



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.122 OF 2013

In

NOTICE OF MOTION (L) NO.1108 OF 2012

In

SUIT NO.883 OF 2012

Radio One Limited
(formerly known as Radio Mid-day
(West) India Ltd.

: Appellant
(Orig.Defendant)

V/s.

Phonographic Performance Ltd.

: Respondent
(Orig.Plaintiff)

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With

NOTICE OF MOTION NO.460 OF 2013

In

APPEAL NO.122 OF 2013

In

NOTICE OF MOTION (L) NO.1108 OF 2012

In

SUIT NO.883 OF 2012

Radio One Limited

: Applicant
(Orig.Defendant)

In the Matter Between

Radio One Limited
(formerly known as Radio Mid-day
(West) India Ltd.

: Appellant

V/s.

Phonographic Performance Ltd.

: Respondent

....

With

CROSS OBJECTIONS NO.10 OF 2012

In

APPEAL NO.122 OF 2013

In

NOTICE OF MOTION (L) NO.1108 OF 2012

In

SUIT NO.883 OF 2012

Phonographic Performance Limited

: Appellant
(Orig.Plaintiff)

V/s.
Radio One Limited
Formerly Radio Mid-day West (India) Ltd.

: Respondent
(Orig.Defendant)

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With

NOTICE OF MOTION NO.2190 OF 2012

In

CROSS OBJECTIONS NO.10 OF 2012

In

APPEAL NO.122 OF 2013

In

NOTICE OF MOTION (L) NO.1108 OF 2012

In

SUIT NO.883 OF 2012

Phonographic Performance Limited

: Applicant
(Orig.Plaintiff)

In the matter between

Phonographic Performance Limited

: Appellant
(Orig.Plaintiff)

V/s.

Radio One Limited
Formerly Radio Mid-day West (India) Ltd.

: Respondent
(Orig.Defendant)

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Mr.Venkatesh Dhond, Senior Advocate, with Mr.Madhur R. Baya and Mr.Abhileen Chaturvedi for the Appellant in Appeal No.122 of 2013 and Respondent in Cross Objections No.10 of 2012.

Mr.N.H.Seervai, Senior Advocate, with Ms Gulnar Mistri i/b. Ms Madhavi Deshpande Ravuri, Mr.Vinayak Shete and Mr.Manish Upadhye for the Respondent in Appeal No.122 of 2013 and Appellant in Cross Objections No.10 of 2012.

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CORAM : DR.D.Y.CHANDRACHUD &
A.A. SAYED, JJ.

DATE : 02 APRIL 2013.

ORAL JUDGEMENT (Per Dr.Chandrachud,J.)

The appeal before the Court arises from an order of a learned Single Judge dated 9 May 2012. The appeal is by the original Defendant. The Plaintiff has filed cross-objections. For convenience of reference, it would be appropriate

to refer to the parties by their appellations in the suit.

2. In 2011, Radio One Limited, the Defendant, secured a licence for an FM Radio station in Mumbai. The Plaintiff, Phonographic Performance Ltd., apprehending that the Defendant would exploit the sound recordings in the repertoire of the Plaintiff filed a suit¹ for an injunction which is pending on the Original Side of this Court. A Notice of Motion² was filed in the suit.

3. On 1 March 2002, citing the tariff of the Plaintiff as excessive, the Defendant approached the Copyright Board for grant of a compulsory licence under Section 31(1)(b) of the Copyright Act, 1957. The Copyright Board disposed of the complaint on 19 November 2002 by which the rate of royalty was fixed at Rs.661/- per needle hour of broadcasting. Statutory appeals were filed before this Court both by the Plaintiff and by the Defendant against the order of the Copyright Board. On 10 December 2003, the parties arrived at an interim consensual arrangement in the Notice of Motion which was to remain effective pending the hearing and final disposal of the appeals before this Court. On 13 April 2004 this Court disposed of the appeals by setting aside the order of the Copyright Board dated 19 November 2002. Special Leave Petitions were filed against the order of this Court. Since the interim arrangement recorded in the Consent Terms came to an end, a Motion was filed by the Plaintiff in the suit before this Court. By an order dated 21 July 2005, this Court made a previous order dated 8 August 2002 operative against the Defendant. Under the order, the Defendant was to deposit an ad hoc advance amount every month until the

1 Suit No.3752 of 2001

2 Notice of Motion No.2846 of 2003

final orders in the suit and/or the decision of the Board; the amount of the advance was to be adjusted against the dues of the Plaintiff and a guarantee was to be furnished and kept alive pending the hearing and final disposal of the suit or till further orders.

4. By an order dated 16 May 2008, the Supreme Court set aside the order of the Copyright Board dated 19 November 2002 and remanded the matter to the Board for re-consideration.

5. Upon remand, the Copyright Board by an order dated 25 August 2010, granted a compulsory licence, subject to terms and conditions, to the Defendant under Section 31(1)(b). In pursuance of the order of the Copyright Board, a licence was issued to the Defendant which, inter alia, provided for the payment of compensation to the Plaintiff computed at the rate of 2% of the net advertising revenue of the Bombay FM Radio Station. Under the terms of the compulsory licence, the Defendant was to issue a Bank guarantee which had to be revised within two weeks of the close of every quarter to such sums as it was liable to pay as compensation for that quarter. Both the order of the Copyright Board and the licence that was granted to the Defendant specifically provided that the Plaintiff would be at liberty to cancel the licence without notice and to recover the remaining dues if the Defendant failed to revise the quantum of the Bank guarantee.

6. Under the terms of the licence, the Defendant was obliged to submit a revised Bank guarantee within two weeks from the end of the quarter for the

period from October and December 2010. This the Defendant failed to do. On 27 January 2012 the Defendant had instituted its own suit against the Plaintiff to this proceeding claiming certain purported adjustments against fee that they were liable to pay under the voluntary licence entered into by the Defendant with the Plaintiff for six FM Radio Stations outside Mumbai. The Defendant disclosed in the suit, its net advertising earnings and the amount of compensation payable under the compulsory licence.

7. The Plaintiff by a communication dated 29 March 2012 terminated the compulsory licence granted to the Defendant on the ground of breach. The case of the Plaintiff is that despite the receipt of the notice of termination on 30 March 2012, the Defendant continued to unauthorisedly broadcast the sound recordings in the repertoire of the Plaintiff thereby infringing the copyright of the Plaintiff. The Plaintiff has instituted a suit seeking a permanent injunction against the Defendant, rendition of accounts and damages for infringement of copyright.

8. On an application for an ad-interim relief the learned Single Judge, by an order dated 16 April 2012, noted that the Defendant had submitted a Bank Guarantee only in the amount of Rs.10,000/- by a covering letter dated 23 September 2010. The learned Judge held that a revised Bank guarantee should have been submitted every quarter commencing from October to December 2010 and it was on account of a breach of the obligation to submit a Bank guarantee for that quarter and for consecutive five quarters that the termination had been effected. The learned Single Judge observed that in these circumstances it is not open to the Defendant to raise the claim in the suit by the

Plaintiff by relying upon some amount which was stated to be subject to adjustment in the suit that has been instituted by the Defendant against the Plaintiff. The finding of the learned Single Judge was as follows:-

“The revised bank guarantee should have been submitted for every quarter starting from October 2010 to December 2010. It is that breach and for the consecutive five quarters for which the bank guarantee was not revised, that the termination has been effected. It is in such circumstances that I am of the view that the defendant Radio One Station cannot raise a claim in this suit by relying on some amounts which are stated to be lying or adjusted or claimed in the suit that is instituted by Radio One Limited against the society. That suit may refer to amount stated to be lying with the society on the basis that Radio One Station has not bifurcated any such payment station-wise. It may be something that is claimed as consolidated figure qua all stations. However, by institution of such a suit itself and without anything more, it will not be possible for Radio One Station to resist the prayer for interim injunction made in the society's suit.”

At that stage, a statement was made on behalf of the Defendant that an amount of Rs.5,00,000/- would be deposited in Court within a period of two weeks. The learned Judge allowed that request and directed that for a period of two weeks, the broadcast by the Defendant would continue but without prejudice to the rights and contentions of the parties.

9. Subsequently, in the impugned order of the learned Single Judge dated 9 May 2012, the Court has come to the conclusion that: (i) The Defendant was liable to make the payment to the Plaintiff in terms of the licence that was issued in accordance with the order of the Copyright Board; (ii) The terms of the licence contemplated that the Plaintiff could terminate the licence if the Bank Guarantee was not revised; (iii) From the statement of account which was furnished by the

Defendant together with its affidavit, it was apparent that no assertion had been made by the Defendant nor had any Bank guarantee as revised been furnished; (iv) Once the licence was cancelled, it was prima facie undisputed that the repertoire of the Plaintiff cannot be utilised by the radio station of the Defendant. On these facts, the learned Single Judge held that any payment which was made in the past and based on which some adjustment was claimed could not form the basis on which the action of the Plaintiff could be resisted. The learned Single Judge noted that it was incumbent on the Defendant to demonstrate how it had abided by the terms and conditions of the licence which prima facie had not been proved.

10. Despite these findings, the learned Single Judge directed that if the Defendant deposits a sum of Rs.6,50,000/- in addition to the sum of Rs.5,00,000/- already deposited, it can continue to broadcast the sound recordings from the repertoire of the Plaintiff and that it should abide by the terms and conditions of the licence issued in its favour by the Copyright Board. The learned Judge, however, directed that if there is a failure on the part of the Defendant to effect payment as directed, an ad-interim injunction in terms of prayer clause (a) of the Motion would follow.

11. On behalf of the Plaintiff, it has been submitted that the order of the learned Single Judge allowing the Defendant to broadcast songs from the repertoire of the Plaintiff subject to the payment of a total sum of Rs.11.50 lakhs amounts to the grant of a compulsory interim licence, something which even the Copyright Board has been held by the Supreme Court not to have jurisdiction to

grant in the judgement in **Super Cassettes Industries Ltd. v. Music Broadcast Pvt. Ltd.**³ Similarly, reliance has been placed on a judgement of a Division Bench of this Court in **Music Choice India Private Limited v. Phonographic Performance Limited**⁴ where it has been held that exclusive jurisdiction to grant a licence under Section 31(1)(b) is of the Copyright Board. Moreover, it has been urged that both the order of the Copyright Board as well as the terms of the licence confer upon the Plaintiff the power to terminate the licence for a breach of the obligation to submit a revised Bank guarantee. In the present case, it has been submitted that there was admittedly a failure on the part of the Defendant to submit a revised Bank guarantee and no payment was made between 2009 and 2012 when the order of the learned Single Judge was passed. On the other hand, on behalf of the Defendant, it has been urged that the Defendant seeks to claim an adjustment in respect of an excess amount paid to the Plaintiff by way of a set-off and that after the order of the learned Single Judge, payment has been made to the Plaintiff which has however not been accepted. Moreover, it has been submitted that as a result of the amendment which has been brought about by the Copyright (Amendment) Act, 2012, Section 31D has been inserted under which a provision has been made for the grant of a statutory licence for broadcasting of literary and musical works and sound recordings, subject to payment at such rate that may be fixed by the Copyright Board.

12. The rival submissions now fall for consideration. The entitlement, prima facie, which the Defendant claims to broadcast songs from the repertoire of the

3 AIR 2012 SC 2144

4 Appeal No.150 of 2009 decided on 22 January 2010

Plaintiff traces itself to the compulsory licence that was granted in pursuance of the order of the Copyright Board dated 25 August 2010. The Copyright Board stipulated the conditions subject to which the licence was to be granted, these being as follows:-

“(a) 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station shall be set apart by each complainant for pro rata distribution of compensation to all music providers including the respondent herein in proportion to the music provided by the respective music providers and broadcast by the complainant. Complainant shall be deemed to be a music provider for the music provided by it or received by it free of cost and broadcast. For arriving at “net advertisement earnings”, all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded;

(b) Complainants shall furnish within a week of grant of licence by the Registrar of Copyrights a bank guarantee for Rs.10,000 in favour of the respondent for each radio station. However, the sum of such bank guarantee shall be revised within two weeks after the close of every quarter of the year to such sum for which complainant was liable for payment of compensation for that quarter. Quarter of a year means a period of three months ending on the last day of March, June, September and December of the relevant year;

(c) If the complainant fails to revise the bank guarantee in terms of clause (b), respondent shall be at liberty to cancel the licence without giving any notice and recover the remaining dues from the available bank guarantee;

(d) Payment of compensation by the complainant to the respondent for a month shall be made by 7th day of the month following the month to which payment relates. Complainant shall also furnish alongwith the payment the date wise details of the periods for which the music relating to the respondent and all other music providers has been used for the month. However, payment for the period beginning with the grant of licence and ending on 30th September, 2010 shall be made in lump sum by 7th October, 2010;



- (e) For any delayed payment for a month beyond 7th of the following month, interest at the rate of 1% per month or a part of month shall be payable;
- (f) In case payment is not made by the complainant for a radio station for consecutive two months, respondent herein shall be entitled to cancel the licence by giving notice of one month and recover the remaining dues from the bank guarantee;
- (g) A complainant may for one or more radio stations, by giving notice of one month and after making payment of all sums due, cancel the licence;
- (h) The validity of the licence granted by the Registrar of Copyright shall come to end on 30th September, 2020.”

The compulsory licence that was granted to the Defendant on 16 September 2010 incorporates the conditions which were prescribed by the Copyright Board. Under the terms of the licence, the Defendant was to furnish initially a Bank guarantee for Rs.10,000/- in favour of the Plaintiff for each Radio Station. The amount of the Bank guarantee was to be revised within two weeks after close of every quarter to such sum for which the Defendant was required to make payment of compensation for that quarter. Compensation was payable at the rate of 2% of the net advertisement earnings for each FM Radio Station accruing from the radio business. The licence was terminable and an express provision was introduced into the licence, following the order of the Copyright Board, to the effect that if the licensee fails to revise the Bank guarantee as required, the Plaintiff would be at liberty to cancel the licence without notice and to recover the remaining dues from the available bank guarantee. Moreover, payment of compensation was liable to be made by the Defendant to the Plaintiff by the seventh day of the month following the month to which the payment relates. The

Defendant was also to furnish together with the payment datewise details of the periods for which the music relating to the Plaintiff has been used for the month.

13. There is no dispute before the Court about the factual position, as there was none before the learned Single Judge, that a revised bank guarantee was never furnished. Moreover, no payment whatsoever was effected by the Defendant to the Plaintiff between 2009 and 2012. This is evident from the chart that was annexed by the Defendant to its affidavit-in-reply dated 7 May 2012. The contention of the Defendant, however, was that there was an understanding between the parties that in the event the final order of the Copyright Board prescribes a lower rate of royalty than the interim rate that was paid by the Defendant, the Plaintiff would be required to adjust the future amount of royalty payable by the Defendant from the account already in possession of the Plaintiff in the form of excess royalty payments. Now prima facie, any such understanding would have to be premised on the basis of some material on record which is conspicuous by its absence. As a matter of fact, the letter of the Defendant's Advocate dated 8 May 2012 contains a fair admission that there is no document formally recording the alleged understanding and arrangement. In its rejoinder before the learned Single Judge, the Plaintiff while adverting to the statement of account furnished by the Defendant noted that the account made it abundantly clear that no payment was made from the financial year 2009-10 onwards and that the Defendant had admitted to having stopped making payment even prior to the order of the Copyright Board dated 25 August 2010. There has been no traverse to this averment on the part of the Defendant. The

earlier order of the learned Single Judge dated 16 April 2012 held that it was not open to the Defendant to claim an adjustment in the present suit. There is no challenge to that order by the Defendant. Moreover, it could never have been open to the Defendant to make unilateral adjustments.

14. On these facts, prima facie, the learned Single Judge has justifiably come to the conclusion that in breach of the obligation that was cast upon the Defendant by the terms of the compulsory licence, the Defendant failed to revise the quantum of Bank guarantee for every quarter commencing from September to December 2010 and, as a matter of fact, for five quarters thereafter. The authority of the Defendant to broadcast songs from the repertoire of the Plaintiff traces its origin exclusively to the grant of the compulsory licence which was terminable for breach of the obligation to furnish a Bank guarantee. The licence has been terminated for breach. The ad-interim finding of the learned Single Judge that there was a breach on the part of the Defendant is borne out by the record and does not fall for interference in appeal. The contention of the Defendant is that on 3 September 2010, 23 September 2010 and 7 October 2010 the Defendant had sought a refund of the security deposit of Rs.86 lakhs and its bona fides, it is urged, could appear from this demand. The submission cannot be accepted for the simple reason that so long as the compulsory licence that was issued under section 31(1)(b) held the field, the Defendant was obliged to comply with the terms of the licence. Upon its failure to do so, the Plaintiff terminated the licence in accordance with the terms and conditions governing the licence. Once the licence has been terminated, any broadcasting of songs from the repertoire of the Plaintiff would constitute an infringement of the

copyright. The Plaintiff has made out a strong prima facie case for grant of an injunction. The balance of convenience would weigh in favour of injuncting against an infringement of its copyright.

15. The learned Single Judge, in our view, was in error, having correctly come to the conclusion that there was a breach on the part of the Defendant in complying with the terms of the licence, in directing that subject to a deposit of Rs.11.50 lakhs, the Defendant would be entitled to the benefit of the broadcasting of songs from the repertoire of the Plaintiff on the terms and conditions as set out in the compulsory licence. Once prima facie a breach has been established and the termination follows the breach, it would be wholly inappropriate to direct that the Defendant may nonetheless continue to broadcast songs from the repertoire of the Plaintiff on the terms governing the compulsory licence. The licence was terminable and has been terminated for breach.

16. In **Super Cassettes Industries Ltd.** (supra), the Supreme Court has held that even the Copyright Board does not possess the power under Section 31(1) (b) to grant an interim compulsory licence. The judgement of a Division Bench of this Court in **Music Choice India Private Limited** (supra) similarly emphasises that exclusive jurisdiction to grant a licence is vested with the Copyright Board. This is a case where the Defendant has prima facie been guilty of a persistent breach of its obligation under the terms of the compulsory licence. The operative order of the learned Single Judge in substance grants a compulsory licence to the Defendant, in a suit instituted by the Plaintiff, a consequence

which ought not to ensue at least on facts as found by the learned Single Judge. The Plaintiff has made out a strong prima facie case. The balance of convenience must necessarily weigh in favour of the Plaintiff since, to allow the Defendant to broadcast songs on the basis of the terms of the compulsory licence which has been validly terminated would amount to an infringement of the copyright of the Plaintiff. Moreover, admittedly the Plaintiff does not command a monopoly in respect of the entire market. The grant of an injunction may at worst be a matter of inconvenience but would not result in the closing down of the business of the Defendant.

17. Section 31D has been introduced into the Copyright Act, 1957 by the Copyright (Amendment) Act, 2012. Under sub-section (1) of Section 31D as now introduced, any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of the section. Under sub-section (2) of Section 31D, the broadcasting organisation is required to pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board. Sub-section (8) of Section 31D stipulates that nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012. We need to only clarify that the grant of an ad-interim injunction in terms of prayer clause (a) of the Motion shall not preclude the Defendant from seeking recourse to the remedies, if any, that may be available under Section 31D. We express no opinion in that regard.

18. For these reasons, while we affirm the finding of the learned Single Judge, that there was a breach by the Defendant of the terms of the compulsory licence granted under Section 31(1)(b) of the Copyright Act, 1957 and that licence was prima facie validly terminated on that ground, we are of the view that the learned Single Judge was in error in allowing the Defendant the continued use of the repertoire of the songs of the Plaintiff, subject to the deposit of an amount of Rs.11.50 lakhs. In consequence, we set aside the operative direction contained in paragraphs 9 and 10 of the impugned order of the learned Single Judge allowing the Defendant to broadcast sound recordings from the repertoire of the Plaintiff subject to the deposit of an amount of Rs.11.50 lakhs. For the reasons indicated earlier, we grant an ad-interim order in terms of prayer clause (a) of the Notice of Motion. We also clarify by way of abundant caution that this order shall not come in the way of the final disposal of the Notice of Motion on merits.

19. The appeal filed by the Defendant, Appeal no.122 of 2013, shall accordingly stand dismissed. Cross-Objections no.10 of 2012 of the Plaintiff shall accordingly stand allowed in the terms indicated above. There shall be no order as to costs.

20. In view of the disposal of the appeal and the cross-objections, the Notices of Motion in the appeal and the cross-objections do not survive and are accordingly disposed of.

21. A stay of the operation of this order is sought by the learned Counsel for the Defendant. The Defendant, prima facie, has been in persistent breach and default of the terms of the licence. The licence, prima facie, has been validly terminated. Any such order as sought by the Defendant would constitute an infringement of copyright. Hence, stay is refused.

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

(A.A. Sayed, J.)