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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO. 2401 OF 2006

Music Broadcast Private Limited)
a company incorporated under the provisions of)
the Companies Act, 1956, having its registered)
office at IL & FS, North Quadranht, 5th Floor,)
G-Block, Bandra-Kurla Complex, Bandra (East))
Mumbai – 400 051.)... Plaintiff

Versus

Indian Performing Right Society Limited)
a Company incorporated under the Companies Act))
1956 and having its registered office at 208,)
2nd Floor, Golden Chambers, New Andheri Link)
Road, Andheri (West), Mumbai – 400 058.)... Defendant

Dr. Virendra Tulzapurkar, senior counsel with Mr. Amit Jamsandekar, Mr. Sanjay Kadam and Ms. Apeksha Sharma i/b Kadam & Co. for the Plaintiff.

Mr. Navroz Seervai, senior counsel with Mr. Sandeep Marne, Ms. Soniya Sharma and Ms. Gulnar Mistry i/b Media Lexicon for the Defendant.

CORAM : S.J. VAZIFDAR, J.

***Date of Reserving* : MONDAY, 18TH JULY, 2011.**

***Date of Pronouncement* : MONDAY, 25TH JULY, 2011.**

ORAL JUDGMENT :

1. The plaintiff has sought a declaration that the defendant is not entitled to demand or recover royalty and/or licence fee or require the plaintiff to pay the same in respect of broadcast of sound recordings by the plaintiff at its FM Radio Stations and is not entitled to interfere with such broadcasts by the plaintiff for non payment of royalty and/or licence fee; a permanent injunction restraining the defendant from demanding or claiming or making any claim in respect of or interfering with such broadcasts by the plaintiff for non payment of royalty/licence fee and a decree in the sum of ₹.1,27,62,589/- towards refund of royalty/licence fee received by the defendant from the plaintiff from 1st August, 2003 upto 31st July, 2006, together with interest.

In the alternative to the above prayers, the plaintiff has sought a declaration that it is entitled to a licence to broadcast the works from the defendant's repertoire on payment of royalty as stipulated by an order dated 25th August, 2010, passed by the Copyright Board and for an order restraining the defendant by a perpetual injunction from interfering with the plaintiff's broadcasting works upon payment of such amounts.

2. The plaintiff carries on business, *inter-alia*, of establishing, operating and maintaining FM Radio broadcasting stations in various cities of India. It is not necessary to refer to the policy of the Central Government which led to the privatisation of FM radio broadcasting sector. Suffice it to state that the plaintiff has obtained the necessary licence to operate and maintain FM radio stations at various places in India.

The defendant, a Copyright Society constituted under section 33 of the Copyright Act, 1957 administers the rights of lyricists and composers and issues licences to perform publicly the dramatico-musical works controlled by it and its affiliated foreign collecting societies and collects licence fee/royalty from several radio stations in India and thereafter distributes the same among its members whose works are performed by such radio stations.

3. The only point decided in this suit is a question of law leading to the grant of the declaration sought by the plaintiff.

It was not seriously disputed that this Court does not have jurisdiction to decide the other issues. The Copyright Board has the

exclusive jurisdiction to decide them. I have, however, referred to the pleadings in greater detail than is necessary as there was a lot said about the plaintiff's conduct being dishonest and as the matter has gone to trial. In deciding a pure question of law, a parties' conduct is not relevant. If I ever have occasion to refer to this judgment in future, I should from here proceed straight to the part after the issues.

Plaint :

4. The plaintiff has been paying the defendant royalties in respect of broadcast of sound recordings by the plaintiff at its FM radio stations under a mistaken belief of law. The plaintiff is legally bound to pay royalty only to the Phonographic Performances Limited (PPL) and not to the defendant. As a result of incorrect advise and under a misconception of law, the plaintiff entered into a licence agreement with the defendant dated 11th June, 2001. Under this agreement, the defendant granted the plaintiff the non exclusive licence to perform publicly, the dramatico-musical works controlled by the defendant and its affiliated foreign collecting societies for a term of ten years and on the other conditions mentioned therein. The agreement provides,

inter-alia, for the royalty/licence fees. The defendant granted the plaintiff an infancy discount on its royalty/licence fees as the private FM radio industry was at its nascent stage.

Disputes arose between the parties as a result whereof, the defendant, by a letter dated 22nd March, 2003, withdrew the infancy discount. The plaintiff contended that there was no breach of the agreement on its part and pointed out that it was incurring heavy financial losses for a variety of reasons. Thereafter, as a result of discussions between the parties, the defendant assured the plaintiff that the licence agreement would continue. By a letter dated 15th April, 2005, superceded by a legal notice dated 1st March, 2006, the defendant once again alleged a breach of the terms of the licence agreement by the plaintiff. In the course of correspondence, the plaintiff denied the same. The defendant stopped accepting from the plaintiff, the royalty/licence fee under the licence agreement and the plaintiff, therefore, opened a separate bank account in which the royalty/licence fee accrued to the defendant is being deposited. Subsequently, the defendant accepted the payments.

5. On 21st September, 2005, the IB Ministry invited tenders in Phase-II of the licencing policy for running, operating and maintaining FM radio broadcasting stations at various places. The plaintiff's bid was accepted. The plaintiff paid an amount of about ₹.124/- crores towards a one-time entry fee. Under the terms of the letter of intent issued by the Government and the grant of permission agreements, the plaintiff was obliged to commence broadcasting within a stipulated time, failing which the same would stand cancelled. The plaintiff, accordingly, commenced broadcasting at two stations. The plaintiff claims to have expended large amounts in this regard. The plaintiff thereafter commenced negotiations with the defendant for grant of a licence to perform publicly on the FM radio stations the said work controlled by the defendant. In paragraph 14 of the plaint, it is alleged that pursuant to these negotiations, an understanding was arrived at between the parties in respect of the said FM radio stations without prejudice to the rights of the parties. The plaintiff recorded this alleged understanding in a letter dated 15th May, 2006. The defendant, however, by its letter dated 25th May, 2006, denied the same, stipulated a higher rate which was unreasonably exorbitant and declined to allow the plaintiff to communicate to the

public by broadcasting the works against payment of a reasonable amount of royalty/licence fees.

6. The plaintiff, therefore, made an application under section 31(1) (b) of the Copyrights Act, 1957, for obtaining a compulsory licence. The plaintiff has averred that this application was also a misconception of law to the effect that the defendant was entitled to charge royalty in respect of broadcast of sound recordings by the plaintiff at its FM radio stations.

7. The plaintiff proposed to launch the FM radio stations at Hyderabad on 28th May, 2006 and soon thereafter at Jaipur and Chennai and had publicly announced the dates and given them wide publicity. This, the plaintiff did, on the assumption of the alleged understanding recorded in the letter dated 15th May, 2006. However, in view of the defendant's reply dated 19th May, 2006, the plaintiff apprehended that if it failed to broadcast the works as scheduled it would suffer irreparable loss which could not have been compensated in terms of money. The plaintiff, therefore, filed Suit No.1694 of 2006 in this Court, *inter-alia*, claiming a declaration that it was

entitled to broadcast the said works from the defendant's repertoire on payment of royalty to be decided by the Copyright Board. The plaintiff took out Notice of Motion No.1976 of 2006 in this suit in which an ad-interim order dated 26th May, 2006, was passed. The plaintiff was permitted to pay a sum of ₹.666/- per needle hour on account and subject to the final decision in the Notice of Motion.

8. The plaintiff was thereafter advised that the defendant was not entitled to charge or claim any royalty/licence fees from it in respect of broadcast of sound recordings by the plaintiff at its FM radio stations. The plaintiff, therefore, on 1st August, 2006, withdrew the suit with liberty.

It is in these circumstances, that the present suit was filed.

9. I will deal with the legal submissions pleaded in the plaint in support of the plaintiff's contention later. Suffice it to state that according to the plaintiff, the defendant is not entitled to interfere with the plaintiff's broadcast of sound recordings at its FM radio stations in India for non payment of royalty or licence fees or otherwise as the works of the lyricists and music composers are incorporated in a sound recording made by music companies and such music companies

exclusively own the copyright in such sound recordings. Once such lyrics and music are incorporated in the sound recordings, a new copyrightable work comes into existence viz. the sound recordings. The producer or sound recorder is the author and owner of the entire copyright in the sound recording with an exclusive right under section 14(1)(e) of the Act, *inter-alia*, to communicate the sound recording to the public. The members of PPL are owners of such sound recordings and as such only PPL is entitled under the provisions of the Act to grant a licence to do the things mentioned in section 14(1)(e). The plaintiff has obtained a licence from PPL. There are no disputes between the plaintiff and PPL in this regard. The defendant's right is restricted only in respect of public performance of any musical work or literary work which means live performance to communicate to the public the musical work or literary work, otherwise than as part of the sound recording.

The plaintiff, therefore, contended that the payments made pursuant to the said agreement were under a misconception of belief or misconception of law and were received by the defendant on account of a mutual mistake. The defendant was not entitled to receive the said sum as there was no consideration for the same. The

defendant is, therefore, liable to return the same to the plaintiff.

10. Alternatively, the plaintiff contended that it is entitled to proceed under section 31(1)(b) of the Act for a compulsory licence.

The plaintiff had filed an application being Application No.1 of 2002 before the Copyright Board against PPL for obtaining a compulsory licence in respect of the broadcast of the said work. The plaintiff had originally sought a declaration in the alternative that it was entitled to broadcast the work from the defendant's repertoire on payment of royalty as allegedly agreed between the parties and recorded in the letter dated 15th May, 2006 and for an order that upon the plaintiff undertaking to pay such amount, the defendant be restrained by a perpetual injunction from interfering with the plaintiff's broadcasting the said works.

The Copyright Board passed an order dated 25th August, 2010 in the plaintiff's said application against PPL. The Copyright Board had directed the Registrar of Copyrights to grant a compulsory licence on certain terms and conditions.

The plaintiff, by an amendment to the plaint brought the order on record and submitted that in the alternative to the main prayers,

the defendant would be entitled to share on *pro rata* basis along with other music providers two per cent of the net advertisement earnings of each FM radio station accruing from the radio business as directed by the Copyright Board. A prayer to this effect was also incorporated by the amendment.

The Written Statement :

11. The defendant has denied the plaintiff's entire case. The defendant has further contended that the plaintiff had admitted, acknowledged, accepted and relied on the defendant's right to further its case against PPL before the Copyright Board and, therefore, cannot be allowed to resile from the same. The plaintiff is estopped from contending to the contrary.

The plaintiff is in breach of the said agreement between the parties. The defendant is entitled to file appropriate proceedings in this regard. The defendant is a no-profit no-loss organization whose primary task is to collect royalty from users of music and to distribute the same to the owner of copyright in the music whose interest it represents. The defendant's members are lyricists, music composers and publishing houses.

PPL has the sound recording rights and the defendant-society has the literary and musical rights. The defendant and PPL are, therefore, authorised to collect royalty for and on behalf of their members in respect of the broadcast of sound recordings. The defendant has the literary and music rights under the Copyright Act and the licences obtained by the plaintiff are towards compensating the defendant for exploiting the rights of its members. PPL collects royalties in respect of public performance of sound recordings, whereas the defendant collects royalties in respect of public performance/communication to the public of the musical compositions and lyrics. The class of works in respect of which the defendant and PPL collect royalties are different. Licences, therefore, have to be obtained and paid for separately to PPL and the defendant. Upon broadcasting the sound recordings to the public, the rights of the plaintiff's members i.e. musical rights are infringed and the plaintiff cannot exploit the same without paying the requisite licence fees. It is only upon the broadcast and/or commercial exploitation of the music that the defendant's rights come into operation. The literary and musical works constitute a separate and distinct right for which the plaintiffs are liable to obtain the requisite licences from the defendant.

The defendant has never denied the licence to the plaintiff for exploiting the rights of its members. The plaintiff, however, cannot exploit the rights of the defendant and its members without compensating them for the same.

The plaintiff, though required, failed to restrict the broadcast of FM radio signals within the city limits, failed to announce the names of the composers and authors (lyricists) and to provide the defendant with proper and complete details of the works performed by the radio stations. The plaintiff having approached the defendant for the requisite licence cannot be allowed to turn around and dispute the defendant's right to collect the licence fees. The allegations regarding the understanding recorded in the letter dated 15th May, 2006, are denied.

12. The plaintiff obtained the necessary licences from the IB Ministry at its own risk in view of the fact that the defendant by its letter dated 19th May, 2006, immediately denied the alleged understanding recorded in the plaintiff's letter dated 15th May, 2006.

The defendant denied that the agreements between the plaintiff and the defendant and the payments by the plaintiff to the defendant

were under a mistake or misconception of law. The defendant is not concerned with the moneys expended by the plaintiff in acquiring the licence from the Government for setting up the business relating to FM radio stations. The plaintiff having approached the Copyright Board for fixation of the royalty cannot be allowed to challenge the plaintiff's right to collect royalty/licence fees in respect of the work. The defendant and its members have suffered considerable loss on account of the sales of records having dropped by 33% due to the introduction of FM radio stations.

13. The contention that this suit cannot proceed in view of a similar suit filed in the Calcutta High Court was not pressed.

14. The following issues were raised :

ISSUES:

- 1) Is the Defendant not entitled to claim and/or demand royalty fees and/or license fees from the Plaintiff in respect of the sound recording comprising of musical and/or literary work broadcast by them at their Radio station as alleged in paragraphs 25 and 26 of the plaint?

- 2) Is the Plaintiff entitled to recover and receive a sum of Rs. 1,55,54,885/- from the Defendant with interest as alleged in paragraph 30 of the plaint?
- 3) Is the Plaintiff estopped in law from claiming the aforesaid refund along with the interest amount as alleged in paragraph 34 of the Defendant's written statement?
- 4) Whether the understanding as recorded vide the letter dated 15th May, 2005 being Exhibit "B" to the Plaint, binding upon the Defendant as alleged in paragraph 15 of the plaint?
- 5) In the event the issues 1 and 4 being answered in negative, is the Plaintiff entitled to have compulsory license under Section 31 (1) (b) of the Copyright Act, 1957 and thereby entitled to pay the royalty on pro rata basis to the Defendant as held by the Copyright Board on 25th August, 2010 in the matter of MBPL vs PPL as alleged in paragraphs 36A, 36B and 37 of the plaint?
- 6) Is the Defendant entitled to interfere with the Plaintiff's broadcast of sound recordings even when the Plaintiff is willing to pay the amount of royalty as per the Copyright Board's order dated 25th August, 2008 as alleged in paragraph 37 of the plaint?
- 7) In the event the issue No. 1 is decided against the plaintiff, then whether the plaintiff has committed breach of license agreement

dated 11th June, 2001 executed by them with the Defendant ?

- 8) In the event the issue No. 1 is decided against the plaintiff, then whether the Defendant is entitled to withdraw infancy discount granted to the Plaintiff w.e.f 22.03.2008?
- 9) In the event the issue No. 1 is decided against the plaintiff, then whether the Plaintiff is liable to pay to the Defendant license fess as per the tariff of the Defendant in force from time to time, subject to challenge before the Copyright board in respect of the Radio Stations operated by the Plaintiffs?

15. The plaintiff did not lead any evidence. The defendant lead the evidence of its Director, one Rakesh Nigam. The witness was cross-examined. However, neither side placed any reliance or even referred to his evidence in their arguments. Nor did they rely upon the documents tendered in evidence. This was obviously in view of the fact that only the question of law was argued.

16. Both the parties rightly agreed that only the first issue arises for the determination of this Court and that the other issues fall within the exclusive jurisdiction of the Copyright Board in view of the provisions of section 19A(2) read with section 30A of the Copyright

Act, 1957. Section 40 makes applicable the provisions of section 19-A to licences. The other issues relate to the disputes between the parties in respect of the licence agreement entered into between them.

Sections 19-A and 30-A read as under :-

“19-A. Disputes with respect to assignment of copyright.—*(1) If an assignee fails to make sufficient exercise of the rights assigned to him, and such failure is not attributable to any act or omission of the assignor, then, the Copyright Board may, on receipt of a complaint from the assignor and after holding such inquiry as it may deem necessary, revoke such assignment.*

(2) If any dispute arises with respect to the assignment of any copyright, the Copyright Board may, on receipt of a complaint from the aggrieved party and after holding such inquiry as it considers necessary, pass such order as it may deem fit including an order for the recovery of any royalty payable :

Provided that the Copyright Board shall not pass any order under this sub-section to revoke the assignment unless it is satisfied that the terms of assignment are harsh to the assignor in case the assignor is also the author :

Provided further that no order of revocation of assignment under this sub-section, shall be made within a period of five years from the date of such assignment.]

.....

30A. Application of sections 19 and 19-A – *The provisions of sections 19 and 19-A shall, with any necessary adaptations and modifications, apply in*

relation to a licence under section 30 as they apply in relation to assignment of copyright in a work.”

17. Dr. Tulzapurkar and Mr. Seervai agreed that copyright can be claimed and protection thereof sought only to the extent provided in the Copyright Act, 1957 and indeed that is so, in view of section 16 thereof.

The defendant did not deny that the plaintiff has validly obtained licences from PPL to broadcast on its FM radio stations, sound recordings owned by PPL's members. The defendant's contention is that despite the same, the plaintiff is not entitled to broadcast the said sound recordings without also obtaining a licence from the owners of the underlying musical and literary works therein, which are owned by its members.

18. Dr. Tulzapurkar, the learned senior counsel appearing on behalf of the plaintiff submitted as under :-

I. The Act recognizes only three classes of work viz. (a), literary, dramatic, musical or artistic work; (b) cinematograph films and (c) sound recordings. Each class is independent of the other. Each class

of work gives a bundles of right to the owner thereof, which are independent of the other works. The rights therein can be exploited by the owner of the work in each class without the interference by the owners of the works is other classes.

II. No class of work is inferior to the work in another class.

III. In sound recordings and cinematograph films, the literary and musical work gets incorporated therein and thereupon independent copyrightable works viz. sound recordings and cinematograph films come into existence and, therefore, rights under section 14 in respect of each sound recording and cinematograph film come into existence which can be exploited by the owner of the sound recording or cinematograph film without interference from the owners of copyright in the underlying literary or musical works therein.

IV. The owner of a sound recording has, *inter-alia*, the exclusive right of communicating the sound recording to the public. Though the exercise of such right has the effect of communicating the underlying works viz. musical or literary to the public such communication of

underlying works being a part of sound recording does not amount to infringement of the copyright of communicating to the public, the underlying works.

The owner of a sound recording has an exclusive right to communicate the sound recording in any form and such communication in exercise of right under section 14(1)(e)(iii) cannot amount to infringement of any underlying work in such sound recording.

V. The owners of underlying works incorporated in a sound recording do not have the right of communicating the same to the public as a part of the sound recording.

VI. The owner of a copyright in the underlying works retains the bundle of copyrights therein otherwise than as a part of the sound recording.

VII. The right of public performance of an underlying work is different from the right to communicate the sound recording in which the musical or literary work is incorporated.

VIII. The defendant, therefore, can claim licence fees only in respect of public performance of musical or literary works of its members or in respect of communication of such works otherwise than as a part of other copyright work viz. sound recording or cinematograph film. In other words, the defendant cannot claim licence fees in respect of public broadcast or communicate to the public, musical or literary works as a part of a sound recording.

IX. Upon the owner of a copyright in musical and literary work permitting the making of a sound recording, his right to make or permit to be made another sound recording containing such work comes to an end.

I have held all but the last submission to be well founded.

19. Mr. Seervai, the learned senior counsel appearing on behalf of the defendant, on the other hand, contended that the author of the literary or musical work is and remains, at all times, the owner of the copyright in such work including as embedded in the sound recording.

The owner of the copyright in a sound recording does not, by virtue of the authorisation by the owner of his right to make a sound recording of his original literary or musical work, become the owner of that underlying literary or musical work embodied in that sound recording; for, otherwise, the logical and necessary conclusion would be that the original owner is completely denuded of his copyrightable work *qua* a sound recording, including the subject sound recording. There is nothing in the Copyright Act, 1957 which so provides, either expressly or by necessary implication. On the contrary, there are express provisions to the contrary, including, *inter alia*, section 13(4). Upon the making of a sound recording there emerge and exist two sets of copyright; one in the sound recording itself and the other in the underlying musical or literary work so recorded. The communication of a sound recording of a literary or musical work involves the communication not only of the sound recording, but of the underlying work. The right of communication to the public is granted by the Act to sound recordings and to literary and to musical work. On the defendant's interpretation of the provisions of the Act and in particular sections 13 and 14 thereof, the copyright in sound recording is not rendered nugatory and both copyrights that exist when a sound

recording is made are exercised and enjoyed to the fullest by their respective owners. On the other hand, the plaintiff's interpretation has the effect of destroying the rights of the owners of the underlying work and infringing their right under section 14(1)(a)(iii).

Mr. Seervai agreed that the owners of the underlying works cannot use the same as recorded in any manner they desire unilaterally. To use such a sound recording they must also obtain a licence from the owner of the sound recording. He also admitted that the owner of a sound recording can also permit others to make copies of the sound recording without seeking permission from the owners of the underlying musical and literary works.

In other words, according to the defendant the person making the sound recording pays the owner of the underlying works only to make the sound recording. Thereafter, the owner of the sound recording must again approach the owner of the underlying works for a licence and pay the royalty if he wants to communicate it to the public by broadcast.

20. It would be convenient at this stage to set out the following provisions of the Copyright Act :-

“ Section 2. Interpretation

(d) “author” means,—

(i) in relation to a literary or dramatic work, the author of the work;

(ii) in relation to a musical work, the composer;

(iii) in relation to an artistic work other than a photograph, the artist;

(iv) in relation to a photograph, the person taking the photograph;

(v) in relation to a cinematograph film or sound-recording, the producer; and

(vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

(dd) “broadcast” means communication to the public—

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire;

and includes a re-broadcast;

(f) “cinematograph film” means any work of visual recording on any medium produced through a process from which a moving image may be produced by any

means and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films;

(ff) “communication to the public” means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation.—For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;

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

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

(o) “literary work” includes computer programmes,

tables and compilations including computer databases;

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

(t) “plate” includes any stereotype or other plate, stone, 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 sound-recordings for the acoustic presentation of the work are or are intended to be made;

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

(xx) “sound recording” means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced;

*(y) “work” means any of the following works, namely,—
(i) a literary, dramatic, musical or artistic work;*

(ii) a cinematograph film; (iii) a [sound recording;

.....

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

(a) original, literary, dramatic, musical and artistic works; (b) cinematograph films; and sound recordings.

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless,—

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than a work of architecture, the author is at the date of making of the work a citizen of India or domiciled in India; and

(iii) in the case of a work of architecture, the work is located in India.

Explanation.—In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist—

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any-sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.

(5) In the case of a work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

.....

14. Meaning of copyright.—*For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being

copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,—

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,—

(i) to reproduce the work in any material form including depiction in three dimensions of a two-dimensional work or in two dimensions of a three-dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;
(v) to make any adaptation of the work;
(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,—

(i) to make a copy of the film, including a photograph of any image forming part thereof;
(ii) 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;
(iii) to communicate the film to the public;

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

(i) to make any other sound recording embodying it;
(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;
(iii) to communicate the sound recording to the public.

Explanation.—For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.]”

21. Mr. Seervai submitted that while interpreting the above provisions the Court must keep in mind that a sound recording is only

a derivative work being derived from the musical and literary work. The musical and literary works are the original works. The creator of the original musical and literary work ought therefore to be given precedence over the owner of the copyright in a sound recording.

22. Section 2(y) read with section 13(1) indicates that the Act recognizes three classes of works viz. (a) original, literary, dramatic, musical and artistic work; (b) cinematograph films and (c) sound recording. Indeed musical and literary works are original works and a sound recording is a derivative work. The question of giving a particular work precedence over other works however does not arise. The rights of the owners of the copyrights in each type of work is prescribed by the provisions of the Act.

Chapter IV deals with the ownership of copyright and the rights of the owner. Section 14 stipulates the exclusive right to do or authorize the doing of the acts mentioned therein in respect of a work or any substantial part thereof. Rights which may be exercised in respect of each class of work are stipulated in section 14. Section 14 does not indicate any order of priority between the different classes of works. Nor does it place any particular work above the others. It

merely prescribes the rights that can be exercised in respect of each class of work.

This view is supported by a judgment of a Division Bench of this Court and a judgment of the Supreme Court.

23(A). In *Phonographic Performance Ltd. Vs. Music Broadcast (P) Ltd.* 2004 (7) LJSOFT 22 = 2004 29 PTC 282, a Division Bench of this High Court held in paragraph 9 :-

“9. In so far as the submission on behalf of PPL that if the requirement of the refusal resulting in withholding the work from the public is not made applicable even in relation to broadcast, it will result in abrogating the rate of copyright holder is concerned, in our opinion, the submission is not well founded. All the rights that the copyright holder gets are created by the statute namely the Copyright Act, and therefore, they are governed by the provisions of the Act. Copyright in any work does not exist independently of the Act. In this regard the provisions of Section 16, in our opinion, are absolutely clear. Section 16 of the Act reads as under :

"No copyright except as provided in this Act.- No person shall be entitled to copyright or any similar right in any work, whether published or

unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence."

It is thus clear from the perusal of Section 16 of the Act that all the rights that can be claimed by the copyright holder are the rights given to him by the Act and therefore, there is no question of one provision of the Act being narrowly construed or not being given its natural meaning, because it is likely to encroach upon some supposed rights of the copyright holder. The intention of the Legislature from the provision of Section 31 is clear that it did not want to make applicable the requirement of the refusal of the copyright holder resulting in withholding the work from the public to the field of broadcast and in so far as the field of broadcast is concerned, the Legislature wanted to make a provision for grant of licence to all the persons who are seeking the same if they are willing to offer reasonable terms. The Legislature in its wisdom has provided in the scheme of the legislation itself that the field of broadcast is to be treated differently than other modes of communication to the public. In our opinion, treating one of the modes of the communication to the public differently would also

not result in violation of Article 14 of the Constitution of India. Though communication by broadcast is included in the concept of communication to the public, for the purpose of grant of compulsory licence broadcast being a totally different mode of communication is capable of being treated differently. In the present appeals we are dealing with the rights in a sound recording. In so far as the sound recording is concerned in terms of the provision of Section 14 of the Act, copyright in a sound recording authorises the holder of the copyright to make any other sound recording embodying it, to sell the sound recording on hire or offer for sale and also hire any copy of the sound recording as also to communicate the sound recording to the public. Thus, the rights of a copyright holder in a sound recording includes the right to make the work available to the public by other modes of communication as also by broadcast.” (emphasis supplied)

(B). In *Entertainment Network (India) Limited v. Super Cassette Industries Limited*, (2008) 13 SCC 30, the Supreme Court held as under :-

“58. *There cannot be any doubt whatsoever that an artistic, literary or musical work is the brainchild of an author, the fruit of his labour and, so, considered to be*

his property. A copyright, however, unlike a trade mark is a right created under the Act as is evident from Section 16 thereof. When an author of a copyright and other claims a copyright, it is subjected to the provisions of the Act. The rights and obligations of the author ought to be found out within the four corners of the Act. It is not necessary to dilate more upon these aspects of the matter as the object behind enacting the Act is absolutely clear and explicit. It creates a monopoly in favour of the author. Copyright also creates a monopoly in favour of the copyright society. What requires protection is unlawful reproduction of the author's work by others. It is the long period which encourages the authors to create works of literature, music and art.

63. A statute as is well known must be read in its entirety. It is required to be read chapter by chapter, section by section and clause by clause. The definitions of the term “broadcast” as also “sound recording” must be given a wide meaning. Clause (a) of Section 13 protects original work whereas clauses (b) and (c) protect derivative works. It provides for commercial manifestation of original work and the fields specified therein. Clause (a) of sub-section (1) of Section 14 deals with original work. It is extremely broad. In contrast thereto, the copyright on films or sound recording work operates in restrictive field; they provide for a

restrictive right as would appear from the provisions contained in Section 14(1)(e) of the Act.

64. *For a proper construction of the provisions, will it be necessary to keep in mind the difference between the right of the original work and right of sound recording? Should we also bear in mind that there are various forms of intellectual property rights. Section 16 provides that a right, inter alia, in respect of any work must be claimed only under and in accordance with the provisions of the Act unlike trade mark and passing off rights can be enforced even though they are not registered. It must also be noticed that whereas the term of a copyright in original literary, dramatic, musical and artistic works not only remains protected in the entire lifetime of the author but also until 60 years from the beginning of the calendar year next following the year in which the author dies, the term of copyright in sound recording subsists only for 60 years, but as indicated hereinbefore, the same would not mean that the right of an owner of sound recording is in any way inferior to that of right of an owner of copyright on original literary work, etc.*

.....

87. *The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works on the other. The extent to*

which the owner is entitled to protection in regard to his work for which he has obtained copyright and the interest of the public is a matter which would depend upon the statutory provisions” (emphasis supplied)

24. It is clear, therefore, that although clauses (b) and (c) of section 13 protects derivative works in a restricted field , whereas clause (a) thereof protects original works in a broader field, it does not mean that the rights of an owner of a sound recording are, in any way, inferior to those of an owner of copyright in the original literary or musical work. The last two sentences in paragraph 63 only indicates the difference in the extent and not the nature of protection given in section 14 to original and derivative works. The last sentence in paragraph 64 makes it clear that “ the same would not mean that the right of an owner of sound recording is in any way inferior to that of right of an owner of copyright on original literary work, etc.”

The submission, therefore, that in interpreting the provisions of section 14, I ought to construe the rights conferred upon the owner of derivative works in a restricted manner vis-a-vis the rights conferred by sections 14 on the owners of copyright in the original work, is not well founded. The Legislature has conferred specific rights upon the

owners of copyrights in each class of works and it is not open to the Court to restrict the rights based on the Court's perception as to which of the works is more valuable or important than the other. Although much was said on behalf of the defendant in this regard, I do not think it necessary to deal with the same.

25. It is but obvious that while construing section 13 and 14 it is necessary to understand the meaning of the expression "sound recording" in section 2(xx). Mr. Seervai submitted that a sound recording is only the medium i.e. the hardware such as a compact disc, cassette or record on which the recording is made and from which sounds are produced. This, he stated, was the product of technological developments and innovations over the years entailing the fixing/fixation of sounds on a particular medium. In other words, according to him, a sound recording comprises of the hardware and the technical process of recording the sounds and nothing more. It does not include the sounds viz. the musical and literary works.

26. The submission is contrary to the plain language of section 2(xx). In that case the section would have been worded entirely

differently. The definition of “sound recording” in section 2(xx), in fact, distinguishes between the material/medium on which the sound is recorded and the recording itself. This is clear from the use of the words in the definition “means a recording of sounds” and not the words means the “material containing the recording of sounds”. Secondly the words in section 2(xx) : “*regardless of the medium on which such recording is made or the method by which the sounds are produced*” militates against Mr. Seervai’s submission, both as regards the medium on which the recording is made as well as the method by which the recording is made and the sounds are produced from such medium. The copyright subsists, therefore, in the sound recording meaning thereby that particular recording of the musical and literary work transposed on the medium by any process. I hasten to add that this does not obliterate the separate copyright that exists in the underlying musical and literary works independent of or otherwise than as contained in the authorized sound recording.

27. It can hardly be suggested that the producer of the sound recording has a copyright in the hardware/medium. He cannot possibly acquire a copyright, if there is one, in a hardware by

recording therein a performance of musical and literary works. Nor can he thereby possibly acquire a copyright, assuming there is one, in the technological process of recording sounds on to a medium. The producer of a sound recording would then not acquire a copyright in anything at all. The interpretation would render section 14(1)(e) otious.

28. That this interpretation is erroneous is also clear from section 14(1)(e)(iii) which permits the owner of a copyright in a sound recording to communicate the sound recording to the public. Section 14(i)(e)(iii) entitles him “to communicate the sound recording to the public.”

The submission that sound recording only means the material / hardware and the technological innovation in making the same and nothing more, if accepted, would in effect require section 14(i)(e)(iii) to be read thus :-

“to communicate the material on and the technological process by which the sounds are recorded to the public.”

29. The owner of the material/hardware does not communicate the material/hardware even assuming he is the owner of the copyright, in

the hardware. It is difficult to understand how hardware can be communicated to the public especially by broadcasting it. It is equally difficult to see how the technological or scientific innovation enabling the making of a sound recording is or can be communicated to the public by broadcasting the sound recording. The listener of a broadcast on an FM station does not see the hardware when the sound recording is broadcast. The listener does not see or hear the technological or scientific innovation. Neither of these elements can be communicated to the public. It is axiomatic, therefore, that what the Legislature intended by section 14(1)(e)(iii) was the right to communicate the sound recorded on the material by whatever device.

30. If the defendant's contention is accepted even the right conferred by section 14(1)(e)(ii) would be redundant. Section 14(1)(e)(i) entitles the owner of a sound recording to make any other sound recording embodied in it. Section 14(1)(e)(ii) entitles the owner of a sound recording to sell or hire any copy of the sound recording made in exercise of the powers under sub-clause (1). If the defendant's contention is correct, every time a copy is sold or hired, the owner of the sound recording must obtain a licence from and pay royalty to the

owners of the underlying work. It is not even the defendant's case that this is either necessary or warranted under any provision of the Act including section 14(1)(e). There is nothing in section 14(1)(e) which even remotely suggests the same. If that was the intention of the Legislature, it would have been expressly so provided.

31. In that event, there is no reason why a licence is required and royalty is payable by the owner of a sound recording to the owners of the copyrights in the underlying works incorporated therein while communicating the sound recording to the public in exercise of the right under section 14(1)(a)(iii).

32. Faced with this, Mr. Seervai contended that there is a difference between sub-clause (ii) and sub-clause (iii) of section 14(1)(e) as when in exercise of the right under section 14(1)(e)(iii), the material such as a compact disc, record or cassette is sold or hired by the owner of the sound recording to the purchaser or the hirer, as the case may be, the underlying work is not played. Therefore, it is not necessary for the owner of the sound recording to obtain a licence from or pay royalty to the owners of the underlying works

incorporated therein. On the other hand, while communicating the sound recording to the public by broadcast, it is not merely the hardware and the technological innovation applied in making the sound recording that is communicated to the public, but even the underlying musical and literary works are communicated to the public.

33. I have already rejected the idea of the material/hardware and the technological innovation being communicated to the public. I do not see how the defendant can have a right to receive royalty when the owner of the sound recording communicates it to the public but not when he sells or hires a copy thereof merely because at the time of sale or hire, the underlying work is not played. I cannot see a basis for this distinction. Even by the selling or hiring a copy of the sound recording the owner of the copyright in the sound recording enables the purchaser or hirer to hear the sounds embodied therein. The purchaser and the hirer of the medium/material must play it through a device, such as a CD player, a cassette recorder or a turn-table. So must a listener of an FM Radio station – through a radio. The only difference is that the playing or reproduction of the sound recording

when a copy thereof is sold or hired is postponed till the purchaser or hirer plays it whereas when it is broadcast it is heard almost instantaneously. Actually even that is not necessarily the case. The broadcast can be recorded directly without the sound being played or heard and the same can be played later. There is, therefore, no difference between the two.

34. If authority is needed, I need go no further than refer to the following extracts from the versions of *Nimmer on Copyright*, Release No.77, cited by Mr. Seervai in another context :-

“[2] The Requirement of Originality in Sound Recordings.

A sound recording must be distinguished from, on the one hand, the material object on which the sound is recorded, and, on the other hand, the underlying musical composition, or dramatic or literary work that is recorded and transposed into aural form by the sound recording. Clearly, a sound recording copyright vests no proprietary rights in the material object as such.”

35. Mr. Seervai relied upon the following footnote in *Nimmer on Copyright*, Indian Reprint, Vol.I Release No.82 at page 4-42.4 which

reads as under :-

“A phonorecord is a material object in which sounds are fixed. 17 U.S.C. 101. Such sounds may consist of a literary, musical or dramatic work. No copyright may be claimed in a phonorecord as such, but a literary, musical or dramatic work will be eligible for copyright if it is fixed in any tangible medium of expression, including that of a phonorecord. See 203(B) supra. In addition, a separate copyright may be claimed in the manner in which such a work is performed or rendered on the phonorecord. This is the sound recording copyright. See 2.10 supra. The distinction may be summed up as the difference between a copyright in a Cole Porter song, and a copyright in Frank Sinatra’s recorded performance of that song. The former would be a musical work copyright and the latter would be a sound recording copyright, although both may be embodied in the same phonorecord. Daboub v. Gibbons, 42 F. 3d 285, 388 (5th Cir. 1995) (Treatise quoted). A further distinction pertains between recorded performances and live performances. See 8.14[B][2]. 8E.03[A] infra.”

36. Once a sound recording is made, it is only the producer, as the owner thereof, who can exploit it exclusively in the manner provided in section 14(1)(e). However, those rights are confined to that

particular sound recording and that sound recording alone. The owner of the sound recording can communicate the same to the public, *inter-alia*, by broadcasting it or playing it in public places. The owners of the underlying musical and literary work embodied in such sound recording cannot interfere with these rights of the owner of the sound recording qua that sound recording.

37. That, however, does not support Dr. Tulzapurkar's last proposition that upon the owner of a copyright in musical and literary work permitting the making of a sound recording, his right to make or permit to be made another sound recording containing such work comes to an end. It would be convenient to deal with this aspect at this stage itself although it interrupts the consideration of the main point. The making of sound recording pursuant to authority to do so by the owners of the underlying works does not affect in any manner whatever, the existence of the copyright in the underlying works *dehors* the sound recording. In particular, it does not prevent the owners of the copyright in the underlying musical and literary works from making any other sound recording embodying the same underlying work. This is clear from section 14(1)(a)(iv) which provides that

copyright means the exclusive right, *inter-alia*, to make any cinematograph film or sound recording in respect of a literary, dramatic or musical work not being a computer programme. The word “any” makes this clear. This, of course, would be subject to a contract to the contrary. For instance, if the authors of the literary, dramatic or musical work agree to transfer all their rights in the underlying work to another subject to any statutory bar, they would divest themselves of any ownership right therein. However, absent any contract to this effect, the owners of literary and musical work retain the right to make any sound recording in respect of a work even though they may have permitted another to make a sound recording thereof. In other words, Dr. Tulzapurkar’s contention that once the right to make the sound recording is given, the owners of the underlying works cannot themselves make or allow another to make another, independent sound recording, containing such work, is rejected. Such rights do not get extinguished upon the permission being granted by the owners of the underlying works with respect to the first recording.

38. A view to the contrary is against the express language of section 14(1)(a)(iv). I do not rest my judgment on this point merely on the wholly undesirable, unwarranted and dangerous consequences of a view to the contrary. This view does not conflict with the provisions of section 14(1)(a)(iii). The right under section 14(1)(a)(iii) to communicate the work to the public even after the owners of the underlying work authorise the making of the sound recording is restricted to any other performance or recording containing the underlying works i.e. other than as recorded in the sound recording, which is owned by another pursuant to an agreement with the owners of the original musical and literary works.

39(A) A similar view was taken by a learned single Judge of the Delhi High Court in *Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.* 2010 (44) PTC 541 (Del.). This judgment was relied upon by Mr. Seervai in support of the main question which falls for consideration. I will therefore, refer to it again later. The case was not similar to the present one in as much as it dealt with the case under section 52(1)(j). However, this aspect of the matter was dealt with in paragraph 34. While reading this paragraph, it is also

important to note that the learned Judge held that section 14(1)(e) confers exclusive rights on the owner of a copyright in a sound recording. Paragraph 34 reads as under :-

“34. The limited rights conferred by Section 14 (e) on the owner of copyright in a sound recording (viz. the exclusive right to make other sound recording embodying it; to sell or hire any copy of the sound recording; or to communicate the sound recording to the public) harmonizes with the rights which vest in the owner of the primary literary, dramatic and musical work utilized to make a sound recording. The owner(s) of copyright in the literary, dramatic and musical works can make or authorize the making of a new sound recording by utilizing the same literary, dramatic or musical work which may earlier have been utilized for making an earlier sound recording. This right is not abridged or taken away by the said provision. Therefore, it is permissible to make another sound recording, may be by utilizing the same or different set of musicians, singers or artists by utilizing the same literary, dramatic or musical work. The owner of the Copyright in the earlier produced sound recording cannot object to the making of such subsequent sound recordings or version recordings merely because he is the owner of the copyright in the

earlier made sound recording. His exclusive rights are confined to the exploitation of 'his' work i.e. 'his' sound recording in which he owns the copyright and does not give him the right to interfere or intermeddle with the exploitation of copyright(s) in the original primary works viz. the literary, dramatic and musical works by the author(s). This position is clear from sub-section (4) of Section 13 of the Act, which states that the copyright in a sound recording shall not affect the separate copyright in any work in respect of which the sound recording is made. Any other interpretation would render sub-Section (4) of Section 13 otiose, and nullify the copyrights conferred on the author of a literary, dramatic or musical work to make or authorize, inter alia, the making of any subsequent sound recording of his work, once his work has been utilized by any person to make a sound recording. From Section 2(m) it is clear that unless a sound recording actually embodies a previous sound recording or a substantial part thereof, there is no copying or infringement of the copyright of the owner of a sound recording. The copyright of the owner of a sound recording does not get infringed on account of the making of another sound recording by using the same original literary, musical or dramatic work.”

(B). I am in respectful agreement with these observations and I have nothing more to add in this regard. I hasten to add however, that this does not support Mr. Seervai's submission on the main question viz. the exclusive right of the producer of the sound recording under section 14(1)(e)(iii). The observations are clearly to the effect that it is only a "new" sound recording which can be made by the owner of the copyright in the original underlying works and the right does not extend to the very sound recording earlier authorised by him to be made. On that point, the observations are entirely in favour of the plaintiff as is evident from the first sentence and the subsequent observation that the owner of the copyright in the earlier produced sound recording has exclusive right to the exploitation of "his" work i.e. "his" sound recording in which he owns the copyright.

40. Mr. Seervai placed considerable reliance upon section 13(4) in support of his contention. He submitted that section 13(4) recognises that there is a separate copyright in any work in respect of which a film or the sound recording is made. As I have indicated earlier there indeed is a separate copyright in the underlying musical and literary works which are embodied in a cinematograph film or sound

recordings. Such underlying works do not lose their existence upon a sound recording or any number of sound recordings being made. They subsist. They, however, subsist independent of and otherwise than as contained in the cinematograph film and the sound recording. The words “separate copyright” refer to the copyright in the works other than as a part of the cinematograph film or the sound recording. So read, the provisions of section 13(4) and 14(1)(a), (d) and (e) can be harmonised. Indeed, section 13(4) reserves protection for a literary or musical work in respect of which a sound recording has been made. The question is the extent to which the Legislature intended reserving such protection. If section 13(4) is construed as per the defendant’s submission, it would render the provisions of section 14(1)(e)(iii) meaningless if not redundant. It would deprive the owner of the copyright in a sound recording of any right. On the other hand, section 13(4) construed, as suggested by Dr.Tulzapurkar, gives full effect and meaning to the provisions thereof as well as the provisions of section 14(1)(a), 14(1)(d) and 14(1)(e).

41. The term “any” in section 13(4) refers to the type of work and the extent of the right. In other words, the expression “any work”

refers to the type of work in a cinematograph film or a sound recording viz. literary, dramatic or musical work. The expression does not refer to the extent to which each of these rights is preserved and protected by section 13(4).

42. I entirely agree that the three classes of work referred to in section 2(1) are mutually exclusive. That, however, does not answer the question against the plaintiff. Even upon a sound recording being made, these works are mutually exclusive and the ownership therein can be exercised to the extent prescribed upon the sound recording being permitted to be made and/or made. Once the musical and literary works are subsumed in a cinematograph film or a sound recording, *qua* that cinematograph film or sound recording and as embodied in such recording, they do not have a separate existence. However, in all other respects, the separate existence even of the underlying works continues to subsist and can be exercised by the owners thereof.

43. Mr. Seervai then relied upon section 38(4) in support of his contention. It is, however, necessary to read the entire section as well

as sections 2(q) and 2(qq), which read as follows:-

“Section 2. Interpretation.—In this Act, unless the context otherwise requires,—

(q) “performance”, in relation to performer's right, means any visual or acoustic presentation made live by one or more performers;]

[(qq) “performer” includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake-charmer, a person delivering a lecture or any other person who makes a performance;]

.....

38. Performer's right.—(1) Where any performer appears or engages in any performance, he shall have a special right to be known as the “performer's right” in relation to such performance.

(2) The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made.

(3) During the continuance of a performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely :—

(a) makes a sound recording or visual recording of the performance; or

(b) reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was—

(i) made without the performer's consent; or

(ii) made for purposes different from those for which the performer gave his consent; or

(iii) made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39; or

(c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a rebroadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right; or

(d) communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast, shall, subject to the provisions of Section 39, be deemed to have infringed the performer's right.

(4) Once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-sections (1), (2) and (3) shall have no further application to such performance.”

He submitted that when the Legislature sought to withdraw a right, it provided so expressly as is the case under section 38(4) whereas section 13(4) reserves protection for literary or musical work in respect of which a sound recording has been made.

44. I have already dealt with section 13(4). The reliance upon section 38(4) is not apposite. The question as to what section 13(4) preserves and protects in respect of the underlying works upon the making of a sound recording cannot be interpreted by what section 38(4) takes away. Sections 13 and 38 provided for different rights in different works altogether. Sections 13 and 14 dealt with the rights of the owners of copyrights in the items specified therein which did not include a performer's rights. Section 2(q) and 2(qq) and 34 were introduced by The Copyright (Amendment) Act, 1994, with effect from 10th May, 1995 to confer rights upon performer's. Sections 13 and 14 do not fall for consideration at all while dealing with a performer's rights.

45. Sections 31 and 52-A are of no assistance in interpreting the provisions of sections 13 and 14.

46. Section 31 deals with compulsory licences. It entitles the Copyright Board, upon a complaint, that the owner of the copyright in the work has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work and by reason of which refusal, the work is withheld from the public or has refused to allow communication to the public by broadcast of such work or in the case of a sound recording, the work recorded in such sound recording on terms which the complainant considers reasonable, to direct the Registrar of Copyrights to grant to the complainant a licence, *inter-alia*, to communicate the work to the public by broadcast, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine. The question as to who is the owner of the copyright in the work is not dealt with by section 31. In other words, section 31 would have to be implemented against the person found to be the owner of the copyright on a consideration of the relevant provisions of the Act, especially sections 2, 13 and 14.

47. In support of his submission, Dr. Tulzapurkar relied upon section 52A(1)(b) which requires the name and address of the owner of the underlying work in a sound recording to be displayed on the sound recording and/or any container thereof. Section 52-A reads as under :-

“52-A. Particulars to be included in ²[sound recording] and video films.—(1) No person shall publish a [sound recording] in respect of any work unless the following particulars are displayed on the [sound recording] and on any container thereof, namely :—

(a) the name and address of the person who has made the [sound recording];

(b) the name and address of the owner of the copyright in such work; and

(c) the year of its first publication.

(2) No person shall publish a video film in respect of any work unless the following particulars are displayed in the video film, when exhibited, and on the video cassette or other container thereof, namely :—

(a) if such work is a cinematograph film required to be certified for exhibition under the provisions of the Cinematograph Act, 1952 (37 of 1952), a copy of the certificate granted by the Board of Film Certification under Section 5-A of that Act in respect of such work;

(b) the name and address of the person who has made the video film and a declaration by him that he has obtained the necessary licence or consent from the owner of the copyright in such work for making such video film; and

(c) the name and address of the owner of the copyright in such work.]”

48. The submission is founded on the erroneous basis that the words “such work” in sub-clause (b) refers to sound recording. They do not. They refer to the underlying work. The words “such work” in sub-clause (b) is a reference to the work referred to in the opening part of sub-section (1). The term “work” in sub-section (1) refers to the underlying works. Sub-section (1) could, therefore, logically read as :- “no person shall publish a sound recording in respect of any musical or literary work”. The term “work” in sub-section (1) cannot possibly refer to a sound recording for then it would read :- “no person shall publish a sound recording in respect of any sound recording.....” which is meaningless. Thus, section 52A(1)(b) requires the name and address of the owners of the copyright in the underlying work embodied in a sound recording.

49. The section was inserted by Act 65 of 1984 which came into effect on 8th October, 1984. It is a statutory conferment upon the authors of the works embodied in a sound recording the right to be identified and to have their work acknowledged and recognized.

50(A) Dr. Tulzapurkar relied upon the judgment of the Supreme Court in *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association* 1977 2 SCC 820. I find the judgment to cover the case in the plaintiff's favour. Although it was in respect of a cinematograph film, I find it to be equally applicable in the case of a sound recording. Indeed, after having read the judgment more than once and, as rightly insisted upon by Mr. Seervai, comparing the provisions of the Act as they stood at the time of the judgment and as they stand amended today, I am of the opinion that the judgment continues to hold the field. I say so with great respect as it was seriously suggested on behalf of the defendant that the judgment is no longer good law in view of the amendments to the Act after the judgment. It was also submitted that the judgment being in respect of cinematograph films is not relevant in the present case which deals with sound recordings. It is necessary, therefore, to deal with the judgment in greater detail than I would have otherwise thought it necessary having come to conclusion that it clearly supports the plaintiff's case.

(B). In that case, the appellant – IPRS published a tariff laying down the fees, charges and royalties that it proposed to collect for the grant of licences for the performance in public of the works in respect of which it claimed to be an assignee of copyright and to have authority to grant the licences. Among others the associations of producers of cinematograph films claiming to be the owners thereof, including the sound track therein and Cinematograph Exhibitors Association of India filed objections repudiating the claim of IPRS. They objected on the ground that the composers and song writers had executed the work under contracts of service with them/their members to be utilised in the films. It was also contended that the musical works prepared by the composers of lyric and music having been utilised and incorporated in the sound track of the cinematograph films produced by them, all the rights which subsisted in the composers and their works, including the right to perform them in public, became the property of the producers of cinematograph films and no copyright subsisted in the composers which they could assign to IRPS and that the producers of cinematograph films being the authors and first owners of the copyright in cinematograph films produced by them had the exclusive right, *inter-alia*, to cause the said films insofar as the

same consisted of sound (which included musical works) to be heard in public as also the exclusive right to make records embodying the sound track of the films produced by them and to cause the said works to be heard in public. It is important to note that the contention was based not merely on the ground that the composers were under a contract of service, but also on the ground that they did so for valuable consideration. In other words, it was also contended that for valuable consideration which is substantial, a music director sets the work to tunes and imparts music to it and a singer sings the same, but none of them nor any one of their aforesaid works can and have any separate copyright; that the motion picture is the combination of all arts and music in the sound track which cannot be detached from the film itself; that the purpose of making a motion picture is not only to complete it, but also to publicly exhibit it throughout the world and that having regard to the provisions of the Act, the copyright in the case of cinematograph film vests in the owner of the film and that, therefore, any assignment purporting to have been made in favour of IPRS was void and of no effect and was incapable of conferring any rights in such musical works on the IPRS. It was further contended that copyright in a cinematograph film which vested in the producers

meant copyright in the entirety of the film as an integral unit, including the musical work incorporated in the sound track of the film and the right to perform the work in public.

The Supreme Court, after referring to the various provisions of the Act, held as under :-

“15. The interpretation clause (f) of Section 2 reproduced above, which is not exhaustive, leaves no room for doubt when read in continuation with Section 14(1)(c)(iii) that the term “cinematograph film” includes a sound track associated with the film. In the light of these provisions, it cannot be disputed that a “cinematograph film” is to be taken to include the sounds embodied in a sound track which is associated with the film. Section 13 recognises “cinematograph film” as a distinct and separate class of “work” and declares that copyright shall subsist therein throughout India. Section 14 which enumerates the rights that subsist in various classes of works mentioned in Section 13 provides that copyright in case of a literary or musical work means inter alia (a) the right to perform or cause the performance of the work in public and (b) to make or authorise the making of a cinematograph film or a record in respect of the work. It also provides that copyright in case of cinematograph film means among other rights, the right of exhibiting or causing the

exhibition in public of the cinematograph film i.e. of causing the film insofar as it consists of visual images to be seen in public and insofar it consists of sounds to be heard in public. Section 13(4) on which Mr Ashok Sen has leaned heavily in support of his contentions lays down that the copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made. Though a conflict may at first sight seem to exist between Section 13(4) and Section 14(1)(a)(iii) on the one hand and Section 14(1)(c)(ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once 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 Section 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 insofar as it consists of visual images to be seen in public and insofar 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 musical work for the performance of the work in public. In other words, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric or musical work recorded on the sound track of the film to be heard in public and nothing contained in Section 13(4) of the Act on which Mr Ashok Sen has strongly relied can operate to affect the rights acquired by the author (owner) of the film by virtue of Section 14(1)(c) of the Act. 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. In other words, the author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph

film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the express provisions of clauses (f), (m), (y) of Section 2, Section 13(1)(b) and Section 14(1) (c) of the Act otiose but would also defeat the intention of the Legislature, which in view of the growing importance of the cinematograph film as a powerful media of expression, and the highly complex technical and scientific process and heavy capital outlay involved in its production, has sought to recognise it as a separate entity and to treat a record embodying the recording in any part of the sound track associated with the film by utilising such sound track as something distinct from a record as ordinarily understood.

(C). The provisions of the Act in respect of a cinematograph film and sound recordings are not identical in view of the nature of the two works. The rights conferred upon them in certain respects are naturally different. However, what is important to note is the similar manner in which exclusivity of the rights are conferred by the Act to the producers who are the owners of the copyright in the underlying works in cinematograph films and sound recordings. I am unable to distinguish the judgment on the ground that the Supreme Court dealt with a cinematograph film, whereas the present case concerns sound recordings alone. No cogent reason, justifying such a distinction, has been furnished.

51. It is, however, necessary first to consider Mr. Seervai's submission that the judgment is no longer good law and has lost its relevance even in respect of cinematograph films in view of the subsequent amendments to the Act. The contention was mainly based on the amendment to the definition of cinematograph film in section 2(f). Section 2(f) prior to and, as amended, reads thus :-

SECTION	PROVISIONS PRIOR TO ACT 38 OF 1994	PROVISIONS AFTER ACT 38 OF 1994 (AS ON DATE)
Section 2(f) - "cinematograph film"	(f) "cinematograph film" includes the sound track if any, and "cinematograph" shall be construed as including any work produced by process analogous to cinematography.	(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 process analogous to cinematography including video films.

52. It is impossible to ignore the judgment of the Supreme Court on the basis of the amended definition of cinematograph film. Indeed, if I were to decide an identical case as the one before the Supreme Court, I would still consider myself bound by the judgment despite the amendment in the definition of cinematograph film. In fact, the amendment would reinforce the need to follow the judgment, rather than to distinguish and ignore it. This, I think, is clear from the words in the amended definition, the first part of which provides "*work of visual recording*" and then goes on to provide "*and includes a sound recording accompanying such visual recording*". The definition of cinematograph film prior to the amendment included the sound track,

if any. I do not see how this position could possibly have changed with the amended definition.

53. Obviously realizing this, Mr. Seervai, submitted that in the amended definitions, cinematograph film is defined to mean only any work of visual recording and the reference to sound recordings accompanying such visual recordings does not form a part of the definition of cinematograph film. He submitted that the words “*and into the sound recording accompanying such visual recording*” only recognise that a sound recording accompanies cinematograph films. He submitted that these words must be held to be distinct and must be held to form no part of the definition of cinematograph film.

54. The submission invites the Court to rewrite the definition of “cinematograph films”. Worse still, it invites the Court to delete a significant and vital part thereof. There is nothing in the plain language of the definition that warrants a Court doing so. I am not inclined to distinguish and thereby ignore the judgment of the Supreme Court on this interpretation of the words “cinematograph film”.

55. The suggestion that the words “*and includes the sound recording accompanying visual recording*” only a sound recording accompanies a film and is of no other relevance is totally unfounded. Firstly, there is no purpose served by the Legislature merely referring to what accompanies a cinematograph film. I am not inclined to ascribe to the Legislature a meaningless definition. There are many other things that accompany a cinematograph film, including the inscriptions thereon and the chemicals and other material used. If Mr. Seervai’s submission was well founded, there is no reason why only some of the accompaniments to a cinematograph film are mentioned.

56. Nor do I agree with the submissions that the judgment of the Supreme Court in the IPRS case has lost relevance in view of the amendment to the definition of “infringing copy” in section 2(m)(ii).

The provisions read as under :-

SECTION	PROVISIONS PRIOR TO ACT 38 OF 1994	PROVISIONS AFTER ACT 38 OF 1994 (AS ON DATE)
Section 2(m) - “infringing copy”	Section 2 (m) “infringing copy” means – (ii) in relation to a cinematographic film, a copy of the film or record embodying the recording in any part of the sound track associated with the film;	Section 2 (m) “infringing copy” means – (ii) in relation to a cinematographic film, a copy of the film made on any medium by any means ;

The Legislature probably did not consider it necessary to have an expanded definition as in any event section 2(f) defines “cinematograph film” to mean any visual recording and includes “a sound recording accompanying such visual recording”.

57. Nor am I inclined to distinguish the judgment of the Supreme Court on the ground that prior to the 1994 amendment, section 2(w) defined “record” whereas by the amendment section 2(xx) was introduced to define “sound recording”. The provisions read as under :-

SECTION	PROVISIONS PRIOR TO ACT 38 OF 1994	PROVISIONS AFTER ACT 38 OF 1994 (AS ON DATE)
Section 2(w) - “record”	(w) “record means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable to being reproduced therefrom, other than a sound track associated with a cinematograph film.	(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.

58. The definitions do not support the contention that a sound recording refers only to the material/medium on which the sounds are recorded and the technological process of recording the same. If

anything, section 2(xx) makes it clear that a sound recording includes the underlying works as recorded therein, with emphasis on the word “as”.

59. The author of a literary work is the author of the work [section 2(d)(i)]. The composer is the author of a musical work [section 2(d)(ii)]. Section 17 provides “*subject to other provisions of this Act, the author of a work shall be the first owner of the copyright therein.*”

Thus, the first owner of the copyright in a literary work and a musical work are the author of the literary work and the composer of the musical work respectively. Under section 14(1)(a)(iv), the composer of a musical work and the author of a literary work have the exclusive right to make or authorise the making of a cinematograph film or a sound recording in respect of their works. Once this is appreciated, it becomes clearer that the judgment of the Supreme Court applies to a sound recording with the necessary adaptations. Thus, once the author of a lyric or a musical work parts with a portion of his copyright by authorising the producer of a sound recording to make a sound recording in respect of his work and thereby to have his work incorporated or recorded in a sound recording, the producer of the

sound recording acquires by virtue of section 14(1)(e) of the Act, a copyright which gives him the exclusive right stipulated in section 14(1)(e) which includes the right to communicate the sound recording to the public. A distinct copyright comes to vest in the sound recording as a whole. I see no reason why if this is the case for cinematograph films, it is not so in respect of a sound recording.

60. It is also important to note the following observations from the concurring judgment of Krishna Iyer, J., in the IPRS case.

“20. Copyright in a cinema film exists in law, but Section 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any “work” notwithstanding its confluence in the film. This persistence of the aesthetic “personality” of the intellectual property cannot cut down the copyright of the film qua film. The latter right is, as explained earlier in my learned Brother's judgment set out indubitably in Section 14 (1) (c). True, the exclusive right, otherwise called copyright, in the case of a musical work extends to all the sub-rights spelt out in Section 14(1)(a). A harmonious construction of Section 14, which is the integral yoga of copyrights in creative works, takes us to the soul of the subject. The artist enjoys his copyright in the musical work, the film

producer is the master of his combination of artistic pieces and the two can happily coexist and need not conflict. What is the modus vivendi?

21. *The solution is simple. The film producer has the sole right to exercise what is his entitlement under Section 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 Section 14(1)(a). For instance, a film may be caused to be exhibited as a film but the pieces 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 Section 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 Arts Society. These are the boundaries of composite creations of art which are at once individual and collective, viewed from different angles."*

.....

23. *Not the recommendations in conventions but provisions in municipal laws determine enforceable rights.*

Our copyright statute protects the composite cinematograph work produced by lay-out of heavy money and many talents but does not extinguish the copyrightable component parts in toto. The music which has merged, through the sound track, into the motion picture, is copyrighted by the producer but, on account of this monopoly, the music composer's copyright does not perish. The twin lights can coexist, each fulfilling itself in its delectable distinctiveness. Section 14 has, in its careful arrangement of the rights belonging to each copyright, has a certain melody and harmony to miss which is to lose the sense of the scheme.”

61. The judgment of the Supreme Court answers the entire case against the defendant including the contention based section 13(4).

62. As both counsel strongly relied upon the judgment in *Gramophone Company Limited v. Stephen Cawardine & Co., 1934 1 Ch.d. 450* I will refer to it in detail although in my view, the judgment does not assist either side in view of the learned Judge having expressly clarified that he was not considering the right of the owners of the original works.

In that case, the plaintiff made an original plate from a performance by the London Symphony Orchestra of the Overture to Auber's "The Black Domino" and manufactured from the plate, gramophone records. The defendants bought one of the records and played the same without the plaintiff's consent at one of their tea & coffee rooms. The plaintiff alleged that, to be an infringement of its right in the record and, therefore, claimed an injunction restraining the defendant from doing so. The defendant denied that the plaintiff was the owner of the copyright in the record or of the musical adaptation recorded on it. As noted in the judgment, the question was whether the plaintiff was entitled to restrain not the performance of the piece of music simpliciter, but the performance of it as played by the London Symphony Orchestra and recorded, as mentioned. Section 19 of the Copyright Act, 1911, which fell for consideration, insofar as it is relevant, reads as under :-

"Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived. and the person who was the owner of

such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts."

By sub-s. 2: *"It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves-*

(a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him,"

Justice Maugham held :-

"The question that then arises is this: what is the position of the owner of the copyright in the original

work so far as regards a performance in public ? Counsel for the company, not unnaturally, I think, in this case at any rate, argued that the right of the original owner as regards a performance in public was not interfered with by the existence of a copyright under s. 19. I think an admission of that kind was probably necessary for his purpose. In my opinion the admission was rightly made. I see no reason for thinking that the copyright in the original work is interfered with by the creation of a special copyright in what I have called for brevity a record, except to the extent to which that right has been derogated from by the express language of s. 19 or a necessary inference therefrom. Therefore in my opinion the original owner has under s. 1 of the Act the sole right of performing the work in public, and this includes the sole right of performing the work by any mechanical means, and the existence of what I have termed the special copyright under s. 19 does not derogate from this right of the original owner. If the contrary had been intended I should certainly have expected clear words in s. 19 to that effect, and they are not to be found.

Accordingly, my opinion is that while the original copyright subsists, its owner is entitled to restrain a performance in public by any of the persons who get the limited and, as I think, subordinate copyright under s.

19: and it follows, as was argued on behalf of the company, that the two kinds of copyright may co-exist for terms of years which, as I have pointed out, may vary widely. The conception of co-existing copyrights is a familiar one in copyright law. A number of instances could be given. I think the best analogy for the present purpose is that of an adaptation or a new arrangement of a musical work composed by some other person. The rights of the adapter are subordinate to the rights of the composer, who is entitled to an injunction to restrain the performance of the new arrangement of his musical work so long as his copyright is still subsisting. If authority is needed for that, the case of Wood v. Boosey (1) may be cited. Other examples of the same kind may be derived from the law in reference to translations and in reference to anthologies. I think I have already said that the rights conferred by s. 19 on the various persons who may have made records include a right to sell the records for the purpose of private performance. The necessary implication must be that, the person who has a copyright in the record can sell the record, and a buyer is entitled to make the work audible in private circles, since that is not an infringement of any right.

Now comes the question that has to be determined in this case. Have the persons who have lawfully made records such a copyright under s. 19 as would entitle

them to the exclusive right of performance in public of those particular records so that they are entitled to restrain the use of those records for public performances ? In putting the question in this form I may point out that I am not considering the rights of the owner of the copyright in the original work, but I am assuming either that there is no such copyright or that the owner does not choose to intervene. I confess that I do not think the answer to the question is free from difficulty, having regard to the defective nature of the drafting of s. 19. The conclusion at which I have arrived is guided to some extent by the view I have expressed as to the co-existing copyrights in the original work and the special copyrights under s. 19. The words in the section "copyright shall subsist in records, perforated rolls, and other contrivances, . . . in like manner as if such contrivances were musical works," are general in their form, and, apart from the rights of the original owner, can only, I think, be cut down by a reasonably clear context. The phrase is not, in my, opinion, apt to describe a mere right to prevent the reproduction in a physical form of the record and a right to sell the record. The owner of the copyright in a musical work has the sole right to produce the work in public. It is, in my opinion, a reasonable construction that the owner of a special copyright under s. 19 in a record of which he is the owner has the sole right to use that record for a

performance in public, provided that the overriding rights of the original owner do not intervene. On this view, each owner of each record of the work has a like right to use and to protect his record. Some weight ought to be attached, in my opinion, to the phrase "the person who was the owner of such original plate. . . . shall be deemed to be the author of the work." That, it seems to me, supports the same view: and I would add, without placing too much stress on such a consideration arising in a matter under the Copyright Act, 1911, that I see no injustice or unfairness which is likely to arise from my construction of the section. On the other hand, I can see considerable objection, from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance. ”

63. Dr. Tulzapurkar invited my attention to the commentary in *The Modern Law of Copyright and Designs, Second Edition, Volume I of Hume Laddie Peter Prescott & Mary Vitoria*. The authors while referring to the history of collecting societies in the U.K. observed that in 1934 followed the formation of Phonographic Performance Limited to administer the public performance rights in the sound recordings in consonance of the decision in Cawardine's Case (*supra*) which

established that The Copyright Act, 1911 “gives full copyright to the sound recordings”.

64. The learned Judge in Cawardine’s case has prefaced a consideration of the question as to whether the persons who have lawfully made records such a copyright as would entitle them to the exclusive right of performance in public of those particular records so that they are entitled to restrain the use of those records for public performances with the reservation expressed in the first portion underlined by me which starts with the words “*In putting the question in this form....*”. The learned Judge having expressly stated that he was not considering the rights of the owner of the copyright in the original work and clarifying that he was proceeding on the assumption that either there is no such copyright or that the owner does not choose to intervene, it would be incorrect to read the other observations in the judgment as expressing a final opinion as to the rights between persons who have lawfully made a sound recording on the one hand and the owners of the copyright in the original work on the other, which is the question that falls for consideration in the case before me.

The second portion in the above extract underlined by me was strongly relied upon by Mr. Seervai, especially the concluding words thereof “*provided that the overriding right of the original owner does not intervene*”.

I am not inclined to read a part of the judgment in isolation and out of context, especially when the learned Judge has expressly clarified the basis of and the presumption on which he was deciding the matter.

65. Dr. Tulzapurkar relied upon *FOX Canadian Law of Copyright And Industrial Designs – John S. McKeown*. :-

“A sound recording is frequently a derivative work, in that it is derived from an existing musical or literary work. However, it should still be entitled to copyright protection even if it is infringing. The rights of the owner of the copyright in the sound recording will be subordinate to the rights of the original composer so long as their copyright is still subsisting.”

14:4 DISINGUISHED FROM PERFORMING RIGHT

The rights granted by the Act to the maker of a sound recording (to publish it for the first time,

reproduce it in any material form, and to remit it out), must be distinguished from the right to perform the work in public which includes a representation made by means of any mechanical instrument. The two rights are quite distinct.

In the case Tele Metropole Inc. v. Bishop, McLachlin J., after observing that the right to perform and right to make a recording are distinct rights in theory and in practice, made the following observations:

This distinction between the right to perform and the right to record a work is unsurprising in light of the object and purpose of the Act. As noted by Maugham J., in Performing Right Society Ltd. v. Hammond's Bradford Brewery Co. (1934) 1 Ch. 121, at p.127, "the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical". See also Article 1 of the Revised Berne Convention, cited above. A performance is by its very nature fleeting, transient, impermanent. When it is over, only the memory remains. A composer who authorizes performance of his work for a period of time has not irrevocably given up control over how the work is presented to the public. He may choose at a future time to withdraw his authorization, and be the sole

interpreter of his own work, or he may place conditions on his authorization. He may control the frequency of performance, and choose the audiences which are to hear his work. Other performers might copy his performances without authorization, but the public nature of performance is such that this will likely come to his attention. Furthermore, no imitation of a performance can be a precise copy. A recording, on the other hand, is permanent. It may be copied easily, privately, and precisely. Once a work has been recorded, the recording takes on a life of its own. This is why, from a composer's point of view, the right to control the circumstances under which the first recording is made is crucial. Once the composer has made or authorized a recording of his work, he has irrevocably given up much of his control over its presentation to the public. These are the reasons why the rights to perform and to record are recognized as distinct in the Act, and why in practice a composer may wish to authorize performances but not recordings of his work."

Performing rights societies acquire the performing rights in works protected by copyright and grant licenses to others to perform these works in public. The Act contains a number of provisions which affect

such societies, which are discussed in Chapter 27.”

The commentary, and especially the words emphasised, supports the plaintiff’s case though only to the extent I have already indicated.

66. Mr. Seervai relied upon the following passage from *Nimmer On Copyright Vol.I* – Release No.77 at page 2 – 175.

“[2] The Requirement of Originality in Sound Recordings.

A sound recording must be distinguished from, on the one hand, the material object on which the sound is recorded, and, on the other hand, the underlying musical composition, or dramatic or literary work that is recorded and transposed into aural form by the sound recording. Clearly, a sound recording copyright vests no proprietary rights in the material object as such. Likewise, the sound recording copyright does not attach to the underlying work per se, but only to the aural version of such work as fixed on the material object. A sound recording is, in this sense, a derivative work. Thus, the originality that may be claimed in a given musical work will not in itself constitute the originality necessary to support a copyright in a sound recording of such musical work.”

.....

“*Staggers v. Real Authentic Sound*, 77 F. Supp. 2D 57, 61n.6 (D.D.C. 1999) (Treatise quoted). See *H. Rep.*, p. 56. Thus, a musical work copyright inheres in a Cole Porter song, while a sound recording copyright inheres in Frank Sinatra’s rendition of the Porter song.”

67. The commentary far from supporting the defendant’s case militates against it. The very first sentence by excluding the material object from a sound recording indicates that a sound recording is “the underlying musical composition or dramatic or literary work that is recorded or transposed into aural form by the sound recording”. The next sentence says what has been said earlier in this judgment viz. that the copyright in this sound recording does not affect the underlying work *per-se* to wit it affects only the version recorded and not any other version or performance of the underlying works.

68. Mr. Seervai relied upon a footnote in *Nimmer on Copyright, Indian Reprint, Vol.I Release No.82 at page 4-42.4* which retains this position. It reads as under :-

“A phonorecord is a material object in which sounds are fixed. 17 U.S.C. 101. Such sounds may consist of a literary, musical or dramatic work. No copyright may be claimed in a phonorecord as such, but a literary, musical or dramatic work will be eligible for copyright if it is fixed in any tangible medium of expression, including that of a phonorecord. See 203(B) supra. In addition, a separate copyright may be claimed in the manner in which such a work is performed or rendered on the phonorecord. This is the sound recording copyright. See 2.10 supra. The distinction may be summed up as the difference between a copyright in a Cole Porter song, and a copyright in Frank Sinatra’s recorded performance of that song. The former would be a musical work copyright and the latter would be a sound recording copyright, although both may be embodied in the same phonorecord. Daboub v. Gibbons, 42 F. 3d 285, 388 (5th Cir. 1995) (Treatise quoted). A further distinction pertains between recorded performances and live performances. See 8.14[B][2]. 8E.03[A] infra.”

69. Mr. Seervai relied upon the following extracts from *Law of Copyright and Industrial Design* by P.Narayanan, Fourth Edition :-

“5.15 Sound recording.

The right of sound recording is different from the subject matter recorded as they are the subject of independent copyrights. The author of a sound recording is the producer.

.....

5.17 Recording of music *Musical works and sound recording embodying the music are considered separate subject-matters for copyright. Thus copyright in the recording of music is separate from the copyright in the music. Copyright in the music vests in the composer and the copyright in the music recorded vests in the producer of the sound recording. Where the song has not been written down and the composer who is also the performer records the song two copyrights come into existence simultaneously, one for the music and one for the sound recording.” (emphasis supplied)*

70. The commentary supports not the defendant but the plaintiff. The sentence emphasised by me recognizes a copyright “in the music recorded” and states that it “vests in the producer of the sound recording”. In other words the author does not suggest that this copyright i.e. the copyright in the sound recording, vests in the owners of the copyright of the original work. Further it recognizes that the

copyright is in the sound recording embodying the music. In other words, the author does not consider the copyright to be in the material in which the music is embodied nor in the technological process by which it is so embodied.

71. Mr. Seervai relied upon the following commentary from *The Law of Entertainment and Broadcasting by Vincent Nelson* :-

“9.01 Copyright in musical works, lyrics and sound recordings distinguished.

A “musical work” is defined in the Copyright, Design and Patents Act 1988 (“the 1988 Act”) as a “work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music”) and a literary work (“the lyrics”) as any work, other than a dramatic or musical work, which is written, spoken or sung. A sound recording is defined as :

(a) a recording of sounds, from which sounds may be produced; or

(b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or

produced. Thus, any means of sound recording now existing or which may be invented from which sounds may be produced will qualify as a sound recording and such sound recording will have a separate copyright from the works which form the subject matter of the recording.

The effect is, therefore, that there is a separate and distinct copyright in the music and the lyrics in a song. Additionally, there is a separate copyright in any sound recording incorporating such musical work and lyrics. The fact that the music and words are combined together for the purposes of performance does not cause the separate and distinct copyrights to merge. Thus, where X writes the words and Y composes the music, X will be the first owner of copyright in the lyrics and Y the owner of the copyright in the music. If the song is then recorded by X and Y, copyright will subsist in the sound recording which may or may not belong to X and Y depending on the contractual relationship entered into with their record company.

Thus, where words are set to music and a sound recording is made of that composition, the musical work, the lyrics (i.e. the literary work) and the sound recording remain distinct works for copyright purposes. The fact that the copyright in the lyrics, musical work and sound recording remain separate and distinct has important consequences in respect of the manner in which the

exclusive rights in the musical work, lyrics and sound recording are exploited.”

The views of the author are no different from what has been held so far regarding the separate copyright in each of the works. The issue in question was not commented upon by the author.

72. Mr. Seervai relied upon the judgment of a Division Bench of the Delhi High Court in the Federation of Hotels & Restaurants Association of India v. Union of India & Ors. MIPR 2011 (2) 0001.

The judgment does not decide the issue. The Division Bench has merely stated that the Copyright Board as and when approached will have to pronounce upon the question whether a consumer or a recipient of a broadcast is liable to pay copyright fees to the artist/musician of a version recording and in addition thereto, also other holders of the original/primary copyright. The Division Bench has merely expressed a *prima facie* view in paragraph 21 to the effect that IPRS as well as PPL have a legal foundation to claim payment against use of the copyright held by them. That the question is kept open is clear from the following observations :-

“19.

The Copyright Board, as and when approached, will have to pronounce upon the vexed and complicated question of whether a consumer or recipient of a broadcast, if liable to pay copyright fees to the artist/musician of a version recording and in addition thereto, also to the holders of the original/primary copyright. To borrow from the words of their Lordships, copyright encompasses bundles of artists which, at any given time, may vest in different persons.

.....

21. *In view of this discussion, the Writ Petitions, in all their aspects and ramifications, are devoid of merit. Prima facie, there is legal foundation for the IPRS as well as PPL to claim payment against use of the copyrights held by them. If and when the Petitioners approach the concerned appropriate Authorities for adjudication of their disputes, a definitive answer shall be given with regard to legitimacy of these claims.”*

73. I have already referred to the judgment of the learned single Judge of the Delhi High Court in *Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.* 2010 (44) PTC 541 (Del.) relied upon by Mr. Seervai. The nature of the case, which was under section 52(1)(j), was different from the one before me. The plaintiff in that case was the owner of the copyright in various sound recordings,

which comprised of lyrics and background music or the musical score. The plaintiff also claimed to be the owner of the copyright in the underlying music sound or composition and lyric embodied in the sound recordings. In other words, the plaintiff claimed to be the owner of the copyright in the literary, dramatic and musical works in these songs as well as the copyright in sound recordings comprising of these songs. There was, therefore, no dispute between the owner of the copyright in the sound recording on the one hand and the owner of the copyright in the original underlying works embodied therein on the other. The plaintiff contended that the defendant released audio cassettes which contained a remix version of songs from the film titles, the copyright whereof vested in the plaintiff. The defendant contended that it was entitled to do so, so long as it complied with the provisions of section 52(1)(j) of the Act. The plaintiff's stand in this regard was that DVD's and VCD's contain cinematograph films and therefore, do not fall within the ambit of section 52(1)(j). This contention was upheld. While upholding this contention, the learned Judge also dealt with the copyright in a sound recording including as to the rights of the producer of the sound recording. I have already reproduced paragraph 34, which itself supports the plaintiff as regards

its contention under section 14(1)(iii) to the effect that it has exclusive right in respect of the said sound recordings which were validly and legally made by the members of PPL and were, in turn, legally acquired by the plaintiff from PPL. Mr. Seervai placed reliance on paragraphs 44 and 45. The same however, do not support the defendant and in fact support the plaintiff. The relevant parts of paragraph 34 and paragraphs 44 and 45 of the judgment read as under :-

*“34. The limited rights conferred by Section 14 (e) on the owner of copyright in a sound recording (viz. the exclusive right to make other sound recording embodying it; to sell or hire any copy of the sound recording; or to communicate the sound recording to the public) harmonizes with the rights which vest in the owner of the primary literary, dramatic and musical work utilized to make a sound recording.....
His exclusive rights are confined to the exploitation of 'his' work i.e. 'his' sound recording in which he owns the copyright and does not give him the right to interfere or intermeddle with the exploitation of copyright(s) in the original primary works viz. the literary, dramatic and musical works by the author(s). This position is clear from sub- section (4) of Section 13 of *the Act*, which states that the copyright in a sound recording shall not*

affect the separate copyright in any work in respect of which the sound recording is made.”

*“44. I find no merit in the submission of learned counsel for the plaintiff that if the above interpretation of the provisions of **the Act** (as is canvassed by learned counsel for the defendant in so far as it pertains to the making of sound recording) is adopted, the copyright bestowed by Section 14 on the author(s) of the original literary, dramatic and musical works would be reduced to a mere right to collect royalties. I also do not find merit in the submission that Section 13(4) and Section 18, 19, 30 and 30A would also be rendered meaningless. Section 52(1) (j) only deals with exploitation of only those literary, dramatic or musical work which the author of the work has already voluntarily permitted to be made into sound recordings, and has thereby thrown his work in the public domain in the form of a sound recording. The law grants him the right to exclusively make sound recordings and the rights which go with it (under Section 14 (e)) until the expiration of two calendar years after the end of the year in which the first recording of the work was made. However, thereafter the right to make version recordings or further sound recordings becomes available to others as well, subject to the conditions of Section 52 and Rule 21 of **the Rules** being complied with. Right of the owner of the copyright in the original*

*literary, dramatic or musical work to exclusively exploit his work in all the other respects specified in Section 14(a) remains unaffected. Only the right to make or authorize the making of sound recordings [conferred by Section 14(a) (iv)] gets diluted, inasmuch as, the same can be exploited by others as well upon payment of royalty and subject to compliance of the conditions laid down in Section 52(1)(j) of **the Act**, and Rule 21 of **the Rules**, even without the consent of the owner. Since the rights conferred by Section 13 are subject to the provisions of the said Section and subject to the provisions of **the Act**, and the rights conferred by Section 14 are subject to other provisions of **the Act**, which includes Section 52 of **the Act**, the owner of the copyright in the original literary, dramatic or musical works who has already authorized the making of sound recordings of his work, cannot have a grievance that any other person is also statutorily authorized to make sound recordings of his work upon payment of royalties fixed by the Copyright Board and upon the fulfillment of the conditions prescribed in Section 52 (1)(j) of **the Act** and Rule 21 of the **Copyright Rules**.*

45. A Division Bench of this Court (to which I was a party) in *Microfibres Inc. v. Girdhar & Co. & Anr.* **2009 Indlaw DEL 647 RFA(OS) No.25/2006**, decided on 28.05.2009 has recently interpreted Section 15 of the

Copyright Act in the light of Section 2(c) of *the Act* and Section 2(d) of the *Designs Act*. Section 15 of *the Act* reads as follows:

"15. Special provision regarding copyright in designs registered or capable of being registered under the *Designs Act, 1911*. -

(1) Copyright shall not subsist under this Act in any design which is registered under the *Designs Act, 1911* (2 of 1911)

(2) Copyright in any design, which is capable of being registered under the *Designs Act, 1911* (2 of 1911), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person."

The Bench held that:

"the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art."

In my view, the same philosophy has inspired the enactment of Section 52(1)(j) of *the Act*. Therefore, in

respect of a literary, dramatic or musical work, which has been circulated to the public by its author himself or under his authority, by making a sound recording, the protection of the author's copyright is diluted so far as the making of subsequent recordings is concerned. Though he continues to own the copyright, his express consent is not necessary for making subsequent or version recordings if they are made in compliance with Section 52(1)(j) of the Act and Rule 21 of the Rules. The owner of copyright in the previous sound recording made by exploiting the original literary, dramatic or musical works in nowhere in the picture here as his right, as already pointed out, is restricted to exploiting his own sound recording.”

74. The observations in the judgment do not support the submissions on behalf of the defendant. If anything they support the plaintiff. For instance, the learned Judge has observed “the law grants him the right to exclusively make sound recordings and the rights which go with it [under section 14(e)] until the expiry of two calendar years after the end of the year in which the first recording of the work was made”.

75. Mr. Seervai relied upon an interlocutory order passed by a learned single Judge of the Madras High Court in *Indian Performing Rights Society Limited v. Muthoot Finance Private Limited & Ors. 2010 (42) PTC 752*, in support of his contention that the judgment of the Supreme Court in the IPRS case is of no relevance where a sound recording is in question. The learned Judge held :-

“19. That was a case between a composer of musical work and the owner of cinematographic film. Here is a case where the dispute has arisen between a registered Society which has got assignment of literary and musical work from its owner and a broadcaster, who claims to have acquired licence from another registered Society for broadcasting not only sound recording, but also literary and musical work. Further, the core issue that has arisen in that case is found to be totally different from the issue arisen in the case on hand. Therefore, the aforesaid authority does not apply to the facts and circumstances of this case.

20. The applicant Society has established, prima facie, that it has got assignment of the literary and musical work from its owners by entering into separate agreement of assignment. It is also shown before the court that sound recording is a different class of work

from that of literary and musical work. The Government of India has also registered two separate Societies one for carrying on the business of issuing or granting licence in respect of literary and musical work viz. IPRS and another in respect of sound recording work viz. PPL. Unless the third respondent obtains licence for broadcasting literary and musical work of the members of the applicant Society, they have no right to broadcast the songs of the members of the applicant Society, it has been established prima facie before the court.”

76. For the reasons I have already furnished I am, with great respect, unable to agree with the judgment. The nature of the parties before the Supreme Court and in these proceedings cannot determine the question of law. The defendant-society acquires such right as its members are entitled to and capable of assigning to it. The defendant i.e. the plaintiff before the Madras High Court cannot have any higher right than those of its members with whom it has entered into assignment agreements. Merely because section 33 provides for the formation of two societies viz. IPRS - the defendant and PPL, it does not lead to the conclusion that a licence must be obtained from both of them even if it is otherwise not necessary under the provisions of the Act and in particular section 14 thereof.

77. A learned single Judge of the Kerala High Court, by an order dated 8th February, 2011, in *Matrubhumi Printing & Publishing v. The Indian Performing Rights Society*, FAO Nos.82, 83/2009 and 38 of 2009, has taken a contrary view.

78. Mr. Seervai relied upon the following passages from *Copinger And Skone James on Copyright, Fifteenth Edition* :-

“2. SCOPE OF SUCH RIGHTS GENERALLY

A. INTER-RELATIONSHIP OF RIGHTS

Copyright as bundle of rights. *Copyright gives the copyright owner a bundle of property rights. Thus, the owner has the right to do or to authorise other persons to do the various acts restricted by the copyright law, including, for example, inter alia, to reproduce, rent out and broadcast the work and to communicate it to the public. The right to control each of these acts is generally exercisable separately. However, these rights may overlap with other rights such as moral rights, so that in a given situation, there may be infringement of the right of reproduction as well as of the moral right to be identified as the author. Rarely, the exercise of rights is mutually exclusive, as in the case of the protection given to those original designs which are not protected*

by copyright but which are protected by means of the separate registered design right described above.

Similarly, where more than one right owner has rights in a work, these rights subsist and may be exercised independently. For example, in relation to a sound recording, separate rights subsist with respect to : (a) the music and lyrics embodied in it; (b) the fixation of the performances recorded on it; and (c) the sound recording itself. Someone who wishes to exploit the sound recording must, therefore, acquire or clear all these separate rights. Any unauthorised exploitation will be actionable by any individual right owner.

Copyright is essentially not a positive but a negative right. Thus, for example, no provision of the Copyright Act confers on the owner of copyright in a literary work the right to publish it. The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has the right to do.”

B. THE MUSIC, PUBLISHING BUSINESS

The copyrights in musical and literary works were the earliest of the rights that underpin the music industry to have been recognised and are the underlying rights on which much of the remainder of the industry is built. With the exception of works that are in the public domain, practically any commercial exploitation of

sound recordings or performances requires a licence of the copyright in the original musical and literary works which are embodied in those recordings or performed by performers. The fact that these rights endure for the life of the author plus 70 years (the longest period of protection afforded to any of the rights examined in this section) means that the vast majority of works that are the subject of significant commercial exploitation (with the notable exception of a substantial proportion of classical compositions) remain in copyright.”(emphasis supplied)

79. I have underlined the two sentences emphasised by Mr. Seervai. An initial reading of these passages do appear to support Mr. Seervai’s submission. On further reflection, it does not appear to be as clear as he suggested. Mr. Tulzapurkar submitted that the author has referred to the creation and exploitation of the sound recording, as is evident from the last sentence from the first passage. According to him, the commentary indicates that when a sound recording is to be created, the producer must acquire the underlying rights in music and lyric but once the owners of the underlying works have conferred the right upon the producer to make the sound recording the separate work viz. the sound recording comes into existence and that it is an

independent copyright. Thereupon the producer of the sound recording has exclusive rights to exploit the said sound recording in every manner stipulated in section 14(1)(e)(iii).

80. The precise question before me was not discussed. It is difficult to speculate whether in the first of the passages cited, the learned author was referring to the exploitation by another of the works embodied in the sound recording per-se i.e. independent of the sound recording or the works as embodied in the sound recording. Assuming the commentary supports Mr. Seervai's submission, the underlined sentence in the first passage is not an absolute proposition. This is clear from the next passage which qualifies this to be so only in "practically any" commercial exploitation of sound recording. Even assuming that the commentary favours the defendant, I am, with respect, unable to follow the same in view of what I have held earlier and especially in view of the judgment of the Supreme Court in the IPRS case.

81. Mr. Seervai relied upon the *User's Guide to Copyright, Sixth Edition* by Michael Flint, Nicholas Fitzpatrick & Clive Thorne -

“The Public performance of music and sound recordings

25.03

When a record is performed in public, two consents are required (i.e. one from the owner of the copyright in the music itself and the other from the owner of the copyright in the sound recording). In the great majority of cases, the owners of the copyright in the sound recordings which are issued for sale to the public, assign the right to perform such recordings to Phonographic Performance Limited (PPL). So, in the case of a performance of a record on, say, a juke box in a public house, two licences are required; the PRS licence to perform the musical composition and a licence from PPL to play the recording of the music in public.”

82. I do not suggest that I will not consider the view of any author unless it is accompanied by reasons in support of it although reasons are always of great assistance. However in view of all that I have held and especially in view of the judgment of the Supreme Court in the IPRS case, I am with respect unable to accept the view.

83. For the same reason, I am also unable to accept the opinion of certain lawyers expressed in an article in a July 2010 publication

titled “Review Commercial and Dispute Resolution” referred to by Mr. Seervai.

84. In the result, issue No.1 is answered in the affirmative. The Copyright Board has the exclusive jurisdiction to decide the remaining issues which are answered accordingly. The reliefs sought on the basis of those issues are, therefore, rejected for want of jurisdiction with a clarification that the parties are at liberty to adopt appropriate proceedings in respect thereof.

ORDER:

(1) The suit is decreed in terms of prayers (a), (b) (c) and (d).

(2) Considering the fact that the parties had entered into agreements from time to time and the question of the enforceability of the agreements despite the above decree being open to be agitated before the appropriate forum, I would use my discretion to depart from the normal rule and deny the plaintiff, costs.

(3) Considering the consequences of the judgment not only in this matter, but qua various others including broadcasters, I am inclined to accept Mr.Seervai's request for a stay of the judgment itself upto and including 31st October 2011.

The stay of the operation of the decree is neither sought nor granted.