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**(1991) 09 CAL CK 0003**

**Calcutta High Court**

**Case No:** Criminal Rev. No. 1561 of 1990

Sankar Biswas and Another

APPELLANT

Vs

Salil Chatterjee and Another

RESPONDENT

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**Date of Decision:** Sept. 26, 1991

**Acts Referred:**

- Copyright Act, 1957 - Section 14(d), 2, 63, 69
- Criminal Procedure Code, 1973 (CrPC) - Section 244, 245(1), 245(2)
- Penal Code, 1860 (IPC) - Section 417

**Citation:** 96 CWN 540

**Hon'ble Judges:** Ajoy Nath Ray, J; A.M. Bhattacharjee, J

**Bench:** Division Bench

**Advocate:** Balai Roy, Y. Dastoor and Milan Mukherjee, for the Appellant; Dilip Dutta and B.N. Sanyal, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

A.M. Bhattacharjee, J.

The Petitioners, against whom processes have been issued for offences u/s 417 of the Penal Code and Sections 63 and 69 of the Copyright Act, 1957, on a complaint filed by the Opposite Party no. 1, have applied before us for quashing the prosecution after having moved, but without success, the Magistrate for an Order of discharge u/s 245(2) of the Code of Criminal Procedure. It is beyond doubt that, notwithstanding the issuance of process, a Magistrate may discharge the accused at any stage thereafter and before reaching the stage of consideration of framing of charge. And, therefore, the Magistrate went very much wrong in holding, as he did that such discharge "is not possible before recording the evidence of the witnesses before consideration of charge" as "the Court must apply mind to the evidence before it prior to coming to such a conclusion". True, u/s 245(1) of the Code, the Magistrate is entitled to discharge the accused only after considering all the

evidence produced in support of the prosecution. But to hold that the Magistrate cannot do so in any case before or without recording evidence, would be to render Section 245(2) absolutely meaningless and otiose. But notwithstanding these broad and sweeping observations, the Order of the Magistrate can, however, be meaningfully read to mean that, in his view, there was nothing on record, as at present, to demonstrate that the charge was groundless. And I am inclined to think that the Magistrate is correct in that view. I have no doubt that the case of the Petitioners deserves serious consideration and must be considered by the Magistrate at the appropriate stage; but the materials now on record would not, without more, warrant quashing of the prosecution. Such a short-cut would be a wrong-cut, to borrow from Krishna Iyer, who has very rightly, if I may say so with respect, observed that both in life as well as in law, short-cut may very often be the wrong-cut. The complainant is the Gramophone Company of India Limited, hereinafter "Gramophone Company", for short. The accused persons are the Managing Director and the Executive of Electroband (India) Private Limited, hereinafter "Electroband" for short. The case of the complainant is that the Gramophone Company is the owner of the original plates wherein the songs sung by the late singer were recorded and as such the company alone has the exclusive right to make any other record embodying the same recording. But the accused persons of Electroband have infringed that right by making cassette-recording from the records of Gramophone Company and have offered those cassettes for sale through advertisements in Newspapers. The Gramophone Company served Solicitor's notice on Electroband complaining of the infringement.

2. The case of Electroband is that the cassettes were records of the live-programmes of the late singer who sold them all his rights. But, even then, on receipt of the Solicitor's notice, Electroband, in order to avoid all possible disputes, entered into an agreement dated 2.8.1989, agreeing inter alia that Electroband would - (a) pay to Gramophone Company royalty at the rate of 5% per cent per cassette. (b) inscribe on each cassette the words "by the courtesy of the Gramophone Company of India Ltd.," (c) notify to Gramophone Company the amount paid by Electroband to the late singer and (d) obtain prior permission of Gramophone Company for future projects. A xerox copy of that Agreement has been annexed with the revisional application, but the same was not on record before the Magistrate as formal Exhibit.

If the cassettes were recording from live-programme of the late singer and not from the records of the Gramophone Company, why Electroband readily agreed to pay royalty and to inscribe on each cassette the words "by the courtesy of the Gramophone Co. of India " ? The songs were combination of three "works", as defined in clauses (c), (o) and (p) of Section 2 of the Copyright Act, 1957. The "lyric" is the "literary work", the "musical notation" is the "musical work" and the actual performance by the singer is the "artistic work". If the copyright in the "lyric" and the "musical notation" was already acquired by the Gramophone Co., could the singer again perform the song and sell the records to Electroband without

infringing the copyright of the Gramophone Company in the "lyric" and the "musical notation" ? It may be that, if Electroband can prove that it was led to a bona fide belief by the singer that he was still the owner of the melody and the musical work that may, on proof, be a very pertinent circumstance in favour of the accused to show that they had no mens rea. It may be that the admitted fact that Electroband proceeded to sell the cassettes - openly and through advertisements in Newspapers may lend further assurance to its case of bona fides. The fact that Electroband has filed a suit in the City Civil Court for the declaration of its right may also show its bona fides. All these would require consideration by the Court when the trial commences and materials are produced in support. Even if the cassettes were records from the original records owned by Gramophone Company, Electroband may still have a good case if it can be shown that the Agreement dated 2.8.1989 was entered into by Gramophone Co., after knowing that these were recorded from its records. But all these would depend on further materials to be brought hereafter and, on the materials now on record, the Magistrate could not regard the accusation to be "groundless" within the meaning of Section 245(2) of the Code of Criminal Procedure to warrant discharge.

3. Revision is accordingly dismissed. Records, with copies of our judgments to go down at once to the Court below which is directed to proceed with the case with expedition and in accordance with law.

Ajoy Nath Ray, J.:

4. The revisional applicants apply to quash an Order of the Metropolitan Magistrate, 12th Court, dated 16.07.1990 whereby the Learned magistrate, after taking certain depositions u/s 244, refused summarily to conclude the copyright prosecution initiated as against the applicants, as groundless, and refused to discharge the accused there and then, refusing also to hold that no case against the accused had been made out.

5. The complaint is of the Gramophone Company of India Ltd. They say that their records of the songs of the singer Hemanta Mukherjee have been unauthorizedly copied by the applicants and that they have also been deceived by the applicants.

6. The story is short. About eight months before the then unanticipated death of the singer, he purported to sell to the applicants, under a written agreement dated 24.01.1989, certain live performance tapes of his. These contained songs of which the GCI has records, in which records the GCI has admitted Copyright. Section 14(d) of the Copyright Act, 1957 recognizes this important Copyright which subsists in records, which, without permission, cannot be legally used for reproduction.

7. According to the applicants, they approached the GCI and obtained permission to use their records to erase out hums in the cassettes sold by the singer. According to the GCI the applicants merely approached them for permission to reproduce the live performance tapes and the question of any use of their records never arose.

8. Admittedly the Gramophone Company of India were paid Rs. 10,000/- which they sought to return after the disputes crystallized. Admittedly a letter of permission dated 2nd August, was written in the following terms : -

THE GRAMOPHONE COMPANY INDIA LIMITED

33, JESSORE ROAD, DUM DUM, PIN CODE 700028

TELEPHONES 57-2431 (3 LINES), 57-4163 (3 LINES)

CABLES EMITRON, CALCUTTA, TELEX 0217007.

Ref. QR : BR : PSG. 2nd August, 1989

M/s. Electroband (India) Pvt. Ltd.,

162/69, Lake Gardens,

Calcutta - 700045

Dear Sirs,

Re : Hemanta Mukherjee-Sangeet

Lahari Subscription Scheme

Further to our Solicitor M/s. Orr. Dignam & Co."s letter of the 13th ultimo and to the discussion held on the 31st July '89 between the undersigned, our Mr. Salil Chatterjee, and your Mr. Sankar Biswas and Mr. Arun Sengupta we are to inform you that we are agreeable to give you our one time exclusive permission to you to release the cassettes for the aforesaid subscription scheme only subject to the following terms and conditions : -

1. You will submit us the list of seventy songs that you propose to release.
2. This subscription scheme will only be restricted to West Bengal at the closing of subscription scheme i.e. on 7./8.89 as per your Ad. in the AAJKAL & ANANDA BAZAR of 1.8.89, you will confirm us the total quantity of orders received by you.
3. You will pay us, for our copyrighted works, royalty @ 5% per cassette (pro-rata on title basis) of your recommended retail price less taxes towards advance against copyright royalty.
4. We will be entitled to inspect your books of accounts and production facilities to verify the authenticity of the statements that you will submit to us about total production etc. at any time after prior intimation to you.
5. You will give the following courtesy on your cassettes inlay cards and all future Ads for this subscription scheme : -

Songs appeared by courtesy of -

The Gramophone Co. of India Ltd.

6. You will send us full text and design of the inlay card including photographs/pictorial representations proposed to be featured therein for our approval.

7. Since you have confirmed that you have paid some amount to Mr. Hemanta Mukherjee for acquisition of tapes, kindly confirm the amount that has been paid to him.

8. For your future projects like this kindly send us, sent herewith, as a token of your acceptance of these terms and return the same to us along with your cheque towards advance against Copyright Royalty.

Thanking you,

Yours faithfully,

THE GRAMOPHONE CO. OF INDIA LIMITED.

(BABUL RAHMAN)

MANAGER

SALES, R.C. & R. ADEN.

9. This is what the applicants say in the, 17th para of their application :-

17. That thereafter the said Sales Manager pointed out the humming noise in those tapes which was made from the tapes of live programmes held by Sri Hemanta Mukherjee and advised the petitioners for recording of the proposed cassettes from records of the opposite parties' company for better production. The petitioners agreed to the proposal and thereafter on 2.8.89 they entered into the agreement with the opposite parties' company on the terms of payment of royalty as otherwise in case of cassettes from live programmes there would not have been any question of payment of royalty.

10. I do not see the case of the applicants to be so fully borne out by the letter of 2nd August as to hold at this stage that the prosecution is either an abuse of the process of law or is without any reasonable likelihood of success. In the letter of 2.8.89 no records are mentioned; no humming noise is mentioned. The applicants' story doesn't ex facie tally.

11. In this view of the matter, the learned magistrate did not summarily throw out the complaint of the GCI which contained the following :-

10. That the complainant Company however, received information of the accused persons that aforesaid music cassettes "Sangit Lahari" based on the live performance of Hemanta Kumar are entirely false and the accused persons had copied from the original gramophone records of Hemanta Kumar, the Copyright of

which rests with the complainant company thereby infringing the copyright of the company.

The aforesaid impugned music cassettes and songs therein as contained in the said music cassettes were sent by the complainant company to different experts and authorities for testing with the original plates of the complainant company and it was found that these impugned cassettes made by the accused were recorded from complainant's gramophone records and those impugned cassettes were same identical and dishonest reproduction of the originals belonging to the complainant company.

12. The initial depositions of Salil Kumar Chatterjee and Babul Rahaman who deposed in January '90 on behalf of the GCI contain the following : -

Chatterjee : -

There was release for sale in the market of Sangeet Lahari contained in six cassettes. We heard the severity musical performances contained in six cassettes under the name and Style of Sangeet Lahori and we knew that the representation of the accd. that they were live performances of Hemanta Kumar Mukhopadhyay was not correct. It also come to our knowledge that most of the musical performances of Sangeet Lahori were copy from our records & cassettes, the Copyright of which belonged to us absolutely.

Rahaman : -

The accd. Sankar Biswas and Arun Sengupta, met me and Salil Kumar Chatterjee and represented to us that the songs Sangeet Lahori were the live performances of Hemanta Kr. Mukhopadhyay. After Sangeet Lahori was marketed, we heard the musical performances and found that they were not live performances but copy from our cassettes and records. We got the cassettes of Sangeet Lahori examined by different experts and learnt that those were all copies from our cassettes and records.

13. It would not be just to terminate the prosecution altogether at this stage. It may be that a slight infelicity of expression crept into the impugned order when the learned magistrate said this : --

Secondly in order to invoke power u/s 245(2) Criminal Procedure Code this court is required to observe that the alleged charge is groundless. But that is not possible before recording the evidence of the witness before consideration of charge. The court must apply mind to the evidence before it prior to coming to such a conclusion. In this particular case the court finding prima facie case against the accd. persons to proceed with issued summons. There is no material, other than the initial deposition on the basis of which summons were issued, to come to such a finding that the charge is groundless.

14. If the meaning of the above passage is understood to be a desire on the part of the magistrate to permit the trial to proceed and not to throw out the case only on the materials currently available, I do not think such understanding would really do any very great violence either to the language or to the content of the order of the learned magistrate. I would therefore dismiss the application, express a desire for expeditions proceedings before the learned magistrate and direct copy of this order to be sent there forthwith.

Ajoy Nath Ray, J.

I agree.