

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on April 22, 2016
Judgment delivered on September 30, 2016

+ CS (OS) 3958/2014

THE INDIAN SINGERS RIGHTS ASSOCIATION Plaintiff
Through: Mr. Pravin Anand, Mr. Dhruv Anand,
Ms. Udit Patra, Mr. Shamim
Nooreyezdan, Advs.

versus

NIGHT FEVER CLUB & LOUNGE Defendant
Through: None.

CORAM:
HON'BLE MR JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

I.A. No. 15/2016 (under Order 6 Rule 17 read with Section 151 CPC)

This is an application filed by the plaintiff under Order 6 Rule 17 CPC read with Section 151 CPC for amendment of the plaint. Vide the said application, the plaintiff seeks to amend the para 14 of the plaint, which relates to Court Fee and jurisdiction in the following manner:

(a) For a decree of permanent injunction restraining infringement of Performer's Right, this relief is valued for purposes of court fee and jurisdiction at Rs.200/- and requisite fees of Rs.20/- is affixed thereon.

(b) For a decree of permanent injunction restraining violation of Right to Receive Royalty (the R3 Right), this relief is valued for purposes of court fee and jurisdiction at Rs.200/- and requisite fees of Rs.20/- is affixed thereon.

(c) For an order for rendition of accounts, relief is valued at Rs.200/- for purpose of court fees and jurisdiction and requisite court fee of Rs.20/- is affixed thereon; the plaintiff undertakes, further, to affix such additional court fee as may be required by this Hon'ble Court after rendition of accounts.

(d) For an order of damages, the relief is valued for the purposes of jurisdiction at ~~Rs.21,00,000 Lakhs~~ 1,00,00,100/- and Court Fee of ~~Rs.22,840~~ 99944/- is annexed thereon.

Thus, the suit is valued at for the purposes of jurisdiction and court fees at ~~Rs.21,00,000~~ 1,00,00,700/- and court fees of ~~Rs.22,900/-~~ 1,00,004 is affixed thereon.

Noting the contents of the application, the same is allowed. The amended plaint along with the difference of Court Fee be paid/filed within three weeks from the date of this order.

The application stands disposed of.

CS(OS) 3958/2014 & I.A. No. 25817/2014 (under Order 39 Rules 1 & 2 CPC)

1. This Suit has been filed by the Indian Singers Rights Association (ISRA) against the Night Fever Club and Lounge at G-1 and G-2, near Fun Cinema, North Square Mall, Netaji Subhash Place, New Delhi. The prayers in the Suit are as under:

(i) An order of permanent injunction restraining the Defendant, its officers, servants, agents and representatives and all others acting for and on its behalf from communicating to the public the Plaintiffs repertoire comprising of the Performances of all its members and Performer's rights of its sister societies which it is authorized to administer in India, without obtaining a license from the Plaintiff or doing any other act infringing the Plaintiffs members' Performer's rights;

(li) An order of permanent injunction restraining the Defendant, its officers, servants, agents and representatives and all others acting for and on its behalf from communicating to the public the Plaintiffs repertoire comprising of Performer's rights of all its members and of its sister societies which it is authorized to administer in India, without obtaining a license from the Plaintiff or doing any other act violating the Plaintiffs members' Right to Receive Royalties (the R3 right)

(iii) An order for rendition of accounts illegally earned by the Defendant and a decree for the same be passed in favour of the Plaintiff and against the Defendant;

(iv) An order requiring the Defendants to pay to the Plaintiff damages as stated hereinabove;

(v) An order awarding the costs of the present suit to the Plaintiff;

2. The suit has been filed along with an application under Order XXXIX Rule 1 and 2 CPC being I.A. 25817/2014 which was considered by this Court on December 23, 2014 when this Court had restrained the defendant from communicating to the public the plaintiff's repertoire comprising of performance of all its members without obtaining licence from the plaintiff or doing any other act infringing the plaintiff's members' performance rights till further orders. On July 23, 2015, the defendant was proceeded ex-parte. The plaintiff had filed an *ex-parte* evidence of its witness namely Mr. Sanjay Tandon, a constituted attorney of the plaintiff and the same is exhibited as Ex.PW1/A. The narrated statement of Mr. Tandon depicts the following:

The plaintiff is a Company Limited by guarantee and not having a share capital registered, under Section 25 of the Companies Act, 1956. The Certificate of Incorporation dated May 3, 2013 has been exhibited as Ex.PW1/2. The plaintiff is the first copyright Society to be registered by the Central Government on June 14, 2013, after the Copyright (Amendment) Act, 2012 came into force on June 21, 2012 for protection of Performer's Rights described under Section 38 of the Copyright Act, 1957. The plaintiff members are singers as a category of performers. Each singer is the performers of the performance and / or owner of the Performer's right in a

song, i.e., “Performer Owner” of a song and each singer apart from the exclusive performer’s also has the inalienable Right to Receive Royalty under Section 38A of the Copyright Act, 1957 (in short, Act of 1957). The Certificate of Registration dated June 14, 2013 is exhibited as Ex.PW1/3. The plaintiff’s member are all singers in India who includes Lata Mangeshkar, Usha Mangeshkar, Suresh Wadkar, Gurudas Mann, Pankaj Udhas, Alka Yagnik, Kumar Sanu amongst others. The plaintiff has filed a print out from the website of all its members and the same has been exhibited as Ex.PW1/7. It is the case of the plaintiff that all its members have executed deeds of exclusive authorization, authorizing the plaintiff to receive royalty from the exploitation and / or usage of the exclusive right of performers under Section 38A of the Act of 1957 and therefore the plaintiff is exclusive owner of the Performer’s Right to the extent of Right to Receive Royalty. The authorization deeds have been exhibited as Ex.PW1/9 (Colly). The case of the plaintiff is that Rediff.com India Ltd. has taken a licence from the plaintiff for Performer’s Rights that the plaintiff enforces and administers on behalf of its members. In this regard, the plaintiff has filed on record the invoice dated June 2, 2014 and has exhibited the same as Ex.PW1/10. It is the case of the plaintiff that the plaintiff’s tariffs work out

only to a negligible and insignificant percentage of the total turnover in media for example, Radio Stations, T.V., Mobile Companies, Event Organizers, Shops, Departmental Stores, Showroom, Emporiums, Hotels and Restaurants etc. and the plaintiff's tariffs are transparently available at the plaintiff's website as well as in the annual reports of the plaintiff. A print out of the page from the website of the plaintiff has been exhibited as exhibited as Ex.PW1/11. The case of the plaintiff is that in October, 2014, plaintiff found that live performances are being organized at the defendant's premises using plaintiff's repertoire. In this regard, the plaintiff relied upon the print out from the internet pertaining to the defendant, which has been exhibited as Ex. PW1/13 (Colly).

3. The plaintiff in the month of November, 2014 instructed an independent investigator to confirm that the defendant is playing music in its premises. The investigation confirmed that the defendant is engaged in the act of communicating music to the public from the plaintiff's repertoire. It is the case of the plaintiff that the investigator recorded on a sample basis the songs belonging to the plaintiff's repertoire being played at the defendant's club and lounge. The original CD containing infringing recordings has been exhibited as Ex.PW/14. It is noted that the investigator's affidavit has also

been filed on record as Ex.PW1/15 (Colly). A table containing the list of songs belonging to the plaintiff's repertoire communicated to the public as recorded by the plaintiff's investigator has been reflected in Para 22 of the affidavit of Mr. Sanjay Tandon (Ex.PW1/A). According to the plaintiff, the said list is only a sample list as recorded within a period of 45 minutes for which the investigator was present at the defendant's Club and Lounge on October 22, 2015. It is the case of the plaintiff that thereafter a cease and desist letter dated November 10, 2014 was issued by the plaintiff requesting the defendant to kindly take a requisite clearance from the plaintiff namely "*Performer's Rights Clearance Certificate*". A copy of the letter / notice dated November 10, 2014 is exhibited as Ex.PW1/16 (Colly). The plaintiff's witness has stated that the public performances of the plaintiff's repertoire at the defendant's premises greatly enhances its ambience making the general experience of all those who visit the premises more pleasurable and enables the Defendant to enhance its commercial profits. It is the case that the public performances of the plaintiff's repertoire at defendant's Club and Lounge without the permission of the plaintiff and without payment of royalties is unlawful and amounts to infringement of the Plaintiff's Performers Rights and violation of the Right to Receive Royalty from the defendant, which is

reaping illegal gains. By this act of the defendant, according to Mr. Sanjay Tandon, the plaintiff is being denied its rightful right to receive royalty in terms of the fees payable by the defendant. The plaintiff and through the plaintiff its members are suffering loss of their legitimate dues because the defendant's refusal to pay the royalties due to the plaintiff. It may be noted here that the case of the plaintiff is also that it administers the relevant rights in India on behalf of sister Society in Ireland called Recorded Artist Actors Performers (R.A.A.P). The bilateral agreement between the plaintiff and R.A.A.P is exhibited as Ex.PW1/8. I note that the requirement of Section 65 (B) of the Indian Evidence Act having been satisfied, the Court takes the said evidence on record.

4. Mr. Praveen Anand, leaned counsel for the plaintiff would submit that the Special Right called the "Performer's Right" was for the first time introduced by the Copyright (Amendment) Act, 1994 by way of the amendment to Section 38 of the Act of 1957. Section 38 (1) guarantees Performers a special right in respect of their performances. The term of such Performer's Right is 50 years from the beginning of the calendar year next following the year in which the performance is made. He would state that the Copyright (Amendment) Act, 2012 inserted Section 38A in the Act,

provides certain exclusive rights to Performers. These exclusive rights include (1) the Rights of fixation of performance (as sound / video recordings) and subsequent communication to the public or commercial distribution of such recordings [Section 38A(1)(a)]; (2) Right of the broadcasting / communicating to the public, the performance at the first instance [Section 38A (1)(b)]. He would also state fourth and third provisos of Section 18 (1) read with Section 39A grant the performers an ill-alienable Right to Receive Royalty for utilization of their performances incorporated in a sound recording (not forming part of the film) or in a cinematographic film in any form (other than for communication to the public of the performance as part of the same film in a cinema hall). This Right to Receive Royalty can only be assigned to (a) legal heirs of the performers, or (b) a collecting society for collection and distribution. Any assignment to the contrary shall be void. This Right to Receive Royalty is further exemplified by the proviso to Section 38 A (2) which provides that notwithstanding anything contained in the contrary in the said section, the performer shall be entitled for royalties in case of making of the performance for commercial use, even if he has consented by written agreement to the incorporation of his performance in a cinematographic film. The consent

given only prevents the performer from objecting to the enjoyment by the producer of film of the Performer's rights in the same film. He would also state under Section 18 (2) read with Section 39 A of the Act of 1957, the Performer in respect of the rights not assigned to it (i.e., the non-assignable Right to Receive Royalty) shall be treated as the "owner of copyright" and the producer in respect of the rights assigned to it (i.e., the rights in respect of the performance in the film for the said film only), shall be treated as Owner of the Copyright. The third and fourth provisos to Section 18 mandate that the royalty earned from commercial exploitation of the Performer's performance shall be shared on an equal basis between the performer and the producer (assignee). He states that in the light of the above, if a third party commercially utilizes the performance included in a cinematographic film in any form (except communicating to the public, the performance along with the cinematograph film in a cinema hall), or utilizes the performance included in a sound recording, the performer would retain the right to receive the royalty from such third party for such uses of the performance. Non-payment of such royalty by the third party would amount to infringement of the Performer's rights in that performance.

5. Mr. Anand states the main object of the plaintiff is to protect, exercise

and promote the Performer's rights of 'Singers' as 'Performers' and ensure enforcement of their Performer's rights. He would also highlight the plaintiffs Memorandum of Association Ex.PW1/5. It is his submission that the plaintiff society is empowered under Section 34 (3) of the Act to issue licences under Section 30 to users, collect fees pursuant to such licences, distribute such fees to its members after deducting its expenses. He would also reiterate Rediff.com India Ltd. and IPL teams have taken a licence / clearance certificate from the plaintiff for utilization / exploitation of the Performer's performance. He relied upon similar orders passed by this Court wherein the plaintiff society has exclusively restrained third parties by *ex-parte* ad-interim injunction from infringing the Performer's rights of its performer / members by communicating to the public (without payment of appropriate royalties) like order dated September 10, 2015 in **ISRA v. Saurabh Yadav in CS(OS) 2068/2015**; order dated April 8, 2016 in **ISRA v. Ashok Singh Ors. CM (COMM.) 356/2016** and order / judgment dated August 12, 2016 in **CS (OS) 2608/2015 in ISRA v. Chapter 25, Bar and Restaurant** (copy of order filed on August 17, 2016).

6. Having heard Mr. Praveen Anand, learned counsel for the plaintiff this Court is satisfied that the plaintiff has been able to prove infringement by the

defendant of the right to receive royalties of the members of the plaintiff society in the performances as recorded by the plaintiff's investigator and as depicted in Para 22 of Ex.PW1/A. The playing of songs by the defendant in its Lounge without payment of royalty to the plaintiff is in violation of the right to receive royalty of the performers, who are members of the plaintiff.

7. In view of the above, the Suit is decreed and the decree of permanent injunction is issued restraining the defendants, its officer, servants, agents and representatives and all others acting for and on behalf of the defendant from communicating to the public the repertoire comprising of performers' performances of its members and that of the members of its sister Societies, which it is authorized to administer in India without obtaining a licence from the plaintiff or doing any act infringing the performer's rights. A decree is issued directing the defendant to render to the plaintiff accounts of all the monies earned by it from the performance of the repertoire comprising the performance of the performers who are members of the plaintiff.

8. In the absence of any substantive evidence in the present proceedings, the prayer of the plaintiff for damages is declined. However, the right of the plaintiff to institute a separate proceedings in future in that regard against the Defendant after rendition of accounts by the Defendant in terms of Para 7

above in accordance with law is reserved. The Suit is decreed in the above terms with cost of Rs.20,000/-, which will be paid by the defendant to the plaintiff within eight weeks. Decree sheet shall be drawn after the plaintiff files the amended plaint and the difference of the Court Fee, as directed while deciding the application IA 15/2016.

The application under Order XXXIX Rule 1 and 2 is also disposed of.

V. KAMESWAR RAO, J

SEPTEMBER 30, 2016

js

