

Form No. J (2)

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
In Appeal From An Order Passed In
Ordinary Original Civil Jurisdiction
Original Side

Present :

The Hon'ble Justice Kalyan Jyoti Sengupta
&
The Hon'ble Justice Kanchan Chakraborty

APO No. 254/2010
C.S.No. 112/2010
G.A. 1423/2010

SAREGAMA India Ltd
Vs.
Puneet Prakash Mehra & ors.

APO No. 253/2010
C.S.No. 101/2010

SAREGAMA India Ltd
Vs.
Puneet Prakash Mehra & ors.

APO 255/2010
GA 2128/2010
GA 1970/2010
GA 2163/2010
CS No.112/2010

EROS International Media Private Ltd.
Vs.

Puneet Prakash Mehra & ors.

APO 256/2010
CS No. 112/2010

Nandiadwala Grandson Entertainment Ltd.
Vs.

Puneet Prakash Mehra & ors.

APO 257/2010
C.S.No.101/2010

Nadiadwala Grandson Entertainment Ltd.
Vs.
Puneet Prakash Mehra & ors.

APO 261/2010
C.S.No.112/2010

EROS International Media Private Limited
Vs.
Puneet Prakash Mehra & ors

APO 265/2010
C.S.No.109/2010
GA 1731/2010

Anandji Virji Shah & ors.
Vs.
Nadiadwala Grandson Entertainment Ltd.

Judgment on: 1st October, 2010.

K. J. Sengupta, J.:-

All the aforesaid appeals are heard analogously against the judgment and orders dated 29th April, 2010 and dated 30th April 2010. Two judgment and orders dated 29th April 2010 passed by the learned Trial Judge in two different suits on two different applications, and the judgment and order dated 30th of April 2010 was passed in connection with the suit No.101 of 2010. The appellant SAREGAMA India Limited (hereinafter referred to in short 'SAREGAMA') preferred appeal against the judgment and order dated 29th April 2010 and then against 30th April 2010. Nadiadwala Grandson Entertainment Limited (in short

'Nadiadwala') preferred its appeal against judgment and orders dated 30th April 2010 and 29th April 2010, EROS International Media Private Limited (in short 'EROS') preferred appeal against the judgment and order dated 30th April 2010; Anandji Virji Shah and others (hereinafter in short 'Anand') preferred appeal against judgment and order dated 29th April 2010 refusing to grant interlocutory relief in favour of this appellants.

It is pertinent to record that all the aforesaid orders were passed in three civil suits by the learned Trial Judge on the respective applications for interlocutory relief at the ad interim stage and those applications are still pending for final hearing. But it appears the effect of the two orders of the learned Trial Judge is so substantial that those really dispose of the interim applications finally if not the suit itself.

The short fact which give rise to the present appeals is as follows:-

One M/s. Prakash Mehra Productions had produced a feature film 'Laawaris' in the year 1981. By an agreement in writing dated 19th July 1981 Prakash Mehra, since deceased being the sole proprietor of the said M/s. Prakash Mehra Productions, assigned the rights in the literary, dramatic, musical and artistic works and the soundtrack and recording of the songs of the said film unto and in favour of erstwhile Gramophone Company India Limited being predecessor-in-interest of the appellant SAREGAMA. However, the right acquired under the said agreement is seriously disputed by the said Mehra and also by Anand Virji Shah and others who are claiming exclusive copyright in the music of the songs. The SAREGAMA in terms of the right acquired under the said

agreement, thereafter, by an agreement dated 11th February, 2010 entered with the one Nadiadwala Grandson Entertainment Private Limited (hereinafter in short Nadiadwala) and Super Cassettes Industries Limited (hereinafter referred to as Super) granted licence amongst others to record and synchronize the lyrics and music of the song “Apni To Jese Tese” composed by Kalyanji Anandji and lyrics by Prakash Mehra in the film “Laawaris”. Nadiadwala according to the terms of the said agreement of 11th February 2010 synchronized the music and lyrics of few lines of the said song “Apni To Jese Tese’ in the song with first words ‘Aapka Kaya Hoga (Dhanno)’ in film “Housefull”. After producing the film Nadiadwala granted distribution right of the said film to EROS International Media Private Limited (hereinafter in short EROS). The scope of agreement dated 11th February 2010, inexhaustively is grant of licence by SAREGAMA to Nadiadwala and Super Cassettes to record and synchronize use, exploit recreated sound recording the said song with the lyrics and music ‘Apni To Jese Tese’ from the film LAAWARIS by physical and non-physical means, modes or formats including on mobile and digital platform and to make any sound recording embodying the recreated sound recording either alone or together with any other sound recording etc. and also to exploit new film HOUSEFULL by any mean including VCP, DVD, television, internet etc.

By letter dated 4th March 2010, Prakash Mehra Productions through the heirs of Prakash Mehra alleged that Nadiadwala has used for his movie HOUSEFULL one of their song ‘Apni To Jese Tese’ from movie LAAWARIS, but Nadiadwala has not approached Prakash Mehra for any permission regarding

this song. On coming to know the said Prakash Mehra by letters dated 31st March 2010 and 6th April 2010 issued a desist notice calling upon SAREGAMA from granting any licence allowing them from using the copyright of the said song in any manner whatsoever in the said new film HOUSEFULL. On receipt of the desist notice the SAREGAMA filed above suit No. 112 of 2010 in or about 16th April 2010 in this Court praying for the following reliefs:-

- a) Declaration that the defendant Nos. 1 to 3 and the defendant Nos. 4 to 9 have no right or claim or copyright in their favour in respect of the literary or musical works respectively in relation to the songs from the film "Laawaris" including the song "Apni To Jaise Taise".
- b) Declaration that the threats made by and on behalf of the defendant Nos. 1 to 3 to the plaintiff as contained in the letter dated 31st March 2010 and 6th April 2010 are wrongful,
- c) Declaration that the threats made by or on behalf of the defendant Nos. 4 to 9 to the plaintiff as contained in the letter dated March 30, 2010 is wrongful,
- d) Perpetual injunction restraining the defendant Nos. 1 to 3 from making any wrongful and groundless threats against the plaintiff as contained in the letters dated 31st March 2010 and 6th April 2010 or in any other manner,

- e) Perpetual injunction restraining the defendant Nos. 4 to 9 from making any wrongful and groundless threats against the plaintiff as contained in the letter dated 30th March 2010 or in any other manner,
- f) Perpetual injunction restraining the defendant Nos. 1 to 3 from claiming any copyright in the lyrics or any other literary work in respect of the song 'Apni To Jaise Taise' of the film 'Laawaris' or in respect of any songs embodied in the film 'Laawaris' in any manner whatsoever,
- g) Perpetual injunction restraining the defendant Nos. 4 to 9 from claiming any copyright in musical works of the song 'Apni To Jaise Taise' in the film 'Laawaris' or in respect of any songs embodied in the cinematographic film 'Laawaris'.

In the said suit immediately after filing the aforesaid application being G.A. No. 1251 of 2010 was taken out by SAREGAMA for the following amongst others interlocutory reliefs:

- a) Injunction restraining the respondent Nos. 1 to 3 from making any wrongful and groundless threats against the petitioner as contained in the letters dated 31st March 2010 and 6th April 2010 or in any other manner,
- b) Injunction restraining the respondent Nos. 4 to 9 from making any wrongful and groundless threats against the petitioner as contained in the letter dated 30th March 2010 or in any other manner,

- c) Injunction restraining the respondent Nos. 1 to 3 from acting upon or giving any effect to the letters dated 31st March 2010 and 6th April 2010 in any manner whatsoever,
- d) Injunction restraining the respondent Nos. 4 to 9 from acting upon or giving any effect to the letter dated 30th March 2010 in any manner whatsoever,
- e) Injunction restraining the respondent Nos. 1 to 3 from claiming any copyright in the lyrics or any other literary work in respect of the song 'Apni To Jaise Taise' of the film 'Laawaris' or in respect of any songs embodied in the film 'Laawaris' in any manner whatsoever,
- f) Injunction restraining the respondent Nos.4 to 9 from claiming any copyright in the musical works of the song 'Apni To Jaise Taise' in the film 'Laawaris' or in respect any songs embodied in the cinematographic film 'Laawaris'.

On 16th April 2010, Learned Trial Judge, Hon'ble Justice Patherya was pleased to pass an order of injunction in terms of prayer (f), (g), (h) and (i) and thereby in substance, the respondent Nos. 1 to 9 were restrained from claiming any copyright in the lyrics and musical works or any other literary works in respect of the said song 'Apni To Jese Tese' or any other literary works, musical works and sound recording of the said song. On 29th April 2010 upon hearing the parties the Learned Trial Judge vacated the interim order passed in favour of SAREGAMA. Immediately after 16th April, 2010 Mehras filed the suit against SAREGAMA, Eros, Nadiadwala and also the Super. In the said suit Mehras

claimed decree for perpetual injunction in various manners and forms by which the Saregama, Nadiadwala, Eros and Super are sought to be restrained from exploiting the song 'Apni To Jese Tese' in the film 'Housefull'. Immediately thereafter an application was taken out for interim relief in terms of the substantive relief claimed in the suit. By the impugned judgment and order dated 30th April 2010 the learned Trial Judge held that petitioners namely Mehras are entitled to restraint order against respondents from exploiting the subject song 'Apni To Jese Tese' in the film 'Housefull'.

Almost at the same time Anand and the heirs and legal representatives of Kalyanji namely Smt. M/s. Jaya Shah and others filed a suit against Nadiadwala, Eros, Super Cassettes, Saregama, one Shankar Mahadevan, one Ehsaan Noorani, Loy Mendonsa, Reliance Media Works Limited, Sumeet Prakash Mehra, Amit Prakash Mehra and Puneet Prakash Mehra claiming injunction against amongst others Nadiadwala, Eros, Super Cassettes, Saregama, Shankar Mahadevan, Ehsaan Noorani, Loy Mendonsa from restraining the musical works incorporated in the song 'Apni To Jese Tese' used in the film 'Laawaris' in any form whatsoever and also decree for perpetual injunction against the same restraining defendant Nos. 1 to 7 from any manner violating and infringing the special rights of the plaintiff No.1 and late Shri Kalyanji as author of musical works incorporated in the song 'Apni To Jese Tese' for claiming the defendant Nos. 5 to 7 or any of them are authors of musical works and also other consequential relief. In the said suit of Anandji Virji Shah and others an application was filed for interlocutory relief in terms of the final relief claiming in

the suit. The said application of Anandji was moved for obtaining ad interim order of injunction however the learned Trial Judge refused to pass any ad interim order of injunction on 29th April 2010. Anandji has preferred above appeal against the aforesaid order of refusal.

This Court heard all the applications analogously and finally delivered judgment on the aforesaid appeals on 13th May 2010 and suitably varied and or modified order of injunction passed by the learned Trial Judge on terms mentioned therein.

Mr. **Gautam Chakraborty**, learned Senior Advocate appearing for the **SAREGAMA** in their appeal in APO. 253 of 2010 submits that there has been no challenge to the deed of assignment dated 18th July 1981 either by Mehra or by Anandji and others. By the said agreement the predecessor-in-interest of the Mehra without any reservation or restriction has assigned all rights, title and interest which were with the Mehra. It will appear from **Clause (B) of the said agreement that the predecessor-in-interest of Mehra had also granted right to license for publication, sound and television broadcasting, public performance and mechanical reproduction (including sound and television broadcasting) through out the world by any and every means whatsoever of the contract works or any of them.** It **also gives right to authorize any other person, firm or corporation to do any and all such acts and things.**

He urges that it is clear from the aforesaid clause that apart from the rights granted under clause 3(A) the assignee is also entitled to the right to grant licenses in respect of the contract works to third parties. He submits further that

even the learned Single Judge found in favour of the appellant that the right which was given to Saregama was in the literary, dramatic and musical works embodied in the producer's film and all Contract works but no right was given to exploit such literary, dramatic and musical work as embodied in the producer's film in another film.

Mehras have received royalty in terms of the deed of assignment for exploiting the song in physical and non-physical form after the agreement being concluded in 1981 till February 2010. He submits that if the agreement is read carefully it will appear that copyright in respect of literary, dramatic and musical works in respect of the song of 'Laawaris' is assigned to SAREGAMA absolutely and his client is entitled to synchronize the said song in any manner whatsoever without any restriction.

His further contention is that copyright is a bundle of rights and the second part of Clause 3(A) gives SAREGAMA a copyright, performance right and all other rights, title and interest embodied in the predecessor film. Copyright is defined in Section 14 of the Copyright Act, 1957 (hereinafter referred to as the Act) and in respect of literary and musical work in clause (a)(i), (ii), (viii) of the said section. Further in the case of sound recording clause (e)(i)(iii) of the said section will apply. Section 2(a)(iv) and (v) defines adaptation and the owners of the copyright to adopt in any manner that he wishes. It is not a case of infringement at all. The said agreement almost for last three decades has been accepted, acted upon and such factum of acting upon will be established as the royalty was received by Mehras for physical and non-physical and

synchronization and such payments of royalty was received in February 2010. In support of his submission he has relied on decision of the Supreme Court reported in AIR 1977 SC 1443, unreported judgment of Bombay High Court in Suit (L) No. 2993 of 2006 (*Anandji Virji & others vs. Ritesh Sidhwani & others*), decision of the learned Single Judge reported in AIR 1997 Calcutta 63 (para 20, 23, 24, 30, 31, 33), decision of Bombay High Court reported in (2008), 110 Bombay Law Reporter 924 (para 5, 6 and 7) and an unreported judgment of Delhi High Court in FAO (OS) No.81/2002 (*International Film Distributors vs. Sri Rishi Raj*).

He further submits that appeal is maintainable even if the appellants might have stated before Learned Trial Judge that order would be carried out, as the right to appeal cannot be taken away because of undertaking being given. In connection with this proposition of law he has relied on a judgment of Supreme Court reported in 1998 (6) SCC 507.

Mr. Chakraborty while opposing to the claim of Anandji Virji & others submits that neither the said late Kalyanji nor Anandji had any right to resist the claim of the appellant SAREGAMA and indeed they had transferred and assigned in favour of Prakash. Actually, under the law these two gentlemen cannot claim any copyright in the music as they worked in course of their employment for which consideration was paid. The said Anandji and the heirs of Kalyanji in their suit or in the appeal have not disclosed any letter or document to show on what capacity consideration was paid to them. It is interesting to note that both have suppressed what the consideration was.

He further submits that Kalyanji and Anandji have not produced any document or record to show that since 1981 till date they have received any royalty in respect of their music in the song in the film Laawaris. This establishes that they did not retain any right over the music when the same was given for consideration to Prakash Mehra. Kalyanji and Anandji have not produced original notation of the songs or the dummy recording alleged to have been made by them in 1980. Explanation of practice of destruction of the same is unbelievable.

He further submits that for long 30 years there was no claim of copyright of the said music either by Kalyanji or Anandji. Such inaction in claiming copyright is unbelievable. He contends that once music composed by them was married into lyrics written by Mehra, latter became the owner of first copyright therein. It has been judicially established that engagement of a person as a music director would forfeit their copyright in the musical works and this will appear from an unreported judgment of Bombay High Court in case of *Anandji Virji Shah v. Ritesh Sidhwani* in suit (L) No. 2993 of 2006 with regard to the film 'DON'. This principle is also supported by the judgment of the Supreme Court of India reported in AIR 1977 SC 1443 at paragraph 18. It is interesting to note that although Anandji is alive that he has not verified the plaint nor come forward to tell what was the actual dealings and transactions with Prakash Mehra with himself and the late Kalyanji.

Mr. **Jayanta Kumar Mitra**, Senior Advocate appearing for the appellant, **EROS**, while supporting the argument advanced by Mr. Chakraborty submits

that 1981 agreement clearly envisages the transfer of all the rights (literary, musical and others to SAREGAMA). It will appear from the plain language of 1981 agreement that it envisages beneficial and absolute transfer and assignment of all the rights (literary, musical and others) to Saregama.

He submits that the definition “contract works” employed in the said work agreement means and includes all literary and musical work in contract recording. Contract recording in its turn is defined as recording of performance in the film, and the work performance in its turn defined inclusively speech, dialogue, acting, playing an instrument or any other sound on visual effect of any kind. If those clauses are read with Section 18(1) of the Act, it will establish without any doubt that the assignment of the work has been done wholly and without any limitation including the right to adaptation under Section 2(a)(iv) of the Act which allows arrangement or transcription of the musical work/copyright. Thus the complete transfer of copyright in musical works or the right, title and interest has been effected by the said agreement. In this case, the song has been recreated by adoption of the musical works in terms of Section 2 and copyright can be claimed in respect thereof. The SAREGAMA had paid synchronization fees to Mehra. It means, the right to record the music is part of the soundtrack in a film. This right is included in the right to reproduce the work in any material form and it would be supported by the proposition of law in the text book of P. Narayanan 3rd Edition of Copyright Industrial Design. Thus the SAREGAMA exploited the song in all possible manner including licensing the same for other film and no right whatsoever left to Prakash Mehra after execution

of 1981 agreement and this would be clear from clause 9 of the said agreement with a negative covenant whereby Mehra cannot exploit the copyright without the consent of SAREGAMA.

He submits that case of Anandji and the heirs of Kalyanji and that of Mehra are quite opposite to each other. Mehra on one hand has claimed that it has purchased such right whereas Anandji and the heirs and legal representatives of Kalyanji have asserted that copyright belong to them and under the law they retained such copyright. Conveniently no document has been produced to show what are the terms and conditions and what was the relationship between the Mehra and Kalyanji Anandji for the creation of the said song. The Learned Trial Judge has rightly found that there was no proof of mutilation or distortion of the said song whatsoever. No appeal has been preferred from the said part of the order. He submits that they have neither proved nor pleaded anything to show that their honour or reputation has been prejudiced by the insertion of musical works in HOUSEFULL as envisaged in Section 57 of the Act, since the song has been faithfully represented question of infringement does not arise and Section 58 of the Act is not applicable.

His next contention is that in the 1981 agreement Mehra assured SAREGAMA that he had the absolute and unfettered right free from obligation of third parties in the literary and musical works and further there would be no liability in respect of the musician, music directors, etc. He refers to clause 4(c) and clause 18 of the said agreement in this connection. Therefore, Mehra in law

was the owner of both literary and musical works as per Section 2(d)(i) and (ii) of the Act and therefore, Kalyanji and Anandji can claim no right.

Thus, prima facie case reveals that there is a written assignment subsisting for merely 30 years and, contention of both Mehra and Kalyanji are not proved prima facie. The balance of convenience demands that EROS as a bona fide purchaser for value ought not to be made to suffer irreparable and disproportionate loss to this extent, where the song comprises barely 100 seconds in three-hour film. Moreover, third party rights had been created by appointment of distributors, sub-distributors, exhibitor and print have been issued not only in India but also abroad. By reason of their conduct EROS is suffering further loss and damage inasmuch as the demand for film HOUSEFULL will wane in the course of time, unless the DVDs and satellite release of film are allowed. Pirated copies of the film are already flooding the market. Further the film cannot be released in Nepal where there is a huge demand of Hindi movies. EROS is losing the market in every passing day.

It is significant to mention that in the plaint filed in Bombay suit there was complete denial of existence of 1981 agreement and whereas in Calcutta Suit conveniently they have made a casual reference to the agreement in which they have not made any challenge against the said agreement dated 18th July, 1981. He further contends that they have failed to make out any prima facie case in their favour for which the impugned judgment and order of the learned Trial Judge should be sustained.

Mr. Anindya Kumar Mitra appearing for the Mehras submits that agreement of assignment dated 18th July 1981 even if interpreted liberally, does not confer the right to recreate, rerecord or synchronize the musical work, literary work (lyrics) and dramatic works embodied in the film LAAWARIS. The words “re-record” or “recreate” or “synchronization” are not even mentioned in agreement dated 18th July 1981. SAREGAMA not having derived any right to recreate or rerecord or synchronize could not have granted any licence in respect thereof in favour of the producer and the distributor of the film HOUSEFULL or in favour of any other person. Hence, the Learned Trial Judge has correctly held the right granted under this licence de hors the agreement.

His next contention is that admittedly the author of lyrics of the song ‘Apni To Jese Tese’ is Prakash Mehra, and director and composer of musical works is Kalyanji and Anandji. The singer of song is Kishore Kumar as admitted in the said licence agreement dated 11th February 2010 disclosed by the defendant-appellant. Admittedly, 13 lines of the song have been mixed with another song composed by others and a new song has been created by using the said 13 lines three times.

Admittedly, the Music Director of the song in the film HOUSEFULL named ‘Ap ka Kya Hoga (Dhanno)’ is Shankar Mahadevan, Ehsaan, and Loy Mendonsa. Author of the song is Sameer and singer of the song is Mika, and not Prakash Mehra, Kalyanji Anandji and Kishore Kumar. According to him it is clear case of infringement of the copyright of the author and producer of the cinematographic film, Prakash Mehra.

If SAREGAMA has no defence to claim for injunction its licensee cannot have any defence against claim for injunction.

His additional argument to counter the claim of SAREGAMA is as follows:

In the instant case, admittedly, SAREGAMA has not sent half-yearly statement of sale of records (clause 15) to Prakash Mehra Production and admittedly, again has not paid royalty since 2007. In the plaint/petition of SAREGAMA there is no averment that royalty statement has regularly been sent. In this connection reference may be made to the letter dated March 4, 2010 at page 557 by which Prakash Mehra Production asked for the statement of sales and in reply by letter dated 16th March 2010 at page 558 SAREGAMA has not disputed non-supply of statement. In the instant case, as on 31st March, 2010, 7.89 lakhs was due and payable as royalty. Further royalty accrues since April 1, 2010 but no payment has been made. So the amount of outstanding royalty would be more than 7.99 lakhs as on that date. Non submission of royalty statement is a continuing breach. Therefore, SAREGAMA cannot claim or enforce any right under the agreement nor can it licensees or assigns namely producer of Housefull or distributor of Super Cassettes.

He submits that agreement dated 18th July 1981 has to be read as a whole. Subsequent conduct of the parties is also relevant for ascertaining true intent of the agreement. In the year 2000, SAREGAMA applied for registration of copyright in sound recording of the music and registration was granted on 10th October, 2007. This was in compliance with the judgment of the Hon'ble Court reported in AIR 1997 Calcutta 63. Identical agreement involving that case, was

construed and the Hon'ble Court held that the SAREGAMA had copyright of soundtrack and it had right to assign the same only and nothing else.

Thus the SAREGAMA or its assigns Nadiadwala and EROS have not made out even any prima facie case of any right to copy any portion of the song 'Apni To Jese Tese' and to include the same in the film Housefull with the following modifications:-

- (i) Mixing the lyrics of song with another song 'Apka Kya Hoga (Dhanno)',
- (ii) Change of Music Director,
- (iii) Change of writer of song (lyricist),
- (iv) Change of singer for singing 13 lines of the song.

He would urge that the balance of convenience is in favour of his client for maintaining interim injunction passed by the learned Trial Judge in his client's suit as there has been no delay on the part of his client to apply for injunction. Moreover, the balance of convenience is not a criteria in the case of infringement of copyright particularly when cease and desist notice has been given. In support of this portion of the contention he has referred to a number of decisions viz. 23 PTC 22 (paragraphs 19 and 20), 2004 (6) SCC 145 (paragraph 34), 40 PTC 78.

Mr. **Ranjan Bachawat**, learned advocate appearing for the appellant, **Anandji Virji Shah** and others submits that the learned Trial Judge should not have refused the prayer for injunction although the prima facie case on behalf of his client was made out. He submits elaborately the prima facie case of his client in the manner as follows:-

Admittedly, Kalyanji Anandji composed music 'Apni To Jese Tese', as such are authors and first owner of the copyright in the music as under Section 17 of the Act. They would remain owner of the music unless they have assigned it in writing under the provision of Section 19 of the Act. He draws support of this argument, of the judgment of Madras High Court reported in AIR 2009 Mad 149. The ownership cannot be obtained, he contends in case where the music was composed in the course of the author's employment under a contract service under Section 17 (c) of the Act.

He contends that no written document of the assignment or contract of agreement has been produced and no one has alleged that there is any written assignment. Even Mehra have not claimed anywhere that the music was composed by his client under a contract of employment between Kalyanji Anandji and Mehra. The case made out by SAREGAMA claiming copyright over the music is totally absurd as the statements of its plaint are verified as true to knowledge by one Piyush Changia aged 25 years who was not even born at that time when the music was composed. Hence, the suit of SAREGAMA must be dismissed in view of defect of verification while applying the ratio decided in the Supreme Court judgment reported in 2001 (8) SCC 233. Such a statement of claim in the plaint so to say remain unverified and this must be ignored, applying the law laid down by the Supreme Court in this regard in its judgment reported in AIR 1970 SC 652 (11).

The claim of SAREGAMA that Mehra as producer had right to assign and transfer the ownership of music under Section 17 even, has rightly been rejected

as in absence of any written assignment or the contract of employment of the author of music this contention is not tenable. Similar argument was expressly rejected in a decision of this Court reported in AIR 2002 Calcutta 33.

He further submits that it has been held by the Supreme Court in the decisions reported in (1977) 2 SCC 820 that the producer is owner of copyright in the cinematographic film, composer remains the owner of music. In para 21, it was held that while the film producer has the sole right to exercise what is his entitlement under Section 14(1)(c) qua film, but the producer cannot trench on the composer's copyright which he does by performing or producing reproducing the music separately.

Thus composer cannot have any claim when the music is played as a part of the soundtrack in the course of exhibition of the cinematographic film. Mehra cannot have any right in the said song except sound recording and the lyrics and not the music. The copyright in the cinematographic film/sound recording does not affect the separate copyright in any work in respect of which the film or the sound recording is made. Thus, the music composer continues to be the owner of copyright irrespective of copyright of the producer in the film or the sound recording. These are separate copyrights under the Act. The alleged assignment of the copyrights of music of the Kalyanji Anandji under the agreement dated July 18th, 1981 is invalid, void and not binding on Kalyanji and Anandji. Since Mehra was not the owner, he could not have transferred any right in the music and more so, Kalyanji Anandji are not parties or signatories to the agreement. In any event, the agreement only confers upon SAREGAMA right on

the sound recording, it does not confer the right to re-record, synchronize or exploit the song recording or the musical works unlike the case of International Film Distributors relied on by SAREGAMA.

He submits with the support of authority namely, AIR 1998 Madras 284 that there can be no assignment of unknown right or rights which are not in existence as on the date of agreement.

His next contention is that his client has got special right under Section 57 of the Act. The Bern convention to which India is signatory recognizes the moral right of owners of musical works and this convention has got the acknowledgement of Supreme Court in a decision of 2008 (13) SCC 30. It recognizes the monopoly in favour of the author which requires protection from unlawful reproduction by others so as to encourage creativity. It also recognizes the social requirement and public interest to encourage author. In paragraph 118 it has been held that an owner of a copyright indisputably has right akin to right of property. It is also a human right. He submits that in case of violation of authors special right injunction is granted as a matter of course and in support of his argument he relies on decision of Delhi High Court reported in AIR 1987 Delhi 13 and 25 PTC page 56. When SAREGAMA has no right agreement with Nadiadwala or Super Cassettes cannot derive any right under agreement dated 11th February 2010. Hence, strong prima facie case has been made out to obtain order of injunction.

It seems to us at this interlocutory stage presently the suit filed by Seregama and also their interlocutory action have now become redundant. Their

suit being quia timet action on account of groundless threat against Mehras might have been appropriate under Section 60 of the Act, until filing of suit by Mehras. Hence vacating order of injunction on its application by the learned Trial Judge on 29th April 2010 in GA No. 1251 of 2010 has no relevancy except the reasoning for vacating that needs to be considered since in the impugned judgment and order dated 30th April 2010 passed in Mehra's suit reasons for vacating order of injunction have been adopted. Now it has become incumbent upon this Court whether order of injunction granted in Mehra's suit on 30th April 2010 is justified on the facts and circumstances of the case or not, of course at the same time contention of Mr. Bachawat which has been rejected by the learned trial Judge has also to be considered.

The plea of maintainability of the appeal has been taken by Mr. A.K. Mitra, Senior Advocate, as it appears on 30th April 2010, at 2.22 pm it was submitted by SAREGAMA seeking time to comply with the order dated 30th April 2010 passed in Mehra's suit, hence the said judgment and order dated 30th April 2010 has been accepted. We also note the counter submission that time was taken to avoid contempt proceeding, as no appeal could be preferred in view of non-availability of the judgment and order dated 29th April 2010 the reasoning of which was incorporated in to the judgment and order dated 30th April 2010.

We have heard the learned counsel for the parties and we have gone through the materials placed before us. The core issue besides maintainability as above, which are fallen for decision is :

- (i) Whether learned Trial Judge has on the facts and in the circumstances of the case made out by the respective parties was justified in vacating order of injunction granted earlier in favour of SAREGAMA and subsequently passing order of injunction in favour of Mehra against SAREGAMA?

We think to address the core issue as correctly submitted by Mr. Anindya Kumar Mitra answer to first question (i) whether by the agreement dated 18th July 1981 SAREGAMA has acquired copyright of all songs of the film 'Laawaris' particularly 'Apni To Jese Tese', is to be given.

Then second question (ii) whether Kalyanji Anandji had and whether Anandji at present still retain first ownership of copyright in the said music in the song 'Apni To Jese Tese'.

Before we proceed to dilate these aspects on merit we need to deal with the contention of maintainability of the appeal.

We to examine this contention, have checked up the order, dated 30th April 2010 passed at 2.22 p.m. which is the sheet anchor of this preliminary issue. It appears from the tenor of the said order that it was passed without prejudice to the rights and contention of all the parties. It seems to us time was sought for because of non-availability of the copy of the judgment and order dated 29th April 2010 which was basis of passing interim order of injunction dated 30th April 2010 in the forenoon against Saregama, as such no action could

be taken. As correctly submitted by Mr. Chakraborty that right to prefer appeal by Seregama against the said judgment and order has not been abandoned nor making statement before the Court for compliance can be said to be acceptance of the judgment and order. Right of appeal is a statutory one and the same can be assailed even if the order is accepted on the threat of contempt proceedings and this legal position could be found in the judgment of the Supreme Court reported in (1998) 6 SCC 507. The Supreme Court in that case held in spite of the undertaking having been filed to carry out the order of the Court, appeal can be maintained. We therefore, hold that the appeal of Seregama is maintainable and the impugned order dated 30th April 2010 passed at 2.22 p.m. does not stand in the way.

On merit:-

From Clause 3 of the said Agreement it appears to us that Late Prakash Mehra had transferred and/or assigned to the Seregama absolutely and beneficially copyright for making records of all contract works, performing right and all other rights, title and interest in and to the literary, dramatic and musical works embodied in the Producer's Film including all rights of publication, sound and television broadcasting mechanical reproduction of the said works. The definition of contract works had been mentioned in the said agreement itself. The definition of the contract works recorded in the agreement is as follows:

“Contract works” defined in the agreement that it shall mean all works of literary, dramatic or musical nature performed in contract recordings.”

It will appear from Clause 3A(ii) that subject matter of assignment or transfer also include “sole and exclusive right to make or authorized the making of any record embodying the contract recordings either alone or together with any other proceedings”.

As we read without any ambiguity the said clause, we cannot accept the contention of Mr. Mitra that the right given under the said agreement merely confined to sound recording. If the said Clause 3A is read with Clause 8 it will be clearer that by this agreement the entire copy right of the said song in the film “Laawaris” has been transferred and/or assigned. Clause 8 of the said Agreement is as follows:

“The company shall be owner of the original plate within the meaning of Copyright Act, 1957 and any extension or modification thereof of any performance from which any records are manufactured in pursuance of this agreement.’

It would be relevant in this contention to bear in mind where copyright subsists so far musical works is concerned under Section 13 of the said Act. Under Section 13 sub-section (1) (a) and (c) it provides that Copy right subsists in original musical and cinematograph film and sound recordings. Hence the music is impregnated in the film, consequently copyright subsists in this case not only in the music, but cinematograph film also so far the portion of the song and sound recording are concerned. The copyright of music is a bundle of several rights as correctly submitted by Mr. Chakraborty which includes copyright of lyrics, music and then sound-track. It seems to us that Clause 8 of the said

Agreement was not drawn to the attention of the learned Trial Judge. We are of the view that the learned Trial Judge has not correctly interpreted the scope of the said agreement of 1981 as a whole. This agreement came to be placed for consideration before the Court in 1987 for ascertaining of its scope and interpretation. A learned Single Judge of this Court in the judgment reported in AIR 1997 Cal. 63 in paragraph 20 found what we concluded above, of course on the issue agitated before His Lordship.

From the judgment of the Learned Single Judge it appears to us, the subject matter was confined to the issue whether SAREGAMA had exclusive copyright of the soundtrack or not and no other issues namely whether the copyright of the entire song was assigned by the said agreement or not were raised or could possibly be raised in that case.

The act and conduct of the parties namely SAREGAMA and Mehra subsequent to agreement support our finding above. It will appear from records namely the royalty statement that the royalty was received by Mehra for physical and non-physical and synchronization of song as recent as in February 2010, the correctness of the statement is denied and disputed, though, no objection was ever raised till 4th March 2010 regarding the exploitation of the said song. The factum of receipt of such royalty will appear from the letter of Puneet Prakash Mehra dated 4th March, 2010. In the said letter at page 68 of the paper book of SAREGAMA's appeal it appears that Mehra were cognizant of the fact that the said song 'Apni To Jese Tese' has been allowed to be used by

synchronization in a song in the movie HOUSEFULL. From the tenor of the letter it does not appear that said agreement of 1981 has been denied and disputed. Surprisingly, in the copy of the plaint filed in Bombay High Court there was total denial of factum of such agreement and in the Calcutta suit there has been casual statement and averment of existence of the same. Thus, it is plain that the Mehras despite having knowledge of the said agreement 1981 did not make any challenge to the same even in Calcutta suit also. Hence, prima facie conclusion of the learned Trial Judge in the judgment and order of 29th April, 2010 in our opinion is patently erroneous. Therefore, SAREGAMA under the said agreement is entitled to grant licence to any person and as such there is no prima facie case of infringement of copyright either that of author or of composer of the music in the cinematographic film, "Laawaris".

While dealing with the contention of Anandji Virji Shah and others as raised by Mr. Bachawat, we are of the view when the copyright of the entire song has been assigned by Mehras it shall be presumed that music of the song is also assigned lawfully as copyright of the song is bundle of rights which includes lyrics, music. Nobody is disputing that Kalyanji Anandji was the composer of the music of the said song 'Apni To Jese Tese' but it was represented in the said agreement of 1981 entered with the Mehras that said music composer has no right whatsoever and they were engaged for consideration once for all. It is significant to mention that no document has been produced either from the side of said Anandji Virji Shah or the heirs of Kalyanji or from Mehras to show the exact nature of engagement of the duo. It is the special knowledge under Section

106 of the Evidence Act of both the parties to produce prima facie the nature of engagement. Almost long 19 years no-one has disputed and challenged assignment of copyright under 1981 agreement of amongst other of the said song.

The judgment of the Learned Single Judge reported in AIR 2002 Calcutta 33 is not helpful in this case factually to hold that the onus lies upon the subsequent assignee. It depends upon the nature of the engagement of the composer of a music by the producer. The ratio of the decision of the Learned Single Judge is that in view of Section 17 of the Act, the first owner of the copyright of lyrics and musical works shall be the authors unless it is shown that such work was made in course of author's employment under a contract of service or apprenticeship with his employer and there is no agreement relinquishing his Copyright. Significantly Mehra nowhere stated that Kalyanji and Anandji have retained right of first owner of copyright in the pleading. Thus claim and counter claim are confined to pleadings only without any support of document. At this stage, we are to prima facie conclude that there is possibility of engagement being one under contract of service.

The essence of argument of Mr. Bachawat who appears for Anandji -Virji Shah in his client's appeal granted against Seregama, is that the producer cannot trench on composer copyrights which he does by performing or producing or reproducing the music separately under Section 14 (1) (c) of the Act. It seems to us this argument is advanced being inspired by the opinion of Justice Krishna Iyer expressed independently in paragraph 21 of the judgment of case reported in

(1977) 2 SCC 820. Paragraph 21 of the said judgment is not ratio, merely wishes of His Lordship which ought to be taken note of by the legislature. Our conclusion will be clear from first paragraph of the footnote which is set out hereunder:-

“The judgment just delivered is on behalf of the Court, which makes this footnote, in a sense, otiose. But I do append the abbreviated opinion solely to highlight a slightly penumbral area of the law and to voice a need for legislative exploration to protect a category now left in the cold.”

The ratio is to be found in Section 17 of the said judgment which is as follows:

“This takes us to the core of the question, namely, whether producer of a cinematograph film can defeat the right of the composer of music or lyricist by engaging him. The key to the solution of this question lies in provisos (b) and (c) to Section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos viz. Proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film.....”

We do not find any gray area to hold that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in proviso (b) and (c) of Section 17 of the Act.

In our view the aforesaid Section 14 has to be read with Section 17 of the said Act. It is true the composer becomes the first owner of the copy right of the

music but when a composer does any work in course of the employment of contract the employer shall in absence of such contract or agreement providing specific term, becomes the first owner of the copy right thereof. In this judgment the aforesaid provision of Section 17 (c) is explained in the aforesaid paragraph of the said report that the definition of composer copyright is subject to the special provision as mentioned in Section 17 proviso (c).

Hence the aforesaid decisions really helps the case of the Seregama. When there is no evidence of the nature of the engagement of Bachawat's client at present and it has to be found out at the time of the trial of the suit, infringement of the composer's copyright or for obtaining the permission or written assignment from his client at this stage does not and cannot arise.

We are unable to accept the contention of Mr. Bachawat that by the said agreement dated 18th July 1981 the right of re-recording or synchronization of music has not been given. We have already explained the scope and purview of the right given to SAREGAMA and it includes all things in future years to come and even to include modern technological medium or method of recreating the sounds either in its original form or by synchronization. It is true when 1981 agreement was entered into there was no existence of the modern mode namely DVD or satellite television channel.

We think this argument has no force in view of the judgment of Single Judge of Bombay High Court in the case of Maganlal Shivani vs. Khosla Enterprises in suit No. 925/99, and accepted by the Division Bench of Delhi High Court in the case of M/s International Film Distributors -vs- Rishi Raj [FAO(OS)

No. 81/2002] which held on discussion of the fact in that case, legal principle as follows: “A perusal of clause (1) of the agreement shows that the plaintiff has been granted sole exclusive and perpetual copy rights of exploitation distribution and exhibition, commercial as well as non-commercial in respect of the said pictures in 35 mm as well as any redned size or sizes. These rights include the rights of television and all other rights and all other rights attached to such exploitation. The phrase ‘all other rights’ attached to such exploitation cannot be read to mean that the other rights referred only to television right. The clause clearly shows that the plaintiff is the sole exclusive and perpetual copyright holder for exploitation of the films. Ultimately what was assigned to the plaintiff was the right to exploit and exhibit the films through different sizes of the film and by the medium of television. Video cassettes, VCD and DVD are only improved version of exhibiting the film. What was earlier done by the spool containing the film, is now being done by video cassettes and DVDs. Satellite broadcasting can also not be said to be excluded from the television rights which had been granted to the plaintiff. By using the satellite channels the plaintiff is still exhibiting the films on television. In fact the clause clearly indicates that all rights for exploiting the film had been assigned to the plaintiff”.

It is submitted that the said song has been mutilated, hence the composer’s special right as recognized in the said Copy Right Act has been infringed. Indisputably under Section 57 the author has special right and the author shall enforce the right to claim authorship of the work and/or mutilation, modification or other Act in relation to the said works.

The learned Trial Judge after having heard the offending music in the film Housefull found that there has been no mutilation or distortion, as infringement of the author's special right under Section 57 sub-section 1(b) does not and cannot arise. There has been no appeal against the aforesaid order challenging above findings. Hence we are to accept the learned Trial Judge's own evaluation at least at this stage. Under this circumstances protection and enforcement of the author's special right or human right as urged by Mr. Bachawat at this stage does not and cannot arise. The modern jurisprudential approach with regard to ownership of author's copyright in literary and musical works, is recognition of two rights – author's economic right and moral right. Even after lawful transfer of former, the ownership of later remains with author and it is protectable under law against any distortion or mutilation. Reputation and honour of creator/author is like property and human right as enunciated by the Supreme Court in case of Entertainment Network India Ltd. –vs.- Super Cassettes Industries Ltd. reported in (2008) 13 SCC 30 in paragraph 118 accepting Bern Convention for the protection of literary and artistic works and also Article 27 of Universal Declaration of human rights. This protection is recognized to encourage creativity in field of art, literature, music and aesthetic activity. If the author's copyright is distorted, mutilated his honour, respect and reputation are seriously affected. Hence any case of mutilation, distortion is made out protection of the Court by way of injunction is called for, otherwise not.

Mr. Bachawat contends that the plaint of the Seregama filed by a person who is incompetent to verify and as such the plaint has to be ignored. This point

has no relevance and does not require any consideration now, because Seregama filed its suit against a groundless threat held out by Meheras and this suit has become infructuous so to say in view of suit having been filed by Meheras making threat being reality. Now it is the concern of the Seregama to resist the claim of Mehrras. If Mehrras fail to establish their right in their suit obviously the claim and contention of Seregama will automatically be upheld. The aspect of balance of convenience has been dealt with extensively at the time of hearing of the application at the interim stage and we think that the same principle of balance convenience will still be appropriate, as we do not see any changed circumstances. Balance of convenience has become factor and relevant, because we have held prima facie, there has been no infringement, therefore decisions cited by Mr. Mitra in this aspect are not relevant.

It is difficult for us to accept contention of Mr. Mitra that the balance of convenience is not a criteria in the case of infringement of copyright particularly when cease and desist notice has been given. The decision of the learned Single Judge in case of Schening Corporation & others –versus- Kilitch Co (Pharma) Pvt. Ltd. reported in PTC (Suppl) 222 (Bom) DB has dwelt upon the question of delay and acquiescence in the matter of grant of interlocutory relief. It is held in paragraphs 19 and 20 that delay and acquiescence do not matter if infringement of trade mark is firmly established prima facie.

On the contrary in the case of Satyam Infoway Ltd –vs.- Sifynet Solutions (P) Ltd reported in (2004) 6 SCC 145 in paragraph 34 Supreme Court observed

amongst other...”Weighed in the balance of comparative hardship, it is difficult to hold that the respondent would suffer any such loss as the appellant would unless an injunction is granted.....” Therefore Supreme Court did not brush aside the question of balance of convenience. The learned Single Judge of the Bombay High Court in case of Ram Sampath v. Rajesh Roshan & others reported in 2009 (40) PTC 78 in paragraph 19 considered the question of balance of convenience.

Non-payment of royalty as urged by Mr. Mitra in this matter is not at all germane. The core issue is whether there has been assignment of the copyright of the song “*Apni To Jese Tese*” in the film *Laawaris* in favour of SAREGAMA. Lastly in view of above findings, we hold that Seregama has lawful right under the said agreement to grant license to use the said song either by reproduction in its entirety or by synchronization. Consequently the claim and contention Eros prima facie is found to be valid as we see that there was a written document granting license and this is permissible under the law.

In view of the aforesaid discussion the order of injunction passed by the learned Trial Judge stand set aside, however, with the same condition as stipulated in the earlier order of Division Bench dated 13th May, 2010. Accordingly the bank guarantee furnished in favour of Mehras as well as Anandji-Virji Shah shall be kept alive until further order that might be passed by the learned Trial Judge. The aforesaid bank guarantees need to be kept as

equitable measure to secure future payment of Royalty. In addition thereto Appellants, Saregama, Eros International, Nadiadwala Grandson Entertainment Ltd. are to furnish monthly statement of their respective receipts on account of the said film in sealed cover with the Registrar, Original Side.

Accordingly appeal filed by Saregama, Eros and Nadiadwala are allowed to the extent as above and, the appeal filed by Anandji – Virji Shah is disposed of by the aforesaid order of furnishing security.

We make it clear that the aforesaid findings and observation are absolutely prima facie and it will not be binding upon the learned Trial Judge at any stage.

There will be no order as to costs.

(K. J. Sengupta, J.)

I agree.

(Kanchan Chakraborty, J.)

