Bar whose names we have noted while recording representation by counsel in the memo of parties above. It indeed were pleasurable moments to hear high quality arguments which kept us captive for a number of days when learned counsel showed their legal forensic skills.

59. The contentions urged in the appeal being plausible, it not being a case of filing of appeal just because an appellate remedy is available, we refrain from imposing any costs.

(PRADEEP NANDRAJOG)
JUDGE

(S.P.GARG)
JUDGE

MAY 08, 2012
dk