

(2017) 08 MP CK 0006
MADHYA PRADESH HIGH COURT
Case No: 10703 of 2017

Keshav Singh Tomar & ors.

APPELLANT

Vs

State of M.P. & anr.

RESPONDENT

Date of Decision: Aug. 3, 2017

Acts Referred:

- Constitution of India, Article 226, Article 12 - Power of High Courts to Issue certain writs - Application of Acts of Parliament and of the Legislature of the State of Assam to autonomous distr

Hon'ble Judges: Vandana Kasrekar

Bench: Single Bench

Advocate: A.M. Trivedi, Vishal Dhagat, Mukesh Agrawal, Kishore Shrivastava, Shashank Verma, Kunal Thakre

Final Decision: Dismissed

Judgement

1. The petitioner has filed the present writ petition challenging the action of the respondents whereby the private respondents are using the song "Hus Mat Pagali Pyar Ho Jayega" written by the petitioner without his permission.

2. The petitioner is engaged in the work of writing and also writing songs for drama, TV shows and films. The creative work which has been done by the petitioner and various songs and story which had been penned by him was registered with respondent No.2. The petitioner is a member of Writer Association now known as Screen Writer's Association. Respondent No.2 is statutory body registered under the Trade Union Act, 1926. All the writers, screen writers, poets get their song, story, scripts etc registered with films writer association. If any person steals or uses the original first work of the writer, then the complaint is made to respondent No.2. The

registration of the petitioner is renewed from time to time. The Central Board of Film Certification or Indian Censor Board is a regulatory body in India to review films T.V. Serials, T.V. Commercials and various visual materials. It is under the Ministry of Information and Broadcasting, Government of India. Its task is to regulate the public exhibition of film under the provisions of Cinematograph Act, 1952 (hereinafter referred to as "the Act of 1952"). Films can be publically exhibited in India only after they are certified by board. The petitioner wrote a song with Mukhda "Hus Mat Pagali Pyar Ho Jayega". This song was first created by the petitioner and this song is his authoritative work. The said song written by the petitioner was registered with Writer Association on 09/02/2016.

3. The petitioner submitted an application to respondents No.2 and 3 to take action against the private respondents for using/stealing his original first creating work i.e. song written by him with title "Hus Mat Pagali Pyar Ho Jayega", however, no action has been taken to restrain the telecast of said song. The petitioner is living in Jabalpur. While he was at Jabalpur, he heard about the movie "Toilet-Ek Prem Katha" in media. The petitioner also learnt that said movie is due for release before public on 11th August, 2017. As the release date of the film was reaching on 11 th August, 2017, many advertisement of the movie, its story, script and songs were displayed in the media. While going through the material published and broadcasted in Media, the petitioner learnt that one of the song which has been written by him is being used in the film. The song of the petitioner with Mukhda "Hus Mat Pagali Pyar Ho Jayega" was main song in the film and this Mukhda was repeated in the song in many times. When the petitioner heard about the said song, he gave notice to Viacom 18 Media i.e. respondent No.4. The petitioner has also filed a complaint before Film Writers Association, but no action has been taken by the Film Writers Association till date. The petitioner has also preferred one complaint before the Superintendent of Police, Jabalpur, seeking appropriate action against the private respondents in regard to piracy of song penned by the petitioner. The petitioner received reply sent to him on behalf of respondent No.4 on 19/07/2017 in which respondent No.4 has denied that the petitioner is having any right over the said song. Being aggrieved the inaction of the respondents, the petitioner has filed the present writ petition.

4. Respondents No.4 and 8 have filed their reply.

5. Respondent No.4, in its reply, has raised a preliminary objection regarding maintainability of this writ petition, firstly on the ground that the petitioner has an alternative remedy of filing a civil suit under the Copyright Act, 1957; secondly, on the ground that the petition involves a disputed question of fact which cannot be decided by this Court by exercising the powers under Article 226 of the Constitution of India; thirdly, on the ground that respondent No.2 against which the petitioner has sought a relief, is not amenable to writ jurisdiction of this Court as respondent No.2 is neither a State nor an instrumentality as contemplated under Article 12 of

the Constitution of India; fourthly, the writ of mandamus cannot be issued in the present case.

6. Learned senior counsel appearing on behalf of the respondents No.4 and 8 argued on the point of preliminary objection raised by them in the return. Firstly, learned senior counsel for the respondents No.4 and 8 submitted that the petitioner has an alternative remedy of filing civil suit under the Copyright Act . Section 55 of the Copyright provides for civil remedies for infringement of copyright. As per this section, where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law. Learned senior counsel further submitted that as per Section 62 of the Act, District Court will have jurisdiction in respect of the infringement of copyright in any work shall be instituted before the District Court. On the basis of these two sections, learned senior counsel submitted that the petitioner is having a remedy of filing a civil suit before the District Court. He further submitted that whether the said song is an original song of the petitioner or not is a disputed question of fact which can be decided only after recording the evidence and, therefore, as the petition involves disputed question of fact, the writ petition is not maintainable. He further argued that respondent No.2 is a Screen Writer Association which is registered under the Trade Union Act, therefore, neither a State nor an Instrumentality as contemplated under Article 12 of the Constitution of India, thus, the writ petition is not maintainable against the said respondent. He further submitted that respondents No.4 and 8 are in no way bound by the orders or decisions of respondent No.2 and that any fundamental right of the petitioner or any legal right of him has been violated by the respondents, therefore, the writ petition is not maintainable. He further argued that no fundamental or any statutory right has been infringed by the respondents. He also argued that the writ of mandamus under Article 226 of the Constitution of India can be issued only when there is a demand regarding violation of any fundamental or legal right. In the present case, as the petitioner has not made any demand before filing the said writ petition, therefore, a writ of mandamus cannot be issued in the present case. He further contended that before filing of this writ petition, the respondents have executed four agreement with different persons with regard to the said song. However, the petitioner has not challenged the said agreements.

7. Learned senior counsel for the petitioner has orally opposed the prayer of learned senior counsel for the respondents No.4 and 8 that the writ petition be dismissed on the ground of availability of alternate remedy. He submitted that Article 19 of the Constitution of India provides for protection of certain rights regarding freedom of speech etc. Clause-(1)(a) of Article 19 of the Constitution of India deals with freedom of speech and expression. He further submitted that every citizen has a right to freedom of speech and expression and the State Government can impose reasonable restriction under Article 19(2) of the Constitution of India. In light of the

said article, learned senior counsel for the petitioner submitted that by the impugned action of the respondents, right of speech and expression has been violated and, therefore, the present writ petition is maintainable. He further submitted that as per Section 3 of the Act of 1952, the Central Government has constituted a board of film certification. Section 4 of the Act of 1952 provides for examination of films by which the Board examines the film before issuing the certificate. He also submitted that as respondent No.3 has been constituted under the Act of 1952, therefore, amenable to writ jurisdiction. Learned senior counsel also argued that exhibition of film is a public duty and as the respondents are discharging the public duty, therefore, the writ petition is maintainable. He relied upon Section 5B of the Act of 1952 which provides for principles of guidance in certifying films. In light of aforesaid, he submitted that the film cannot be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interest of security of the State, friendly relations with foreign States, public order, decency or morality. He submitted that stealing of song by the respondents is against the morality. Learned senior counsel further submitted that song in question is his first creation. The song is authoritative work of the petitioner and the same has been copied and stolen by the private respondents without his permission and consent, therefore, the petitioner is deprived of his fundamental right under Article 21 of the Constitution of India and legal right under Section 57 of the Copyright Act.

8. I have heard learned counsel for the parties and perused the record. From perusal of the record, it reveals that the petitioner has filed the present writ petition praying for the following reliefs :

"7.1 Hon"ble Court may kindly issue writ/orders to respondents for removing the song "Hus Mat Pagali Pyar Ho Jayega" from film "Toilet Ek Prem Katha".

7.2 That, Hon"ble Court may kindly issued writ and direction to statutory bodies to stop the film makers from copying, stealing intellectual property of other writers and poets. Presently, statutory body like Censor Board of India which is working under Ministry of Information and Broadcasting is only issuing certificate and doing censorship work but, such statutory bodies do not protect the intellectual works of writer and poets and also does not see to it that whenever any biography is made then there should be consent or purchase of rights from the person whose life is depicted in the film.

7.3 Hon"ble Court may please to direct the respondent No.1 and 2 to grant protection to the songs penned by the petitioner so that in future no one can adhere to infringe the fundamental rights of petitioner.

7.4 That, Hon"ble Court may kindly issue writ/order/direction which it deems fit under the facts and circumstances of the case."

9. The petitioner has filed this petition mainly on the ground that the petitioner is the original author of song "Hus Mat Pagali Pyar Ho Jayega" from film "Toilet Ek Prem Katha". The petitioner further stated that the said song has been registered with respondent No.2 and certificate has also been issued of that song in favour of the petitioner as Annexure-P/3. The main contention of the petitioner is that the said song is being exhibited by respondent No.4 in their forthcoming film "Toilet Ek Prem Katha" without his content and permission. The petitioner has already served notice to respondent No.4 through his lawyer on 05/07/2017, however, no action has been taken in the matter, therefore, this writ petition has been filed. The main contention of petitioner is that due to exhibition of the said song in the film, his copyright is being infringed. Section 55 of the Copyright Act provides for civil remedies for infringement of copyright. Section 55 of the Copyright Act reads as under :

"55. Civil Remedies for infringement of copyright- (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitle to all such remedies by way of injunction, damages, accounts and otherwise as are or many be conferred by law for the infringement of a right :

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

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

(3) The costs of all parties in any proceeding in respect of the infringement of copyright shall be in the discretion of the Court."

As per the said section, mere copy of any copyright work has been infringed, then the owner of the copyright shall be entitled to all remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for infringement of a right.

10. Section 62 of the said Act provides for jurisdiction of the Court over matters arising under this Chapter. Section 62 of the said Act reads as under :

"62. Jurisdiction of court over matters arising under this Chapter.- (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

As per the said section, every suit or civil proceeding arising under this Chapter in respect of the infringement of the copyright in any work, it shall be instituted in the District Court having jurisdiction. Thus, the District Court is having jurisdiction in the matter when there is infringement of copyright, therefore, the writ petition is not maintainable on the ground of availability of the alternate remedy. The Apex Court in the case of Dhanyalakshmi Rice Mills and others Vs. The Commissioner of Civil Supplies and others, reported in (1976) 4 SCC 723, in para-28 has held as under :

"28.

A mandamus will go where there is a specific legal right. Mandamus may be refused where there is an alternative remedy which is equally convenient, beneficial and effectual. If there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. Those are cases where justice can not be done unless a mandamus is to go. R. V. Bristol and Exeter Railway Co. is an authority for the proposition where the Corporation could be compelled to pay a sum of money pursuant to an agreement which could not be enforced by action because the agreement was not under seal.

This Court in *Lekh Raj v. Deputy Custodian and Har Shankar & Ors Vs. Deputy Exercise and Taxation Commissioner* held that contractual obligations cannot be enforced through a writ of mandamus."

11. It is also noted that whether the petitioner is author of song "Hus Mat Pagali Pyar Ho Jayega" or not is a pure question of fact which can be decided only after recording the evidence by the District Court. Thus, as the writ petition involves the disputed question of fact, therefore, also the present writ petition is not maintainable. The Apex Court in the case of *Noble Resources Ltd. Vs. State of Orissa* and another, reported in (2006) 10 SCC 236, in para-18 has held as under :

"18. It may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, thus, for determination thereof, examination of witnesses would be necessary, it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India."

12. From perusal of the reliefs which are claimed by the petitioner, it reveals that the petitioner has claimed the reliefs which are general in nature. He prays for issuance of direction to the respondents i.e. issuance of writ of mandamus. For issuance of writ of mandamus, the petitioner is required to first make a demand before the authority regarding violation of his legal and fundamental right, then only he can approach to this Court. However, in the present case, from perusal of the record, it reveals that the petitioner has served a legal notice to respondent No.4 who is a private body and no demand has been made against the statutory body/official respondents, therefore, no writ of mandamus can be issued in the present case. The Apex Court in the case of *Amrit Lal Berry Vs. Collector of Central Excise, New Delhi* and others, reported in (1975) 4 SCC 714 in para-25 has held as under :

"25. In the petition of *K.N. Kapur and others*, we do not even find an assertion that any representation was made against any violation of a petitioner's right. Hence, the rule recognised by this Court in *Kamini Kumar Das Choudhury Vs. State of W.B.*, that a demand for justice and its refusal must precede the filing of a petition, asking for direction or writ of mandamus, would also operate against the petitioners."

The Apex Court in the case of *Union of India and another Vs. S.B. Vohra and others*, reported in (2004) 2 SCC 150, in para-13 has held as under :

"13. A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The writ of mandamus is of a most extensive remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted."

13. Although learned senior counsel for both the parties have also argued the matter on merit, but, as this Court is dismissing the writ petition on the ground of preliminary objection raised by the respondents, this Court, therefore, does not think it proper to decide the case on merit. Thus, in light of aforesaid discussion, this Court does not find any reason to interfere into the writ petition.

14. Accordingly, the writ petition is dismissed as not maintainable. There shall be no cost.