

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

**SUBJECT : Code of Civil Procedure, 1908**

Judgment delivered on: 02.07.2008

**IA 334/2005 in CS(OS) 1498/2004 (U/O 7 R 11, CPC)**

**M/S PHONOGRAPHIC PERFORMANCE LTD ... Plaintiff**

— versus —

**M/S HOTEL GOLD REGENCY & OTHERS ... Defendants**

**Advocates who appeared in this case:**

For the Plaintiff	: Mr Sandeep Sethi, Sr Advocate with Mr Pragyansh Sharma and Ms Kanika Mehra
For the Defendant Nos. 2 & 3	: Mr K.K. Sharma with Ms Arpita
For the Defendant No.5	: Mr Milanika Chaudhury with Mr Sarojanand Jha
For the Defendant Nos. 7, 12 & 14	: Ms Pratibha M. Singh with Ms Pema Yeshey
For the Defendant No.10	: Ms Bimla Sharma

**BADAR DURREZ AHMED, J**

1. Defendant Nos. 2 and 3 have filed this application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 for rejection of the plaint. As indicated in the order dated 25.02.2008, the counsel appearing on behalf of defendant nos. 2 and 3 as well as the other defendants, all of whom supported this prayer for rejection of the plaint, raised the following two fundamental questions with regard to the maintainability of the suit:-

1. Whether, in view of the provisions of sections 33 and

2. Whether, in view of the provisions of section 61 of the Copyright Act, 1957, inasmuch as the owner of the copyright has not been made a party to the present suit, the same would be liable to be rejected on the ground of non-impleadment of a necessary party?

**The parties and the reliefs claimed:**

2. Before I consider the two questions, it would be necessary to indicate who the parties are and what is the nature of the reliefs sought in the present case. As disclosed in the plaint, the plaintiff is a company incorporated under the provisions of the Companies Act, 1956. It is also a copyright society registered under section 33 of the Copyright Act, 1957. The registrar of copyrights has issued a certificate dated 7.05.1996 under section 33 (3) of the Copyright act, 1957 in favour of the plaintiff. By virtue of the said certificate, the plaintiff is permitted to commence and carry on the copyright business in sound recordings.

3. It is further stated in the plaint that various owners of copyrights in different sound recordings in respect of recorded music

at page 20 of the documents file and it is between Saregama India Ltd and the plaintiff. The agreement is dated 01.04.2003. In the said agreement it is categorically stated in the recitals that Saregama India Ltd is the owner of the copyright in various sound recordings and that by virtue of its membership of the plaintiff society, it has agreed to authorise/grant to the plaintiff, in respect of its sound recordings, its rights of communication to the public (including broadcast/telecast and public performance rights) on the terms and conditions mentioned in the agreement. By virtue of clause 1 of the agreement, the owner granted and authorised the plaintiff its right of communication to the public in respect of its sound recordings. The owner also authorised the plaintiff to grant licences, collect and distribute revenue on behalf of the owner, whether on the plaintiff's own account, or through its duly appointed agents. The plaintiff was also entitled to realise all fees and licence fees payable in respect of such recordings (the rights of communication to the public of which have been granted to the plaintiff) from any person, authority, firm or company. The owner also authorised the plaintiff to realise and receive payments of all such fees and licence fees from All India Radio, any other broadcasting / telecasting organisation and / or any other person, authority, firm or

4. Clause 2 of the agreement deals with enforcements. It stipulates that ancillary to the rights granted in clause 1 to the plaintiff and/or its agents, in case of any infringement of the right to communication to the public of any of the recordings which constitute the subject matter of the agreement, the owner authorises the plaintiff to, *inter alia*, swear affidavits, institute, commence or conduct civil, criminal and/or administrative proceedings, file complaints, notices, or give evidence in any court, tribunal or relevant authority, and appoint solicitors to act for the purpose of commencing or conducting proceedings on the owner's behalf in respect of such infringing/unauthorised communication to the public, arising out of the said agreement.

5. The defendants are hotels, lounges, bars and restaurants. It is alleged that they play the sound recordings in respect of which the plaintiff has entered into agreements with the owners of the copyrights. It is further alleged that the defendants play such music without having obtained any licence from the plaintiff and have therefore infringed the copyrights of the owners thereof. It is the case of the plaintiff that

of injunction restraining the defendants from playing the sound recordings without first obtaining annual licences for the same. It is also averred that the plaintiff is entitled to a money decree against the defendants jointly and severally for the sum of money as calculated on the basis of the applicable tariff charts of the plaintiff for using and/or communicating the sound recording of the plaintiff for the period prior to the filing of the suit as also after the filing of the suit upto the date of the decree. Interest has also been claimed on the said amount.

6. It is, therefore, clear that the suit is primarily for infringement of the copyrights in the sound recordings which are owned by the members of the plaintiff copyright society. The suit is also for recovery of money from the defendants for unauthorised playing of the sound recordings and/or communicating the same to the public at their respective premises without having obtained a licence for the same from the plaintiff.

**Question 1:**

7. It was contended on behalf of the defendants that under the

licensee can maintain a suit for infringement. And, in a suit filed by the exclusive licensee, the owner of the copyright has to be made a party to the suit. It was contended that section 33 of the said act contemplates the establishment and formation of a copyright society. The first proviso to section 33 (1) specifically provides 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. This, according to the defendants, clearly demonstrates that the plaintiff being a registered copyright society does not have exclusive rights to grant a licence much less an exclusive ownership in respect of the copyright.

8. It was further contended that the rights of a copyright society are limited to issuance of licences and administration of copyrights and does not extend to the filing of suits for infringement. With reference to section 34 of the said act, it was submitted that the copyright society, at best, is a society for administration of rights conferred on the society. It was also contended that section 34 (3) clearly stipulates that the copyright society may (a) issue licences under section 30 in respect of

functions consistent with the provisions of section 35 of the said act. The submission is that these rights of administration do not include the right to sue for infringement and therefore a copyright society cannot bring a suit for infringement of copyright. The present suit is, therefore, according to the defendants, not maintainable and is liable to be dismissed.

9. It was also contended on behalf of the defendants that the legislature in its wisdom has not permitted a copyright society to maintain a suit for infringement and that this would be clear from a reading of the provisions of section 55 of the said act which has reference only to the owner of the copyright. The right to seek civil remedies for infringement of copyrights has been limited to the owners thereof. According to the defendants, the copyright society does not have any such right to seek remedies for infringement of copyright by way of injunction, damages, accounts etc.

10. On the other hand, the learned counsel for the plaintiff submitted that section 34 enabled a copyright society to accept from copyright owners "authorisation to administer any right". Sub-section

and perform any other functions consistent with the provisions of section 35. It was contended that section 35 contemplates the control of owners of copyright over such copyright society and permits a copyright society to obtain the approval of such owners of rights for its procedures of collection of licence fee. It was contended that the powers conferred upon the copyright society includes the power to sue for enforcement of rights of the copyright owners.

11. It was submitted that the business of a copyright society under section 33(1) is of issuing/ granting licences in respect of any rights under the act. Such business would necessarily include the matter of legal enforcement of such rights. Reliance was placed by the learned counsel for the plaintiff on the provisions of section 188 of the Indian Contract Act, 1872 which defines the extent of an agent's authority. An agent having authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business. Illustration(a) to the section was also referred to. The same reads as under:-

*"A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal*

According to the learned counsel for the plaintiff, the above illustration puts the matter beyond doubt that an authority to recover debt includes the power to adopt any legal process to recover the same. In this context it was also submitted that chapter VII of the Copyright Act, 1957 not only authorises the doing of business by a copyright society of issuing or granting licences but also authorises such a society to collect licence fees.

12. It was also contended that the word "business" is a very wide term, which includes, the right to institute a suit for the enforcement and protection of rights granted to the plaintiff by its members. The object of registration is to aid individual copyright owners so that they are not made to prosecute tortuous proceedings in different parts of the country for the enforcement of the rights against the same person violating their rights.

13. The learned counsel for the plaintiff contended that Section 34(1)(a) of the Copyright Act, 1957 uses the words "authorisation" and "administer any right in any work", which are words of wide amplitude. It was contended that the word "administer" is susceptible

regulate in behalf of others...”; “The word “administer”, as used with respect to a court decree means to execute it, to enforce its provisions, to resolve conflicts as to its meanings, and to construe and interpret its language”; ““Administer” has been held to be synonymous with “conduct”, “direct”, “distribute”, “furnish”, “give out”, and “manage”.”

14. According to the learned counsel for the plaintiff, the said Section 34 enables the owner of a copyright to empower a copyright society to institute suits as a part of administration of its rights. It was further contended that by virtue of the public performance authorisation agreements executed by owners of the copyrights in favour of the plaintiff, the plaintiff has been authorised to act as a collection company. Clause 2 (a) of the agreements was referred to for submitting that the owners of the copyrights had specifically authorised the plaintiff to “... swear affidavits, institute, commence or conduct civil, criminal and / or administrative proceedings...” It was submitted that such a clause was akin to the powers given under a power of attorney.

15. Furthermore, it was submitted on behalf of the plaintiff,

contended that the authority to collect licence fee implies and includes authority to use the means ordinarily employed for the purpose of accomplishing a collection and this would, *inter alia*, mean retaining of counsel and institution of suits as there is no other legitimate way in which collection could be compelled. A reference was made to Words and Phrases (Permanent Edition, Volume 4A, West Publishing Co.), wherein the expression “authority to collect” has been indicated as under:-

“AUTHORITY TO COLLECT

‘Authority to collect’ implies and includes authority to use the means ordinarily employed for the purpose of accomplishing a collection, and among these are the retaining of counsel and the institution of suit. Indeed, that is generally the only way in which collection can be compelled, and an agent whose duty it is to collect has certainly the implied power to resort to the ordinary and generally the only means of compelling collection. ‘Authority to collect’ is broader and more comprehensive than ‘authority to receive payment.’ Ryan v. Tudor, 2 P. 797, 798, 31 Kan. 366.”

16. It was then contended that the authority to institute legal proceedings in order to enforce such rights of collection of licence fee etc. is also implicit in the rights of administration granted to a copyright society under Section 34 by an owner of such rights. In other words, the power to issue licence and collect licence fee also includes within

17. Section 33 (1) of the Copyright Act, 1957 prohibits any person or association of persons from commencing or carrying 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 the said Act except under or in accordance with the registration granted under Section 33 (3) thereof. The first proviso to Section 33(1) stipulates 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. These provisions indicate that the business of issuing or granting licences in respect of any work in which copyright subsists can only be conducted by a person or association of persons etc., registered as a copyright society under Section 33(3). They also indicate that the owner of the copyright shall 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. The copyright society, therefore, does not have the exclusive right to grant licences and owner of the copyright retains his individual right to grant licences in respect of his own works.

- (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 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 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 ”

authorisation to administer any right in any work by issue of licences or collection of licence fee or both. The owner has the right to withdraw such authorisation without prejudice to the rights of the copyright society under any contract. The extent of authorisation to administer any right in any work has been indicated in Section 34(1)(a) to be issuance of licences or collection of licence fee or both. Section 34(3) also indicates that a copyright society may issue licences under Section 30 in respect of any rights under the Act; it may collect fees in pursuance of such licences; distribute such fees among owners of rights after making deductions for its own expenses; and perform any other functions consistent with the provisions of Section 35. Leaving aside the provisions of Section 35 for the moment, it is apparent that the copyright society can have authorisation only with respect to issue of licences and / or collection of licence fees and consequently distribution of such fees among owners of the rights after making deductions for its own expenses. Conspicuous by its absence is the right to institute an infringement action.

20. Reverting to Section 35 of the Copyright Act, 1957, a reading of the same would make it clear that the provision merely

approvals from the owners of rights, such as the approval for its procedures of collection and distribution of fees; for the utilisation of any amounts collected as fees for any purpose other than distribution to the owners of rights. The copyright society is also required to provide to such owners regular, full and detailed information concerning all its activities, in relation to the administration of their rights. Section 35(2) stipulates that all fees distributed among the owners of the rights shall, as far as may be, be distributed in proportion to the actual use of their works. Section 35 does not, in any way, amplify the authority granted to a copyright society under Section 34. On the other hand, Section 35 clearly stipulates that the copyright society would be under the collective control of the owners of the rights and would have to obtain approvals from them as well as provide full information to them. The rights of a copyright society are, therefore, circumscribed by the provisions of Section 34. Section 34(1)(a) clearly stipulates that the 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 fee or both”. The exclusive authorisation to administer any rights in a work are limited to issuance of licences and / or collection of licence fee and obviously distribution of such fees [as

21. Chapter XI deals with the infringement of copyrights. It comprises of Sections 51 to 53A. This is followed by Chapter XII which deals with civil remedies and comprises of Sections 54 to Section 62. Section 54 defines the expression “owner of copyright” for the purposes of Chapter XII, to include, inter alia, an exclusive licensee. Section 55 which provides for civil remedies for infringement of copyrights reads as under:-

**“55. Civil remedies for infringement of copyrights.—**(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the Plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher, as the case may be, appears on copies of the work as published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed

22. This provision makes it clear that when the copyright in any work is infringed, it is only the “owner of the copyright” who is entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law. Since the expression “owner of copyright” has been defined in Section 54 to include an exclusive licensee, an exclusive licensee would also be entitled to all the aforesaid remedies of injunction etc. It is, therefore, abundantly clear that apart from the owner of the copyright and an exclusive licensee, no other person is entitled to the civil remedies for infringement of copyright. The provisions of Section 61 are also important but they shall be dealt with separately under Question No.2. For the present, it is sufficient to note that it is the plaintiff's own case that it is not an exclusive licensee. The plaintiff is admittedly also not an owner of the copyright. Therefore, going by a plain reading of Sections 54 and 55 of the said Act, the plaintiff would not be entitled to the remedies for infringement of copyright. The remedies being by way of injunction, damages, accounts and otherwise as are or may be conferred by law.

licence fee would in the very nature of such an authority also include the right to institute civil proceedings for the purposes of collecting fees. It was also strongly contended that the said exclusive authorisation would also enable the copyright society to seek the collection of fees from persons who were using the said works without a licence.

24. It must be remembered that the owners of the copyrights, such as Saregama India Ltd have entered into broadcast, telecast, public performance authorisation agreements with the plaintiff. It is on the basis of these agreements that the copyright society can grant licences for the use of the works in respect of which the agreements have been entered into. It is these agreements which also authorise the copyright society to collect and distribute the revenue on behalf of the owners of the rights. The authorisation and grant as per clause 1 of such agreements also entitles the copyright society to realise fees and licence fees payable in respect of the works and the owners have authorised the copyright society to realize and receive payments of such fees and licence fee from All India Radio and other broadcasting, telecasting organisations and / or any other person, etc. who uses the said work. It

infringement of the right on the owner's behalf in respect of such infringement / unauthorised communication to the public. The exact expressions used would be relevant, as such, clause 2 of such agreements is reproduced hereinbelow:-

## **“2. Enforcements**

Ancillary to the rights granted in Clause 1 to the Collection Company and/or its agents, in case any instance of any infringement of the Communication to the Public right of any of the Recordings hereunder is brought to the notice of the Collection Company, the Owner hereby authorizes the Collection Company and/or its duly authorized agents to do the following:-

- (a) swear affidavits, institute, commence or conduct civil, criminal and/or administrative proceedings, file complaints, notices, or give evidence in any court, tribunal or relevant authority, and appoint solicitors to act for the purpose of commencing or conducting proceedings on the Owner's behalf in respect of such infringing/unauthorized Communication to the Public, arising out of this Agreement;
- (b) compromise, refer to arbitration or otherwise settle any suit or legal or administrative proceedings commenced under this Agreement, consulting where reasonably necessary with the copyright owner or exclusive licensee as appropriate;
- (c) receive property, damages or costs awarded by a court, tribunal or other relevant authority, or as agreed by settlement, in respect of proceedings commenced under

(d) give undertakings to any court, tribunal or relevant authority as to damages and costs and in case damages and/or costs are awarded by a court, tribunal or judicial authority against the Collection Company in respect of proceedings, which have been initiated pursuant to this Agreement, the Owner hereby agrees to pay to the Collection Company the Owner's share thereof.”

25. Whatever the agreement between the owner of the copyright and the copyright society may provide, only that which is permitted by The Copyright Act, 1957 would be permissible and enforceable. I have already indicated above that Section 34 of the Act only permits the grant of exclusive authorisation by the owners to the copyright society for grant of licences, collection of fees and distribution thereof amongst the owners. The Act does not permit the grant of any authorisation by the owners to the copyright society to sue for infringement of copyright and seek injunctions, damages, accounts or other civil remedies as provided in Section 55 thereof. The parties can only agree to do what the law permits them to do. If they agree on something which is not permissible under law, such an agreement to that extent would not be enforceable.

does not extend to collecting fees from those persons to whom the copyright society has not granted any licences. To illustrate this point, let us assume that an owner enters into an agreement with a copyright society giving exclusive authorisation to the copyright society to grant licences and to collect fees in respect thereof as per the tariff of the copyright society. Let us assume further that the copyright society grants licences to three persons—A, B and C. The copyright society in such a situation would be well within its rights to demand fees from A, B and C in respect of the licences granted by it to them. In case, A, B or C do not pay the fees as contemplated under the licences granted by the copyright society on behalf of the owner, it may be argued that the copyright society can institute proceedings, including the filing of a civil suit for recovery of the fees due under the licences granted to A, B or C. It would, however, be another question, and that is a debate upon which I shall not enter in this case, as to whether the copyright society can bring a suit in its own name and not in the name of the owner. So, it may be possible for the plaintiff to argue and seek refuge under Section 188 of the Indian Contract Act, 1872 that the authority of the agent includes the authority to recover the fees by filing a civil suit. But, this would be limited to cases where the copyright society has

where persons, to whom no licence has been granted by a copyright society, use the works, in which the owner has copyrights. The copyright society would not have any authority to file a suit against such persons either for infringement or for recovery of fees or damages. That right is in the exclusive domain of the owner or an exclusive licensee. A copyright society is neither. The reason for the difference can be easily discerned because where the copyright society seeks to recover / collect fees from persons to whom licences have been granted, it is doing so in terms of the licences. On the other hand, where the copyright society would attempt to recover fees / damages from persons to whom no licences have been granted, it would be doing so on the basis of infringement. The civil remedy for infringement is restricted to an owner or an exclusive licensee. The copyright society cannot institute a suit for infringement of a copyright and, therefore, a copyright society would not be in a position to file a suit seeking injunction, damages, accounts or other civil remedies in respect of persons, such as the defendants, who have allegedly infringed the copyrights of the owners. Consequently, the defendants are right. Question No.1 has to be answered in the negative. The present suit is not maintainable at the instance of the copyright society.

## Question No.2.

27. Section 61 reads as under:-

**“61. Owner of copyright to be party to the proceeding.—**(1) In every civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.

(2) Where any civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceeding in respect of the same cause of action shall lie at the instance of the owner of the copyright.”

28. It is apparent that the said provision relates to suits or other proceedings regarding infringement of copyright instituted by an exclusive licensee. An exclusive licensee can institute such a suit because of the provisions of Section 55 read with Section 54 which have been discussed in detail above. When an exclusive licensee institutes such a suit, Section 61 of the Copyright Act, 1957 mandates that the owner of the copyright shall, unless the court otherwise directs be made a defendant.

29. It was contended on behalf of the defendants that since the

**Star Sports v. Global Broadcast News Limited and Others** [CS(OS)

**219/2008 decided on 18.02.2008**]. In that decision, the learned single Judge observed that Section 61(1) creates an absolute standard in the case of civil action for infringement of a copyright; it prescribes that in every suit for infringement of a copyright filed by an exclusive licensee, the owner of the copyright has to be, unless the court otherwise directs, made a defendant and where such owner is so impleaded, he shall have the right to dispute the claim of the exclusive licensee. The learned single Judge concluded:-

“For these reasons, it has to be held that the mandate of Section 61(1) applies in case of claims for infringement of broadcast reproduction rights; the non-impleadment of the owner of copyright is fatal to the maintainability of the suit.”

30. On behalf of the plaintiff, it was contended that Section 61(1) does not at all apply in the facts of the present case. It was submitted that Section 61 relates to proceedings instituted by an exclusive licensee. Since the plaintiff is a copyright society registered under Section 33 and is not an exclusive licensee, this provision would not apply to a suit instituted by a copyright society, such as the plaintiff.

that is only a hypothetical situation because the plaintiff, in any event, does not have the right to sue for infringement either on behalf of the owner or on its own right. This aspect of the matter has already been discussed in detail under Question No.1. The suit filed by the plaintiff is one for infringement of copyright alongwith damages, recovery of fees, etc. It cannot be entertained, not because of the provisions of Section 61 inasmuch as the owner of the copyright has not been made a party, but because a copyright society has no right to sue seeking civil remedies of injunction, damages, accounts, etc. founded upon an action of infringement of copyright. This question is also answered accordingly.

32. In view of the foregoing discussion, the plaint is liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908. This application is allowed. The plaint is rejected. No costs. The interim orders stand vacated.

This application, the suit and all pending applications stand disposed of.

Sd/-

**BADAR DURREZ AHMED**  
**(JUDGE)**