

MANU/WB/1041/2017

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IN THE HIGH COURT OF CALCUTTA

G.A. Nos. 2083 of 2016, 3551 of 2015 and C.S. No. 310 of 2015

Decided On: 22.12.2017

Saregama Ltd. **Vs.** The New Digital Media and Ors.

Hon'ble Judges/Coram:

Soumen Sen, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Pratap Chatterjee, Ranjan Bachawat, Sr. Advs., Debnath Ghosh, Soumya Roy Chowdhury, Sarosij Dasgupta and Gautam Banerjee, Advs.

For Respondents/Defendant: S.N. Mukherjee, Sr. Adv., Aniruddha Mitra, Samik Kanti Chakraborty and Alakananda Das, Advs.

JUDGMENT

Soumen Sen, J.

1. This is an action in infringement of copyright. The petitioner is claiming to be the owner of sound recording and underlying literally and musical works in sound recording of fifteen songs forming the part of the films produced by the producer and/or production houses. The petitioner has disclosed fifteen several agreements between the producers and/or the production houses of the films with the plaintiff covering such fifteen songs. The petitioner claims to have obtained all available rights in respect of the fifteen films including internet and digital exploitation rights in accordance with the law. It is alleged that the lyricists and music composers of the said films since had written and composed the said songs under a contract of service with the respective producers and/or production houses and, accordingly, the said respective producers became the owner of the copyright of all rights, title and interest in the literary, musical works and all other rights including sound recordings of each of the songs embodied in the said films. The petitioners alleged that the respondents without any licence or authority were using and exploiting the said songs on a plea that the said respondents have obtained audio, musical and/or MP3 rights of the songs of about 11 films out of the 15 films forming the subject matter of the suit until an interim order was passed in favour of the petitioner restraining them from using and exploiting the songs in any form. The petitioner asserts that the musical works and lyrics and all other rights of the said songs both physical, non-physical and otherwise have been duly assigned in favour of the petitioner by the producers and/or production houses under several agreements. By virtue of the said assignment, the petitioner has become the absolute owner of all the sound recordings, lyrics, musical works and all other rights of the songs of each of the cinematographic films under the Copyright Act, 1957.

2. Mr. Pratap Chatterjee, learned Senior Counsel appearing on behalf of the petitioner submits that the petitioner is owner of the rights in the sound and lyrics of the cinematographic films by virtue of the ownership of the 'original plate'. Mr. Chatterjee has referred to the definition of the "author" before the amendment to the Copyright Act, 1957 in 1994 which was as follows:-

"2(d) author means -

(vi) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of the plate".

3. It is submitted that by virtue of Section 2(d)(vi) as it stood prior to 1994, the definition of "author" in relation to sound recording would mean the owner of the original plate as there was no separate definition of sound recording in the 1957 Act. It is axiomatic that the person who owned the original plate was the author of the sound recording. All the contracts of the petitioners forming the subject matter of the suit specifically transferred ownership of the original plate to the petitioner. The possession of the petitioner is really in the nature of an owner. Mr. Chatterjee has referred to the agreements produced by the respondents and submitted that the purported deeds and the purported documents relied upon by the defendant, namely, the agreements dated 16th October, 1984, 15th May, 1985, 5th January, 1987, 10th March, 1987, 25th March, 1987, 28th March, 1987, 15th April, 1987, 4th January, 1988, 25th February, 1988, 16th March, 1996 do not confer any right whatsoever on the defendant or its predecessor-in-interest. The said agreements do not establish assignment of any copyright or any right in favour of the said defendants. The said agreements even otherwise do not permit and/or authorize the respondent to use, apply or adopt the subject songs and the underlying musical and literary works contained therein otherwise than as part of cinematograph films. The respondent has no right to the sound recordings and underlying works separately. A bare perusal of the said agreements would make it abundantly clear that they were mere proposal to assign and/or agreement to enter into an assignment agreement and not an assignment per se as alleged. It is submitted that it is trite law that one cannot confer upon another a better title than he has. Therefore, all subsequent agreements entered in purported reliance of the parent purported agreements do not confer any title on any subsequent transferees including the present defendants.

4. Mr. Chatterjee has referred to Section 19 of the Copyright Act which deals with the mode of assignment. It is submitted that the said Section has undergone substantial change in the year 1994 by which several sub-sections were added namely sub-sections 2, 3, 4, 5, 6 and 7. Sub-section 19(7) of the Copyright Act states that nothing in sub-section (2) or sub-section (3) or subsection (4) or sub-section (5) or sub-section (6) shall be applicable to assignments made before the coming into force of the Copyright (Amendment) Act, 1994. All the agreements entered into between the producers of the films in question and the plaintiffs have been entered prior to the coming into force of the Copyright (Amendment) Act, 1994. This makes the intention of the legislature clear that all assignments made prior to 1994 which do not have any period mentioned are perpetual in nature.

5. Mr. Pratap Chatterjee, the learned Senior Counsel representing the plaintiffs submits that the several agreements disclosed in the petition has to be read and understood in the context of the unamended provisions of the Copyright Act, 1957. It is submitted that the producer and/or production houses although have ownership over the sound track of the film but after the assignment, such producers and/or production houses have no right to independently exploit the sound track and/or the songs which has since been recorded and re-recorded by the plaintiff under the several agreements. The producer has only the residual right to use the said sound and/or songs along with the film and not separately.

6. Mr. Chatterjee referred to the Clause 10 of the agreement of 22nd February, 1966

which says that by virtue of the assignment agreement, the plaintiff shall be the owner of the original plate within the meaning of Copyright Act, 1957 and any extension or modification thereof of each title recorded or rerecorded under the said agreements at the time when such plate shall be made. The said clause makes it clear that the 'original plate' mentioned in the agreement would have the same meaning of 'plate' as defined in Section 2(t) of the Copyright Act, 1957. All other clauses in the agreement have to be understood and interpreted by recognizing that the plaintiff is the owner of the original plate. The parties by a contract cannot derogate from the statutory right vested in the plaintiff. The agreements also recognize that the producer has assigned their gramophone recording rights in all works to be recorded or rerecorded under the agreement to the plaintiff and in consideration thereof the plaintiff shall pay the royalty.

7. Mr. Chatterjee submits that the said clause refers to an absolute assignment and virtually denudes the producer and/or production houses of any claim of ownership on the works so assigned. Mr. Chatterjee submits that Clause 6 and its proviso refer to the rights of the musicians and/or artists employed by the producer for recording of its work and does not affect the statutory right of the plaintiff to exploit the said songs by virtue of being the owner of the original plate within the meaning of the Copyright Act, 1957. Once the agreements recognize the plaintiff as the owner of the original plate, the medium by which or through which the works are published is immaterial. Moreover, the agreements disclosed by the defendants would only show that they have acquired rights in the films which necessarily exclude the right to use the sound track in the films independently inasmuch as the producers having already assigned their rights to the petitioner the gramophone recording rights cannot subsequently assign similar rights. Mr. Chatterjee in this context has referred to the Latin phrase "Nemo Dat Quod Non Habet" which means that "no one can convey a better title than what he had". Since each of the producers and/or production houses by virtue of the assignment agreements have denuded their rights to use the sound track of the films, the exploitation of such songs by the respondents are unauthorized.

8. Mr. Chatterjee submits that Section 18(2) of the Copyright Act, 1957 recognized that the copyright in a work could be divided between the assignor and the assignee and the assignor as respects the rights not assigned shall be treated for the purposes of this Act as owner of the copyright which, in the instant case, would be the right to play the songs along with the film and such right can only be assigned to any third party. Mr. Chatterjee submits that the reference of the duration of the agreement in Category A and Category B types of agreement as classified by the defendants are of no consequence in view of the other clauses in the agreement which creates an absolute assignment of the rights of the producer in the sound track inasmuch as having regard to the omnibus clause in each of the agreements recognizing the plaintiff to be the owner of the original plate, the said clauses are to be understood in the context of the definition of 'plate' in the unamended 1957 Act. It is submitted that the agreement between the parties cannot overwrite the statute. The plaintiff is entitled to the statutory protection being the owner of the original plate.

9. Mr. Chatterjee submits that by virtue of the agreements, the producer can only play songs along with film and not separately. Once the petitioner has become the owner of the original plate which gives omnibus right and privilege to the petitioner, the other clauses in the agreement are required to be read down inasmuch as the Act recognizes the owner of the original plate is the owner of copyright and by an agreement, the parties cannot derogate from such terms. The agreement was executed subsequent to Copyright Act, 1957 and, accordingly, in case of any inconsistency between the agreement and the statute, the provisions of the statute shall prevail, such parties

cannot act in derogation of their statutory obligation. Once it is established that the petitioner is the owner of the plate as defined under the 1957 Act, all other persons are excluded from using the songs recorded in the said plate with prior permission of the plaintiff. The producers cannot act in derogation of the agreements by which there has been an absolute assignment of all rights in relation to the film songs produced during the tenure of the agreements to the exclusion of others.

10. Mr. Chatterjee submits that in the Eastern India Motion Pictures Association (supra) both the Division Bench of our High Court and the Hon'ble Supreme Court has recognized that the producers are the owners of the sound track in the films and having regard to the fact that this right has been separately assigned in favour of the plaintiff any unauthorized use of works forming several agreements of assignment is an act of infringement. Mr. Chatterjee submits that the respondents being aware of the undoubted right of the plaintiff to use and exploit such songs to the exclusion of all others have now pleaded to Section 31(d) of the Copyright Act, 1957 which, however, is only applicable to broadcasting organization and not to the defendants as the defendant No. 1 is not a broadcasting organization.

11. Mr. Chatterjee has referred to a Division Bench judgment of our Court in Saregama v. Puneet Prakash Mehra reported at MANU/WB/0616/2010 : 2011 (1) CHN 341 (Cal) to argue that while construing identical clauses being Clauses 3, 3A and 3A(ii) it has been held that Saregama is the owner of the musical and literary rights of the songs covered under the agreement. Mr. Chatterjee has referred to Clause 8 of the agreement being under consideration before the Hon'ble Division Bench which reads:-

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

12. The said clause, it is argued, is identical to Clause 10 of the agreement entered into between the petitioner and JB Productions on 6th January, 1966. Mr. Chatterjee has also specifically referred to Paragraphs 47, 48, 49, 50, 52, 56 and 58 of the said report in order to establish that Saregama should be held to be the owner of the musical and literary rights of the songs covered under fifteen agreements. Mr. Chatterjee has referred to a Single Bench decision of our Court in Gramophone Co. of India v. Shanti Films reported at MANU/WB/0008/1997 : AIR 1997 Cal 63 Paragraphs 31, 32 and 33 to argue that it has been held in the said decision that the assignment is a grant and does not cease to operate on happening of any event. It is submitted that non-payment of royalty cannot revoke the assignment. The celebrated and frequently referred decision of the Hon'ble Supreme Court in Indian Performing Right Society Ltd. v. Eastern India Motion Picture Association & Ors. reported at MANU/SC/0220/1977 : AIR 1977 SC 144: has been relied upon in aid of the submission that Section 2(f) read with Section 14(1) (c)(iii) clearly shows that the terms "cinematograph film" includes a sound track associated with the film. A protectable copyright, comprising of bundle of exclusive rights mentioned in Section 14(1)(c) of the Act, comes to vest in a cinematograph film on its completion which is said to take place when visual portion or audible portion are synchronized. The copyright protection is available to the cinematograph film including the sound track. In relation to a cinematograph film, the producer is the first owner of the copyright and no copyright subsists in the composer, lyricist or musician unless contract to the contrary and their right can be defeated by the producer of the said film. In the present case, the copyright in the musical and literary works in the songs has been assigned to Saregama by the producers of the said films by reason whereof

Saregama becomes the owner of the said songs and is entitled to use and exploit such songs to the exclusion of all others.

13. Mr. Chatterjee has also referred to a Division Bench judgment of our Court in Eastern India Motion Pictures Association & Ors. v. Indian Performing Right Society Ltd. & Ors. reported at MANU/WB/0056/1974 : AIR 1974 CAL 257 to argue that when a composer of lyric or music composes for the first time for valuable consideration for purposes of a cinematograph film, the owner of the film at whose instance the composition is made becomes the first owner of the copyright in the composition. Mr. Chatterjee has referred to Paragraph 29 of the report in particular where it has been stated that a cinematograph film includes the sounds embodied in the sound track and 'sound' means anything perceived by the ear. The music in the sound track is, therefore, a part and parcel of the cinematograph film itself. Mr. Chatterjee has referred to Paragraph 22 of the said report where on a conspectus of the various provisions of the Copyright Act, 1957, the following conclusions were reached:-

"(1). The owner of a cinematograph film which includes the sound track is the author of the film: vide Section 2(d)(v) read with Section 2(f).

(2). As author of the film the owner in the absence of an agreement to the contrary is the first owner of the copyright in the film: vide Section 17 proviso (b).

(3) Since he is the first owner of the copyright in the film including the sound track he has the exclusive right to do or authorize the doing of the following acts, namely,

(i) to make a copy of the film;

(ii) to cause the film, in so far as it consist of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public;

(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track;

(iv) to communicate the film by radio-diffusion (vide Section 14 (1) (c))."

14. Mr. Chatterjee in response to the defence raised by the respondents that non-payment of royalty to the producer or production houses would disentitle the petitioner to claim any relief in respect of such film songs has referred to in Puneet Prakash Mehra (supra) and submitted that in the said decision it has been held that non-payment of royalty is not at all germane for considering an issue of assignment. Saregama is the original owner of the aforesaid works and is entitled to use and exploit the same. Mr. Chatterjee in particular has referred to Paragraphs 67 of the said report which reads:-

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

15. It is submitted that in any event the defence of Jus tertii to defeat the claim of the plaintiff is not sustainable in law.

16. Mr. Chatterjee has referred to the decision of the US Court in Ward Banking Co. v. Potter-Wrightington, Inc., 298 F 398 402 in which it has held that Jus tertii is not a defence to infringement trademark. Mr. Chatterjee has referred to McCarthy on Trademarks and Unfair Competition 4th Edition Vol-5 paragraphs 31:160 to argue that so long as plaintiff proves rights superior to defendant, that is enough. As a matter of policy, Jus tertii should not be allowed as a defence in any trademark case. All that the plaintiff has to prove is that his right are superior right to the defendant and that is enough. The defendant is no less an infringer because it is brought to account by a plaintiff whose right may or may not be superior to the whole world.

17. Mr. Chatterjee has referred to the agreement dated 6th November, 2013 by Jayshree Pravin Enterprises and M/s. New Digital Media disclosed by the defendants in their affidavit-in-opposition. It is submitted that the said agreement does not confer any right upon the defendants to use the songs covered under the said agreement. Mr. Chatterjee has referred Clause 12 of the said agreement and submits that the said clause would clearly show that the copyright has been retained by the licensor and not transferred to the defendants. The Clause 12 of the said agreement reads:-

"12. Acknowledgement

a) The Licensee acknowledges that the Licensor is the owner of the copyright in all the Source Content. The Licensee undertakes not to claim any right over or dispute the ownership of copyright of the Licensor at any time which shall always remain the sole and exclusive property of the Licensor. The copyrights and the intellectual property rights in respect of the aforesaid works shall remain with the Licensor.

b) This Agreement comes into effect from date of signing of the agreement. Any changes/amendments to this agreement shall be with prospective effect."

18. It is argued that in the event where copyright has been retained by any party in any agreement, the same amounts to mere licence and in this regard, the learned Senior Counsel has referred to a Division Bench judgment of the Lahore High Court in William Butler Yeats v. Prof. Eric Dickinson & Ors. reported at MANU/LA/0254/1937 : AIR 1938 Lahore 173.

19. Mr. Chatterjee has referred to Section 55 sub-section (2) of the Copyright Act, 1957 which deals with the civil remedies for infringement of copyright. The said sub-section has been relied upon to show that law under such circumstances presumes ownership of copyright of Saregama. It is submitted that the said sub-section makes it clear that in case of any literary, dramatic, musical or artistic work or sound recording, the name of the publisher of that work appears on copies of the said work as published, the person whose name so appears or appeared, in any proceeding in respect of infringement of copyright in such work, shall be presumed, unless proved to the contrary, to be the publisher of the work.

20. On the aforesaid basis, Mr. Chatterjee has prayed for confirming the interim order passed on 5th November, 2015 till the disposal of the suit.

21. The defendants have filed an affidavit-in-opposition.

22. In the affidavit, the defendants have disclosed agreements in relation to eleven films out of the fifteen films. In the said affidavit it has been clearly stated that so far as the four films, namely, Zehreela Insaan, Kudrat, The Great Gambler and Prem Pujari are concerned, no right has been assigned in favour of the respondents and the respondents are not claiming any right over and in respect of the said songs.

23. The respondent No. 1 contends that the respondents are in possession of all documents and agreements relating to devolution of rights and negative rights of all the 11 movies. The rights have been sold by the producer of the respective movies which rights have now flowed in favour of the respondent No. 1. In the affidavit-in-opposition, the respondents have given the chain of events on the basis of which the respondent No. 1 claims its right to use and exploit the said songs.

24. Mr. S.N. Mukherjee, the learned Senior Counsel appearing on behalf of the respondents has submitted that the burden of proof is on the petitioner to demonstrate that its purported right as a purported assignee of the copyright over the songs of the films was subsisting over the entirety of the copyright in the said musical work as per the provisions of Section 18(2) of the Copyright Act, 1957 and the respondent was infringing the right of the petitioner. It has to be further shown that the original producer or copyright holder of the said films have illegally assigned the cinematographic rights to the respondent i.e., in terms of Section 51 of the Copyright Act, 1957. The petitioner has failed to show that it had the right to exploit the music/audio/songs of the said 11 movies till the day the instant suit was instituted and the petitioner has paid and/or is paying royalty to the rightful owners of the said movies. The petitioner has failed to disclose any document to show that the petitioner was continually exploiting the rights under the agreements.

25. Mr. Mukherjee submits that the petitioner has relied upon four types of agreements to establish their purported rights in respect of the aforesaid films.

26. The respondents have classified the said agreements as type A, B, C & D respectively.

27. The films Do Badan, Duniya, Lofer and Dusman has been classified type 'A' category. The films Awara Baap, Dhanwan and Babu as 'B' category. The films Yahudi, Bombai Ka Babu, Ajj Aur Kall and Teen Devian fall under 'C' category. Mr. Mukherjee has referred paragraph 15 and 16 of the affidavit in opposition in which the respondent has given a detailed analysis of each type of agreements in order to demonstrate that the petitioner has no sole and subsisting right over the digital recording of the musical works in the aforesaid films.

28. Mr. Mukherjee analysing the A type and B type agreements submitted that the clauses are the same and/or similar in nature. Clause 4 of the type A agreements give the right to the petitioner to use sound track provided by the producers for re-recording. This necessarily means that the producer had the right to make records and re-recording of all works after the expiry period mentioned in the agreements which vary between one to seven years and could thus assign such rights. The plaintiff thus could not claim any copyright in the works embodied in the song. In fact, the proviso to Clause 6 recognizes this and relieved the plaintiff from making payment of royalty if the producer records or re-records in terms of Clause 5. It is submitted that Clause 5 of the agreements restricted the period of contract which varies between one to seven years and after expiry of this lock in period the producer has no fetter to record or re-record sound track. Clause 12 of the agreement permitted extension of the agreement which

however, the petitioner has unable to demonstrate. Clause 7 of the agreement only assigned gramophone recording rights. In these agreements the names of the feature films or the songs are not specifically mentioned and all these agreements have expired.

29. Mr. Mukherjee submits that insofar as the agreements concerning 'B' type films, Clause (1) of each of the agreement would show that the period of the agreement was restricted for one year and there is no document on record to show that the agreements are still alive. In these agreements the names of the feature films or the songs are not specifically mentioned and all these agreements in any events have expired. The petitioner is unable to show any right over these films on the basis of the agreements disclosed by the petitioner in this proceeding.

30. In D type agreements the names of the feature films or the songs specifically mentioned and these agreements had expired. In any event the defendant does not claim any right over the said films.

31. It is submitted that the agreement dated 24th August, 2012 disclosed by the petitioner alleged to have been entered into between M/s. Narendra Hirawat & Company and Saregama India Limited makes no reference as to how the said Hirawat acquired the rights over the motion picture and no documents exists on record to establish the same.

32. The petitioners have failed to demonstrate that the rights over the soundtrack of the film remained with the petitioners despite the expiry of the period mentioned in each of these agreements relied upon by the petitioner.

33. Furthermore, the argument of the petitioner that they are the owners of the "Original Plate" of the films as per Clause 10 of the agreements is incorrect. The petitioner, at best, is the owner of the original plate of the recordings made by it or the re-recorded soundtrack by virtue of Clause 2 and 4 of the Type A Agreement and not the owner of the original soundtrack of the film. In any event, the defendants are using the sound recording from the soundtrack of the film and are in no manner infringing any rights of the petitioner over the original plate of the re-recorded sound track of these films or the recording make by the petitioners.

34. Mr. Mukherjee has referred to the agreements disclosed in the affidavit in opposition to demonstrate the entire chain of rights over the 11 disputed films and has submitted that the rights assigned to the respondent No. 1 also include the right to make sound recording by using the sound track of the films.

35. Mr. Mukherjee refers to the agreement dated 6th November 2013 entered into before Hemant Jain, sole proprietor of M/s. Jayshree Pravin Private Enterprise and the respondent No. 1 whereby, the exclusive perpetual licence/copyright was given to the Respondent to "exploit the audio, video, games and imagery content and offer the content for download, streaming, subscription, hiring on Mobile or internet, in any form or manner, and exclusive rights to authorize others to do the same, in any media or format, whether now known or hereafter devised including without limitation the right on Personal Entertainment Devices and Mobile Devices, to distribute or cause them to be broadcast or diffused and publishing in any other way the whole or part of the Content, by whatever means, of the content on Mobile or Internet, of the consumers of the content Dealers", in respect of approximately 546 music and motion pictures which include the 11 disputed films. It is submitted that in view of such licence agreement the respondent has an existing right to commence exploit the cinematograph work in any manner.

36. Mr. Mukherjee has distinguished the judgment of the Supreme Court in Indian Performing Rights Society (supra) and submitted that reliance of the said judgment by the petitioner to prove their case is misplaced since the petitioner has relied on the footnote of the judgment delivered by Late Justice Krishna Iyer to state that the composer of a soundtrack also has a right over the same. The petitioner has not made any claim under any composer. Furthermore, the agreements relied upon by the respondents are rights derived from the producer of these films.

37. Further in Indian Performing Rights Society v. Eastern Indian Performing Rights Society reported at MANU/SC/0220/1977 : AIR 1977 SC 1443 the matter was related to the rights of the musical composers of songs in films vis-À-vis the rights of the producer of the film and as such it has no applicability in the instant case.

38. The Hon'ble Supreme Court of India in India Performing Rights Society Ltd. (supra) was pleased to hold that under the extent copyright Act a producer of a cinematograph film has the right over the soundtrack of the film and dismissed the appeal from the judgment of the Division Bench of this Hon'ble Court which held the same view in Eastern India Motion Picture Association v. Indian Performing Rights Society Ltd. MANU/WB/0056/1974 : AIR 1974 CAL 257. By reason of the same a producer had the right to make sound recording by using the soundtrack of the film (see Section 2(f), 13(1), 13(4), 14(1)(c)(ii) and (iii) of the Copyright Act, 1957 prior to the amendments effected by the Copyright Amendment Act, 1994 which came into effect on 10th May, 1995.

39. The respondents have demonstrated the entire chain of rights over the 9 disputed films which were originally obtained from the producer of these cinematographic films. In these assignments the producer had assigned the entire film rights to the assignee. At that time, the Copyright Act was in the same form as considered by this Hon'ble Court and the Hon'ble Supreme Court of India. The subsequent assignments/licenses show that the right to make sound recordings from the soundtrack of the film have been expressly assigned/licensed.

40. Thereby the respondents also have the right over the soundtrack of these films and the right to make sound recordings from the same and communicate the same to the public. As such this contention is wholly misplaced and does not cover sound recordings made from the soundtrack.

41. The judgment in Gellman (supra) is also distinguishable on facts. The petitioner has failed to factually demonstrate that the petitioner had any rights over the films or that such rights are subsisting or that the producer of these films did not have the right to assign the right to make sound recording from the soundtrack of the said films.

42. The reliance of the petitioner on Section 55 (2) of the Copyright Act, 1957 to establish the petitioner's rights pursuant to their agreements is not relevant to the instant case since the defendants are not challenging any right of the petitioner over the original plate of the re-recorded soundtrack over which the petitioner claims its rights.

43. It is submitted that scrutiny of the three types of purported assigned agreements of the petitioner would clearly show that no right has been assigned in favour of the petitioner over the said cinematographic films or sound recording or musical works or lyrics or any other right of the said song both physical and non-physical. An analysis of the assignment of copyright clauses of the purported agreements relied upon by the petitioner makes it unequivocally clear that the petitioner has no sole and subsisting rights over the digital recording of the musical works in the aforesaid films.

44. Mr. Mukherjee submits that the argument of the petitioner that the agreements relied by them predate the respondent's agreements and the soundtrack of the said films were carved out and given separately to the petitioner prior to the assignment by the producer in favour of persons under whom the respondent's claim its rights is unmeritorious. These agreements have clauses that state that the right to exploit the soundtrack reverts to the producer upon the expiry of one year. Such agreements make it clear that the producers after expiry of one year were entitled to record and/or re-record the musical and other works of the said films.

45. Mr. Mukherjee has submitted that principle of "jus tertii" relied upon by the petitioner to contend that the respondents must win on its own defence is not applicable in the instant case. Mr. Mukherjee has relied upon Black's Law Dictionary, 7th Edition which defines "jus tertii" as "the right of a third party..... it may once have been associated with a presumption of common law jurisprudence that one cannot be harmed by an action that achieves its effects upon others, cannot be indirectly harmed."

46. Mr. Mukherjee has referred to Bouvier's Law Dictionary, Third Revision Volume 2 @ page 1794 which defines "jus tertii" as "the right of a third person. This is set up by way of defence in many actions where it is sought to establish relations of landlord and tenant, or bailor and bailee, by a plea of setting up jus tertii".

47. It is submitted that in cases where jus tertii is pleaded it is a defence stating that the plaintiff cannot bring action against the defendant if there is a third party which has better rights to the property than him. Further, it is a defence taken to say that the act complained of against the defendant has been done by the defendant under authority of the original title holder. In this regard reliance is placed on (B. Gangayya & Ors. v. Vennavalli Satyanarayana & Ors. reported at MANU/TN/0486/1925 : AIR 1925 Mad 1021)

48. Mr. Mukherjee argued that this principle has no applicability to the instant case since it is not the case of the defendant that a third party has a valid claim against it and not the petitioner. It is submitted that the petitioner has failed to demonstrate payment of royalty to the copyright holder. The petitioner is required to show in the instant suit that it has a superior right over the songs of the aforesaid films that of the respondent. It is submitted that the petitioner has failed to show any subsisting right over the said film.

49. The petitioner has failed to prove its case by showing any right over the aforesaid films. It is an established principle that the burden of proof is on the petitioner. The learned Senior Counsel in this regard has referred to the following decisions:-

- i) Anil Rishi v. Gurbaksh Singh reported at MANU/SC/8133/2006 : 2006 (5) SCC 558, para 9 and 10;
- ii) Subhra Mukherjee & Anr. v. Bharat Coking Coal Ltd. & Ors. reported at MANU/SC/3328/2000 : 2000(3) SCC 312 para 12;
- iii) Rangammal v. Kuppuswami & Anr. reported at MANU/SC/0620/2011 : 2011 (12) SCC 220 para 21-29, 34-36, 44-49.

50. The respondents are owners and/or license holders and have acquired the right, title and interest in musical composition, songs, recording, sound tracks, and literary works and have all rights to exploit the songs in the said movies. The respondent has a right to digitally exploit the sound recording of the aforesaid films.

51. Mr. Mukherjee has distinguished the IIMP, Punit Mehra and Santi Films (supra) by submitting that these cases have no application since in the instant case the petitioner has failed to show its prima facie subsisting right over the aforesaid films as well as the right to exploit the musical works in the aforesaid films.

52. In any view of the matter even if the plaintiff has the copyright in the literary and musical work and sound recording, the plaintiff is not entitled to an order of injunction by reason of the provision contained in Section 31 D of the Copyright Act, 1957 which came into force with effect from 21st June, 2012.

53. The Central Government by its office memorandum dated 5th September 2016 has also interpreted Section 31D of the Act to the effect that internet broadcasting companies come under the purview of statutory licensing, the respondents have relied upon an office memorandum dated 5th September, 2016.

54. The provisions of Section 31D merely require royalties to be paid to the owner of the work in the manner and at the rate fixed by the Copyright Board the same is a statutory license. As such, for breach of copyright there can be no order of injunction only monetary claim. This is also recognised in rule 29 to 31 of the Copyright Rules 2013.

55. The petitioner is not entitled to any ad interim order as it has failed to show prima facie rights over the aforesaid films. Furthermore, the respondent shall suffer irreparable loss and prejudice if orders as prayed for are passed since it has prima facie demonstrated that it has a right to exploit the musical works in the said films and is in no manner infringing any purported rights of the petitioner over the said films.

56. The respondents have thus prayed for dismissed of the petition.

57. The Copyright Act, 1957 was enacted in order to protect the rights and obligations of Authors. The definition of copyright in the 1957 Act was enlarged to include the exclusive right to communicate works by Radio Diffusion. A Cinematograph Film was given a separate copyright apart from its various components, namely, story, music, etc. The said Act has been amended five times once each in the years 1983, 1984, 1992, 1994 and 1999.

58. The 1983 Amendments were primarily focused on compulsory licensing and manner of assignment of copyright. The 1984 Amendment addressed the piracy issue as piracy became a global problem due to the rapid advances in technology. The 1992 Amendment was essentially to protect the copyright of Gurudev Rabindra Nath Tagore. The 1994 Amendment was a major one which harmonized the provisions of the Copyright Act, 1957 with the Rome convention, 1961 by providing protection to the rights of performers, producers of phonograms and broadcasting organizations. It also introduced the concept of registration of copyright societies for collective management of the rights in each category of copyright works. The amendment in 1999 introduced a few minor changes to comply with the obligations with the trade related aspects of Intellectual Property Rights (TRIPS). In 2012, the last amendment has taken place. The amendment was made with the object of making certain changes for clarity to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the internet. It has addressed the rights of the Authors of literal and artistic works and also certain related rights which are the rights of the performers and phonograms. The amendment, inter alia, provides for definition of Cinematograph Films to give independent rights to Authors of literal and musical works in Cinematograph Films and clarified that the Authors would have rights to

receive royalties and the benefits enjoyed through the copyright society. It also introduced statutory licensing for version recordings of all sound recordings.

59. In the instant case, the Court is required to consider few definitions that have undergone amendments over a period of time.

60. Copyright is a right to stop others from exploiting the work without the consent or assents of the owner of the copyright. Our copyright law does not require compulsory registration of the copyright for availing the benefits and protection available to the owners under the Act. The registration of copyright has been made optional.

61. The definitions that are relevant for the present purpose are "Author", "Cinematograph Film", "Composer", "Plate", "Producer", "Sound Recording" and "Work".

62. The term "author" refers to the creator of the copyrighted work. The "author" may be the person who records the ideas of mind or he may be the person who supplies those ideas themselves. In contemporary usage an author is an individual who is solely responsible and therefore exclusively deserving credit for the production of a unique work. (Gallagher T William, Intellectual Property, Woodmansee Martha, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of 'Author', (Asghate Publishing Ltd.), P.426.)

63. The 1956 Act defines "Author" to mean in relation to a Cinematograph Film, the owner of the film at the time of its completion. This definition was substituted by Act, 38 of 1994 by which "Author" means "in relation to a Cinematograph Film or Sound Record, the Producer".

64. The copyright law accords special treatment to works made for hire. The work made in course of employment or on hire is the major exception to the fundamental principle that copyright ownership vests initially in the individual who creates the work. If the work is a "work made for hire" the employer under the copyright law will be considered both the author and copyright owner of the work.

65. The importance of the concept of copyright ownership lies in the fact that owner of the copyright work will get exclusive right to exploit and reproduce the work.

66. For many years the question whether a specific work was a "work made for hire" was a source of great confusion to the courts as judicial decisions generally focused upon the "manner and means" by which the hired party developed the creative work. To help determine who is an employee, the U.S Supreme Court in *Community for Creative Works v. Reid*, 490 U.S. 730, identified certain factors that characterize an "employer employee" relationship as defined by agency law:

1) Control by the employer over the work (e.g., the employer may determine how the work is done, has the work done at the employer's location, and provides equipment or other means to create work)

2) Control by employer over the employee (e.g., the employer controls the employee's schedule in creating work, has the right to have the employee perform other assignments, determines the method of payment, and/or has the right to hire the employee's assistants)

3) Status and conduct of employer (e.g., the employer is in business to produce such works, provides the employee with benefits, and/or withholds tax from the

employee's payment).

67. These factors are not exhaustive. As one learned Author observed that the court left unclear which of these factors must be present to establish the employment relationship under the work for hire definition, but held that supervision or control over creation of the work alone is not controlling.

68. All or most of these factors characterize a regular, salaried employment relationship, and it is clear that a work created within the scope of such employment is work made for hire.

69. Section 2 sub-section (f) of 1957 Act defines Cinematograph Film as under:-

"S. 2(f). "Cinematograph film" includes the sound track, if any, and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography;

Explanation. For the purpose of this clause, "video films" shall also be deemed to be work produced by a process analogous to cinematography."

70. In 1995, it has undergone a change and substituted by Act 38 of 1994 which came into effect on 10th May, 1995. The amended definition reads:-

"S. 2(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."

71. The said definition was again substituted by Act 27 of 2012 by which the words on any medium produced through a process from which a moving image may be produced by any means were omitted.

72. The concept of cinematograph film is defined in sec. 2 (f) of the Act as "work of visual recordings and include a sound recordings accompanying such visual recordings and cinematograph shall be construed as including any work produced by any process analogous to cinematograph including a video-film."

73. The definition of cinematograph film states that cinematograph film includes a sound recording that accompany visual recording. The term visual recording is defined by section 2 (xxa) as "the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method."

74. Sec. 2(xx) defines sound recordings as "a recording of sounds from which sounds may be produced regardless of the medium on which recording is the method by which the sounds are produced."

75. Under old as well as new definition of cinematograph film, sound track is protected as part of cinematograph film and not as sound recording. However, independent copyright may also subsist in those sound recordings which are made from film sound tracks. (Ahuja V.K. Intellectual Property Rights in India, (lexis Nexis, Second edition, 2nd edition), P.28)

76. The cinematograph film is a homogenous material. It is a collection or collage or ensemble of various works like story, screenplay, dialogue, sound track, video images, lyrics etc. Each of these works may also enjoy copyright protection under the head 'underlying works'.

77. The Act 38 of 1994 which came into effect on and from 10th May, 1995 has defined "Composer" in Section 2(ffa). It reads:-

"S. 2(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."

78. The definition of "Composer" was first introduced by Act 38 of 1994. Section 2(t) of the 1957 Act defines "Plate" which reads:-

"S. 2(t). "Plate" includes any stereotype or other plate, block, mould, matrix, transfer, negative, duplicating equipment or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records for the acoustic presentation of the work are or are intended to be made."

79. Subsequently, the said definition has undergone two changes once in 1984 and once in 1994 by Act 65 of 1984 and Act 38 of 1994 by which the words "duplicate equipment" and "sound recording" were inserted. The 1984 amendment incorporates duplicate equipment and the 1994 amendment incorporates sound recording. The definition of "record" and 'recording' in the 1957 Act in Section 2(w) and 2(x) were omitted by the Act 38 of 1994. The words "record" and "recording" under the 1957 Act in Section 2(w) and 2(x) were:-

"S. 2(w). "Record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound track associated with a cinematograph film.

S. 2(x). "recording" means the aggregate of the sounds embodied in and capable of being reproduced by means of a record."

80. The definition of "producer" was first introduced by the Act 38 of 1994 in Section 2(uu) which reads:-

"S. 2(uu). "Producer", in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work."

81. By operation of law or by contract or assignment the producer of the film may be vested with copyrights in the cinematograph film (2(d)(v)). Section 2(uu) defines the term producer in relation to sound recording as a "person who takes the initiative and responsibility for making the work." The producer may employ a story-writer or a screenplay writer or a singer under a contract of employment. In that case the employer, subject to contract, is the first owner of the copyright. Otherwise, the author of the work may retain his individual copyright. Now, when all these works are put together and a cinematograph film is made a new copyright over the film is vested in maker of the film or its producer.

82. The right to record the music as part of the sound track in a film is known as 'the

synchronisation right', because it is performed in synchronisation with the film. This right is included in the right to reproduce the work in any material form.

83. When the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of s. 14(1)(c) of the Act, on completion of the cinematograph film, a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public. The composer of a lyric or a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so.

84. The film producer has the sole right to exercise what is his entitlement under s. 14(1)(c) qua film; but he cannot trench on the composer's copyright which he does only if the 'music' is performed or produced or reproduced separately in violation of s. 14(1)(a). For instance a film may be caused to be exhibited as a film but the piece of music cannot be picked out of the sound track and played in the cinema or other theatre. To do that is the privilege of the composer and that right of his is not drowned in the film copyright except where there is special provision such as in s. 17 proviso (c). So beyond exhibiting the film as a cinema show, if the producer plays the songs separately to attract an audience or for other reason he infringes the composer's copyright. Anywhere in a restaurant or aeroplane or radio station or cinema theatre, if a music is played, there comes into play the copyright of the composer or the Performing Rights Society.

85. "Sound Recording" has been defined in Section 2(xx). The definition was introduced by the Act 38 of 1994 in substitution of Section 2(x) of the 1957 Act. Section 2(xx) reads:-

"S. 2(xx) "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced."

86. The 1957 Act defines the word "work" in Section 2(y) as:-

"S. 2(y) "work means any of the following works, namely:-

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a record.

87. Section 13 of the Copyright Act deals with the words in which copyright subsists. The Section provides that copyright shall subsist amongst others in cinematograph films and sound recording. The word "sound recording" was substituted by the Act 38 of 1994. Section 14 gives an exhaustive meaning of copyright. The said section has undergone changes in 1995, 2000 and 2012. Section 14 sub-section (1)(d) which corresponds to Section 14(1)(c) of the 1957 Act deals with copyright in cinematograph film. The unamended Section 14(1)(c) of the 1957 Act in Section 14(1)(c) reads:-

"S. 14(1)(c) In the case of a cinematograph film, to do or authorize the doing of any of the following acts, namely:-

- (i) to make a copy of the film;
- (ii) to cause the film, in so far as it consists of visual images, to be seen in public and in so far as it consist of sounds, to be heard in public;
- (iii) to make any record embodying the recording in any party of the sound track associated with the film by utilizing such sound track;
- (iv) to communicate the film by broadcast."

88. In 2012 by Act 27 of 2012 the said Section was amended and it now reads:-

"S. 14(1)(d). In the case of a cinematograph film, -

- (i) to make a copy of the film, including -
 - (A) a photograph of any image forming part thereof; or
 - (B) storing of it in any medium by electronic or other means;
- (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;
- (iii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iv) to communicate the film to the public."

89. In *Indian Performing Rights Society v. Eastern Motion Pictures Assn.*, MANU/SC/0220/1977 : AIR 1977 SC 1443 the main question was whether the producer of a cinematograph film can defeat the right of composer of music or lyricist by engaging him, to which the court held:

"The rights of music... Composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in proviso (b) and (c) of Section 17 of the Act. In both the cases falling under clauses (b) and (c) of s. 17, a cinematograph film producer becomes the first owner of the copyright and no copyright subsists in the composer of the lyrics or music so composed unless there is a contract to the contrary between the composer of the lyric or music on one hand and the producer of the cinematograph film on the other".

90. In *Shree Venkatesh Films Pvt. Ltd. v. Vipul Amrutlal Shah*, G.A. No. 2153 of 2009, MANU/WB/1465/2009 : , a Division Bench of the Calcutta High Court has revisited the law relating to subsistence of copyright in cinematograph films. While dealing with the question ownership the Court said:

"When the film as whole is exhibited the individual owners of copyright in works who have permitted the film to be made cannot claim copyright but if a part of the film is segregated and the individual work is culled out and exhibited then the individual owner can assert his copyright. Now, suppose the

producer of the film without taking permission of the owners of the copyrighted works exhibits the film, the film may not have any copyright at all as a substantial part of the film is infringement of other work or works. (Section 13(3)(a) of the Copyright Act). The authority for the aforesaid legal position with regard to copyright in cinematography film is to be found in the decision of the Hon'ble Supreme Court in Indian Performing Right Society Ltd. v. Eastern India Motion Picture Association & Ors., reported in MANU/SC/0220/1977 : AIR 1977 SC 1443. However, not each and every work is entitled to copyright protection. Copyright protection is extended to original literary, dramatic, musical and artistic works; cinematograph films and sound recording (Sec. 13(1)(a),(b) & (c) of the Copyright Act). In order to claim copyright there must be some originality in the work. The author of a work may obtain raw materials for the work from any or many sources but will only be entitled to copyright if these raw materials are converted, by use of his labour skill, capital and intelligence to create another material or work which is something different from the raw materials and has an element of novelty."

91. A sound recording has a "unitary" nature wherein the individual constituents are complete in themselves which enjoy independent copyrights. However, the vesting of such independent copyrights in such ingredients does not affect the unitary nature of a sound recording or its unitary use. Only when the use is not unitary, it results in the infringement of copyrights in underlying works/ingredients.

92. This proposition is beautifully articulated in a decision of the Delhi High Court Super Cassettes v. Chintamani, MANU/DE/4400/2011 : 2012 (49) PTC (1)(Del) delivered in July 2011. The court observed:

"There is no quarrel with the proposition that cinematograph films and sound recordings are derivative works, which are eventually derived from original literary, dramatic, musical and artistic works. That does not make copyright in cinematograph films and sound recordings inferior. In Entertainment Network (India) Ltd. the Supreme Court has held that only because the term for holding copyright under Section 27 (in relation to a copyright in sound recording) is different from the term of the copyright in relation to original literary, dramatic, musical and artistic works, the same would not mean that the right of the copyright owner in sound recordings is somewhat inferior. Even though the copyright in relation to derived work such as cinematograph films and sound recordings operate in a relatively restrictive field, when compared to the copyright in original literary, dramatic, musical and artistic works, to the extent that the said copyright in derived work is vested by the Act, the same operates with full force and vigour. The decision of the Supreme Court in Entertainment Network (India) Ltd. relied upon by the defendant, India TV in no way advances their submission that cinematograph films and sound recordings are covered by Sections 52(1)(a) and 52(1)(b) of the Act."

93. According to Section 2(d)(v) of the Copyright Act, 1957 'author' in relation to sound recording is the producer. Section 2(uu) defines the term producer in relation to sound recording as a "person who takes the initiative and responsibility for making the film".

94. Under the Copyright Act, 1957, a music in a movie comprises at least three different types of works; a musical work (melody), literary (lyrics) and the sound recording (which emerges from the recording of the performance of the music and lyrics

in a studio). Each work is protected by a different copyright. A copyright is not a singular right, but is, in fact, a bundle of rights, such as the right to reproduce the work, the right to communicate the work to the public or the right to incorporate the work in a sound recording or cinematograph film. These rights can be either compressed together or can be unbundled from each other. As a result, it is entirely possible that the right to reproduce the work can be assigned to one person and the right to communicate the work to the public can be assigned to a different person.

95. By default, under the Copyright Act, 1957, the composer of a musical work is the author of the musical work and the person writing the lyrics is an author of the literary work. The author of the sound recording could be a producer. The music label could usually be a Company which acquires the copyright in the sound recording from the film producer. There is also additionally a performance right that vests in the performer - a person who sings the lyrics or plays the music of an instrument.

96. While the authorship of a work can never change the ownership of the copyrights can change depending on the contractual obligations of the various authors. In film music, the composer, lyricist and producer may keep all other rights and licence only the right to synchronize their respective works with the film to the film producer. In such a case, the producer can buy only the right to use the music and lyrics with the film while the authors retained all other rights, such as public performance rights in hotels and restaurants or reproduction rights in ringtones for mobile phones. Before 2012, it was a normal practice in Indian Film Industry for the composer and lyricist to assign away the copyright in their works to the film producer for a single lumpsum payment. Alternatively in cases, where there was no contract or assignment, film producers were presumed to be the first owners of the copyrights in the music and lyrics. This presumption was due to the decision of the Hon'ble Supreme Court in Indian Performing Rights Society Ltd. (supra).

97. Under the Copyright Act, 1957, the author of a work is usually the first owner of the copyright in the work but Section 17 of the Copyright Act alters this principle of first ownership in specific cases where a work is created during employment or for a commission. The first significant judgment on the first ownership of copyright in music and lyrics in films was delivered by the Hon'ble Supreme Court in 1977 in Indian Performing Rights Society Ltd. (supra). The film producers argued that because of Section 17, they owned all the copyrights in the music and lyrics created for a film. The logic seems to be that since produces commissioned authors to create music and lyrics for films, the resulting works would necessarily be owned by the commissioning producers and not by the composers or lyricists. On the other hand, IPRS (representing the Authors, that is, composer and lyricist) argued that their members owned all the public performance rights to the music and that anybody publicly perform the music, would require a licence from IPRS. In effect, the IPRS was arguing that various authors had only assigned synchronization rights to film producers, that is, the right to use the music along with films to retain all remaining rights in the bundle that constitute a copyright. The Hon'ble Supreme Court referred to two provisos of Section 17 to arrive at its decision that the copyright was owned entirely by the film producers. Under Proviso (b), a person who commissions the creation of cinematograph film, photograph, painting, portrait or engraving owns the copyright in the resulting work. Under Proviso (c), any work created during the course of employment is deemed to be owned by the employer unless otherwise provided in the contract. In the absence of a contract to the contrary, the Hon'ble Supreme Court concluded that Under s. 17, proviso (b) of the 1957 Act, when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his

cinematograph film, or composing music or lyric therefor i.e. the sounds for incorporation or absorption in the sound track associated with the film which are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to s. 17, proviso (c), if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. Thus the rights of a composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in the provisions (b) & (c) of s. 17 of the Act.

98. It is for the 1977 judgment, all producers who commissioned authors to create musical or literary works for their films would be the first owners of copyright in those works unless there was evidence of a contract to the contrary. The Hon'ble Supreme Court judgment, in fact, gave composers and lyricists the right to retain ownership of copyright in their works by specifying ownership rights in their contracts.

99. The Government in 2010 introduced the Copyright Amendment Bill in Parliament, the Amendment Bill sought to insert the following proviso to Section 17:-

"Provided that in case of any work incorporated in a cinematograph work, nothing contained in Clauses (b) and (c) shall affect the right of the author in the work referred to in Clause (a) of sub-section (1) of Section 13."

100. The "works" referred in Section 13(1)(a) are "original literary, dramatic, musical and artistic works". The Parliament Standing Committee, to which the Amendment Bill was referred, endorsed this particular amendment thus:-

"The Committee also takes note of the fact that independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of [the] Supreme Court judgment in Indian Performing Rights Society v. Eastern India Motion Pictures Association which held that [the] film producer is the first owner of the copyright and authors and music composers do not have separate rights."

101. The amendment was retained in its original form in the final version of the law passed by Parliament two years later as the Copyright (Amendment) Act, 2012. As a result, authors would now own their rights in the music and lyrics even if they were created for a cinematograph film.

102. Prior to 10th May, 1995, Copyright subsisted in following classes of works:-

- a) Original, literary, dramatic, musical and artistic works;
- b) Cinematograph films and
- c) Record.

103. The word "record" was substituted by the words "sound recording". By the said amendment, the definition of "Author" has also undergone a change as the "author" now means in relation to a cinematography film or sound recording, the producer. The word "sound recording" appears to have replaced "record" keeping in pace with the development in science and technology. After 10th May, 1995, the producer is regarded as an author in relation to sound recording. The agreements relied upon by the plaintiffs

would show that at the relevant time, sound recording was not separately treated as a class on which a copyright would subsist, however, the copyright subsisted on "record". On the basis of the recitals in the several agreements disclosed by the plaintiffs, there cannot be any doubt that the plaintiff becomes the owner of copyright in respect of all the songs. Now it is necessary to examine the width of assignment.

104. Mr. Mukherjee submitted that there is no absolute assignment. In order to appreciate the said argument it is necessary to examine the three types of agreement.

105. By way of illustration the following clauses from the agreement dated January 6, 1966 are set out hereunder:

"Clause 2. The Clients shall during a period of one year(s) computed from the 6th January, 1966 supply the Company at their own expense with artistes and musicians etc., to perform musical and/or other works from their films for the purpose of making gramophone records, and the artistes and musicians etc., shall attend at the Company's studio or such other place as may be appointed by the Company and shall at such place and time record such works as the Company shall select, for issue under His Master's Voice, or any other Mark which the Company shall select, in which the Mechanical Reproduction Rights including the right to make gramophone records belong to the Clients.

Clause 4. Notwithstanding the provisions in Clauses 2 and 3 hereof the Clients shall at their own expense alternatively and subject to the consent of the Company supply the Company with sound tracks or recorded tapes of their musical and/or other works and the Company shall utilise such sound tracks or recorded tapes for the purpose of re-recording therefrom and the subsequent manufacture of gramophone records as referred to in the abovementioned clauses provided they are in the opinion of the Company suitable for such purpose. The Clients agree to indemnify the Company and keep the Company indemnified from and against all actions, claims and damages in which the Company may be incurred by reason of such re-recording and subsequent manufacture, issue and sale of gramophone records derived from sound tracks or recorded tapes supplied by the Clients as aforesaid.

Clause 5. The Clients shall not during the said period of one year(s) allow any of their musical and/or other works to be recorded or rerecorded by any of their artistes and musicians etc., or from any film sound tracks or recorded tapes or other means for any other person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the Company in all or any of its branches.

Clause 6. The Company during the said period of one year(s) and thereafter while the records recorded or re-recorded under the provisions of this Agreement remain on sale by the Company shall pay to the Clients a royalty on nett sales made in any part of the world of all records of the performance of the artistes and musicians etc. as aforesaid calculated on the retail selling price in the country of manufacture for the time being at the following rates:-

* * * * *

Provided always that such royalty shall be payable only so long as the Clients shall not at any time hereafter, allow their artistes and musicians etc., to record any works recorded or re-recorded under the provisions of this Agreement or

permit the recording of such works from any film sound track or recorded tape or other means for any other person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the Company in all or any of its branches and provided further that such royalty shall not be payable to the Clients in respect of records recorded or re-recorded under the provisions of this Agreement by any of the Client's artistes and musicians etc., who has before the execution of this Agreement recorded on behalf of the Company.

Clause 7. The Clients hereby agree that they assign their gramophone recording rights in all works to be recorded or re-recorded under the provisions of this Agreement to the Company, and hereby agree further to indemnify and keep indemnified the Company in the case of such works as aforesaid from and against all actions, claims and damages which the Company may incur by reason of the recording, issue and sale of such works.

Clause 8. In consideration of the assignment set out in Clause 7 hereof the Company shall pay to the Clients a Copyright royalty or nett sales made in any part of the world of the works recorded or rerecorded under the provisions of this Agreement calculated on the retail selling price in the country of manufacture for the time being at the following rates:-

Clause 10. The Company shall be the owner of the original plate within the meaning of The Copyright Act, 1957, and any extensions or modifications thereof of each title recorded or re-recorded under the provisions of this Agreement at the time when such plate shall be made. The Company shall also be entitled to the sole right of production, reproduction, sale, use and performance (including broadcasting) throughout the world by any and every means whatsoever of the records of the works performed by the artistes and musicians etc., under this Agreement. The Company shall in its absolute discretion be entitled to authorise any other persons, firms or corporations in any part of the world to manufacture, sell and/or catalogue records of all or any of the titles recorded or re-recorded under the provisions of this Agreement when royalties shall become payable to the Clients as mentioned in Clauses 6 and 8 hereof.

Clause 12. The Company shall be entitled to continue this Agreement for one further successive period of one year(s) upon giving notice in writing to the Clients. Any notice given under the provisions hereof shall be given before the expiration of this Agreement, or any continuance thereof as the case may be, by registered letter and sent to the address of the Clients last known to the Company.

Clause 14. The Clients shall not:-

- (a) assign the rights of the Clients under this Agreement, nor
- (b) appoint an agent to collect, on behalf of the Clients, any monies due to the Clients under the provisions of this Agreement

Without first obtaining the written consent of the Company so to do."

106. The type A agreements are initially for a period of one year with an option to

continue the said agreement for a further period of one year upon giving notice in writing to the producer and/or production houses as the case may be.

107. Under Clause 2 of the Agreement, the producer for a period of one year is required to supply the plaintiff at its own expense with artistes and musicians etc. to perform musical and/or other works from its films for the purpose of making gramophone records to be published under the logo of the plaintiff in which the mechanical reproduction rights including the right to make gramophone records belonged to the producers. The producer alternatively and subject to the consent of the plaintiff may supply the plaintiff with sound tracks or recorded tapes of its musical and/or other related works and the plaintiff shall utilise such sound tracks or recorded tapes for the purpose of re-recording therefrom and the subsequent manufacture of gramophone records provided they are in the opinion of the plaintiff suitable for such purpose.

108. Clause 5 of the agreement contains the negative covenant. It restrains the producers during the period of one year or a successive period of one year not to allow any of their musical works to be recorded or re-recorded by any of their artistes and musicians or from any film sound tracks or recorded tapes or other means for any other person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the plaintiff.

109. Clause 6 of the agreement refers to payment of royalty. The said clause mentions that the plaintiff during the period of one year and, thereafter, while the records recorded or re-recorded under the said agreement remain on sale by the plaintiff, a royalty shall be paid on nett sales at rates mentioned in the said clause. However, royalty shall be payable provided only so long as the producers shall not at any time hereafter, allow their artistes and musicians to record any works recorded or re-recorded under the agreement or permit the recording of such works from any film sound track or recorded tape or other means for any other person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the plaintiff.

110. Clause 7 of the agreement categorically states that the producers have assigned their gramophone recording rights in all works to be recorded or rerecorded under the agreement and in consideration of such assignment, the plaintiff shall pay to the producers a copyright royalty on nett sales of the works recorded or re-recorded under the agreement at the rates mentioned in Clause 8 of the said agreement.

111. Clause 10 recognizes that the plaintiff shall be the owner of the original plate within the meaning of Copyright Act, 1957. The plaintiff shall also be entitled to the sole right of production, reproduction, sale, use and performance (including broadcasting) throughout the world by any and every means.

112. The agreement in Clause 14 restrains the producers from assigning their rights under the agreement nor appoints an agent to collect, on behalf of the producers, any amount due to the producers without first obtaining the written consent of the plaintiff.

113. Type B agreements are same and/or similar to type A, save and except, the definition Clause 1 in the type A agreement is absent in the type B agreement.

114. In the type C agreement, however, there is no duration mentioned. Mr. Mookherjee, however, has submitted that although no duration is mentioned in the said agreement but having regard to the undisputed position in law that a producer is the owner of the sound track, the right to use the sound track for recording or re-recording

is not affected and the producers can always give licence and/or assign their rights in respect of sound track of the films at least upto May 1995 when the definition of cinematograph film has been amended. Moreover, the respondents are making digital music under the agreement from persons who have become the owner of such sound tracks and music by virtue of assignment in their favour by the original owners.

115. The right to use and/or exploit the songs in the cinematograph films forming the subject matter of this suit must necessarily flow from the agreements. The agreements forming the category type A and category type B clearly permit the producer to re-record the works of any film, sound track or recorded tape or other means for any other person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the plaintiff on expiry of a period of one year. For the initial period of one year, the recording rights in all the works to be recorded or re-recorded under the agreement exclusively rests with the plaintiff and the producer and/or production houses are restrained by the negative covenant in the agreement not to use or exploit its rights in relation to the works forming part of the agreement. The producer forfeits its right to receive royalty, in the event, he does all or any of the acts mentioned in proviso to Clause 6.

116. Both Clauses 6 and 8 of the agreement speak of royalty. While Clause 6 refers to the duration of the agreement during which the plaintiff would be required to pay royalty while the records recorded or re-recorded under the agreement remains on sale by the plaintiff shall pay to the producers a royalty on nett sales made in any part of the world of all records of the performance of the artistes and musicians etc. Clause 8 simply speaks of consideration of the assignment of the gramophone recording rights of the plaintiff in all works to be recorded or re-recorded under the agreement. The definition of "plate" in Section 2(t) of the Copyright Act, 1957 includes an appliance by which records for the acoustic presentation of the works are made or are intended to be made. It also includes a mould.

117. By virtue of Section 18, the owner of a copyright, in any work, may assign the right,-

- (a) either wholly or partially;
- (b) either generally or subject to limitation; and
- (c) either for the whole term of the copyright or for any part thereof.

118. He may also grant any interest in the copyright by licence.

119. It may be stated that since the copyright consists of a bundle of rights, the owner may assign the whole of these rights or only some of them and, therefore, an assignment may be general or may be subject to limitation. Copyright may, therefore, be regarded as divisible as to content, territory or time; and, in each case, the assignee is to be regarded as the owner of the part assigned, and the assignor as the owner of the part not assigned.

120. The words 'either wholly or partially' provide for the right of a copyright owner to divide his copyright as to the mode of reproduction of his work. He may divide the copyright as to the right of reproduction by mechanical contrivances, such as record. (National Publishing House v. Amit Sachdeva, MANU/DE/0095/2001 : 2001 PTC 437 (Del)).

121. In each case, the assignee may be treated as the owner of the particular part assigned to him, but not of any other part of the copyright which has not been assigned to him. (British Actors' Film Co. v. Glover, (1918) 1 KB 299)

122. In English law, an absolute assignment need not necessarily be equivalent to a sale out and out; it may be only an equitable assignment. [Bence v Shearman 47 WR 350: (1898) 2 Ch 582; Brand v London Rubber Co. (1904) 1 KB 387].

123. In India, absolute assignment means a transfer of the entire interest of the assignor.

124. In Black's Law Dictionary, 6th Edition the "Assignment" means the act of transferring to another all or part of one's property, interest, or rights. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all kinds of property (Higgins v. Monckton, 28 Cal. App. 2d 723, 83 P.2d 516, 519), including negotiable instruments.

125. "Assignment" means the transfer of the claim, right or property to another. [The Commissioner of Gift Tax, Madras v N.S. Getty Chettiar, MANU/SC/0249/1971 : AIR 1971 SC 2410: (1971) 2 SCC 741: (1971) 82 ITR 99: (1972) 1 SCR 736].

126. "Assignment" is defined as a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It is defined as the transfer by a party of all rights to some kind of property usually intangible property such as rights in a lease, mortgage, agreement of sale of partnership. [Gopal Saran v Satyanarayan MANU/SC/0195/1989 : AIR 1989 SC 1141: (1989) 3 SCC 56: JT 1989 (Supp) SC 21: (1989) 1 SCR 767].

127. Licence is a permission given by one man to another to do some act which without such permission it would be unlawful for him to do.

128. The main difference between assignment and licence is that in a licence the person granting permission (Licensor) retains an interest in the property being licensed, whereas in an assignment the assignor transfers his rights in the property being assigned.

129. In other words when one gives a copyright assignment, he parts with his copyright and he does not own his copyright anymore and the other party does, unlike a copyright licence where the licensor retains ownership of his copyright and gives the other party permission to use some or all of his copyright rights.

130. There are two ways that a copyright owner can transfer some or all of his or her copyright rights: through a licence or an assignment.

131. In an assignment of copyright rights, the owner sells his or her ownership rights to another party and has no control over how the third party uses those rights. A copyright assignment is sometimes referred to as a sales agreement for copyright.

132. The buyer (assignee) can then use the copyrighted work or do whatever he or she wants with it.

133. A valid assignment of copyright must be in writing and signed by, or on behalf of, the copyright owner/assignor. The subject of the assignment must be clear as to what copyright is being assigned in which work(s).

134. In a licence of copyright rights, the owner maintains his or her copyright ownership rights, but allows another party (the licensee) to exercise some of those rights without the licensee's actions being considered copyright infringement. A licence is often preferred over an assignment when the copyright holder wishes to maintain and exercise some ownership control over the rights and how the licensee uses the copyright holder's rights.

135. The owner of copyright in a work may assign copyright either wholly or partially for the whole or any part of such copyright to any person. The assignment of copyright may be a limited assignment both in content and period. An assignment does not automatically mean that it is an absolute assignment. The intention of the parties with regard to the nature and extent of the assignment is required to be gathered and ascertained from the agreement itself. If on a proper construction of the agreement, it appears that the assignment is for a limited duration then it cannot be contended that simply because an assignment of copyright has been made by giving absolute ownership with regard to the copyright it has to be for an unlimited period. This has been the view of our Court in *Saregama India Ltd. v. Suresh Jindal & Ors.* reported at MANU/WB/0255/2006 : 2007 (34) PTC 522(Cal).

136. The Clauses of the agreement are required to be carefully read and analyzed to find out the real intention of the parties. The copyright grants are misused by the owners of the copyright by selling the copyright time and again in the market by creating multiple rights affecting the commercial transaction. The courts have held that use of expression like "full rights" in the agreement, an only conclusion could be reached is that the agreement contemplates a permanent arrangement as it used the expression "full rights" than the limited term. The use of the expressions like "absolutely" and "worldwide" are considered to be prima facie indicators of the intent of the parties to the agreement to assign the rights "absolutely" and "worldwide" and all the rights available with the producers. In *Suresh Jindal & Ors.* (supra) it was held that the owner of the copyright or the prospective owner of the copyright in a future work may assign the copyright to any person either wholly or partially for the whole of the copyright or any part thereof and once an assignment is made the assignee for the purpose of the said Act is treated as the owner of the copyright. The Copyright Act, 1957 makes it clear that where the assignee does not exercise the rights assigned to it under any of the provisions of Section 19, within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have been lapsed after the expiry of the aforesaid period unless otherwise specified in the agreement.

137. Mr. Mukherjee has submitted that under the agreement, the recording or re-recording from the record manufactured and published by the plaintiff would be unauthorized and that original plate would always remain to be the intellectual property of the plaintiff but that does not prevent the producer of the films to exploit the work by recording or re-recording by other means and device as the producer remains to be the owner of the sound track of the cinematograph film under the unamended Act and such right has been recognized by the Hon'ble Supreme Court in *Indian Performing Rights Society* (supra). The salient features of both the types of agreement, namely, category A and category B is of limited duration inasmuch as the right of the producers to record or re-record the works beyond the period of one year is not restricted. The agreement does not fetter the right of the producer to record any works recorded or re-recorded or permit recording of the works from any film sound track by any person, firm or corporation whatsoever carrying on a business similar to or in competition with that of the plaintiff inasmuch as the renewal clause in the agreement shows that it cannot be an

absolute assignment which may not be the case in respect of type B agreement. In the absence of similar clauses in type B agreement inasmuch as having regard to the present definition of cinematograph film, I am of the view, that the defendants cannot use the sound track of the films Awara Baap, Dhanwan and Babu in any manner whatsoever and, accordingly, the order of injunction passed earlier shall continue in respect of the said three films till the disposal of the suit.

138. The cinematograph film as law stands prior to the amendments referred to above represent a bundle of rights which the producer by reason of the assignment agreement has become the owner thereof.

139. Moreover, the deed of assignment contemplates that the producer of the respective films would not be entitled to royalty in the event re-recording is made of these songs. In other words, the right of the producer to record or re-record of the songs are not prohibited. Although, the plaintiff would rely upon negative covenant being Clause 5 of the agreement with JB Production by which the producer was restrained from assigning its right or appoint any agent without first obtaining the written consent of the company, in my view, the petitioner can rely only upon such negative covenant clause provided the plaintiff is able to establish that the plaintiff has discharged its obligations. In the event, the royalty is not paid to the producer of the respective films by the plaintiff, such producers, in my mind, are entitled to re-record the songs and exercise its right over and in respect of the said songs. The plaintiff has to establish that notwithstanding the fulfilment of its obligation which includes payment of royalty as one of the essential obligations the producers of the said films have assigned the rights covered under the agreement to third parties. Although, the plaintiff is in a position to demonstrate that the plaintiff has fulfilled its obligation and has paid the royalties but the plaintiff for some unknown reasons is unable and reluctant to demonstrate payment of royalties to the producers. A commercial transaction between the parties has to be interpreted in a manner so that it does not become oppressive, inequitable and unjust to a party to the transaction. The documents disclosed in the affidavit-in-opposition by the respondents shows that the producers of the respective films have assigned their rights in favour of third parties through whom the defendant No. 1 has acquired the rights. The very fact that the producer has assigned such rights in absence of any contrary evidence, prima facie, shows that they had exercised their right of re-recording as no royalty presumably has been paid to such producers. A producer of the film cannot suffer double jeopardy by non-payment on one hand and being restrained from exploiting the songs on the other hand and any contrary interpretation of such clauses of the agreement would be unconscionable and contrary to the manifest intention of the parties to the said agreement. On the basis of the disclosures made in the affidavit-in-opposition by the respondent one would have expected the plaintiff either to implead the producers in the suits or to disclose documents to show that the plaintiff has discharged its obligation.

140. Mr. Chatterjee has relied upon the concept of jus tertii. The common law principle that a stranger who made no claim for himself cannot attempt a claimant's title where the claimant had possession of the goods in question either personally or through a bailee or will. A plea of jus tertii was allowed at common law in two cases. The first was where neither the claimant nor anyone through whom he claimed had ever had a possessory right in the goods. The second was where any possessory right the claimant might have had had been voluntarily surrendered or taken away by operation of law. In both these cases the defendant was saying not "you have a prima facie title but X has a better one", but "you have proved no title of any sort, and therefore you must fail in limine".

141. However, the common law position has been considerably changed by the Torts (Interference with Goods) Act, 1977. Section 8(1) of the 1977 Act provides that:

"in any action for wrongful interference with goods the defendant is entitled to show, in accordance with rules of court, that a third party has a better right than the claimant as respect all or any part of the interest claimed by the claimant, or in right of which he sues, and any rule of law (sometimes called Jus tertii) to the contrary is abolished."

142. This section materially changes the common law position.

143. One of the changes brought about is that as against a wrong doer possession is tantamount to title only where no named third party is known to have a better right.

144. Mr. Chatterjee submits that the Court is not required to adjudicate and decide the right of the plaintiff and that of the producers. The argument proceeds on the basis that Courts do not decide what they do not need to decide. In Advanced Law Lexicon 3rd Edition page 2539 Jus tertii as the right of a 3rd party it defines : "It says nothing about the nature of legal argument on the merits of a case once formed, but as a symbol for the separability of cases is a useful term of art. Translated, however, it reads 'right of a third person'. It may once have been associated with a presumption of common law jurisprudence that one cannot be harmed by an action that achieves its effect through effects upon others, cannot be 'indirectly' harmed". Joseph Vining, Legal Identity 120 (1978). The right or interest of a third person. When a person is sued in respect of certain property he may sometimes set up as a defence that the title to such property is not in the plaintiff but in some third person.

145. In Jowitt's Dictionary of English Law 2nd Edition define Jus tertii as: "When a person who is prima facie liable to A, on being sued by him sets up as a defence that the money or property claimed does not belong to A, but belongs by a paramount title to B, he is said to set up the jus tertii (right of a third person)". The general rule is that a wrongdoer cannot set up the jus tertii. Therefore, when A seized goods in the possession of B, and on being sued by B set up as a defence that B had no title because the assignment from C under which he claimed was fraudulent as against A, and that the goods belonged to A under a valid assignment from C, it was held that A, being guilty of conversion, and therefore a wrongdoer, could not set up the jus tertii against B (Jefferies v G.W. Ry. (1854) 3 E & B 802). So an agent cannot refuse to account to his principal or otherwise dispute his title by setting up the jus tertii, unless he does so under the authority of the third person. But see the Third Parties (Rights against Insurers) Act 1930. In an action for wrongful interference with goods, the prohibition on the pleading of jus tertii has been abolished (Torts(Interference with Goods) Act 1977 S. 8(1)".

146. The 4th Edition of McCarthy in paragraphs 31:157 to 31:160 has discussed Jus tertii. The learned Author has commented that the defence of jus tertii arises when defendant raises the right of a third party. The learned Author has also distinguished jus tertii defence from other defences in which defendant challenges plaintiff's title to the mark. For example, if plaintiff is a mere licensee, in most cases plaintiff as licensee acquires no rights in the mark. In such cases, the defence is not really jus tertii, but rather that plaintiff licensee's use inured to the benefit of the licensor such that plaintiff itself has no rights and no title acquired by use. Similarly, if defendant points to an allegedly invalid assignment in gross to plaintiff, in most cases, it is a question of priority of use, not a lack of "title", since even a purported "assignee" acquires rights as

of its own date of first use. Similarly, defendant's claim that plaintiff has failed to sue other infringers (with title inferior to plaintiff), is not *jus tertii*, but rather a claim that the strength of plaintiff's mark has been weakened by widespread use. Modern decisions have rejected a *jus tertii* defence in trademark litigation, one court noting the "general prohibition against the assertion of *jus tertii* as a defence. The reason appears to be that the respondent is not in privity with nor is the successor in interest to any rights which such persons have acquired in their marks, only if defendant can prove privity with the third party would defendant be able to claim some entitlement to the priority rights of that third party. As recognised by many authorities, the allegedly superior right of a third party is a relevant defence if defendant is in privity with that third party. For example, in the case of *L v. PW*, PW can raise the priority of third party BR if PW is a licensee of BR. Since L's trademark rights are not superior to those of BR, L cannot claim that BR's licensee PW is an "infringer" of L's rights. Because PW "derives its right to use" the mark from third party BR's authorization and because BR has trademark rights superior to L, L cannot prevail against defendant PW. The learned Author has commented that as a matter of policy, *jus tertii* should not be allowed as a defence in any trademark case. So long as plaintiff proves rights superior to defendant, that is enough. Defendant is no less an infringer because it is brought to account by a plaintiff whose rights may or may not be superior to the whole world. If the defence were allowed, would the court then declare that the third party is an indispensable party to the case, require the third party to intervene, to act as surrogate advocate for the third party's rights. By raising *jus tertii*, a defendant could effectively divert attention from its own alleged infringement and become a vicarious avenger of another's purported rights against plaintiff. The learned Author has concluded in stating "Even in a case of a 'clearly' inferior plaintiff, such as in *Ubeda*, the better part of judicial discretion would be at least to stop defendant and perhaps also stop plaintiff if the third party's superior right is so clear. (see. *McCarthy on Trademarks and unfair Competition 4th Edi, Vol-6, issued in June, 2017*")

147. The agreement disclosed by the plaintiff shows that during a period of one year to be computed from the date mentioned in each of the agreements the producer or the production houses shall supply the company at their own expense with artists and musicians to perform musical and/or other works from their films for the purpose of making gramophone records. The producers shall their own expense supply the plaintiff with sound track or recorded tapes of the musical and/or other works shows to enable the plaintiff to utilise such sound tracks or recorded tapes for the purpose of re-recording therefrom and the subsequent manufacture of gramophone records. During this period of one year the producers shall not allow any of their musical and/or other works to be recorded or re-recorded by any of their artists and musicians from any films, sound tracks or recorded tapes or other means. The plaintiff during the said period of one year and thereafter while the records recorded or re-recorded under the agreement remained on the same by the plaintiff shall pay to the producers a royalty on net sales at the rate mentioned in each of the agreements. However, royalty is payable only so long the producers do not allow their artist or musician to record any works recorded or re-recorded under the said agreement or permit the recording of such works from any film sound track or recorded tapes or other means. It further stipulates the royalty shall not be payable to the producers in respect of records recorded or re-recorded under the provision of this agreement by any of the artists or musicians of the producers and before the execution of this agreement recorded on behalf of the plaintiff. The producers under the agreement have assigned their gramophone recording rights in all works to be recorded or re-recorded under the agreement and in consideration of the said assignment the plaintiff shall pay to such producers a Copyright royalty on net sales made in any part of the world of the works recorded or

re-recorded under the agreement calculated the rate mentioned in the said agreement. Under the agreement the plaintiff shall become the owner of the original plaint within the meaning of the Copyright Act, 1957 with the sole right of production, reproduction, sales, use and performance (including broadcasting) throughout the world by every means of the records of the works performed by the artist and musician under the agreement. The plaintiff under the agreement was entitled to continue the said agreement for one further successive period of one year upon giving notice in writing to the producers. Such notice shall be given before the expiration of the agreement or any continuance thereof by registered letter and same to the address of to the producers last known to the plaintiff. All the agreements contained a negative covenant which produce that the producers shall not assign their rights under the agreement nor appoint any agent to collect on their behalf, any monies due to them without first obtaining consent from the plaintiff.

148. The materials on record do not show that the agreement was continued beyond a period of one year or any royalty has been paid to any of the producers. Under the agreement the producers cannot claim royalty in the event they allow their artists and musicians to record any works recorded or re-recorded under the agreement or permit the recording of such works from any film, sound track or recorded tape or other means for any other person, firm or corporation.

149. Mr. Chatterjee has strongly relied upon the Shanti Films Corporation (supra) and Punit P. Mehra (supra) that plaintiff being admittedly the owner of the original plate and the same is recognised in the agreement under consideration and having regard to the fact that the plaintiff had copyright in the records and the defendants had copyright in the sound tracks in relation to the films could not have infringed and cannot infringe the copyright of the plaintiff in relation to the said songs. In as much as the agreement does not provide that for non-payment of royalty any right assigned to the plaintiff would revert back to the respective producers, the plaintiff is entitled to confirmation of the order of injunction. In Shanti Films (supra) the gramophone company entered into an agreement with Shanti Films, the defendant, a film producer. Under the agreement the copyright in the sound track of the film produced by the defendant was assigned in favour of the gramophone company whereby the said company got the exclusive right to produce recorded tapes etc. of the film. The plaintiff filed a suit against the defendant and another person to produce and sale records of the film, for permanent injunction against infringement of copyright and also filed an application for temporary injunction.

150. In Shanti Films Corporation (supra) the dispute was between Gramophone Company and the film producer. The agreement was not for a fixed period and could be terminated at the option of the plaintiff. The agreement also does not provide that for non-payment of royalty, any right assigned to the plaintiff would revert back to the defendant No. 1. Clause 3(A) of the Agreement in the aforesaid matter provides that defendant No. 1 hereby assigns and transfers and agrees to assign and transfers to the plaintiff absolutely and beneficially for the world, the copyright for making records for all contract works which are made available to the plaintiff under the terms of this agreement and the copyright, performing right and all other rights, title and interest and to the literary, dramatic and musical works embodied in the said films including all rights of publication, sound and television broadcasting, public performance and mechanical reproduction of the said works and the sole and exclusive right to make or authorise the making of any record embodying the contract recordings, either alone or together with any other recordings. The clauses in the agreements under consideration are different and unlike the clauses in Shanti Film (supra) all the agreements are for a fixed duration and having similar clauses with regard to recording from sound tracks of

the films after expiry of the period of the agreement.

151. Under such circumstances the interim order passed earlier stands modified to the extent that the defendants cannot use the sound track of the films Awara Baap, Dhanwan and Babu in any manner whatsoever and this order shall continue till the disposal of the suit. However, in respect of 8 films forming category A and category B the order of injunction is vacated. The defendants are using digital recording of the said songs. The defendants shall render true and faithful accounts of the revenue earned by exploiting the songs whatsoever in respect of the said eight films and shall furnish quarterly statement of accounts to the plaintiff.

152. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

Later:

A prayer for stay of operation of the order is made. There shall be a stay of operation of the order for three weeks.

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