



IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEB COPY

RESERVED ON : 03.03.2023

PRONOUNCED ON : 27.04.2023

CORAM

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

C.M.A.Nos.3293, 3382 to 3385, 3387 to 3390 and 3490 to 3502 of 2010

and

Rev.A.Nos.8 to 11 of 2011

and

M.PNos.1 of 2010, 1 to 21 of 2010, 2 to 21 of 2010, 3 of 2010,

C.M.P.Nos.22002 and 22005 of 2018

C.M.A.No.3293 of 2010:-

M/s.Phonographic Performance Limited

through its Authorized representative, M.Rajesh Rajan,

Mumbai-400 053.

... Appellant

vs.

M/s.Entertainment Network (India) Limited,

Chennai-18.

... Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 72(2) of the Copyright Act, 1957, to set aside the impugned order, dated 25.08.2010 made in Case Nos.3-4 2008 CRB(NZ) passed by the learned Copyright Board of New Delhi.



WEB COPY



For Appellant :Mr.Vijay Narayan
Senior Counsel
assisted by Mr.Adithya Reddy
for Mr.Su.Srinivasan
For Respondent :Mr.G.Masilamani
Senior Counsel for M/s.King of Partridge

COMMON JUDGMENT

Background Details:-

All the Civil Miscellaneous Appeals have been filed taking advantage of Section 72(2) of the Copyright Act, 1957, as the provision then was, against the order, dated 25.08.2010 of the Copyright Board.

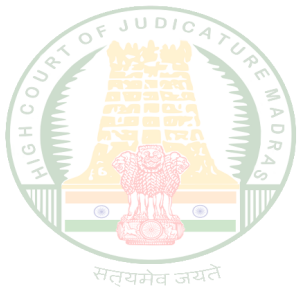
2.Section 72 of the Copyright Act, 1957, was as follows:

“72. Appeals against orders of Registrar of Copyrights and Copyright Board -

(1) Any person aggrieved by any final decision or order of the Registrar of Copyrights may, within three months from the date of the order or decision, appeal to the Copyright Board.

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal under sub section (1), may, within three months from the date of such decision or order, appeal to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain.

Provided that no such appeal shall lie against a decision of the Copyright Board under Section 6.



WEB COPY



(3) In calculating the period of three months provided for an appeal under this section, the time taken in granting a certified copy of the order or record of the decision appealed against shall be excluded.”

(Emphasis supplied)

3.The appellants were the respondents before the Copyright Board.

The appellants are Music Companies, who were engaged in the production and acquisition of rights in sound recordings. They had copyright over a series of cinematographic films and sound recordings.

4.The respondents are private F.M. Radio Broadcasting Companies. They held licenses for running F.M. Radio Stations in various cities across the country.

5.Disputes and differences arose between the two parties relating to the playing of songs over which copyrights vested with the appellants herein.

6.Complaining that the appellants did not voluntarily grant licence



in the rights held by them over the sound recordings, the respondents had filed applications under Section 31(1)(b) of the Copyright Act, 1957, before the Copyright Board seeking intervention to adjudicate the dispute between the two parties.

7. Section 31(1)(b) of the Copy Right Act, 1957, is as follows:

“31. Compulsory license in works withheld from public-

(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work-

(a).....

(b) has refused to allow communication to the public by broadcast of such work or in the case of a sound recording the work recorded in such sound recording on terms which the complainant considers reasonable,

the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deemed necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a license to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine, and thereupon the Registrar of Copyrights shall grant the license to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

Explanation *In this sub section, the expression "Indian work" includes-*



WEB COPY



- (i) *an artistic work, the author of which is a citizen of India; and*
(ii) *a cinematograph film or a sound recording made or manufactured in India.”*

[Emphasis supplied]

8.Applications were first filed on or about 19.11.2002 for grant of compulsory license. The Copyright Board by a judgment and order, dated 19.11.2002 fixed the standard rate of

(a)Payment to be made at Rs.1200/ needle hour during prime time.

(b)For 12 normal hours = 60% of standard rate

(b)For 8 lean (night) hours = 25% of standard rate and respondent also directed to furnish a security/bank guarantee of Rs.20,00,000/- per radio station to PPL.

9.The Copyright Board also held that the aforementioned standard rate shall be in effect for a period of two years and that it would be re-considered some time in September-October 2004.

10.Both the appellants and the respondents filed appeals before the Bombay High Court. The Bombay High Court by a common judgment and order, dated 13.04.2004, in a few of the appeals, remitted the matter



back to the Copyright Board for re-consideration and fixation of license fees.

WEB COPY

11.The respondents then filed a second application before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, on or about 28.01.2003. They sought that compulsory license must be given on terms and conditions, which were considered just and equitable by the Copyright Board.

12.Arguments were advanced and an order was passed granting compulsory license.

13.The respondents herein filed further appeals before the Bombay High Court questioning the rate of compensation. This appeal and the earlier appeals filed questioning the order, dated 19.11.2002 were examined by the Bombay High Court and the Bombay High Court remitted the matter back again to the Copyright Board for fresh disposal.



WEB COPY

14. Appeals had also been filed before the Delhi High Court and the Delhi High Court had however, held that grant of compulsory licence was not permissible.

15. The judgments of the Bombay and the Delhi High Courts were taken in further appeal before the Supreme Court. By judgment reported in *(2008) 13 SCC 30*, in *M/s. Entertainment Network (India) Limited and others vs Super Cassettes Industries Limited and other*, the Supreme Court set aside the order of the Copyright Board and remitted the matters back for fresh consideration by the Copyright Board and permitted examination of witnesses on either side.

16. The Copyright Board then took up the matter again and passed an order on 25.08.2010, which is impugned in these appeals.

17. In the order of the Copyright Board, it had been stated that the



WEB COPY

order shall bind not only the applicants and the respondents before the said Board, but to “all Music Providers”. This had led the applicants before the Copyright Board, namely, the respondents herein, to issue communications not only to the respondents in the Copyright Board, but also to the other appellants before this Court, namely, SIMCA, though they were not parties before the Copyright Board. Claiming that the order binding them was violative of principles of natural justice, further appeals had been filed.

18.The primary contention of the said appellants, particularly, SIMCA, was that they had independent agreements for grant of license with the Radio Stations and that the said agreements would be binding and the order of the Copyright Board was not binding on them.

19.In the appeals filed by them, an interim stay was granted and later, a learned Single Judge had refused to extend the interim stay. Complaining of such refusal, Review Applications were also filed.



WEB COPY

20.As can be culled out from the aforementioned averments, the controversy between the appellants on the one hand and the respondents on the other hand were with respect to the compensation determined by the Copyright Board. The appellants have complained that the compensation was extremely prejudicial to their interest but the respondents contended that it was just and equitable.

21.Before proceeding further, it would only be appropriate that the compensation as granted by the Copyright Board is set out as this Court will have to adjudicate whether such determination of compensation should be upheld or set aside or modified/varied.

22.In this connection, it would be appropriate to set out the guidelines provided under Order XLI Rule 31 of CPC and Order XLI Rule 33 of CPC.



WEB COPY

23. Order XLI Rule 31 of CPC reads as follows:

"Contents, date and signature of judgment. - The judgment of the Appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

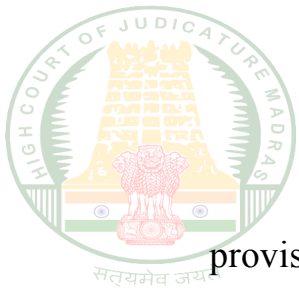
(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

24. Order XLI Rule 33 of CPC reads as follows:

"33. Power of court of appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:"

25. Even though the appeals are termed as Civil Miscellaneous Appeal, they are so termed only because they are appeals from the Copyright Board and not against a judgment of a Court. The same



provisions relating to Appeal Suits, as given under Order XLI CPC will also apply to the appeals on hand.

WEB COPY

26. So far as the Review Applications are concerned, again the principles under Order XLVII Rule I CPC will have to be kept in mind, which reads as follows:

“Application for review of judgment

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

27. The compensation, as determined by the Copyright Board and the reasons for the same, both of which have to be re-examined in the light of the above provisions, were as follows:

“30.26 In matter of determining the specific rate as percentage of revenue, we have been persuaded by various factors.



WEB COPY



Capacity of the licencees to pay and the financial health of the prospective licensors are at the first instance most important factors to be kept in view. It is true that FM radio industry is in a very bad state of financial health. Except one unit, that is, ENIL which has screeched through from a loss making unit to a profit making unit over last two financial years, rest are all loss making all through since their beginning and many are on the road to go, or have gone, out of business. Their survival and growth is very much essential for nation building as the Government policy expects them to handle a priority area, that is, spreading literacy. Music providers, including the respondent herein, are in a very good financial state enjoying a robust compound annual growth rate (CAGR). Future prospects of the music providers are very much assuring as evidenced from inputs brought before the Board from various sources, more so, because of their increasing sales of advanced technology driven gadgets. We cannot lose sight of a news reported in the Hindu dated 19th August, 2010 from the sources of a global consultancy firm Pricewaterhouse Coopers to the effect that "...mobile subscriber base in India would cross the 100 crore mark by 2014 while there will be over 10 crores 3G broadband subscribers by 2015....Indian telecom market has been growing at a compound annual growth rate of approximately 30 per cent since 1995 and growing strong.". Music providers are one of the great beneficiaries of this economic development. FM radio industry, being in bad state of health, cannot be allowed to die in harness. It has been saddled with a welfare programme of the Government - spreading literacy and other social activist roles for the vulnerable segments of the society. Had it been a free lancer at the policy plank of the Government, it would have looked for newer vistas for increasing its revenue. Furthermore, we cannot also lose sight of revenue as a percentage being given in other jurisdictions throughout the world in both developed and developing societies. In view of that we are suggesting a very modest rate of 2% across the board over the net advertisement revenue. Linkage with advertisement revenue is easy to administer and has been preferred in other jurisdictions. Though Government under second phase of licensing policy has gone for a percentage of gross revenue, we have preferred linkage with advertisement revenue over gross revenue as it is truly reflective of response of the listeners. Again, if there be any other sources of the broadcaster, those will not be included and only the revenues arising out of advertisements will be taken for the purpose. We have preferred net revenue over gross revenue as it is truly reflective of the net receipt in the kitty of the



WEB COPY



broadcaster.

30.27 Accordingly, in exercise of powers conferred under Section 31(1)(b) of the Copyright Act, 1957, the Copyright Board hereby **directs** the Registrar of Copyrights to **grant to the complainants separate licences for communicating the work recorded in sound recordings in the repertoire, present and future, of the respondent to the public by broadcast on revenue sharing basis subject to the following terms and conditions:**

(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;

(h) The validity of the licence granted by the Registrar of Copyright shall come to end on 30th September, 2020."

[Emphasis supplied]

Arguments :-

28.Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of the appellants in C.M.A.Nos.3293 of 2010, 3382-3385 of 2010, 3387-3390 of 2010 and 3495-33502 of 2010, led the arguments on behalf of the appellants.



WEB COPY

29. The learned Senior Counsel first took the Court through the provisions of Copyright Act, 1957 and drew a distinction between Section 30 and Section 31 of the Copyright Act, 1957 and referred to the definitions and the relevant provisions. He then took the Court through the scope of an appeal filed under Section 72(2) of the said Act. He also took the Court through the order of the Copyright Board and pointed out the grounds of challenge to the same. He then took the Court through the evidence of the witnesses particularly, the cross examination and argued very emphatically that the compensation as determined by the Copyright Board requires to be interfered with by this Court.

30. The learned Senior Counsel pointed out the definition of a “work” as defined under Section 2(y) of Copyright Act, 1957. A “work” would also mean under sub clause (iii), “a sound recording”. He then took the Court through the definition of “sound recording” under Section 2(xx), which provided it is a recording of sound irrespective of the medium by which the sounds are produced.



WEB COPY

31.The learned Senior Counsel then stated that in a production of sound recording of a movie song or a film song, which according to the learned Senior Counsel, is a very, very important component in every movie and also attracts the movie to the audience, there must be a Lyricist, who writes down the verses of the song, there must also be a Composer, who puts those verses in the form of music and then there must be a Singer, who sings the words in accordance with composition of music and there are also the Performers, who play the background musical instruments. A combination all these experts, who put in their efforts to produce just one song, which runs for about four or five minutes remains in memory for ages and ages.

32.The learned Senior Counsel stated that the words when first written down and then composed in the form of music and then sung melodiously with instrumental background and when recorded becomes a “*Sound Recording*”, as defined under Section 2(xx) of the Act. This sound recording is a “*work*” as defined under Section 2(y)(iii) of the Act.



WEB COPY

33.The learned Senior Counsel then pointed out Section 13 of the Act, which deals with works in which a copyright subsists and specifically pointed out Section 13(1)(c), which includes a sound recording. Thus when a song consisting of words, composed in music form and sung by a singer with instrumental background is recorded in any form whatsoever, it becomes a sound recording and becomes a work under the Act.

34.The learned Senior Counsel then pointed out Section 14 of the Act, which explains the meaning of copyright. Section 14(e) relates to sound recording and sub clause (iii) states that if there is a copyright, then such copyright right enables the communication of the sound recording to the public. In this manner, the concept of a sound recording and its possibility of being communicated to the general public was pointed out by the learned Senior Counsel.

35.Mr.Vijay Narayan, learned Senior Counsel then pointed out Section 17 of the Act, which deals with the owner or rather the first



WEB COPY

owner of the copyright. He pointed out Section 17(c), wherein, it is stated that if a work is made in the course of employment under a contract of service, then, the employer shall be the first owner of the copyright. This fact was explained by stating that when a movie or a film is produced by a Producer, he enters into a contract with a Director to direct the movie. The Director then, of-course with the consent of the Producer, determines the actors. Since songs are an important component of every movie, the Director also determines a Lyricist, who writes down a song in accordance with the fact situation in the movie. He then determines a Composer, who puts these words in the form of music and then he determines the singers both male and female, who would sing these words and the performers, who would actually perform them on the musical instruments. All of them, starting from the Director downwards enter into a contract of service with the Producer, who pays them for the efforts put in producing a work/a sound recording/a song in a movie. Thus under Section 17(c) of the Act, the Employer/Producer becomes the first owner of the copyright of that sound recording, as there is a contract of service.



WEB COPY

36.The learned Senior Counsel then took the Court to Section 18 of the Act, which relates to assignment of copyright. By this provision, the owner of a copyright, let us take the Producer, can assign the copyright of a sound recording/movie song either wholly or partially to be played as an audio recording in Radio Stations; he can assign it for being played both in audio and video in Television; He can even assign the words therein to be exhibited in the print media. All these options are available to the owner of a copyright. The learned Senior Counsel pointed that there was a time when the lyrics of the songs of a movie were reduced in the form of small booklets and distributed to the general public for a price.

37.It must be kept in mind that to conceptualise the issue in these particular appeals, we must take ourselves back to the period between 2002 and 2010.



WEB COPY

38. Under Section 18(2) of the Act, when there is an assignment, then the assignee will be treated as the owner of the copyright. There is also a provision under Section 18 of the Act that a future work can also be assigned. In this connection, the learned Senior Counsel pointed out that when a project of a movie is announced and the names of the Director, the Lyricist, the Music Director and the Actors are announced, then the songs which are advertised can be assigned even prior to the release of the movie. They have a value, even at the embryo stage, but would take effect only when the sound recording is actually made and the song is communicated to the public.

39. The learned Senior Counsel then stated that this assignment, namely, the right of the assignee to communicate the work to the public is reduced in the form of an agreement. Naturally, there is consideration paid to the first owner of the copyright by the assignee. He then pointed out the concept of such consideration, namely,

(a) by way of needle hour, namely, a particular rate for playing a particular song for one hour. It is to be kept in mind that a song is only



WEB COPY

for five minutes. Therefore, on various dates, when it is communicated to the public by Radio Companies like the respondents herein and the playing time touches one hour, then for that one hour, which is called a needle hour, a particular rate is fixed.

(b)The other concept is giving a percentage of the advertisement earned by the Radio Companies at the time when the songs are played. If a song is really popular, then there will be a clamour for advertisements to be played either before or some time even during or some time immediately after that particular song. The revenue earned through such advertisement has to be consolidated by the Radio Companies and a percentage of the net revenue will have to be paid to the first owner of the copyright.

40.The learned Senior Counsel then took the Court through Section 30 of the Act. Section 30 of the Act provides that an owner of a copyright in any existing work or an owner of a future work may grant interest in that right in the form a licence by writing. This licence to play the songs is also granted to Radio Companies, like, the respondents

20/158



herein.

WEB COPY



41. There may be occasions, when the first owner of a copyright may refuse to grant such licence. A movie would have been released. A particular song would have become extremely popular, may be because of the lyrics or may be because of the excellent composition and melodious manner in which it had been sung or even may be because of the background music or instruments played. The general public would expect a right that the song is communicated to them under various modes either through Radio Stations or through the Television or the lyrics being in the form of a small booklet. But, when the first owner of the copyright refuses to grant such licence and the reasons for such refusal are found to be unreasonable and a complaint is made in this regard, then the Copyright Board, after giving notice to the owner of the copyright, who could be the first owner or the assignor, as provided under Section 18 of the Act, and after granting a reasonable opportunity of being heard and holding such enquiry, as it deems to be necessary and after coming to a satisfaction that the grounds for such refusal are not

21/158



WEB COPY

reasonable, may direct the Registrar of Copyrights to grant licence to the complainant, in this case the Radio Companies/respondents, to broadcast the sound recording/songs and determine the compensation to be paid to the owner of the copyright or the assignor of the copyright. Thus, the primary aim is to ensure that the sound recordings are communicated to the public.

42. The old *dog in the manger* attitude of neither communicating the sound recording/song to be public nor granting licence to radio companies to do so is found fault and one of the objects of the Act is to ensure that a good song is heard by everybody in some medium, in this case, through the medium of the respondents/Radio Companies. The learned Senior Counsel then pointed out that Section 31 of the Act would come into play only when the owner of a copyright unreasonably withheld broadcast of a sound recording over which he has a right, since the public also have an equal right to hear the same. This balance is exercised by grant of compulsory licence by order of the Copyright Board.

22/158



WEB COPY

43. In this connection, Article 300(A) of the Constitution was also referred to by the learned Senior Counsel. Article 300(A) of Constitution provides that no person shall be deprived of his property except, by authority of law, which would also include only in accordance with the procedure established by law. In this case, the right to hold on to the copyright by the owner/assignor can be interfered with and compulsory license granted to a Radio Company by authority of the law, namely, Section 31 of the Copyright Act, 1957, and only under the procedure established by law, namely, by granting opportunity of being heard, an enquiry being conducted and finding that the withholding of the right was unreasonable and then granting compulsory licence on payment of fees or compensation.

44. These aspects are the crux of these appeals.

45. The central aspect is about the payment of fees.



WEB COPY

46. It must be kept in mind that a song in a movie which is withheld from being communicated by the owner of a copyright, just remains as a song. If the owner voluntarily grants licence, then he must enter into an agreement with the licensee. But if he does not so grant licence and if it is found that the reasons for not granting licence are unreasonable, then the Copyright Board can step in to examine the circumstances and direct grant of licence and determine the fees payable for such grant of license.

47. The learned Senior Counsel then pointed out Section 33 of the Act, which is about the registration of a Copyright Society. At the time when the appeals were filed, the appellants were a Copyright Society. The Central Government may register an Association of persons having regard to their interest and these persons can include the Authors and other owners of copyrights, as a Copyright Society under Section 33(3) of the Act. This society must be registered.



WEB COPY

48. The learned Senior Counsel then stated that a song in any movie is permanent. However, this song can be exploited numerous number of times in a day, in a week, in a month and for years together. The more that song is played in Radio Stations, the more revenue is generated. This is unlike a painting, which is exhibited in a museum. It is a static work of art. He also pointed out that there were numerous FM Radio Stations that play music 24 hours across the range for which they have been granted license and every time the song is played independently, they earn revenue and therefore, pointed out that the compensation payable for such playing of the song should be in terms of the actual needle hour, for which the songs had been played and that rate per needle hour should be determined by the Copyright Board. It would depend on the value of the song and its general acceptance by the public and the demand by the public for which it replayed again and again. This could be on the basis of the lyrics. This could be on the manner in which the song was sung. This could also be on the basis of the background instrumental music.



WEB COPY

49. The learned Senior Counsel then pointed out the present appeals, which have been filed under Section 72(2) of the Act questioning the compensation determined by the Copyright Board. He stated that these appeals should be considered as a regular first appeal and the provisions of order XLI CPC should come into play. This would necessitate the Court to examine the facts and the law applicable to the facts and whether the facts have been properly appreciated. In this connection, he pointed out the definition of “*error or law*” of ***Halsbury's Laws of England***, wherein, it was stated that it was a *finding unsupported by evidence*. Therefore, he urged that this Court should examine the principles adopted by the Copyright Board while determining the compensation and if those principles are found unreasonable, then this Court should set aside the same.

50. The learned Senior Counsel stated that if compensation is determined on the basis of net advertisement revenue earned, then there is always a possibility of window dressing of accounts and audit.



WEB COPY

51.He specifically pointed out the respondent, M/s.Entertainment Network India Limited which is a conglomerate, having business interests in the print media by way of publishing newspapers, by having a Television Station, by having FM Radio Stations and also other business interests. The learned Senior Counsel stated that there is always a possibility that when a prospective advertiser of a product, say a motor vehicle, approaches the respondent/M/s.Entertainment Network India Limited for advertising their product, then a bargain could be established by the respondent by stating that if the motor vehicle is advertised in the front page of their newspaper, then a concession would be granted for the advertisement rates to be paid, when the motor vehicle is advertised in their Radio Station. If that concession is granted, then the declaration of revenue earned through that particular advertisement by the Radio Station would naturally reflect a lower figure and since a percentage of the same alone is to be paid to the appellant, the revenue for the appellant would also proportionately reduce. Practically every advertiser would like to advertise their product not only in the print media but also in television and also in Radio Stations. There would naturally be an



WEB COPY

adjustment of the cost and that adjustment could be reflected in the rate for advertisement by the Radio Station, which would project a lower figure. The appellants therefore would directly suffer.

52.The learned Senior Counsel was extremely insistent on his assertion that this is a real possibility and therefore stated that the appellants should not be put to disadvantage by the business manipulations of the respondents vis-a-vis, prospective advertisers, who are numerous. He thus stated that the appellants are directly affected by the methodology of payment of royalty suggested by the Copyright Board.

53.To further emphasise this particular point, the learned Senior Counsel pointed out that the respondents had not produced their accounts before the Copyright Board. There was no transparency on this issue. He therefore urged that there was suppression of income earned through advertisement in the Radio Stations and this directly affected the income generated by the appellants herein. He pointed that under the per needle

28/158



hour concept, a minimum amount was definitely guaranteed to be paid.

WEB COPY

But if the respondents were to show nil return on advertisement earned, there would not be a minimum amount guaranteed to be paid.

54. The learned Senior Counsel then took the Court through the guidelines issued by the Supreme Court while remanding the matter back to the Copyright Board. He stated that originally the Copyright Board by a judgment and order, dated 19.11.2002, had fixed the standard rate of payment to be made at Rs.1200/- per needle hour during the prime time. It was also determined that for 12 normal hours, the payment should be 60% of the standard rate and for the lean (night) eight hours, it should be 25% of the standard rate. Questioning this particular determination, nine appeals were filed before the Bombay High Court. By a common judgment, in few of the appeals dated 13.04.2004, the Bombay High Court remitted the matter back to the Copyright Board for reconsideration and for fixation of licence fees. Thereafter, independently, M/s. Entertainment Network India Limited filed an application before the Copyright Board in New Delhi on 28.01.2003



WEB COPY

seeking grant of compulsory licence against M/s.Super Cassette Industries Limited on terms considered just and equitable. An order was passed by the Copyright Board declining permission to adduce oral evidence, but compulsory licence was granted by an order, dated 20.10.2003. Questioning the rate of compensation alone, an appeal was filed before the Bombay High Court. This appeal was tagged with the existing other appeals by the Bombay High Court. There were further appeals filed before the Delhi High Court. The matter was remanded back to the Copyright Board. Questioning the judgments of the Bombay High Court and the Delhi High Court, appeals were filed before the Supreme Court. All these appeals were taken into consideration and a judgment was passed on 16.05.2008 in *M/s.Entertainment Network India Limited vs Super Cassettes and others* in *Civil Appeal Nos.5114, 5178-5180, 5180, 5182 and 5183 of 2005*, reported in *2008 (13) SCC 30*,

55.In the paragraph 103 of the said judgment, it was held as follows:

“PRINCIPLES OF VALUATION

30/158



WEB COPY



103. We have, moreover, been called upon to lay down the principles of evaluation. We decline to do so. We have been taken through various judgments of different jurisdictions. We have noticed hereinbefore that the scheme therein is different. The Tribunal exercises a limited jurisdiction in India. Different cases are required to be considered on its own merits. What would be reasonable for one may not be held to be reasonable for the other. The principles can be determined in a given situation. The Bombay High Court has remitted the matter back to the Board for the said purpose. We endorse the views of the Bombay High Court.”

56. In paragraph 106, it had been held as follows:

“106. However, we do not approve the manner in which the Board has dealt with the matter. It has refused to examine the witnesses. It took up the matter on a day for hearing which was fixed for production of witnesses. We, therefore, are of the opinion that the order of the Board should be set aside and the matter be remitted to the Board again for the consideration of the matter afresh on merit.”

57. It is thus seen that the Supreme Court had placed an obligation on the Copyright Board to permit examination of witnesses and to analyse the statements of the witnesses and then come to a just and equitable conclusion.

58. In this connection, it would be worthwhile to examine Section 12(7) of the Act, which reads as follows:

31/158



Section 12. Powers and procedure of Copyright Board.—

WEB COPY

.....

(7)The Copyright Board shall be deemed to be a Civil Court for the purposes of [sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)] and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860)."

59.The learned Senior Counsel then pointed out that the Copyright Board should have examined the issues on the basis of materials on record. It should have taken into consideration that best judgment assessment is not possible. A private FM Radio Station cannot be equated with All India Radio. There was an obligation to balance the interests of both the parties keeping in mind the salient guideline under Article 300A of Constitution relating to right to property. The Copyright Board should have examined claim of the the Radio Stations independently in accordance with the playing of songs in metro cities, the time slots in which the songs are played and also the category of songs.

60.The learned Senior Counsel then pointed out the reasons given



WEB COPY

by the Copyright Board in the impugned judgment. The Copyright Board had stated that the privatisation of Radio had started in 1995 and private sector involvement in FM Radio Broadcasting was launched by the Government in the year 1999 to open up broadcasting for entertainment, education and information dissemination by commercial broadcasters and to make available quality programmes with localised flavour to encourage new talent and generate employment and to supplement the services of All India Radio and to promote expansion of broadcast network in the country. Thereafter, a technological shift from Medium Wave (MV) to Frequency Modulation (FM) Radio broadcasting was introduced. In March 2000, private sector broadcasters were invited for FM Band (87.5-108 MHz). The private broadcasters were given their own frequency to launch their channels. A total of 108 frequencies were made available in 40 cities. Large towns had 8 or 9 frequencies while small towns had one or two. There was a bidding process and licence fees were fixed. A reserve price was determined. When there were as many interested bidders left, as there were frequencies in that city, then bidding was stopped and successful bidders were allotted frequencies.

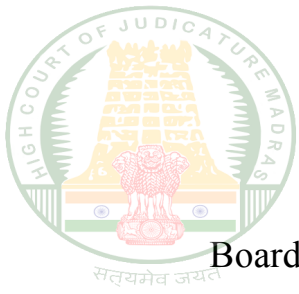


WEB COPY

61. In the order, it was further stated that the licensing policy was designed in such a manner that it was not possible for broadcasters to make any profit. It was therefore, stated that the private radio business was unviable from the very beginning. Thereafter, the Government had enhanced the FM coverage from 30% of the population to 60% of the population by the 10th Five Year Plan. Private participation was encouraged. North Eastern States were also opened for FM stations. FM Radio was to be used to spread literacy. In the impugned order, the appointment of a Radio Broadcast Policy Committee was examined.

62. All these aspects were highlighted by the learned Senior Counsel, who then stated that the Copyright Board had then diverted itself to examine what was called *social impact* of the FM Radio broadcast sector. It was stated by the Copyright Board that FM Radio Station had a social obligation towards nation building. These reasons were criticized by Mr. Vijay Narayan, who stated that they were beyond the available evidence on record. It was also stated by the Copyright

34/158



WEB COPY

Board that FM Radio Stations were vehicles for social upliftment and education. This point was also criticized by Mr.Vijay Narayan. The comparison with All India Radio by the Copyright Board was also charged as being an unequal comparison. The contention of the appellants herein that they had to spend more and more money for acquiring licence or assignment was rejected without any acceptable reasons.

63.The Copyright Board had stated as follows:

“30.14.....

Respondent's lamenting about certain high cost acquisitions recently made by its members does not hold water for the reason that those are small accretions to millions of the old kitty with these members many of which may be 50 years old.”

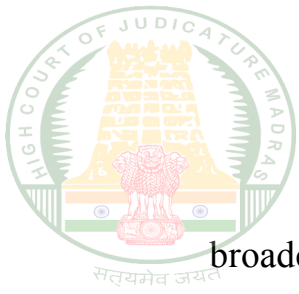
64.This statement was pointed out by Mr.Vijay Narayan, who expressed wonderment as to how the Copyright Board could have simply rejected the stand of the appellants. The above reasoning according to the learned Senior Counsel was bereft of fundamental logic.



WEB COPY

65. Again, the further statement that the FM Radio Stations were involved in social welfare was also criticised. The learned Senior Counsel therefore stated that right from the beginning, the Copyright Board was prejudiced against the appellants herein, who, after all, were the source providers for the song recordings broadcasted by the Radio Stations. They had primarily acquired these sound recordings/music/film music from the first owner or the assignee but were then relegated to the background by the Copyright Board. Their interests were simply not considered by the Copyright Board, which was concerned only about the growth of the Radio Stations. The statement by the Copyright Board that it must ensure that the Radio Stations survive was also criticized by the learned Senior Counsel.

66. The learned Senior Counsel pointed out that the Radio Stations survived not because of advertisement revenue, but because of the content of the songs which they broadcasted to the general public. Advertisement followed those songs. Advertisers advertised their product only because of the quality of the songs, which were



WEB COPY

broadcasted. The rights in those songs had been acquired by the appellants herein. The focus of the Copyright Board should have been on those songs and the value of those songs and the Copyright Board according to the learned Senior Counsel had misdirected itself by lamenting on the licence fee paid by the Radio Stations and the operating costs involved. Revenue was dependent only on the songs for which the appellants had copyright and existing licences. The Radio Stations cannot generate any income, if the songs were not made available for them to broadcast. The issue of social obligation and upliftment of society is a fundamental duty of every citizen and every corporation in this country and that cannot be a reason to give the Radio Stations preferential treatment by the Copyright Board.

67.The learned Senior Counsel criticised the reasons given by the Copyright Board, which in his opinion, were extremely biased in favour of the Radio Stations.

68.The fact that there was a reduction in the sale of cassettes had



WEB COPY

been completely overlooked by the Copyright Board. It is a fact, that if a song can be heard via Radio, then a cassette containing that song would not be purchased at all. Therefore, again the reasons given by the Copyright Board were attacked in all force by the learned Senior Counsel.

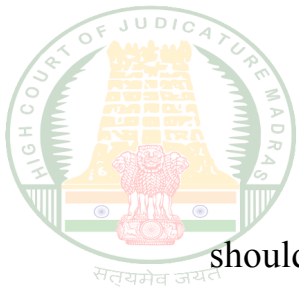
69. He was stated that though an alternative plan of tariff had been presented by the appellants, they were rejected. The Copyright Board rejected the alternate plan, holding it were against the basic philosophy of the Government's plans for infrastructure development. The learned Senior Counsel stated that these considerations went beyond the scope of the determination of the rates by the Copyright Board, which should have evaluated the stand of two contesting parties, namely, the applicants/respondents herein and the respondents/appellants herein. It should have not have entered into a harangue about social welfare and social upliftment, which is a basic duty to be performed and no credit should be attached for being part of that particular movement.



WEB COPY

70. The rejection of the needle per hour rate was criticised by the learned Senior Counsel. The statement that the central heartland of the country are inhabited by private societies, rich in mineral wealth and bio diversity and in traditional knowledge of art, folks, songs and dances were reasons, which according to the learned Senior Counsel should never have entered into any discussion by any judicial forum.

71. The learned Senior Counsel stated that the Copyright Board had completely misdirected itself in determining the compensation to be paid. He stated that the entire reasoning in paragraph 30 and its sub paragraphs amounted to more like a propaganda mission rather than a judicial analysis of the issues. The rejection of the needle per hour by stating that *“it is riddled with its own complexities of operational nature in a heterogeneous society like India,”* was also criticized by stating that the statement conveyed no meaning at all. It was stated that such sentences should never appear in judicial pronouncements as they have no basis, have no meaning and convey nothing. The learned Senior Counsel pointed out all these aspects and stated that judgment under appeal



should be interfered with by this Court.

WEB COPY

72. The statement at paragraph 30.24, “Needle per hour”, as a concept, looks at the music as a bare deal in the nature of selling of goods by the licensor to the licensee.....” was also criticized and the learned Senior Counsel who wondered as to what actually a *bare deal* meant and what that concept indicated. The further reasoning that the survival of Radio Stations is necessary for nation building was also criticised by the learned Senior Counsel. Finally, the application of the compensation for future acquisitions at the same rate of 2% of net advertising revenue and the further direction that the order applied even to those who were not before the Copyright Board and who were not at all heard by the Copyright Board, were criticised as being *mala fide* directions. It was very specifically stated that the evidence on record had not been properly appreciated. The learned Senior Counsel also pointed out the nature of expenses incurred by the Radio Station as salary and other perquisites and pointed out that substantial expenditures incurred by the respondents were deducted from the advertisement income earned



WEB COPY

and only from the reminder was 2% paid. He also stated that a minimum floor rate should have been fixed, which concept had been recognised even by the *Berne* and *Rome Conventions*. The owner of the copyright should get an equitable compensation.

73.A further affidavit was filed on 03.01.2016, indicating the necessity to maintain the appeals. It was pointed out that there was an attempt to suppress accounts by the respondents. It was repeatedly stated that the advertisement rates were riddled with falsity and if a Radio Station fails, it would only be because of mismanagement by incurring expenditure for overheads, salary and perquisites and certainly not because of the quality of the songs which were broadcasted. Quality remains permanent and that it is a fact, which has to be recognised and should have been understood by the Copyright Board. The variables were only the advertisement rates. For that quality of the songs, advertisers swarmed and this necessitated that particular song to be replayed again and again and it was therefore emphasized that since there is manipulation of accounts of the earnings through advertisement, the



WEB COPY

compensation determined should be only on the hours for which the song was played or at the rate of needle per hour. This would guarantee a minimum amount to be paid to the appellants and over and above that, the net advertisement rate can be fixed but merely determining the compensation payable on a percentage of the net advertisement revenue indicated that even the minimum compensation would be breached. The learned Senior Counsel stated that it is a fact which has to be understood.

74. The learned Senior Counsel therefore stated that in exercise of the powers of any Appellate Court, this Court should interfere with the findings and re-examine the evidence and examine whether the findings were based on evidence or on the personal perception of the members of the Copyright Board and if they were based on the personal perceptions of the members of the Copyright Board, then the same should be rejected. A decision should be rendered on the basis of the evidence available on record. The learned Senior Counsel therefore stated that the appeals should be allowed and the order of the Copyright Board should be set aside.

42/158



WEB COPY

75.Mr.Sreenath Sridevan, learned Senior Counsel who also appeared for the appellants pointed out the references in Para 37 and 38 to the judgment of Supreme Court reported in **2008 13 SCC 30** relating to the *Berne* and *Rome conventions*. The learned Senior Counsel stated that there must be a floor rate determination and stated that whether 2% of the net advertisement revenue is equitable for compulsory licence or not is a matter for consideration. But fundamentally, there must be a floor rate fixed and therefore, the learned Senior Counsel stated that cutting out the needle per hour rate method exposed the appellants to the vagaries of accounting and bargain arrangements.

76.The learned Senior Counsel stated that Section 31 of the Copyright Act, 1957 contemplated payment of just compensation. A procedure, had been stated under Section 31 of the Act and fundamentally, compensation must be just and equitable.



WEB COPY

77. The learned Senior Counsel pointed out the evidence presented and urged that the said 2% fixed was on an unknown amount and that unknown amount was determined, not on the basis of determination by both the appellants and the respondents but solely by the respondents. This methodology of a percentage of the net advertisement revenue was not spoken by the witnesses for the respondents themselves. The learned Senior Counsel also pointed out the judgment of the Copyright Board and stated that comparisons with All India Radio were totally irrelevant.

78. The learned Senior Counsel stated that the reasons given by the Copyright Board should be interfered with as they have wandered beyond the factors for consideration. The factors for consideration are to first hold whether the refusal to grant licence was unreasonable and then to determine the compensation. This should be based on a song by song basis or on the basis of assignment and certainly not on the advertisement rate since that advertisement revenue was a revenue as projected only by the respondents and there was no cross verification of that particular revenue. The learned Senior Counsel was equally critical about the



WEB COPY

reasons given by the Copyright Board and also concurred with the arguments presented by Mr.Vijay Narayan.

79.Mr.M.V.Swaroop, learned Counsel for the appellants in C.M.A.Nos.3490 to 3502 of 2010 and for the review applicants, pointed out that the appellants in those appeals were not even parties to the proceedings before the Copyright Board. They were strangers. They never participated in any of the appeals before the Bombay or Delhi High Courts or before the Supreme Court. They cannot be bound by the order of the Copyright Board. The learned Counsel stated that one of the primary requirements of any order passed under Section 31 of the Act is that reasonable opportunity of being heard must be given to the owner of the copyright. If it is not given, then the order suffers. There cannot be any two views on that particular aspect. The learned Counsel pointed that the members of the appellants had individual agreements with the Radio Companies and there were no complaints about those agreements. The learned Counsel also pointed that the income earned prior to the determination by the Copyright Board and the income earned after the



WEB COPY

order and stated that the income had drastically reduced. In this connection, the learned Counsel pointed out that for a particular period, the respondent had forwarded a cheque for just Rs.652/- and stated that this amount can never be termed just and equitable for the sweat and efforts taken in producing the sound recordings. He also stated that there were no complaints at all against the members of the appellant/SIMCA.

80.Insofar as the issue of maintainability was concerned, he stated that the issue of maintainability had already been decided by a learned Single Judge. He also stated that when there is an agreement, then the parties are bound by the agreement. The agreement determined the rate payable at per needle hour alone and not on any other rate. The extreme perversity of the order of the Copyright Board was pointed with anguish by the learned Counsel.

81.The learned Counsel also stated that the proceedings under Section 31 of the Act are not one in *rem*, but specific to those who refused to grant licence. It was not against the public at large. He

46/158



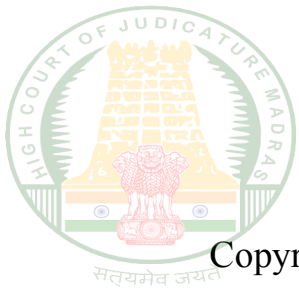
WEB COPY

pointed out that there were signed agreements between the members of the appellants and the Radio Stations which were to the advantage of both the parties to those agreements, till the year 2012. By the order under appeal, after 2012, there has been substantial decrease in the revenue earned by the members of the appellants. The learned Counsel attacked the judgment under appeal as being not only perverse, but bereft of any reason and as a matter of fact alleged *mala fide* in the application of the judgment to parties, who were not even present before the Copyright Board. Opportunity was not given and it was therefore stated that the order should be set aside and the appeals should be allowed.

82.The learned Counsel also advanced arguments with respect to the Review Applications filed by the said appellants questioning non extension of the stay granted. The learned Counsel stated that reasons have not at all been given by the learned Single Judge while vacating the order of interim stay.

83.It was obvious that the appellants were not parties before

47/158



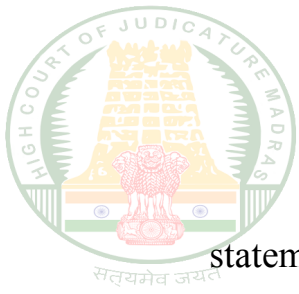
WEB COPY

Copyright Board. It was obvious that the appellants were never heard before the Copyright Board. It was obvious that they were directly affected by the order of the Copyright Board. The basic principles of natural justice had been violated. The learned Counsel therefore stated that the stay should have been extended and urged that therefore, both the appeals and the review applications must be allowed by this Court.

84.Mr.G.Masilamani, learned Senior Counsel led from the front and argued on behalf of the respondent, M/s.Entertainment Network India Limited. The learned Senior Counsel was quiet brazen in his assertion that M/s.Entertainment Network India Limited was a conglomerate with interests in not just in Radio Stations, but also in print media, Television and in a wide spectrum of other business ventures. He stated that they never faced any economic recession and that the compensation as determined by the Copyright Board had been paid to the appellants herein without any default. They continue to do so.

85.The learned Senior Counsel was equally assertive in his

48/158



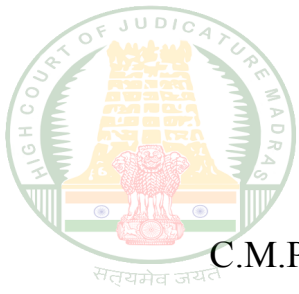
WEB COPY

statement that the Copyright Board was correct in its appreciation of various factors and in the adjudication of the compensation payable to the appellants herein.

86.The learned Senior Counsel pointed out the evolution of provisions of the Act from the establishment of the Copyright Board to the establishment of Intellectual Property Appellate Board and finally to the constitution of Commercial Courts, on date.

87.The learned Senior Counsel pointed out the Finance Act, 2017, the Tribunal Reforms Act, 2021 and the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021. He also, with much grace pointed out Section 6 of the General Clause Act and stated that the amendments in the Act would not affect the pending legal proceeding. He stated that Section 72(2) of the Copyright Act, 1957, provided an appeal to be filed before the High Court, but questioned the locus of the appellants to maintain the appeals and to continue the appeal in its present form. He then pointed out the order passed in

49/158



C.M.P.No.21992 of 2018 dated 21.02.2020, wherein, this Court had kept

WEB COPY

all the contentions open to be advanced at the time of final hearing including the *locus standi* of the appellants to continue with the appeals.

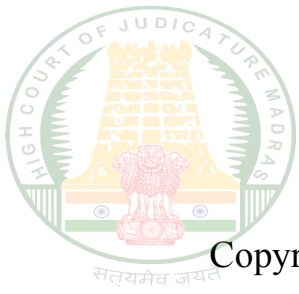
88.He pointed out that the appellant, M/s.Phonographic Performance Limited, was originally a non profit company registered under the Indian Companies Act and later, it was registered as a copyright entity under Section 25 of the Act, as a Limited Liability Company. The learned Senior Counsel then pointed out the parameters required for a copyright society, which required an Association of persons, a list of shareholders licensed to a Company or a copyright owner. The appellant had ceased to become a copyright society. They had filed an application for extension of registration, but for reasons best known to them and for reasons which they have not disclosed, have withdrawn those applications, which were pending before the Central Government. The learned Senior Counsel therefore asserted that the appellant, not being a Copyright Society cannot maintain the appeals. He stated that the appellant collected license fees, deducted their expenses



WEB COPY

and then paid a meagre amount to the creators of the sound recording, the Lyricist, the Music Composer, the Singers and the Instrumental Performers.

89. The learned Senior Counsel also questioned the locus of SIMCA to maintain the appeals as SIMCA was also not a Copyright Society, but a Society registered under the Tamil Nadu Societies Registration Act. The learned Senior Counsel pointed that ENIL had individual agreements with the members and those members had agreed to abide by the order of the Copyright Board. Therefore, the learned Senior Counsel stated that the argument that the order of the Copyright Board would not apply to SIMCA has to be rejected by this Court, since most of the members of SIMCA had agreed to abide by the order of the Copyright Board. He pointed out that therefore, whether they had participated or not participated in the proceedings before the Copyright Board could be made an issue and this Court need not examine the said issue. The learned Senior Counsel stated that the members had taken a conscious decision not to participate in the proceedings before the



WEB COPY

Copyright Board. The proceedings were conducted in open Court in a transparent manner and everybody involved in the industry knew about the ongoing proceedings before the Copyright Board. The learned Senior Counsel therefore stated that SIMCA not being a Copyright Society, having no licence for copyright and being registered only under the Tamil Nadu Societies Registration Act, can only espouse the cause of its members but none of the members had ever complained. He therefore stated that the appeals by the SIMCA against ENIL have to be dismissed as not maintainable.

90. With respect to the maintainability of the appeals by PPL, the learned Senior Counsel also pointed out that equally PPL, has ceased to be a Copyright Society. They were originally registered under the Companies Act, 1956. They claimed to be a non profit company under Section 8A of the Act. They then claimed to be a Limited Liability Company without shares and they also claimed to be registered as a Society, but they were not registered as a Society and as a matter of fact, it was again pointed out by the learned Senior Counsel that they had



withdrawn their applications which were pending before the Central Government seeking registration as a Copyright Society,

WEB COPY

91. The learned Senior Counsel then pointed out that the real life of a song goes beyond 60 years, the life as determined under the Copyright Act, 1957. It was pointed out that the appellants had refused to disclose their purchase value of the songs. He also pointed out that they marketed the songs not only with FM Radio stations, like the respondents, but also in many other ways, including as Ring tones, as music played in aerostations, as music played in elevators and in so many ways. They had the authority under the licence to exploit every sound recording not only as a whole, but also in bits and pieces.

92. The learned Senior Counsel pointed out the agreements, which had been entered into with ENIL and stated that there were nine different forms of agreements and revenue earned had been paid to each one of the copyright owners, namely, actual copyright owners.

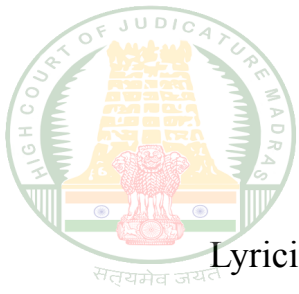


WEB COPY

93. With respect to the rates decided for future acquisition, the learned Senior Counsel pointed out the customary practice and the reality of the nature of business. He pointed out that ENIL had the capacity to draw advertisements. Their accounts, which were complained of, as not revealed, were also actually available by a touch of a button on the internet. He pointed that Phase-I was a fixed licence fee and Phase-2 was 4% of the income determined as licence fee. Even at that time, the learned Senior Counsel stated the concept of needle hour was never introduced.

94. The learned Senior then expanded his arguments to state that every music would have a Lyricist, would have a Music Composer, would have a Singer and stated that a Producer invested money on all these aspects and produced a cinematographic film, which included the music. When the film is played in theaters, the Producer received royalty for such telecast of film in theaters. But when it is shown otherwise or songs are played in Radio Stations, then the Producer get 50% and the

54/158



WEB COPY

Lyricist, Composers and the Singers get the other 50%. It was thus asserted by the learned Senior Counsel that a Producer of a sound recording can let on licence only 50% of the value and the balance 50% would be retained by the Lyricist, Composer and the Singers. Before 2012, the rights had been purchased. Now, they have a right to receive royalty.

95.He further stated that a Copyright Society had been originally formed to ensure that royalty goes to every individual contributor for a music/song. The Lyricist and the Composer were prohibited from selling their songs or their compositions. The music companies like the appellants herein, purchase music from Producers alone with permission to pay royalty.

96.The learned Senior Counsel then pointed out the provisions under Section 2(b) of the Act relating to authors, Section 14 relating to Copyright and more particularly to Section 14(a)(iii) and (d)(iii) and (e)(iii) relating to performers of music, communication and sound

55/158



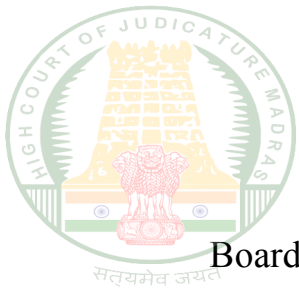
WEB COPY

recording to public. He also pointed out that the first owner of the copyright under Section 17 of the Act would be the Author. Under Section 18, assignment of future rights was also recognized by Legislation. The right to receive royalty was recognized. Section 19 relating to the mode of assignment and Section 30 about licence by owners of copyright. Section 31 related to compulsory licence and with respect to the issue in controversy, the applicable provision was Section 31(1)(b) of the Act.

97.The learned Senior Counsel pointed out the correspondences between the contesting parties. He stated that grant of licence should be routed only through a Copyright Society. He pointed out the obligation of the appellants, who should share 50% of the income with the Lyricist and Music Composers. He charged that the appellants had not disclosed their income and they are seeking more and more revenue from the respondents.

98.He then pointed out the evidence recorded by the Copyright

56/158



WEB COPY

Board PW-4, Dr.Bibek Debroy was the expert witness and he stated that revenue sharing is a far better method of distribution of income and royalty rather than needle per hour. The learned Senior Counsel pointed out that the Copyright Board had examined the evidence in detail and also pointed out the analysis of the evidence of RW-5, S.K.Laroiya. The witness had compared the reach of All India Radio with the reach of FM Radio.

99. There were two options insofar as sharing of royalty was concerned. Option 'A' was by needle per hour and option 'B' was by sharing of net revenue. The net revenue from advertisement involved, deducting from the gross revenue, the commissions and expenses involved for procurement of licences and rights and also Government charges.

100. The learned Senior Counsel therefore, stated that the concept of compulsory licence is engraved and embedded with the policy of the public interest. He pointed out the domain of the legislature when

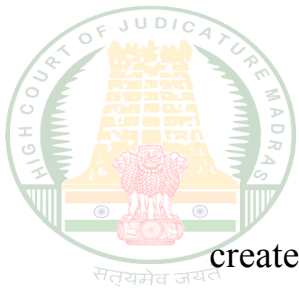
57/158



WEB COPY

public interest is involved and drew comparison with the Control Orders particularly, the Essential Commodities Act, 1955, relating to petrol, their storage and distribution and their price control by the Central Government. These steps were taken in public interest. Similarly, the Government had also recognized music as an art form with much public interest and therefore, had introduced the concept of compulsory licence. The Radio Stations are the media through which music is transmitted to the people. He drew comparison to a public distribution system, like a ration shop, which provides basic essential commodities like rice and sugar to the people.

101. The learned Senior Counsel also stated that there are also Control Orders relating to cement and gold and therefore, stated that FM Radio Stations must survive for the benefit of public interest. He pointed out the increasing number of Radio Stations from 206 in 2010 to 383 in 2020. He pointed out that the owners of the Copyright pay nothing to the Composer or Lyricist. The FM Radio Stations on the other hand generate advertisement income and pay the owners. He pointed out that music is



WEB COPY

created only once. A song is written once. It is composed once. It is sung once. The instrumentalists perform it once. But it is sold multiple, multiple number of times.

102.The learned Senior Counsel also pointed out the grant of permission agreement and stated that for each frequency, there can be only one station. He also pointed that it was the policy of the Government that FM Radio Stations should also have a social obligation to perform. They are an arm or tool for social upliftment. He stated that music is transmitted to the public free of cost. He compared this concept with that of Television Stations, where subscriptions have to be paid to watch a private channel television network. But music through Radio is available free to the general public. There is no subscription. There are no fees. There are no taxes. Music is now freely available. Therefore, it is a very important vehicle for social upliftment, which reaches the nooks and corners of the country.

103.He also pointed out that FM radio Stations cannot act as news

59/158



WEB COPY

channels. They cannot provide news. That is the privilege of All India Radio alone. But there is an obligation to promote the welfare schemes of the Government. It was thus asserted by the learned Senior Counsel that survival of the FM Radio Stations is a core concept, which has to be kept in mind while determining the rates payable to the companies, like, the appellants.

104.He pointed out the reasons given by the Copyright Board and justified each one of them. He contested the arguments of the learned Senior Counsels for the appellants and stated that the Copyright Board had applied its mind to the reality of the situation and had examined each and every aspect. He stated that without Radio Stations, the songs, which are written, which are composed would remain “*still born*”. They can never be transmitted to the public. It is only Radio Stations, which take them to the corners of the country and thereby, bring fame and name to the Lyricists, to the Composers, to those who perform the instrumental background music and to the Singers.



WEB COPY

105.He stated that over a passage of time, FM Radio Stations had increased and multiplied and this was crucial factor, which has to be kept in mind. He pointed out that needle per hour is based on only one factor, namely, on the song. However, a percentage of the advertisement revenue is based not only on the quality of the song, but also on the number of listeners and also on the time slot, and that advertisers flock there to advertise their products. During the peak hours, advertisement rates may increase and correspondingly, the amount paid to the appellants would also increase.

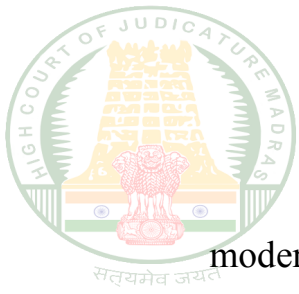
106.The learned Senior Counsel then placed a word of caution to the Court and stated that the order of the Copyright Board has to be either upheld or has to be set aside. He stated that the Court cannot go into an alternate price deal, like determining needle per hour. He stated that opportunity had been granted to the appellants by the Copyright Board and evidence had been adduced and that evidence had been discussed and a judgment had been pronounced.



WEB COPY

107. He then again pointed out the correspondences and stated that the appellants themselves offered existing and future recordings for licensing. He also stated that there cannot be a separate tariff for future production. He also pointed out Section 13 of the Act which also provided for future works. He then justified the order under appeals by stating that it had examined the interest of all the stakeholders. It had also kept in mind the policy of the Government relating to social upliftment and the impact on society, which FM Ratio Stations can have for projecting the social schemes of the Government. He also pointed out the financial status of the FM Radio Stations. He stated that all the materials and evidence had been considered by the Copyright Board. The comparative rates between All India Ratio and the private Radio Stations had also been stated.

108. With respect to the specific allegation that there was a hidden arrangement with advertisers, the learned Senior Counsel stated that it is for those who make such allegation to establish that allegation. He pointed out that no proof had been provided. He also stated that 2% is a



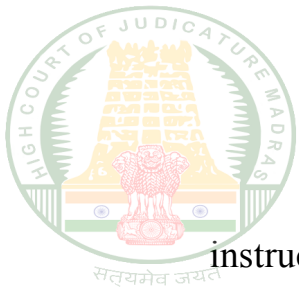
WEB COPY

moderate rate. It is neither high nor low. That decision was made taking into consideration the past, the present and the future. He also stated that no attempt was made to call for accounts from the respondents and when there were no attempts to call for accounts, the assertion that accounts have not been produced is only a hollow statement and should be rejected and cannot be a ground to reject the whole scheme of royalty at 2% of the net advertisement rate.

109. The learned Senior Counsel also pointed out that the reality of the situation was that all Radio Stations were running in loss, except ENIL. It was therefore necessary that a nominal rate is fixed and he asserted that determining the rate at 2% of the net advertisement revenue was extremely rational and there cannot be allegations of perversity being attached to it. He stated that the said rate was determined only on the basis of evidence adduced. The learned Senior Counsel was extremely emphatic in his assertion that the appeals should be dismissed.

110. Mr. Abishek Malhotra, learned Senior Counsel, who was

63/158



WEB COPY

instructed to argue on behalf of the respondents in C.M.A.Nos.3385, 3493 and 3494 of 2010 and Rev.A.No.11 of 2011, pointed out that the order under appeals cannot be categorised as irrational. He pointed out that the World Intellectual Property Organisation (WIPO) had three methods of valuation, namely,

(1)Market method, which was a comparable licensing arrangement;

(2)Income method, which was the income earned by intellectual property owner after deducting the additional expenses.

(3)Cost approach and process, which included the cost of acquisition and the profit on such acquisition.

111.He stated that one song would be played by 245 Radio Stations. The Radio Station had now increased to 388 Radio Stations. Therefore, there cannot be exclusive ownership of that particular song. Everybody can hear the music. It comprises of a bundle of rights.

112.The learned Senior Counsel pointed out Section 14(iii) relating to sound recordings and Section 2(ff) relating to communication to people. He pointed out that the Radio Stations made music available

64/158



WEB COPY

to the general public. He also pointed out that Companies like the appellants, exploit music. They exploited the music by licensing it out to Television, to Radio Stations, to satellite telecasters on OTT platforms.

113.He contested the points raised that since FM Radio Stations have flourished, there had been fall in the sale of cassettes. He stated that it was an argument based on fallacy, since the procurement of music is a commercial decision. The risks are factual. The film must succeed. The shelf life of the music is also limited. As a matter of fact, Radio Stations also suffer because of piracy and 55% of income is lost to piracy. He pointed out that there has been no data provided about the drop in sale in music cassettes. The appellant had the data, but did not produce them. He charged that the appellants had deliberately suppressed accounts. He further stated that there was no data, even for physical sales of cassettes in the year 2008, when the impact of Radio Station was very minimum. The number of alternate platforms by which the music can be exploited has increased. Music is licensed to Radio Stations, as background music in elevators, aeroplanes and in every other



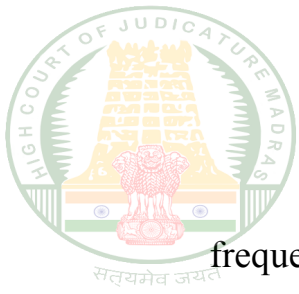
place, even in lifts and elevators. The appellants exploit music in digital mode and have shifted their method of sale.

WEB COPY

114.The learned Senior Counsel asserted that the rate should be determined only in according with the contract. What had been proposed by the appellants has no methodology and economic parameters have not been produced. Balance sheets have not been produced to show the income earned. The cost of acquisition of the music had not been disclosed. The absence of variables had not been taken into consideration, namely, variables in cost, in revenue, in source of exploitation, in actual users of the same music, in loss and profit and variables relating to alternate modes of exploitation.

115.The learned Senior Counsel pointed out that the best judgment method was specifically set aside. He also pointed out that televisions insist on subscriptions payments, but Radio Stations have no such payment of subscriptions. The reach of televisions are wide across the world, but the reach of a FM Radio Station was only limited to its

66/158



WEB COPY

frequency. It cannot also broadcast news. It had to purchase licences for broadcasting music/songs.

116.The learned Senior Counsel pointed out that advertisement is a variable and when the revenue increases naturally, the percentage of advertisement revenue would also increase. It was therefore only appropriate that future works are also covered under the order. The appellants are protected owing to inflation and increasing costs of advertisements. He also pointed out that FM Radio Stations have a duty to disclose their income to the Government and to pay taxes on those income and therefore, determining 2% of the net advertisement revenue is a just and equitable method. The learned Senior Counsel justified the reasons given and stated that the appeals will have to be dismissed.

117.Mr.N.L.Rajah, learned Senior Counsel advanced arguments in C.M.A.Nos.3382, 3491, 3492-3495 of 2010 and also with respect to the Rev.A.No.8 of 2011.

67/158



WEB COPY

118.The learned Senior Counsel pointed out that the Supreme Court had very specifically rejected the best assessment judgment method, which was what the appellants now seek. The proper manner in which any judgment should be rendered is by analysing and considering the evidence. He claimed that the Copyright Board had considered the evidence, which had been adduced. He stated that there cannot be any fencing of the jurisdiction of the Copyright Board. The Copyright Board had a right to examine the evidence adduced and to analyse that evidence and then come to a conclusion . He stated that the trial was a long drawn process. It swung like a pendulum from the Copyright Board to the Bombay High Court, to the Delhi High Court and then back to the Copyright Board and the Supreme Court and back to the Copyright Board. He pointed out that the appellant, SIMCA had every opportunity to participate, but they had taken a decision to peep through the window and not to enter into the arena. They cannot therefore claim ignorance and seek indulgence of this Court. He charged them with deliberate absence from the proceedings. He stated that they cannot be granted any



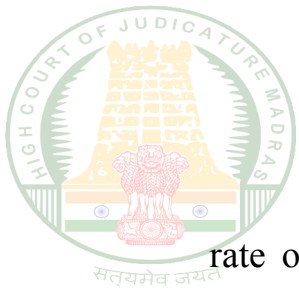
consideration at all.

WEB COPY

119.He further stated that any order passed is an order in *rem* and applies equally to everybody and anybody concerned with the subject issue. He also stated that the rate fixation method was done in accordance with the materials available on record. He claimed that the rates were fixed in proportion to the interest in the songs played and therefore, it was only just that the rate was fixed for a period of ten years and then reconsidered. He claimed that if needle per hour rate had been fixed for the years 2010-2020, then the entire Radio industry would have been strangulated and would have collapsed. He stated that when needle per hour was fixed from the year 2002-2010, then the industry suffered. It was then fixed at a percentage of the revenue earned.

120.The learned Senior Counsel pointed out the number of channels, which were originally available. The learned Senior Counsel also stated that the Copyright Board had analysed the statements of the witnesses and had rendered a judgment determining a just and equitable

69/158



WEB COPY

rate of royalty payable. He further stated that opportunities had been granted not only to tender evidence but also to cross examine the witnesses. He stated that all the factors have been considered in the judgment.

121.He also stated that FM Radio Stations have a very important role in popularising any song and in enhancing the value of the song. There are several other advantages, particularly the reach of FM Radio Stations to the nooks and corners of the country. There was revenue generated at every stage. He also pointed out that Radio Stations only have a specific frequency unlike Television, which was global, owing to satellite connection. The learned Senior Counsel therefore stated that the needle per hour rate as claimed by the appellants would be extremely impracticable. The learned Senior Counsel justified the judgment under appeal and stated that the judgment does not require interference and stated that the appeals should be dismissed. He also stated that the review applications should also be dismissed.



WEB COPY

122.Mr.Vijay Narayan, learned Senior Counsel in his reply arguments reiterated the maintainability of the appeals under Section 72(2) of the Act. He stated that the appeals were maintainable on the date of filing of the appeals and the law as on date of filing of the appeals should be the deciding factor. With respect to the locus of the appellants on the ground that they were not a registered Copyright Society, he stated that the respondents had treated the appellants as Copyright owners. They having been making payments to the appellants. The respondents are dependent on the appellants to get licence for the songs either by way of licence under Section 30 or compulsory licence under Section 31 of the Act. It was therefore urged that contending that the appellants have no locus is a self defeating argument.

123.With respect to the agreements already entered, he stated that limited rights alone had been assigned. None of the assignees or assignors have complained about the said agreements. The learned Senior Counsel stated that this Court is vested with power to examine the issues in entirety in accordance with the provisions of Order XLI CPC

71/158



WEB COPY

and stated that the power is wide enough to examine whether the evidence had been properly analysed and whether the law had been properly applied.

124.The learned Senior Counsel stated that the appellants had disclosed their accounts and the cost of acquisition. He pointed out that the Supreme Court had placed an obligation on the Copyright Board that the evidence should be examined. He stated that the compulsory licence was only an exception. He also pointed out that out of the revenue earned through advertisement, nearly 26% had been expended towards salary. The learned Senior Counsel pointed that the comparative evidence about the audit of income had been completely ignored by the Board.

125.He also pointed out that the determination of 2% of net advertisement rate was based on foreign rates and should not have been applied. He also stated that the royalty rate had nothing to do with the financial condition of the Radio Station. He also urged that 2% was on

72/158



the lower scale.

WEB COPY

126.He stated that there should be a hybrid determination of the rates with a minimum per needle hour determination. He stated that this would depend on market forces. He stated that the Board has to balance the equity of both sides, which unfortunately has not been done and royalty was based only on the survival of FM Radio Stations and not on the expenses incurred by the appellants towards acquisition of the assignment for the songs, which had been compulsorily licensed out to the respondents. The learned Senior Counsel therefore stated that the judgment under appeals required to be revisited by this Court.

127.I have carefully considered the arguments advanced and perused the material records.

128.The points which arise for consideration are:

(1)Whether PPL has locus to maintain the appeals?

73/158



WEB COPY

(2) Whether the appeals filed by PPL are maintainable?

(3) Whether the order of the Copyright Board is applicable to SIMCA?

(4) Whether the appeals filed by SIMCA are maintainable?

(5) Whether the Copyright Board had misdirected itself in venturing into a discussion on social impact and Public Policy?

(6) Whether the Copyright Board was correct in comparing FM Radio Stations with All India Radio and the modalities of royalty payable with foreign Radio Stations?

(7) Whether the compensation determined by the Copyright Board has to be upheld or set aside or modified/varied?

129. Even before proceeding to examine the points framed for consideration, it would be prudent to set out a few salient features of the Copyright Act, 1957.

130. The first legislation in India relating to Copyright was the



WEB COPY

Indian Copyright Act, 1914. This was based on the UK Copyright Act, 1911. The legislation was introduced after it was recognised by the invention of printing press, which enabled the re-production of books in large quantities. Thus, though creative persons like Artists, Musicians and Writers may compose or post their works for fame and recognition, their concern over large scale distribution of such works without proportionate income came to be recognised.

131. Thereafter, modern and advanced means of communications, like broadcasting, litho-photography, television and other such modes had entered into the Indian market making it necessary to fulfill International obligations in the field of copyright.

132. A comprehensive legislation was then introduced to revise the copyright law. Thus, the Copyright Bill, 1957, was introduced in the Parliament. New features were introduced in the draft Bill which included:



WEB COPY

(i) the establishment of a Copyright Office under the control of a Registrar of Copyright, who would act under the superintendence and direction of the Central Government. One of the principal functions would be to maintain a Register of Copyrights in which, the names and addresses of the Authors and owners of Copyright could be entered into. It also provided that proceedings against infringement of copyright cannot be instituted unless the copyright was registered in the Copyright Office. An appeal to the Copyright Board was provided against the order of the Registrar of Copyright.

(ii) the establishment of a Copyright Board to determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, and also to consider applications for general licences for public performances of works and to assess compensation payable in certain circumstances. As against the order of the Copyright Board, an appeal can be filed in the High Court.

133. It is thus seen that two separate bodies came to be established, namely, a Copyright Office under the control of Registrar of Copyright

76/158



and a Copyright Board.

WEB COPY



134. Under the Bill, the definition of Copyright was widened to include the exclusive right to communicate works by radio-diffusion. A cinematographic film was recognised to have a separate copyright and also for its components, like, story and music.

135. While drafting the Bill, consideration was taken of the Copyright Report, 1952, and the suggestion of Ministries under the Government of India and the State Governments, Universities and interested industries and Associations.

136. The Copyright Bill, 1957, was passed by both the Houses of Parliament and received the assent of President on 04.06.1957 and came into force on 21.01.1958, as the Copyright Act, 1957 (Act 14 of 1957).

137. The following provisions of the Copyright Act, 1957, are

77/158



required to be kept in mind while determining the points raised in these

WEB COPY
appeals:

“Section 2: **Interpretation**-In this Act, unless the context otherwise requires:

.....

(d) “**author**” means, –

.....

(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;

(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;

(f)“**Cinematograph film**” means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films.

“(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;



WEB COPY



(ffa) “**composer**”, in relation to a musical work, means the person who composes the music regardless of whether he records it in any form of graphical notation;

(ffd) “**copyright society**” means a society registered under sub-section (3) of section 33;

(j) “**exclusive licence**” means a licence which confers on the licensee or on the licensee and persons authorised by him, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work, and “exclusive licensee” shall be construed accordingly;

(m) “**infringing copy**” means,—

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

.....

(ii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(p) “**musical work**” means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music;”

(uu) “**producer**”, in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work;”

(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;

(y) “**work**” means any of the following works, namely:—

.....

(iii) **sound recording**;

Section 11. Copyright Board.—



WEB COPY



(1) As soon as may be after the commencement of this Act, the Central Government shall constitute a Board to be called the Copyright Board which shall consist of a Chairman and not less than two or more than 1[fourteen] other members.

Section 12. Powers and procedure of Copyright Board.—

(1) The Copyright Board shall, subject to any rules that may be under this Act, have power to regulate its own procedure, including the fixing of places and times of its sittings:

Provided that the Copyright Board shall ordinarily hear any proceeding instituted before it under this Act within the zone in which, at the time of the institution of the proceeding, the person instituting the proceeding actually and voluntarily resides or carries on business or personally work for gain.

.....

(6) No act done or proceeding taken by the Copyright Board under this Act shall be questioned on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Board.

(7) The Copyright Board shall be deemed to be a Civil Court for the purposes of [sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)] and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860).

Section 13. Works in which copyright subsists:

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—

.....

(c) Sound recording.

Section 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 authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:”



WEB COPY



(e) in the case of a sound recording,—

.....

(iii) to communicate the sound recording to the public.

Section 17 First owner of copyright:- Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that—

.....

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Section 18. Assignment of copyright—

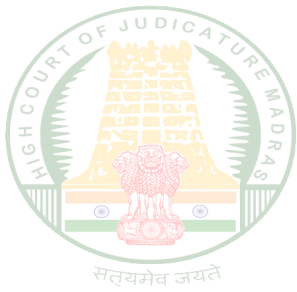
(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression “assignee” as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

Even though the following provisions had been extracted, they are again extracted:



WEB COPY



Section 30. Licences by owners of copyright.—The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing signed by him or by his duly authorised agent:

Provided that in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation.—Where a person to whom a licence relating to copyright in any future work is granted under this section dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

Section 31. Compulsory licence in works withheld from public.—

(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work—

(a) has refused to re-publish or allow the re-publication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

(b) has refused to allow communication to the public by [broadcast], of such work or in the case of a [sound recording] the work recorded in such [sound recording], on terms which the complainant considers reasonable,

the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by [broadcast], as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be



WEB COPY



prescribed.

Explanation.—In this sub-section, the expression “Indian work” includes—

- (i) an artistic work, the author of which is a citizen of India; and*
- (ii) a cinematograph film or a sound recording made or manufactured in India.*

Section 33. Registration of copyright society.—

(1) No person or association of persons shall, after coming into force of the Copyright (Amendment) Act, 1994 commence or, carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3):

Provided that an owner of copyright shall, in his individual capacity, continue to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered copyright society:

Provided further that a performing rights society functioning in accordance with the provisions of section 33 on the date immediately before the coming into force of the Copyright (Amendment) Act, 1994 shall be deemed to be a copyright society for the purposes of this Chapter and every such society shall get itself registered within a period of one year from the date of commencement of the Copyright (Amendment) Act, 1994.

(2) Any association of persons who fulfils such conditions as may be prescribed may apply for permission to do the business specified in sub-section (1) to the Registrar of Copyrights who shall submit the application to the Central Government.

(3) The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed:

Provided that the Central Government shall not ordinarily



WEB COPY



register more than one copyright society to do business in respect of the same class of works.

(4) The Central Government may, if it is satisfied that a copyright society is being managed in a manner detrimental to the interests of the owners of rights concerned, cancel the registration of such society after such inquiry as may be prescribed.

(5) If the Central Government is of the opinion that in the interest of the owners of rights concerned, it is necessary so to do it may, by order suspend the registration of such society pending inquiry for such period not exceeding one year as may be specified in such order under sub-section (4) and that Government shall appoint an administrator to discharge the functions of the copyright society.

Section 34. Administration of rights of owner by copyright society.—

(1) Subject to such conditions as may be prescribed,—

(a) a copyright society may accept from an owner of rights exclusive authorisation to administer any right in any work by issue of licences or collection of licence fees or both; and

(b) an owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society under any contract.

(2) It shall be competent for a copyright society to enter into agreement with any foreign society or organisation administering rights corresponding to rights under this Act, to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organisation:

Provided that no such society or organisation shall permit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works.

(3) Subject to such conditions as may be prescribed, a copyright society may—

(i) issue licences under section 30 in respect of any rights



WEB COPY



under this Act;

- (ii) collect fees in pursuance of such licences;
- (iii) distribute such fees among owners of rights after making deductions for its own expenses;
- (iv) perform any other functions consistent with the provisions of section 35.

Section 35. Control over the copyright society by the owner of rights.—

(1) Every copyright society shall be subject to the collective control of the owners of rights under this Act whose rights it administers (not being owners of rights under this Act administered by a foreign society or organisation referred to in sub-section (2) of section 34) and shall, in such manner as may be prescribed,—

(a) obtain the approval of such owners of rights for its procedures of collection and distribution of fees;

(b) obtain their approval for the utilisation of any amounts collected as fees for any purpose other than distribution to the owner of rights; and

(c) provide to such owners regular, full and detailed information concerning all its activities, in relation to the administration of their rights.

(2) All fees distributed among the owners of rights shall, as far as may be, be distributed in proportion to the actual use of their works.

Section 72. Appeals against orders of Registrar of Copyrights and Copyright Board.—

(1) Any person aggrieved by any final decision or order of the Registrar of Copyrights may, within three months from the date of the order or decision, appeal to the Copyright Board.

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal under sub-section (1), may, within three months from the date of such decision or order, appeal to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain:



WEB COPY



Provided that no such appeal shall lie against a decision of the Copyright Board under section 6.

(3) In calculating the period of three months provided for an appeal under this section, the time taken in granting a certified copy of the order or record of the decision appealed against shall be excluded.

Section 73. Procedure for appeals—*The High Court may make rules consistent with this Act as to the procedure to be followed in respect of appeals made to it under section 72.”*

138. It would also be appropriate to extract Article 300(A) of Constitution, which is as follows:

“300A. Persons not to be deprived of property save by authority of law.— No person shall be deprived of his property save by authority of law.

139. It must be kept in mind that the Copyright Act, 1957, had undergone a sea change by subsequent introductions of provisions and amendments to the provisions extracted above. They had been introduced after the order passed by the Copyright Board, which is now questioned in these appeals and therefore, those amendments are not extracted, but the Law as on the date, when the Copyright Board passed its order and on the date of when the appeals were filed, have been extracted above.



WEB COPY

140. The judgment of the Supreme Court remanding the matter back to the Copyright Board was reported in *(2008) 13 SCC 30*, in *M/s. Entertainment Network (India) Limited and others vs Super Cassettes Industries Limited and others*:

141. A deep analysis of this judgment is required, since in this judgment, the Supreme Court had remitted the matters back to Copyright Board and had given directions, as to how the issues were to be adjudicated and the need for examination of witnesses and to analyse such evidence and then come to a decision. The relevant findings of the above judgment are as follows:

“INTRODUCTION

2. Interpretation of Section 31 of the Copyright Act, 1957 (for the sake of brevity, hereinafter referred to as, 'the Act') is involved in these appeals. We may notice the factual matrix of the matter.

BACKGROUND FACTS

3. First respondent is one of the leading music companies engaged in the production and/or acquisition of rights in sound recordings. It has copyright over a series of cassettes and CDs commonly known as T-series. It has copyrights in cinematographic films and sound recordings. Appellant M/s. Entertainment Network (India) Ltd. (ENIL) broadcasts under the brand name "Radio Mirchi". It is a leading FM radio broadcaster. Disputes and differences arose



WEB COPY



between Bennett Coleman & Co. Ltd., the holding company of the first respondent and Phonographic Performance Ltd. (PPL) as regards the playing of the songs of which copyrights belongs to the first respondent in their FM radio network. Appellant is a company which holds licence for running FM radio stations in various cities across India.

Free-to-Air private FM Radio Broadcasting is a recent phenomenon in India and the basic content of any radio station, presently, is only sound recordings, i.e., songs.

Disputes and differences having arisen between the parties in regard to broadcast of the songs in respect whereof the first respondent holds a copyright as owner thereof or by reason of purchase of the copyright belonging to others.

BACKGROUND FACTS

4. The radio industry was revolutionized by the Government of India as in October 1999 for its first phase of granting license for private FM, broadcasting channel, tenders were invited.

5. Appellant herein was awarded the license for running a private FM broadcasting service in 12 cities on payment of a hefty license fee. Several other bidders were also granted licenses. Respondent, however, was not a member of the appellant - society. It was found to have been using the broadcasting songs in respect whereof Super Cassettes Industry Limited (SCIL) had an ownership over the copyright. It was a member of the copyright society being Phonographic Performance Ltd. (PPL). Indisputably, there had been an infringement of the copyright of Super Cassettes. Allegedly, appellant was under the belief that it was a part of PPL and whereupon the music belonging to the repertoire of SCIL was played during the period from October 2001 to May, 2002 in its stations at Indore and Ahmedabad. Royalty was paid by ENIL to PPL at the rate of Rs. 400/- per needle hour pursuant to the order passed by the Calcutta High Court dated 28.9.2001. Attempts were made to obtain a licence from SCIL when ENIL came to know that it was not a part of the copyright society PPL. Negotiations failed between the parties.

A suit was filed before the Delhi High Court for restraining ENIL from playing and broadcasting the music belonging to SCIL on any of the Radio Stations belonging to ENIL.

.....

11. Various Radio Stations including the petitioner filed an application before the Copyright Board at Hyderabad in terms of Section 31(1)(b) of the Act on or about 19.11.2002 for grant of compulsory license to all the radio stations.



WEB COPY



12. The Copyright Board by a judgment and order dated 19.11.2002 fixed the standard rate of:

- Payment to be made at Rs. 1200/needle hour during prime time.
- For 12 normal hours = 60% of standard rate
- For 8 lean (night) hours = 25% of standard rate and respondents also directed to furnish a security/bank guarantee of Rs. 20,00,000/- per radio station to PPL.

13. The Board also held that the same shall be operative for a period of 2 years and the matter shall be reconsidered again in September- October, 2004. Super Cassettes was not a party therein. The Board fixed royalties initially for a period of two years. An appeal there against was preferred before Bombay High Court and it is the subject matter of C.A. No. 5181 of 2005.

14. Appeals were filed before the Bombay High Court by the radio companies and PPL against the order dated 19.11.2002, details whereof are as under:

1.PPL v. Music Broadcast	279 of 2003
2.PPL v. ENIL	280 of 2003
3.PPL v. Millennium Chennai	281 of 2003
4.PPL v. Millennium Chennai	283 of 2003
5.ENIL v. PPL	288 of 2003
6.Millennium Chennai v. PPL	291 of 2003
7.Millennium Delhi v. PPL	292 of 2003
8.Music Broadcast v. PPL	294 of 2003
9.Radio Midday v. PPL	421 of 2003

Appeals in total were filed before the Bombay High Court. The Bombay High Court by a common judgment and order dated 13.4.2004 in First Appeal Nos. 279-294 of 2003, 421 of 2003 and 1573 of 2003 remitted the matters back to the Copyright Board for reconsideration and for fixation of license fees.

SECOND LICENSE CASE

15. On or about 28.1.2003, appellant filed an application before the Copyright Board at Delhi, which was marked as Case No. 10 of 2003 for grant of compulsory licence in terms of Section 31(1)(b) of the Act against Super Cassettes praying, inter alia, for the following reliefs:

Grant the applicant a compulsory license of the complete



WEB COPY



repertoire (present and future) of SCIL on the terms and conditions considered just and equitable by this Hon'ble Copyright Board.

16. On being noticed, respondents filed an objection contending that as the suit for infringement was pending before the Delhi High Court, no application for compulsory license could be entertained. The High Court, on an application filed by the appellant, clarified that the respondent was free to canvas its submissions before the Copyright Board that the person infringing the Copyright should not be granted compulsory license. The Board directed the parties to come with their respective witnesses. However, when respondent intended to present oral evidence, it was declined. Submissions were directed to be made on or about 20.10.2003. Application No. 10 of 2003 was allowed granting a compulsory license.

17. Appellant filed an appeal against the said order before the Bombay High Court questioning the rates of compensation only. The said appeal was tagged with various other appeals which had been filed before the Bombay High Court against the order dated 19.11.2002 passed by the Copyright Board at Hyderabad.

18. Respondents, however preferred two-fold appeals before the Delhi High Court which were marked as RFA No. 848 of 2003. By reason of the impugned judgment dated 30.6.2004, the respondent's appeal has been allowed remitting the matter back to the Copyright Board to reconsider the application of the appellant for grant of compulsory license under Section 31 of the Act after giving adequate opportunity to the parties to adduce evidence and to dispose of the same by a reasoned order. The High Court furthermore directed that the appellant must file an undertaking that it would not broadcast the sound recordings of the respondent. Appellant had filed Petition for Special Leave to Appeal giving rise to civil Appeal No. 5114 of 2005 in this Court.

PROCEEDING BEFORE US

19. We have two judgments before us; one from the Bombay High Court and another from the Delhi High Court. Whereas the Bombay High Court opined that in terms of Section 31 of the Act, grant of compulsory license on reasonable remuneration is permissible; the Delhi High Court held otherwise.

20. Both the parties have preferred these appeals before us, the particulars whereof are as under:

Case No.	Parties
1.C.A.No.5114/05	ENIL v. SCIL
2.C.A.No.5178-80/05	PPL v. Millennium Chennai
3.C.A.No.5181/05	PPL v. ENIL
4.C.A.No.5182/05	PPL v. Radio Mid-day West



5.C.A.No.5183/05

PPL v. Music Broadcast Pvt. Ltd.

WEB COPY

CORE ISSUES

22. The core questions which, therefore, arise for consideration in these appeals are:

(i) Whether the Copyright Board has jurisdiction under Section 31(1)(b) of the Copyright Act, 1957 to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such as works, where such work is available to the public through radio broadcast?

(ii) Whether in any event such a compulsory license can be issued to more than one complainant in the light of Section 31(2)?

(iii) What would be the relevant considerations which the Copyright Board must keep in view while deciding on; (a) Whether to issue a compulsory license to a particular person; and (b) The terms on which the compulsory license may be issued, including the compensation?

PRINCIPLES OF VALUATION

103. We have, moreover, been called upon to lay down the principles of evaluation. We decline to do so. We have been taken through various judgments of different jurisdictions. We have noticed hereinbefore that the scheme therein is different. The Tribunal exercises a limited jurisdiction in India. Different cases are required to be considered on its own merits. What would be reasonable for one may not be held to be reasonable for the other. The principles can be determined in a given situation. The Bombay High Court has remitted the matter back to the Board for the said purpose. We endorse the views of the Bombay High Court.

DISCRETIONARY JURISDICTION

104. The other question which arises is as to whether the discretionary jurisdiction should have been exercised in favour of the appellant. It was urged that keeping in view the fact that ENIL infringed the copyright, it was not entitled to an injunction.

Reliance has been on *Phonographic Performance Ltd. v. Maitra* (1998) Fleet Street Reports 749 at 770- 773. The general principle of grant of injunction came up for consideration before the Court of Appeal. Therein, it was held that an owner may exercise and exploit his proprietary right by licensing some and not others. He may charge whatever he wishes. Such is not the position in India. Therein, the defendant did not take part in the proceedings. It was, inter alia, from that angle, held that the court could still exercise discretion.



WEB COPY



The court of appeal held:

Use of an injunction by PPL to obtain money to obtain money to which they are not entitled would be an abuse, but there is no evidence that that ever occurs. Where unauthorized use of PPL's copyright is taking place, we do not believe it is an abuse to refuse to licence that copyright without an appropriate payment for past use and an agreement for future use. Nor do we consider it an abuse for PPL to require compliance with an injunction either by the person refraining from using the repertoire or by payment for such use that has taken place and will take place. Apart from the fact that we are not dealing with a case where an order of injunction is required to be issued; as indicated hereinbefore, the question before the Board was as to whether there was an abuse in the sense that unreasonable amount was being claimed by way of royalty.

CONCLUSION

105. As it was a case of abuse, the Board had the jurisdiction to entertain any application for grant of compulsory licence. How far and to what extent appellant has infringed the right of the respondent is a matter which may be taken into consideration by the Board. A suit was filed and injunction was granted. Apart from the fact that the appellant offered to take a license held negotiations with the respondents in the suit as soon as it came to know that Super Cassettes is not a member of PPL, it gave an undertaking. Each case must be considered on its own facts.

106. However, we do not approve the manner in which the Board has dealt with the matter. It has refused to examine the witnesses. It took up the matter on a day for hearing which was fixed for production of witnesses. We, therefore, are of the opinion that the order of the Board should be set aside and the matter be remitted to the Board again for the consideration of the matter afresh on merit.

107. These appeals are allowed with the aforementioned directions. In the facts and circumstances of the case, the parties shall pay and bear their own costs.”

Thus the matters were remitted back to the Copyright Board for fresh consideration.



WEB COPY

142. These Civil Miscellaneous Appeals have been filed taking advantage of Section 72(2) of the Copyright Act, 1957, before it had been amended and as it prevailed on the date when the appeals were filed. Section 72(2) of the Copyright Act, 1957, is as follows:

“72. Appeals against orders of Registrar of Copyrights and Copyright Board -

(1) Any person aggrieved by any final decision or order of the Registrar of Copyrights may, within three months from the date of the order or decision, appeal to the Copyright Board.

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal under sub section (1), may, within three months from the date of such decision or order, appeal to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain.

Provided that no such appeal shall lie against a decision of the Copyright Board under Section 6.

(3) In calculating the period of three months provided for an appeal under this section, the time taken in granting a certified copy of the order or record of the decision appealed against shall be excluded.”

143. The Madras High Court in its Appellate Side Rules, had framed Rules for regulating the procedure with regard to the following:

“(1) To regulate proceedings under Article 226 of the Constitution of India.

(2) To regulate proceedings for contempt of Subordinate Courts and of the High Court.

(3) To regulate the procedure in regard to references and application made to the High Court under Section 256 of the



WEB COPY



Income Tax Act.

(4) To regulate the procedure in regard to references and applications made to the High Court under Section 64 of the Estate Duty Act.

(5) To cases under the Chartered Accountants Act, 1949.

(6) To regulate the procedure in regard to references and petitions made to the High Court under Section 130 of Customs Act.

(7) To regulate the procedure in regard to references and petitions made to the High Court Section 35-G of the Central Excise and Salt Act.

(8) To regulate the procedure in regard to references and petitions made to the High Court Section 8-B of the Gold Control Act.

144. However, Rules relating to Appeals under Section 72(2) of the Copyright Act, 1957, as the Act then was, had not been framed. It is, therefore, incumbent on the part of this Court to fall back to Section 96 of Code of Civil Procedure, namely, Appeals from Original Decree.

145. Section 96(1) of Code of Civil Procedure is as follows:

“Section 96 Appeal from original decree:-

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.

.....”

146. Order XL1 Rule 1 of Code of Civil Procedure is as follows:



WEB COPY



“(1)Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded:

Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court dispense with the filing of more than one copy of the judgment.

(2) Contents of memorandum - The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.”

147. Order XL1 Rule 2 of Code of Civil Procedure is as follows:

“2. GROUNDS WHICH MAY BE TAKEN IN APPEAL.

The appellant shall not except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

148. The above provisions are to be kept in mind, since arguments in these appeals have traversed quite widely beyond the grounds raised



and have widened the scope of the points for consideration in the appeals.

Points Nos.1 & 2:-

149.The first and second points to be addressed are issues relating to maintainability of the appeals and the locus of the appellants, particularly, M/s.Phonographic Performance Limited (PPL).

150.At the time when the appeals were presented, PPL was a Company registered under Section 27 of the Companies Act, 1913 and also a Copyright Society registered under Section 33 of Copyright Act, 1957. They were registered to carry on business in relation to sound recording on behalf of the members of the Society. They also claimed that they were entitled to charge and collect licence fee from the users of sound recordings as stipulated under Section 2(xx) of the Act, which right vested with its members. They also claimed that the members had authorised them to administrate performance/communication to the public.

96/158



WEB COPY

151. However, the Copyright Act, 1957 had been amended in the year 2012. The second proviso to Section 33(3A) of Copyright Act, 1957, r/w the Copyright Rule, 2013, which was brought into effect on 20.06.2012 and on 14.03.2013 respectively, necessitated the appellant, PPL, to register themselves as a Society within a period of one year from the date of the coming into effect of the Amendment Act, 2012. The appellant had forwarded their application for such registration on 09.05.2013. They however claim that even after one year, the registering authority/Central Government had not responded or passed any order. Therefore, the appellant withdrew the application.

152. The fact that the appellant themselves have withdrawn their application was stressed by Mr.G.Masilamani, learned Senior Counsel for the respondents, who claimed that therefore, the appellant/ PPL ceased to be a Copyright Society under Section 33 of the Copyright Act, 1957, and that therefore, they have no right to maintain the appeals any further.

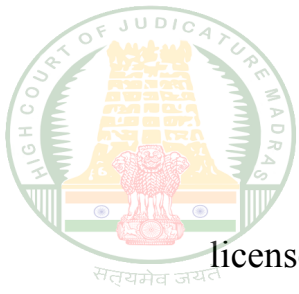
97/158



WEB COPY

153.However, this argument had been countered by Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of the appellants by stating that the appeals should be taken up as presented in the year 2010 and on that particular date, the appellant was a registered Copyright Society and intervening circumstances brought up by legislation cannot and should not a bar for the Court to examine the order of the Copyright Board challenged in the appeals. It was also contended that the appellant had brought this fact to the knowledge of the Court and had filed a series of Civil Miscellaneous Petitions to amend the statement in the Grounds of Appeals and this Court had also allowed those application by order, dated 21.02.2020 and had left the issue open to be raised at the time of final hearing. It had been urged by Mr.Vijay Narayan, learned Senior Counsel that the appellants' right commenced from the date when the respondents had made an application for compulsory licence under Section 31 of the Act before the Copyright Board in the first instance.

154.The appellant had been contesting the issue of compulsory



WEB COPY

license and the compensation payable before the Copyright Board. The matters had travelled via the Bombay High Court and the Delhi High Court to the Honourable Supreme Court and finally, were remitted back to the Copyright Board. Evidence had been adduced. The appellant had filed these appeals, which were admittedly maintainable on the date when they were filed. The learned Senior Counsel therefore urged that the Court should examine the order challenged and thereafter, the issue of *locus* of the appellants to still maintain the appeals can be examined. It was further urged that the members have assigned the copyright of their own sound recordings to the appellant under Section 18 of the Copyright Act, 1957. It had also been stated that the appellant had stepped into the shoe of the member owners of various sound recordings. They were also assignees and/or exclusive licensees of the sound recordings.

155. In the light of the rival contentions more particularly since an amendment had been brought up to the Act pending the appeals and the appellant had made diligent efforts to register themselves as a Copyright Society and such application had not been rejected by the registering



WEB COPY

authority/Central Government, but had been kept pending for more than a year, when probably more out of frustration than for any other reason, the appellant withdrew the application, I would still hold that the appeals are maintainable, since the appeals have been filed against the order of the Copyright Board and it is that order, which has to be examined in the light of Section 72(2) of the Copyright Act 1957, and since Rules have not been framed by the Madras High Court, in the light of Section 96 and Order XLI of the Code of Civil Procedure. Enforcement of the order in these appeals would be a different issue altogether and this Court should not tie its hands and short-circuit the appeals and non suit the appellants. On the date when they filed the appeals, they had locus and the appeals were maintainable. The statute provided it. I would therefore hold that the appellant can still question the order of the Copyright Board and would order accordingly on both the points of maintainability and the locus. The points 1 and 2 are accordingly answered.



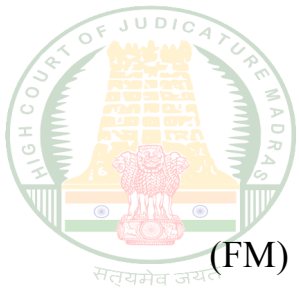
Points 3 and 4:

WEB COPY

156. These two points relate to appeals filed by the South India Music Company Association (SIMCA) in C.M.A.Nos.3490 to 3493 of 2010.

157. M/s. South India Music Company Association (SIMCA) was not a party in any of the proceedings before the Copyright Board. They had, however, filed the aforementioned Civil Miscellaneous Appeals as a person aggrieved under Section 72(2) of the Copyright Act, 1957. The appellant/SIMCA, which was founded in 1996, is an Association of Music Producers. Their object was to resolve the problems faced by the Music Industry in South India. The members included music production and distribution companies. They owned copyrights for various musical and other works including sound recordings. They are also the assignees of musical works and sound recordings of Tamil and Malayalam movies.

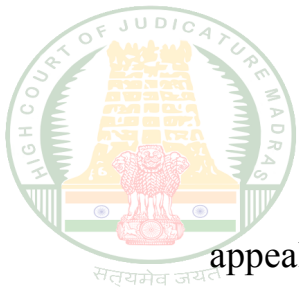
158. The Government of India in their IX Five Year Plan had brought in a shift from Medium Wave (MW) to Frequency Modulation



WEB COPY

(FM) Radio broadcasting and in March 2002, private sector companies were invited in FM Radio broadcasting by offering frequencies in Frequency Modulation Band (87.5-108 Mhz). The respondents had come out with their rates of royalties payable by FM Radio Broadcasters. There were disputes and the matter went before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, and an interim order was passed on 19.11.2002 fixing the rate of royalty at Rs.1,200/- per needle hour during prime time between 08.00 am and 10.00 am and 06.00 pm and 08.00 pm. This was the standard rate. There was also a further determination of the rates at 60% of the standard rates for a normal 12 hours and 25% of the standard for lean night hours. This came into effect from November 2002 till 31.12.2004. The FM Radio Broadcasters had some difficulties in effecting payment at this rate and the appellant/SIMCA had voluntarily agreed to lower the rates of royalty payable and had categorised the cities as A, B and C and had reduced the royalty for both B and C categories cities.

159.Challenging the order dated 19.11.2002, appeals and cross



WEB COPY

appeals were filed and finally, the Honourable Supreme Court had remanded the matter back to the Copyright Board for fresh consideration after examining the evidence available. Again, the appellant was not a party in any of the judicial proceedings.

160. The trial then proceeded before the Copyright Board. None of the parties to the applications had impleaded the appellant either categorizing it as a necessary party or a proper party. Even the Copyright Board did not think it necessary that the appellant must be heard. The Copyright Board then passed the order challenged in these appeals and even though the appellant was not a party, by the impugned order, dated 25.08.2010, it had been stated that the royalty, which had been determined, namely, 2% of the net advertising revenue would also be applicable to all *other content owners*.

161. The appellant was not named specifically in the order, but the respondents in the Civil Miscellaneous Appeal/ENIL unilaterally started making payment to the members of the appellant in accordance with the



WEB COPY

order impugned passed by the Copyright Board. They should have given credit to the fact that the members of SIMCA had actually reduced the rates payable when it was determined as per needle hour in the first order of the Copy right Board. Further, every member of SIMCA had separate agreements with the Radio Stations.

162. Claiming that they were seriously prejudiced by the order and aggrieved by the order, the aforementioned appeals have been filed by SIMCA. It had been argued that there had been complete violation of principles of natural justice. The appellant had not even entered the arena before the Copyright Board. The order was however directly prejudiced and it had been passed and enforced by ENIL to the disadvantage of the members of the appellant herein.

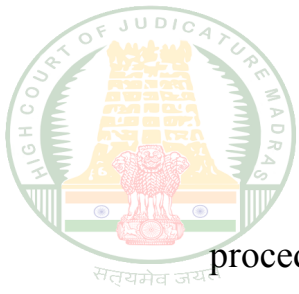
163. When the issue of applicability of the order to the appellant came up during arguments, Mr.G.Masilamani, learned Senior Counsel pointed out that in the agreements entered into by the members of the appellant, they had agreed to abide by the order of the Copyright Board.



WEB COPY

164.Mr.N.L.Rajah, learned Senior Counsel also pointed out that the appellants cannot play hide and seek and claim ignorance and innocence of the proceedings of the Copyright Board, which was conducted in a transparent manner in open Court. He pointed out that the appellant had taken advantage of the order, dated 19.11.2002 and when an order was passed determining an alternative rate of royalty to be paid, the appellant has now raised hue and cry, when they themselves had abided by the order, dated 19.11.2002, to which also they were not a party. He also contended that the appellant should have impleaded themselves as a party to the proceedings.

165.These arguments were countered by Mr.M.V.Swaroop, learned Counsel for the appellant, who pointed out that the appellant had no locus to join the proceedings before the Copyright Board. They were an independent entity altogether. It was pointed out that the jurisdiction of the Copyright Board to fix the royalty would arise only on a complaint filed under Section 31 of the Copyright Act, 1957. Thereafter, the



WEB COPY

procedure is inbuilt in the Act. Opportunity of hearing was not afforded to the appellant. It was claimed that the Copyright Board had exceeded its jurisdiction by bringing into its fold even parties who were not before it during the proceedings. The learned Counsel pointed out that even the Delhi High Court had stayed the impugned order filed by M/s. Super Cassettes Industries Limited, who like the appellant, was not a party to the proceedings before the Copyright Board. The Delhi High Court in its observation has stated that *prima facie*, it was evident that the order had been made applicable by the Copyright Board even to those who did not participate in the proceedings before it. The order had been stayed by the Delhi High Court.

166. I have carefully considered the rival contentions. Any authority, judicial or non judicial which ventures into decision making on the basis of evidence, can only restrict its orders to what had been pleaded and to the evidence that had been produced. Such evidence would be adduced by witnesses, who tendered evidence on behalf of a particular party. Such evidence cannot be analysed and made applicable



WEB COPY

to those who were not parties before the authority. They might have led different evidence altogether. They would have had a different set of facts to be pleaded. These are issues which should have been kept in mind by the Copyright Board before making the order applicable to parties, who were not even present before it.

167. The appellant/ SIMCA was not present before the Copyright Board. The Copyright Board could have, after passing the order and determining the rates, granted liberty to anybody else, who had not participated to seek clarifications/modifications. It is seen that the members of the appellant had independent agreements with the Radio Stations. They had agreed to abide by the order of the Copyright Board in the first instance: This agreement cannot be made to be universally and ever always applicable.

168. There can be an agreement over a definite issue or point, but there cannot be an agreement over undeclared/unpronounced judgments. Vagaries of law would take the decision maker through various paths and

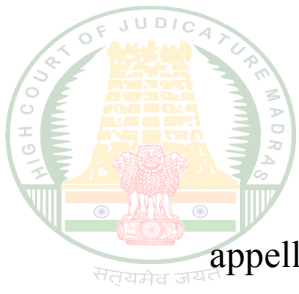


WEB COPY

no party can be bound unless they also had the opportunity of presenting their views before the decision making authority. A sweeping order and a statement that the order would apply everybody else cannot withstand the scrutiny of this Court. It has to be deprecated. I would therefore hold with respect to Point No.3, that the appellants had been seriously prejudiced by the applicability of the order passed by the Copyright Board and therefore the appeals filed by SIMCA are maintainable.

169.The issue then arises as to whether the appellant would be bound by any order passed by this Court. Before this Court, quite apart from the fact that they were not bound by the order of the Copyright Board, arguments were also advanced on merits against the order passed by the Copyright Board.

170.Determination of the rate at net value of 2% of the net advertising income had been very strongly questioned by Mr.M.V.Swaroop, learned Counsel for the appellant. The learned Counsel, in fact during his arguments produced statistics to show that the



appellant had suffered loss owing to unilateral application of the order by

ENIL. It was contended that the appeals are maintainable and arguments were also advanced on merits. Those arguments shall be addressed when those points are taken up for consideration.

171. Insofar as the points now under consideration. I hold that the appeals filed by M/s. South India Music Company Association (SIMCA) are maintainable and SIMCA has locus to file the appeals. The points for consideration are answered in favour of the appellant herein/SIMCA.

172. Having answered Point Nos. 1 to 4, which can be termed as the preliminary points before entering into a discussion on Point Nos. 5 to 7, let me now take up the background facts, the disputes between the parties leading to applications filed before the Copyright Board and finally evidence adduced and then order of the Copyright Board, dated 25.08.2010, which is the subject matter of the appeals.

173. M/s. Phonographic Performance Limited (PPL), was one of the



WEB COPY

leading music companies engaged in production and/or acquisition of rights in sound recordings. These recordings primarily related to film music. They were the holders of the copyright, which they had acquired from the first owner, namely, the Producer of the movie.

174.M/s.Entertainment Network India Limited (ENIL) and other such companies are FM Radio Broadcasters. They had licences to play songs. The private Companies were invited to set up FM Radio Stations. PPL and others had acquired licence after stiff competition and payment of licence fees. They had to play music, but they found that the copyrights vested with PPL and other such companies. They however played the music. This led to a series of correspondences between PPL and ENIL and other such Radio Companies and PPL questioned the authority to play the music and raised the issue of payment of royalty. Even when correspondences were on going, the music was played. There were offers of negotiation by both sides.

175.Complaining that the the offer made by PPL were unrealistic



WEB COPY

and unreasonable and that if the said offers were accepted, it would prejudice them and therefore, the offer itself was only a screen, which actually indicated refusal to grant permission, applications were filed taking advantage of Section 31 of the Copyright Act, 1957, before the Copyright Board by ENIL and other Radio Companies seeking compulsory licence. In the first round of litigation, the Copyright Board by a judgment and order, dated 19.11.2002, fixed the standard rates of :

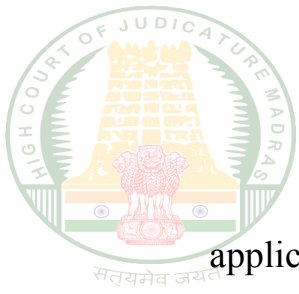
(a) Payment to be made at Rs.1200/ needle hour during prime time.

(b) For 12 normal hours = 60% of standard rate

(b) For 8 lean (night) hours = 25% of standard rate and respondent also directed to furnish a security/bank guarantee of Rs.20,00,000/- per radio station to PPL.

176.This was held to be in operation for a period of two years. Appeals were then filed before the Bombay High Court. In a few of the appeals, the Bombay High Court had remitted the matter back to the Copyright Board. In the year 2003, a further application was filed before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, against M/s.Super Cassettes Industries Limited seeking compulsory licence. In the meanwhile, M/s.Super Cassettes Industries Limited had filed a suit complaining infringement of copyright and therefore, the

111/158



WEB COPY

application for compulsory licence was resisted by M/s.Super Cassettes Industries Limited. The Delhi High Court clarified that the Copyright Board can examine all the issues. Even though the Copyright Board directed witnesses to be present, but still compulsory licence was granted by an order, dated 20.10.2003.

177.Questioning that order, a further appeal was filed before the Bombay High Court questioning the rate of compensation and not the concept of compulsory licence. This appeal was clubbed with the pending appeals before the Bombay High Court. Appeals were also filed before the Delhi High Court. By an order dated 30.06.2004, the matter was remitted back to the Copyright Board. The Copyright Board was directed to give opportunity to the parties to adduce evidence.

178.As against this order, a Special Leave Petition was filed before the Supreme Court. The Supreme Court thus had two appeals, one from the Bombay High Court, which opined that the compulsory licence can be granted by reasonable remuneration and another from the Delhi



WEB COPY

High Court, which directed examination of all issues by the Copyright Board.

179. The judgment of the Honourable Supreme Court in the said appeals was reported in *(2008) 13 SCC 30*, in *M/s. Entertainment Network (India) Limited and others -vs- Super Cassettes Industries Limited and others*. After examining the entire issue on law, the Honourable Supreme Court finally held as follows:

103. We have, moreover, been called upon to lay down the principles of evaluation. We decline to do so. We have been taken through various judgments of different jurisdictions. We have noticed hereinbefore that the scheme therein is different. The Tribunal exercises a limited jurisdiction in India. Different cases are required to be considered on its own merits. What would be reasonable for one may not be held to be reasonable for the other. The principles can be determined in a given situation. The Bombay High Court has remitted the matter back to the Board for the said purpose. We endorse the views of the Bombay High Court.
DISCRETIONARY JURISDICTION

104. The other question which arises is as to whether the discretionary jurisdiction should have been exercised in favour of the appellant. It was urged that keeping in view the fact that ENIL infringed the copyright, it was not entitled to an injunction. Reliance has been on Phonographic Performance Ltd. v. Maitra (1998) Fleet Street Reports 749 at 770- 773. The general principle of grant of injunction came up for consideration before the Court of Appeal. Therein, it was held that an owner may exercise and exploit his proprietary right by licensing some and not others. He may charge whatever he wishes. Such is not the position in India.



WEB COPY



Therein, the defendant did not take part in the proceedings. It was, inter alia, from that angle, held that the court could still exercise discretion.

The court of appeal held:

Use of an injunction by PPL to obtain money to obtain money to which they are not entitled would be an abuse, but there is no evidence that that ever occurs. Where unauthorized use of PPL's copyright is taking place, we do not believe it is an abuse to refuse to licence that copyright without an appropriate payment for past use and an agreement for future use. Nor do we consider it an abuse for PPL to require compliance with an injunction either by the person refraining from using the repertoire or by payment for such use that has taken place and will take place. Apart from the fact that we are not dealing with a case where an order of injunction is required to be issued; as indicated hereinbefore, the question before the Board was as to whether there was an abuse in the sense that unreasonable amount was being claimed by way of royalty.

CONCLUSION

105. As it was a case of abuse, the Board had the jurisdiction to entertain any application for grant of compulsory licence. How far and to what extent appellant has infringed the right of the respondent is a matter which may be taken into consideration by the Board. A suit was filed and injunction was granted. Apart from the fact that the appellant offered to take a license held negotiations with the respondents in the suit as soon as it came to know that Super Cassettes is not a member of PPL, it gave an undertaking. Each case must be considered on its own facts.

106. However, we do not approve the manner in which the Board has dealt with the matter. It has refused to examine the witnesses. It took up the matter on a day for hearing which was fixed for production of witnesses. We, therefore, are of the opinion that the order of the Board should be set aside and the matter be remitted to the Board again for the consideration of the matter afresh on merit.

107. These appeals are allowed with the aforementioned directions. In the facts and circumstances of the case, the parties shall pay and bear their own costs."

180. The matter then went back to the Copyright Board. There were



nine applications filed under Section 31(1)(b) of the Copyright Act, 1957

WEB COPY

for grant of compulsory licence for broadcasting sound recordings.

Three of the applications had been remitted back by the Honourable Supreme Court. Six applications were fresh applications. In deference to the direction of the Supreme Court, the Copyright Board permitted evidence to be adduced. The applicants before the Copyright Board were the Radio Broadcasters. The Copyright Board rendered a common order in nine applications. The details are as follows:

- (1) *Case No.1 of 2002 – M/s.Music Broadcast Private Limited vs M/s.Phonographic Performance Limited*
- (2) *Case No.2 of 2002 – M/s.Entertainment Network (India) Limited vs. M/s.Phonographic Performance Limited*
- (3) *Case No.6 of 2002 – M/s.Radio Mid Day West (India) Limited vs. M/s.Phonographic Performance Limited*
- (4) *Case No.3-1 to 3-3 of 2008 – M/s.Puran Multimedia Private Limited vs M/s.Phonographic Performance Limited*
- (5) *Case No.3-5 of 2002 – M/s.Synergy Music Performance Limited vs.M/s.Phonographic Performance Limited*
- (6) *Case No.3-4 of 2008 – M/s.Entertainment Network (India) Limited vs. M/s.Phonographic Performance Limited*
- (7) *Case No.3-6 of 2008 – M/s.Rajasthan Patrika Private Limited*



WEB COPY



*vs M/s.Phonographic Performance
Limited*

181. On behalf of the applicants, 13 witnesses were examined. Out of them, Prof. Bibek Debroy, PW4 was the expert witness. On behalf of respondents, five witnesses were examined, of whom, RW-1, S. Suresh was the prime witness for PPL and RW-5, Prof. S.K. Laroia, testified about his final conclusion based on his study. To be more precise, the followings were the witnesses examined:

*PW-1-Ashish Sha
PW-2-Ayan Chakraborty
PW-3-Apurva Purhoit
PW-4-Prof. Bibek Debroy
PW-5-Prashant Panday
PW-6-Dalpat Raj Jain
PW-7-Aarti Kathariya
PW-8-Naresh Malviya
PW-9-Rajinder Batra
PW-10-Poovanalingam
PW-11-Kanwar Sameer
PW-12-Rahul Gupta
PW-13-Sudeep Jain
RW-1-S. Suresh
RW-2-Sanjujeet Bhujabal
RW-3-Ramesh Arora
RW-4-Girish Jain
RW-5-Prof. S.K. Laroia*

116/158



WEB COPY

182.The above details have has been stated since it has to be first examined whether the parties before the Copyright Board were provided with opportunity to adduce oral evidence. They had been granted that opportunity and to this extent, the Copyright Board had complied with the direction of the Honourable Supreme Court in its order remanding the matter back to the Copyright Board.

Point Nos.5 to 7:-

183.The discussion on point Nos.5 to 7 overlap and consequently they are taken up together for discussion. The findings relating to Point Nos.5 and 6 would be first rendered and after continuing with the discussion, the findings with respect to point No.7 would be given.

184.Applications had been filed before the Copyright Board seeking compulsory licence by the Radio Companies under Section 31(1)(b) of Copyright Act, 1957. In the application form in the clause relating to *language of the work*, it had been stated as “*all language*

117/158



available now or any future within the Repertoire of PPL.”. In the

application, it had been stated with respect to the purpose for which compulsory licence was required, *to communicate music, being sound recordings, to the public via Radio FM Stations.* The list of cities were also indicated.

185. With respect to the number of copies of work proposed to be published under the licence applied for, it had been stated that *it was not possible to estimate the number of times a work could be communicated to the public or published.* It had been stated that it would depend on the log sheets proposed to be submitted by ENIL at the end of each calendar and that the log sheets are proposed to be in tabular form and will contain the details of the time of the day, name of the song, the sound recordings from which it had been played, the name of the publisher and duration for which the song was played. It was also stated that the estimated cost could not be determined.

186. With respect to the rate of royalty, it had been stated, after



WEB COPY

extracting the previous correspondences between the parties, that PPL demanded as the fair market value at Rs.1,500/- per needle hour for broadcasting of sound recordings of PPL over the radio service. It was stated that a provision was also sought for 5% escalation. It was stated that the rate of royalty suggested by PPL was economically unviable for private FM Radio Stations, which were in its infancy in India.

187.It was also stated that ENIL had obtained separate licences from Indian Performing Right Society Limited (IPRS) under Section 33(3) of the Copyright Act, 1957, and had also entered into agreements in this regard with respect to musical and literary works that in the future will be included within its Repertoire. It was also stated that Indian Performing Right Society Limited (IPRS) had agreed to give several discounts on its total price depending on the cities, differentiating between metro and non metro cities. It had been stated that however, PPL had refused all offers made by ENIL. It was also pointed out that PPL had control of one category of copyright, namely, music, while IPRS controlled both musical and accompanying literary works. It was



WEB COPY

therefore stated that PPL should agree to the same rate of royalty as agreed by IPRS, which was originally determined at Rs.750/- per needle hour for Radio broadcast with discounts relating to prime time and relating to metropolitan and non metropolitan cities.

188.It is thus seen that at no point in their application, did ENIL sought the rate to be fixed as a percentage of the net advertising income. The concept was always rate per needle hour and the only aspect was the quantum of such rate. PPL demanded Rs.1,200/- per needle hour. From the applications, it is evident that ENIL had agreed to Rs.750/- per needle hour, as also agreed by IPRS with corresponding discounts relating to prime time and non prime time and metro and non metro cities.

189.In the application filed by M/s.Rajasthan Patrika Private Limited in the year 2008 in Case Nos.3-6 of 2002, the language of the work was stated as “*all languages available in the work now or in future within the Repertoire of PPL*” . With respect to the royalty, after stating the background facts necessitating the filing of the application under



WEB COPY

Section 31(1)(b) of Copyright Act, 1957, it had been stated that PPL had refused to accept the terms of M/s.Rajasthan Patrika Private Limited, wherein, M/s.Rajasthan Patrika Private Limited had offered Rs.115 per needle hour for the cities of Udaipur, Raipur and Kotta and also for security deposit to be paid. A relief was sought to determine a reasonable rate of licence fee in accordance with the rate per needle hour. The rates were given in a separate annexure. It was a calculation relating to rate per needle hour.

190.Similar applications were filed by other Radio Companies.

191.One fact to be straightaway pointed out is that all the Radio Companies had, in their written applications insisted on compulsory licence to be given, since PPL had stipulated a rate, which in their opinion was practicably usurious and therefore, sought a reasonable rate to be determined keeping in mind the concept of rate per needle hour alone.



WEB COPY

192. In their counter affidavit, PPL justified the rates offered by them. Again, the correspondences and the meeting and the discussions which took place had been stated in detail and the high rate was justified consequent to loss in sale of recordings/cassettes, CDs and the utility of the content, namely, the reach of the content, the marketing and the sales and it was stated that while examining the loss in sale owing to cassettes, CDs and recordings, that Rs.1,500/- per needle hour would be just and proper and while examining the utility that 20% of the net advertising revenue is also just and proper.

193. Thus, for the first time, it was PPL, the appellant herein who brought up the concept of payment of a percentage of the net advertising revenue. It was finally stated that a tariff of Rs.1,500/- per needle hour was justified and with specific reference to the language, which was given as future also, it was stated “*no comments*”. Thus PPL had never objected for future works to be included and taken for consideration while determining the rate of royalty.



WEB COPY

194. The conclusions, which can be reached from a reading of the applications and the counter are as follows:

(1) There had been a series of discussions over determining the rate of royalty and discussions centered around the concept of rate per needle hour.

(2) The applicants were of the opinion that reasonable rate per needle hour would be Rs.750/- and an agreement was reached with Indian Performing Right Society Limited (IPRS), who had control of separate licences both musical and literary works. They had also wanted necessary consideration to be given for the prime and non prime slots and for metro and non metro cities.

(3) On the other hand, PPL had stated that rate per needle hour would be just but stipulated that the rate should be Rs.1,500/- per needle hour.

(4) PPL had also expressed opinion about the net advertising rate, but had stipulated the nature of calculation to be undergone for determining the same and placed two conditions namely, the range of



reach and the extent of advertising to be done.

WEB COPY

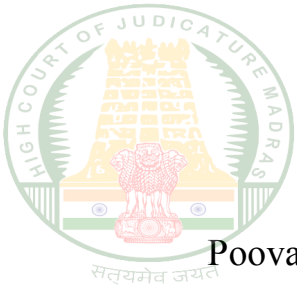
(5) There had been no serious objection raised about future work being included while determining the rate of royalty by the Copyright Board.

195. These background facts have been placed only to determine the basis on which the parties had approached the Copyright Board. They are mere statements of facts.

196. Evidence was also adduced on behalf of ENIL and PPL.

197. On behalf of M/s. Music Broadcast Private Limited, Ashish Sha, Ayan Chakraborty, Ms. Apurva Purhoit, and Prof. Bibek Debroy were examined as PW-1 to PW-4. On behalf of M/s. Entertainment Network India Limited (ENIL), Prashant Panday and Dalpat Raj Jain were examined as PW-5 and PW-6. On behalf of Radio Mid Day West (India) Limited, Arti Katharaiya and Naresh Malaviya were examined as PW-7 and PW-8. On behalf of M/s. Puran Multimedia Limited, Rajinder Batra,

124/158



WEB COPY

Poovanalilingam, Kanwar Sameer and Rahul Gupta were examined as PW-9 to PW-12. On behalf of M/s.Entertainment Network India Limited (ENIL) again, Sudeep Jain was examined as PW-13. Among the above witnesses, Prof.Bibek Debroy, PW-4 was the expert witness.

198.On behalf of M/s.Phonographic Performance Limited (PPL), S.Suresh, Sanujeet Bhujabal, Ramesh Arora, Girish Jain and Prof.S.K.Laroiya were examined as RW-1 to RW-5. Among them, Prof.S.K.Laroiya, RW-5 was the expert opinion.

199.I will take up for consideration the analysis of Prof.Bibek Debroy, PW-4 and Prof.S.K.Laroiya, RW-5 after I had examined the deposition of other witnesses.

200.The other witnesses, who were primarily employees of the stated companies spoke about the operating expenses, programming cost, royalty cost, licence fees, expenses towards employees, administration, selling and distribution, operating cost of running the Radio Stations,



WEB COPY

expansion of Radio Stations, change in Government licensing policy, music royalty based on advertising revenue share, terms of the licence granted by Ministry of Information Broadcasting, operating losses, brand value of the company, time slot voluntary licensing, voluntary licensing agreement, percentage of the royalty paid and payment towards advertisement expenses.

201. On behalf of PPL, RW-1 to RW-4 spoke about the piracy, anti-piracy raids, royalty income, All India Radio (AIR) advertising revenue, consultation by PPL before fixing tariff, decrease in physical sales of CDs and cassettes, cost of music rights, wholesale and retail business of CDs and DVDs and downloading of songs from internet.

202. More specifically, PW-1 Ashish Sha had spoken about the operative expenses, which included programming cost, royalty and licence fee paid to the Government of India and stated that operating cost had come down compared to staff costs.



WEB COPY

203.PW-2, Ayan Chakraborty, stated about the expenses towards employees, administration and selling and distribution and stated that those expenses have increased consequent to the increase in the number of Radio Stations. But the expenses were less than the royalty payable to the copyright owners.

204.PW-3, Apurva Purhoit, spoke about the closure of allocated frequencies, which would indicate individual players, who took frequencies by paying to the Government one time entrance fee and have put up studio facility, but did not put up Radio Stations. The witness also spoke about the growth of revenue and fall of revenue from the second half of 2008.

205.PW-5, Prasanth Panday stated that the profits by ENIL was dependent on the changes in the Government licensing policy. He asserted that songs become hit only when the Radio Stations expose them to various and different audience. He also stated that there is a possibility that promotion of music on Radio will also increase the



downloading of those hit songs from internet.

WEB COPY

206.PW-6, Dalpat Raj Jain, expresses his opinion on music royalty based on advertising revenue share.

207.PW-7, Aarti Kathariya stated that Radio Stations broadcast film music primarily. She also stated that Radio Mid-Day West (India) Limited had independent agreements with 'T' Series and Yash Raj and pay royalty to them in accordance with the order of the Copyright Board of the year 2002. She also stated that the change in policy in the payment of licence fee from an absolute amount to a revenue share model had been a reason for participation in Phase-II policy. She also stated that increase in the payment of royalties had led to decrease in revenue, thereby affecting Radio Stations.

208.PW-8, Naresh Malaviya again spoke about the operating loss of which royalty was a major component. He also stated that the reduction in the royalty rate would reduce loss for FM Radio operators.



WEB COPY

209.PW-9, Rajindar Batra stated that opening of Radio Stations had increased the draw value of M/s.Puran Multimedia Private Limited, but still there was no profit. There was also no provision for payment of royalty in the balance sheet either to Indian Performing Right Society Limited (IPRS) or to M/s.Phonographic Performance Limited (PPL).

210.PW-10, Poovanalingam, stated that AM popularity in India was 90% and FM popularity was 10%.

211.PW-11, Kanwar Sameer stated that the compulsory licensing application had been filed only against PPL. He stated that royalty have to be paid for B, C and D categories of cities. He stated that the order of the Copyright Board, dated 19.11.2002, has been complied with respect to payment of royalties to other content holders.

212.PW-12 Rahul Gupta stated that all agreements relating to payment of royalty had a revision of a rates clause.



WEB COPY

213.PW-13 Sudeep Jain stated that advertising expenses were not paid to their holding Companies as they were not in a position to pay the same. They had to take loan even to meet regular expenses.

214.On behalf of M/s.Phonographic Performance Limited (PPL), RW-1, S.Suresh, Chief Operating Officer PPL, who was previously with Sony Music, stated about piracy, which was rampant in CDs, cassettes and MP3 CD industry. Anti-piracy raids had been increased but physical sales had decreased. He also stated that he understood from newspapers report that All India Radio earns 40% of its revenue from advertisement. However, for Phase-II, the licensing policy had also changed from one time payment of licence fee to that of revenue sharing method. He also stated that the current tariff of PPL was Rs.2,400/- per needle hour or 20% of net advertising revenue, which ever was higher. However, he was not able to name any particular Radio Station with whom this agreement was entered into after consultation. He also stated that the revenue earning capacity would depend upon the city and also prime time



WEB COPY

or lean hours during which they broadcast songs. He also stated that the primary source of revenue for Radio Stations was advertising. He also stated that a percentage of net advertising revenue would be predominantly correct, but subject to a minimum tariff based on needle hours.

215.RW-2, Sanujeet Bhujabal, who was the Director-Marketing of Sony Music Entertainment (India) Private Limited, which was a member of PPL, again spoke about piracy, but since internet connectivity was not to that high level, discounted downloading of music as a reason for decrease in profits. He however stated that the revenue of Sony Music was confidential. He stated that Radio is the cheapest form of entertainment. He also stated that Radio FM Stations promoted only film music and not gazal, classical and devotional musics.

216.RW-3, Ramesh Arora, who was in the business of whole sale music under the name of CD House India Private Limited at Delhi stated that retailers have complained that their sales are steadily suffering. He



also spoke about piracy of music and sales of such CDs. He however was not aware of any details about other regional FM channels.

WEB COPY

217.RW-4 Girish Jain, Director, Venus Records and Tapes Private Limited, Mumbai, a member of PPL, stated that songs can be downloaded from the internet free of cost. He stated that PPL, paid his company a royalty of about 16 crores in 2009-2010. He also stated that the sale of music through digital modes like mobile downloads, internet streaming have increased.

218.A careful analysis of the evidence of the above witnesses would reveal that Radio Stations have expenses to meet which they termed operating costs and these included unavoidable costs like payment of royalty to the content holders, payment of licence fee to the Government and payment of salaries. The Radio Companies having taken on auction, the arduous task of running Radio Stations at various cities, which are categorised as metro cities and B, C and D categorized cities and were dependent on the songs being played continuously and



WEB COPY

those songs must attract advertisement. These songs would attract advertisement only when there is an increase in the number of listeners and there is reach to the remote corners of the frequency of such Radio Station.

219.It must also be kept in mind that private Radio Stations are not permitted to broadcast news, which was the exclusive privilege of All India Radio at that particular point of time. They however served as a medium to promote social awareness about the projects and schemes of the Government. They have to balance the operating expenses with the broadcast of songs and also the broadcast of various schemes of the Government and their only source of revenue was through advertisement. They cannot avoid payment of royalty to the content holders of the music, payment of licence fee to the Government and staff related expenses, like salary and other expenses.

220.It must also be kept in mind that running a Radio Station would require not just staff as required in a Corporate Office, like front



WEB COPY

office staff and secretarial staff, but highly technical staff, who are conversant with the technicalities of running a Radio Station. There must also be marketing for obtaining advertisers and a balance must be made with the advertisement fee which they charged and it must also be at par with other private Radio Stations. All these factors require managerial skills and also require what could be called a right to broadcast hit songs. The more hit songs are played during prime time, the more there will be flow of advertisement and the more there will be competition among the prospective advertisers, which would enable the Radio Stations to increase the advertisement rates.

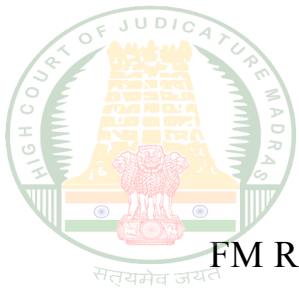
221. This has to be contrasted with the content providers, as they had already acquired copyright for the songs and PPL being a Copyright Society, has under its fold members like, Sony Music and Venus Music. They required royalty to be paid, if songs are broadcast by the Radio Stations, otherwise these songs would be, as Mr.G.Masilamani, learned Senior Counsel in the course of his arguments stated, *still born*.



WEB COPY

222.It is thus seen that though compulsory licence had been resorted to by the filing of applications before the Copyright Board, the concept of compulsory licence had not been seriously questioned by either of the parties either before the Copyright Board or before this Court. Compulsory licensing provides a *win-win* situation. The content holders or copyright holders, who had acquired copyright of the songs from the producers, cannot broadcast them without the assistance or without the platform provided by the Radio FM Stations. No doubt, All India Radio already exists, but the Radio FM Stations have their own charm and attraction for public at large. Songs could be interspersed with advertisements and also with the small quips of comedy and some times even quiz questions by Radio Jockeys.

223.Thus, the amount spent on cost of acquisition of copyright by PPL, is regenerated from the royalty paid by Radio FM Stations. The more popular and more hit the songs were, the more number of times they are played in Radio FM Stations and the more number of time they are played at prime time, the more is the advertisement generated by the



WEB COPY

FM Radio Stations. Thus, both the appellants herein and the respondents herein require monitoring of the licence and it is for their benefit that compulsory licence, as a concept, was accepted by them.

224. The only sore point would be the rate of royalty payable. There are two separate methods of royalties, namely, a share in the net advertisement revenue or rate per needle hour.

225. A share in the net advertising revenue would generate conflict, since the very word “*net*”, would mean, the share of the revenue after deducting expenses incurred in running a Radio Station. Primarily, these expenses include the licence fee and staff expenses. On the other hand, the rate per needle hour would be the rate payable for the songs depending on whether it is played during prime time or during lean hours at a fixed rate for every hour. In their applications, ENIL had projected that they are prepared to provide log sheets to show the number of needle hours every song was played.



WEB COPY

226. Now it is necessary to examine the evidence of the expert witness on either side to determine which one of the two methods would be a more suitable method.

227. It must be kept in mind that in their applications, the respondents herein/Radio Stations had projected that rate per needle hour would be a just determination of royalty and they largely stated that Rs.750/- per needle hour would be a reasonable rate. On other hand, the appellant herein/PPL in their counter before the Copyright Board stated that the rate per needle hour should be Rs.1,200/- and also projected for the first time an alternate, namely, the net advertisement sharing method. But they placed a caveat that this should be resorted to only when there is reach to remote areas and proper marketing to fetch advertisement.

228. PW-4, Prof. Bibek Debroy, an expert with much distinction, stated that there could be one or two alternates, as royalty, namely, rate per needle hour, which he termed as absolute figure or a share in net advertising revenue, which he termed as a percentage of revenue. He



WEB COPY

was of the opinion that a share in the net advertisement revenue would be a better option, as it gives the actual revenue earned and that would be an indication of the actual value of the song or the actual popularity of that particular song. On the other hand, the rate per needle hour is uniformly fixed for all the songs and the only variable would be the lean hours/prime hours and metro cities/non metro cities.

229.He also stated that the rate per needle hour does not have flexibility to adjust to the fluctuations of economy and inflation. He was of the firm opinion that the revenue sharing method was more opt particularly, also because the Radio industry was at its infant stage. He stated that the global range of revenue sharing was between 0.4% and 5%. He also stated that the advertisement rates also fluctuated and these factors would address both the operational expenses necessary for the Radio Stations and the royalty payable to the content providers.

230.RW-5, Prof.S.K.Laroiya stated that the copyright holders quiet apart from granting licence to Radio Stations, also have an eye on profit



WEB COPY

generated from sale of physical cassettes and CDs. That part of sales were affected, when the songs are played in the Radio Stations since the songs could be downloaded. Piracy of CDs and cassettes also directly affected the profits. He also stated that there should be different royalty rates for different cities. The rate per needle hour would mean that the number of spins of the music that a broadcaster plays a particular track in a given hour. He was of the opinion that the royalty rate should be determined by realities of the market and cannot be thrust by a regulatory authority.

231. The evidence of the above two witnesses lead to the following facts:

(1) Copyright had been acquired on payment of fees to the copyright holders.

(2) After acquiring copyright, a particular song will have to be broadcast in a medium, which generates income to cover the acquisition costs.

(3) One of the mediums, which had been opened up to private



sector, were the FM Radio Stations.

WEB COPY

(4) FM Radio Stations during the period under consideration were in their infancy stages.

(5) They had paid licence fees for acquiring a right to broadcast a song in a particular frequency and in particular cities.

(6) They had set up Radio Stations, which have their own operating costs including the costs on technical expertise and the cost on staff and more particularly, costs on marketing.

(7) These Radio Stations require songs to be broadcast.

232. As seen from the judgment of the Supreme Court in *M/s. Entertainment Network (India) Limited and others -vs- Super Cassettes Industries Limited and others*, reported in (2008) 13 SCC 30, there were numerous discussions between the Radio Stations and the copyright holders to determine an equitable and just rate of royalty to be paid to the copyright holders for broadcasting these sound recordings. These discussions ultimately failed. This led to applications being filed under Section 31(1)(b) of the Copyright Act, 1957, by Radio Stations



WEB COPY

seeking compulsory licence of the songs to be broadcast in their Radio Stations.

233.As a concept, neither side had objected to the very filing of these petitions. Their focus was only on the concept of royalty to be paid. It is thus seen that to a large extent, both the Radio Stations and the copyright holders have used the Copyright Board as a medium to determine the royalty payable, in view of the fact that they could not settle that the issue by themselves. They were always prepared to find fault with any solution provided by the Copyright Board.

234.In their applications before the Copyright Board, the Radio Stations, including ENIL had stated that a just method of payment of royalty would be rate per needle hour and they projected Rs.750/- as a just and equitable rate.

235.In their counter, PPL had also harped upon the payment of royalty per needle hour, but had given a sum of Rs.1,200/- as an equitable

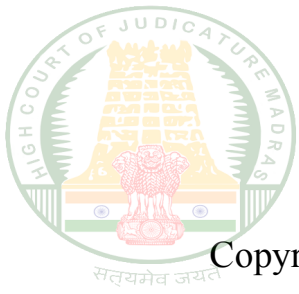


WEB COPY

rate. They had also in their counter opened up a discussion about net revenue sharing method, but stated that Radio Stations must reach out to remote corners and do effective marketing to generate advertisement.

236. The Copyright Board in its judgment had embarked upon the impact of All India Radio, and on a comparison with the rates paid and payable in foreign jurisdiction and on the social impact of Radio Stations and the necessity to ensure that Radio Stations survive the economic vagrancies and do not close down business.

237. These are factors, which necessarily have to be kept in mind, but primarily it has to be examined whether the net revenue sharing method, which the Copyright Board had finally arrived at, was just and equitable. It has to be kept in mind that this Court cannot thrust its views nor would it be proper for embarking on an entirely independent path quite divergent from that stated by the Copyright Board. It has to be seen whether the factors taken by the Copyright Board were relevant and whether if those factors had not been taken into consideration, the



Copyright Board would have come to different conclusion.

WEB COPY

238. The Copyright Board had experts as members even though a judicial member was not present. Due respects should be given to the efforts taken by the Copyright Board to comply with the specific direction of the Supreme Court that evidence should be adduced and evidence should be analysed. The onus then shifted to the parties before the Copyright Board to adduce evidence, which would assist the Copyright Board to conclusively prove facts. Unfortunately, all the witnesses dithered in their oral evidence. Further, unfortunately, accounts were not produced. The matter cannot be held back for ever and ever. The Copyright Board had a duty to discharge and with the available records, they had passed the order now questioned before this Court. They have, I must admit, gone beyond the pleadings and evidence available. But if they had not, they would never have been able to come to any conclusion, because, the parties must accept that their evidence was not wholly satisfactory. Witnesses admitted during cross examination that they did not give particular details, that they did not



WEB COPY

produce accounts and that they were stating their individual opinion alone. It was for that reason, the Copyright Board had to travel far beyond the evidence available. But I must state that even though the reasons relating to social impact was stretched to a little far, still that is a fact to be kept in mind.

239.It must also be pointed out that the written arguments, particularly by the appellant herein/PPL went beyond the evidence. They produced tabular columns of income and expenditure without them being put to test during evidence. Accounts should have been submitted during the course of evidence and merely because, written arguments extended far wide, they cannot be basis of any judgment, as the written arguments were not substantiated by pleadings and evidence.

240.In view of the above findings, I hold with respect to Point Nos.5 and 6 that the Copyright Board had **not** misdirected itself in venturing into a discussion on social impact and public policy and that the Copyright Board **was correct** in comparing FM Radio Stations with



All India Radio and the modalities of royalty payable with foreign Radio Stations.

WEB COPY

241. Order XLI Rule 33 of Code of Civil Procedure is as follows:

“33. POWER OF COURT OF APPEAL:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.”

As stated, this Court had to fall back on the provisions of Code of Civil Procedure, while examining these appeals.

242. In the case of *Pralhad and others vs State of Maharashtra and others*, reported in *(2010) 10 SCC 458*, the Honourable Supreme Court held as follows:

“18. The provision of Order 41 Rule 33 CPC is clearly an enabling provision, whereby the appellate court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass or make such further or other decree or order



WEB COPY



as the case may require. Therefore, the power is very wide and in this enabling provision, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression “order ought to have been made” would obviously mean an order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying “the court may pass such further or other order as the case may require”. This expression “case” would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (Civil Procedure Code, 15th Edn., p. 2647) observed that this Rule is modelled on Order 59 Rule 10(4) of the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this Rule is to do complete justice between the parties.

20 . In *Banarsi v. Ram Phal* [(2003) 9 SCC 606 : AIR 2003 SC 1989] this Court construing the provisions of Order 41 Rule 33 CPC held that this provision confers powers of the widest amplitude on the appellate court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject-matter of the appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See SCC p. 619, para 15 : AIR para 15 at p. 1997.)

It has also been held by this Court in *Samundra Devi v. Narendra Kaur* [(2008) 9 SCC 100 : (2008) 3 SCC (Cri) 690] SCC (para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict.”



WEB COPY

243. This pronouncement of the Honourable Supreme Court was with respect to a notification under Section 4 of Land Acquisition Act, 1894, and whether additional compensation and grant of additional benefit can be granted and their permissibility. The Supreme Court had taken recourse to the provisions under Order XLI Rule 33 of Code of Civil Procedure to set right a denial of relief by the High Court to the appellants.

244. The Supreme Court however placed a word caution in applying the provisions under Order XLI Rule 33 of Code of Civil Procedure in the judgment reported in *2022 SCC Online SC 445*, in the case of *Eastern Coalfields Limited and others vs Rabindra Kumar Bharti*. That was an appeal relating to the provisions of the Prevention of Corruption Act, 1988 and the liberty to proceed with the departmental enquiry. The Supreme Court had referred to Order XLI Rule 33 of Code of Civil Procedure, The relevant paragraph of the judgment reads as follows:



WEB COPY



“15. We may also observe that reference made to Order 41 Rule 33 of the Civil Procedure Code may not have been justified. Order 41 Rule 33 no doubt clothes the appellate court with an extraordinary power, which however is a rare jurisdiction. It is to reach justice in the special facts of a case. It is not an ordinary rule to be applied across the board in all the appeals. In fact, the principle is inter alia no doubt that even if there is no appeal by any of the parties in the proceedings, an order can be passed in his favour in the appeal carried by the other side. Any order which ought to have been passed can be passed. In this case, there is no order against the appellant(s) by the learned Single Judge. The order of dismissal was not specifically the subject matter of challenge as noticed. We do not think in the facts of this case, that it is a fit case where the High Court could have supported the directions with reference to Order 41 Rule 33.

245. On the basis of the above ratio by the Supreme Court and the caution to be kept in mind before invoking the provision of Order XLI Rule 33 of Code of Civil Procedure, this Court must examine whether such provision can even be invoked in the facts of the present appeals.

246. It is trite in law to point out that any judgment or order must be based on the materials before the Court. The definition of “proved” under Section 3 of the Indian Evidence Act, 1872, is as follows:

“Proved-A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the



supposition that it does not exist.”

WEB COPY

247. Though this aspect can strictly be applied to an order in original by the original authority, still that fact or will have to be kept in mind, even while examining an appeal, particularly, a first appeal. The concept of just relief has been expanded in Order XLI Rule 33 of Code of Civil Procedure and the appellate Court can grant such relief.

248. The discussions in these appeals thus far have led to a conclusion that compulsory licence works out to the advantage of both the appellants and the respondents. The issue is as to what should be the royalty payable. This should have been addressed by the parties themselves. Arguments have been advanced that consideration should be given to the social impact which Radio Stations have, which indicated that they must be permitted to survive. On the other hand, arguments were also advanced relating to the *Berne* and *Rome convention*, to which India is a signatory. These emphasised that compulsory licensing as a reality between the two parties and must be accepted as a reality in the industry.

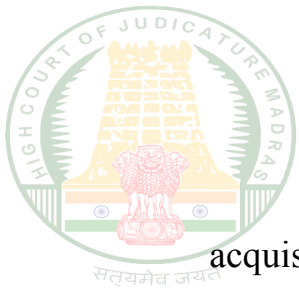
149/158



WEB COPY

249. The only question is the rate of royalty. On the basis of the materials available, the Copyright Board had determined 2% of the net revenue received from advertisers. This is broadly within the parameters of the international rates, which vary from 0.5 to 5%. It had been complained on behalf of the appellants that there is bartering done by the respondents, particularly, ENIL, who projected a high expenditure on staff and other overheads and thereby, have reduced the net value of the advertising revenue which they earned.

250. It had also been complained that by adopting a bartering policy, conglomerates like, ENIL, which have control over print and electronic media, as well as Radio Stations and Television networks, would offer substantial discounts to prospective advertisers, if they were to advertise their products or services in the print media and the discounts offered would directly affect the advertisement revenue earned by the Radio Stations. But, unfortunately, even though that might be a reality, the Court should strike a balance to ensure that the cost of



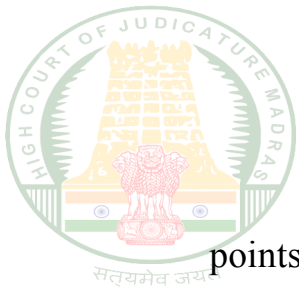
acquisition of copyright is also balanced with the royalty paid by the Radio Stations.

WEB COPY

251.It had been stated by Mr.Vijay Narayan, learned Senior Counsel that cost of acquisition has vastly increased and runs into mind boggling sums and that therefore, pegging the royalty to net revenue sharing method and determining it at 2% was in fact an insult to the appellants herein.

252.The strange fact is that the respondents herein had advocated only needle per hour method in their applications. The witnesses however spoke otherwise and that oral evidence was not substantiated by pleadings. But since at this stage of proceedings, it may not be proper on the part of this Court to direct collection of further evidence, I hold that I am justified in adopting a hybrid method for the royalty to be paid.

253.The scope under Order XLI Code of Civil Procedure is quite narrow. If it is found that the evidence is insufficient or that certain



WEB COPY

points are not answered, then the order has to be set aside and the matter has to be remanded back. This would, in my opinion to put it very mildly, be a horrible order. It would be to the disadvantage of all the parties. This Court will therefore have to balance equities with materials available on record. This Court cannot also embark on a calculation of the optimum percentage of the net revenue in advertisement, which could be thrust upon the parties. Any percentage would be only arbitrary. Striking a middle path is always the object of any judicious decision making. The Copyright Board had struck a middle path in determining 2%, as the optimum net sharing revenue rate.

254.It should however be kept in mind that a minimum platform rate must also be devised. To this extent, I would fall back to the evidence of RW-1, S.Suresh, who stated that net advertisement rate would be a viable rate provided there was a minimum platform or minimum needle hour rate determined. To this extent, I would again fall back to the rate earlier determined and I would hold that 2% net advertisement revenue rate as stated by the Copyright Board with a



minimum platform of Rs.660/- per needle hour would be a just and equitable royalty payable to the appellants herein.

WEB COPY

255.I am deeply conscious of the limitations, which this Court has in adding this factum of minimum platform of rate to be paid, I however hold that it is only justified on the ground that there has to be some assurance on revenue being generated by way of royalty to the Copyright holders. Even if there is juggling of accounts by the respondent, as stated by the appellants, still they would be under obligation to pay this minimum amount for the songs, which they had played, for which they had generated advertisement and which advertisement income or revenue, according to the appellants have not been properly projected by the respondents. This minimum platform would apply only when the respondents state that they are not payable any royalty at all consequent to expenses incurred. They will have to pay this pay minimum Rs.660/- per needle hour, when the 2% net advertisement rate falls below this particular amount. This would give a *win-win* situation to all the parties and more particularly, sensitize them to render proper accounts relating



to the revenue earned through advertisement. I would determine

Rs.660/- per needle hour not on arbitrary basis, but only because that amount had been discussed even between the parties.

256.I must readily accept that any rate thrust on the parties by the Court can always be challenged as arbitrary. To avoid this situation, the parties should have resorted to alternate dispute resolution method to resolve the issue of royalty payable. Whether compulsory licence is to be granted or not is a legal issue. The issue of royalty has should have been determined by mutual consensus. But unfortunately, adversial litigation is so deeply ingrained that any alternate method though spoken in laudatory terms is rarely embraced with an open mind.

257.There were also discussions about the applicability of the order of the Copyright Board to future sound recordings. I would hold that since the net advertising rate is a flexible aspect, which point was stressed by Mr.Abishek Malhotra, learned Senior Counsel, this fluctuation of net advertisement rate would cover the future licences, I



WEB COPY

would not interfere with that aspect of the order of the Copyrights Board. Further, provision of minimum of Rs.660/- as a minimum payable per needle hour would ensure that for every song played, royalty is paid to the copyright owners. It would also ensure that marketing is done to the maximum to generate income through advertisement by the Radio Stations.

258. In view of the discussion above and in view of the answers to Point Nos.1 to 6, Point No.7 is answered as follows:

(1) It is held that the order of the Copyright Board, dated 25.08.2010 is not applicable to SIMCA and SIMCA is not bound by the royalty determined by the Copyright Board by the said order.

(2) The royalty determined by the Copyright Board at 2% of the net advertising revenue is upheld and additionally, the order is also modified by providing a minimum floor rate payable to the appellants at Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour uniformly irrespective of the timing or city/town when the songs were played, since this order is with respect to the past decade 2010-2020.



259. In the result:

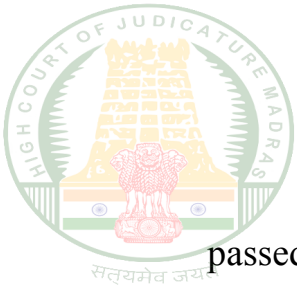
WEB COPY

(1) C.M.A. Nos. 3490, 3491, 3492 and 3493 of 2010 filed by SIMCA are allowed and it is held that the order of the Copyright Board is not binding on SIMCA.

(2) C.M.A. Nos. 3293, 3382, 3383, 3384, 3385, 3387, 3388, 3389 and 3390 of 2010 filed by Phonographic Performance Limited, are partly allowed and the order of the Copyright Board is retained and further modified by fixing a minimum floor rate of Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour, as declared in para 258(2) supra.

(3) C.M.A. Nos. 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501 and 3502 of 2010 filed by Super Audio Madras Private Limited are also partly allowed and the order of the Copyright Board is retained and further modified by fixing a minimum floor rate of Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour, as declared in para 258(2) supra.

(4) Rew.A. Nos. 8 to 11 2011 are dismissed, since orders have been



passed in the corresponding Civil Miscellaneous Appeals.

WEB COPY

(6) All connected Miscellaneous Petitions are closed.

(5) No costs.

(6) The respective parties are directed to put into effect this order

within a period of four weeks from this date.

Index : Yes / No

27.04.2023

Internet : Yes

NCC : Yes/No

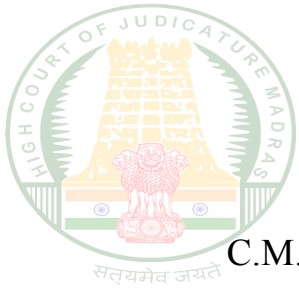
cmr

C.V.KARTHIKEYAN, J.

cmr

Pre Delivery Common Order made in

157/158



C.M.A.Nos.3293, 3382 to 3385, 3387 to 3390 and 3490 to 3502 of 2010
and

WEB COPY

Rev.A.Nos.8 to 11 of 2011

27.04.2023