

## Entertainment Network India Ltd. Vs Super Cassettes Industries Ltd. and Others

**Court:** Delhi High Court

**Date of Decision:** May 11, 2011

**Acts Referred:** Copyright Act, 1957 " Section 31

**Hon'ble Judges:** Dipak Misra, C.J; Sanjiv Khanna, J

**Bench:** Division Bench

**Advocate:** A.M. Singhvi and Sandeep Sethi, Pratibha M. Singh, Archana Sachdeva and Ashwin Kumar, for the Appellant; Amit Sibal, K.K. Khetan and Sankalp Dalal for respondent No. 1, Maneesha Dhir, Preeti Dalal and Mithu Jain for Respondent No. 2, Sagar Chandra, for Respondent No. 3, Neil Hildreth and Shruti Sabarwal for Respondent No. 4, K. Datta and Diggaj Pathak for Respondent No. 5, Abhishek Malhotra and Harsh Vardhan Tripathi for Respondent Nos. 6 and 7, for the Respondent

**Final Decision:** Allowed

### Judgement

Dipak Misra, C.J.

CM Nos. 9371-72/2011

Exemption applications are allowed, subject to all just exceptions.

CM No. 9370/2011

1. This is an application for condonation of delay in preferring the appeal and refilling of the same. Heard Dr. A.M. Singhvi and Mr. Sandeep

Sethi, learned senior counsel along with Ms. Pratibha M. Singh, learned Counsel for the Appellant, Mr. Amit Sibal, learned Counsel for the

Respondent No. 1, Ms. Maneesha Dhir, learned Counsel for the Respondent No. 2, Mr. Sagar Chandra, learned Counsel for the Respondent

No. 3, Mr. Neil Hildreth, learned Counsel for the Respondent No. 4, Mr. K. Datta, learned Counsel for the Respondent No. 5 and Mr. Abhishek

Malhotra, learned Counsel for the Respondent Nos. 6 and 7.

In this application for condonation of delay numerous grounds have been urged for condoning the delay after narrowing the factual chronology and

what happened before the Copyright Board. It is submitted that the subsequent events have compelled the Appellant to file the present appeal so

that there is no confusion or doubt. Mr. Amit Sibal, learned Counsel for the Respondent No. 1 would seriously oppose the prayer for condonation

nation of delay on the foundation that the grounds urged in the application are not justified for condonation of delay and, therefore, the application

should be thrown over board. Regard being had to the assertions made in the application, the nature of the lis involved, keeping in view the order

passed by the learned single Judge and the proceeding pending before the Board, we are of the considered opinion that it is a fit case where delay

should be condoned and accordingly it is so ordered.

The application is disposed of accordingly.

LPA No. 448/2011

In this intra-Court appeal, the challenge is to the orders dated 15th September, 2010 and 19th January, 2011 passed by the learned single Judge

in CM No. 12373/2010 and CM No. 668/2011 in Writ Petition (Civil) No. 6255/2010 respectively. CM No. 12373/2010 is still pending before

the single Judge. To appreciate the controversy, we may embark upon the factual matrix in brief. The Copyright Board adjudicated a controversy

u/s 31 of the Copyright Act, 1957 between the present Appellant and M/s Phonographic Performance Limited, etc. The order was passed on

25th August, 2010. Be it noted, the said order is the subject matter of challenge in appeal before the High Court of Madras. As the Madras High

Court declined to pass any order of stay, the Phonographic Performance Limited and others preferred Special Leave to Appeal (Civil) No. 5727-

5735/2011 and the Apex Court by the order dated 5th April, 2011 did not interfere with the order of refusal of stay and directed the High Court

to dispose of the appeal within a specified period of time. We have been apprised at the Bar the appeal is still pending before the High Court of

Madras.

2. The Petitioner, namely, Super Cassettes Industries limited, the Respondent No. 1 herein, invoked the jurisdiction of this Court in Writ Petition

(Civil) No. 6255/2010 in substance and with reference to the order dated 25th August, 2010 on numerous grounds, including the ground that there

has been violation of the doctrine of audi alteram partem inasmuch as the writ Petitioner was not heard by the Copyright Board. Be it noted, the

writ petition was filed prior to the appeal was preferred before the Madras High Court. Separate proceeding u/s 31 of the Copyright Act are

pending between the Appellant and the Respondent No. 1. The learned single Judge in CM No. 12373/2010 in W.P. (C) No. 6255/2010, while

dealing with the application for stay, in paragraph 12 has passed the following directions:

12. This Court directs that till the next date of hearing, the impugned order dated 25th August, 2010 passed by the Copyright Board will not be

relied upon by any of the Respondents or any other party to insist on the issuance of compulsory licence vis-à-vis the copyright works of the

Petitioner and for the purpose of payment to the Petitioner based on the rates as determined in the impugned order. It is clarified that individual

complaints made to the Copyright Board against the Petitioner that individual complaints made to the Copyright Board against the Petitioner about

its unreasonable refusal to grant licence will be dealt with independently on merits by the Copyright Board.

3. After the said order was passed, the Appellant filed an application for clarification forming the subject matter of CM No. 668/2011, which was

refused.

4. After the said order was passed, the matter was taken up before the Copyright Board and the Board by the order dated 25th January, 2011

passed the following order:

Mr. Amit Sibal on behalf of Super Cassettes Industries filed an application to strike off/expunge portions of the affidavit of Mr. Prashant Panday,

PW1 of the complainant. Alongwith this application the applicant has also filed an Order dated 15th September, 2010 of Hon"ble High Court of

Delhi in WP(c) 6255/2010 wherein the Hon"ble High Court vide para 12 of the Order directs that till the next date of hearing, the impugned order

dated 25th August, 2010 passed by the Copyright Board will not be relied upon by any of the Respondents or any other party to insist on the

issuance of compulsory license vis-à-vis the copyrighted works of the Petitioner and for the purpose of payment to the Petitioner based on the

rates as determined in the impugned Order. It is clarified that individual complaints made to the Copyright Bard against the Petitioner about its

unreasonable refusal to grant license will be dealt with independently on merits by the Copyright Board. The matter was listed on 6th December,

2010.

The opportunity was given to the Counsel of ENIL to file the reply. She made a statement that in view of the fact that the two witnesses on behalf

of the Complainant are present before the Board and she does not want deferment of the cross-examination of these witnesses, subject to the

Complainant's right to challenge the Order of the Hon"ble Delhi Court, at present her client does not rely upon the Order dated 25th August,

2010 qua Respondent herein without prejudice to its rights and contentions. In view of this she does not wish to file the reply qua this relief with

respect to reliance on the Order dated 25th August, 2010. When the recording of the Examination-in-Chief of the witness Mr. Panday is done, she

will make suitable amendment to the affidavit and will not tender the extracted portions referred to in paragraph 8 of the Respondent's application.

In so far as portions of the affidavit of evidence of Mr. Prashant Panday that are said in the application to be beyond the pleadings, the

Respondents applicant states that his objections in that regard may be decided during the stage of final arguments, without prejudice to the

Respondent's rights and contentions in the application.

5. It is submitted by the learned Counsel appearing for the Appellant that they will abide by the directions of stay issued by the learned single Judge

in paragraph 12, which we have reproduced hereinabove, but the command in the said order is being interpreted to mean that the order dated 25th

August, 2010 passed by the Copyright Board cannot be relied upon before the Copyright Board. It is submitted by the learned Counsel for the

Appellant that they have no objection to the resist and doubt on the issuance of compulsory licence vis-à-vis the copyright works of the

Respondent No. 1 or for the purpose of payment to the Respondent No. 1 based on the rates as determined in the order dated 25th August,

2010, but when the lis is adjudicated before the Copyright Board, they can always tender or cite a prior order and state that under certain facts

and circumstances an order was passed. The value of the said decision may not be a binding precedent on the Copyright Board but the analysis in

the order can be referred to.

6. Mr. Sibal would submit that the earlier order cannot be treated as the precedent as the facts are not treated as precedent in law. Learned

Counsel to buttress the said contention has commended us to a decision of the Apex Court in Prakash Chandra Pathak Vs. State of Uttar

Pradesh, specially paragraph 8 whereby their Lordships have observed:

8. Learned Counsel for the Appellant cited before us a number of reported decisions of this Court bearing on the appreciation of circumstantial

evidence. We need not refer to those authorities. It is enough to say that decisions even of the highest court on questions which are essentially

questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own

particular facts. The general principles governing appreciation of circumstantial evidence are well established and beyond doubt or controversy.

The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That

question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It

is no use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another. Therefore, it will serve no

useful purpose to decide this case with reference to the decisions of this Court in previous cases. We have to determine whether on the facts and

circumstances disclosed in the evidence which has been accepted by the Courts below; the crime charged against the Appellant has been made

out. We have carefully weighed the facts and circumstances pro and con forcefully brought to our notice by the learned Counsel for the Appellant

and, in our opinion, no grounds have been made out for differing from the conclusions arrived at by the courts below.

In our opinion, the facts and circumstances proved in this case, establish the guilt of the Appellant beyond all reasonable doubt. The appeal is

accordingly dismissed.

7. It is enough to say that the decisions even of the highest Court on questions which are essentially questions of fact, cannot be cited as precedents

for each case must rest in the ultimate analysis upon their own particular facts. It needs special emphasis to say every fact will lead to its own

decision. A decision rendered by a court of law or a tribunal is not to be read as a statute. A singular fact here or there, thus can make a gulf of

difference. (see Goan Real Estate and Construction Ltd. and Another Vs. Union of India (UOI) through Secretary, Ministry of Environment and

Others,

8. We may be failing in our duty if we do not note the submission of Mr. Sibal that the data, material, evidence or anything that was ancillary and

was referred to in the decision dated 25th August, 2010, namely, ENIL v. PPL, cannot by any stretch of imagination be applied to the pending

appeal as there is a difference in facts, data, evidence, material and many other aspects. That apart, it is submitted that the rate of 2%, which was

applied by the Copyright Board, cannot be applied to the Respondent No. 1 as the Copyright Board is required to make a fresh adjudication as

per law independently on merits.

9. We need not enter into any debate or decide any cavil on merits. What we intend to clarify is that assuming a factual matrix is similar and other

factors have some kind of similitude (on which we make no comment), there cannot be an interdiction with regard to a previous order passed by

the tribunal. What will be the value of that order has to be judged by the tribunal. We hasten to clarify that it should not be treated as a precedent,

as if the hands of the tribunal are closed to render a different decision. We may also clarify if there is dissimilarity on facts, the verdict has to be

dissimilar because factual matrix invites a decision in law. Whether the facts are dissimilar or not are left to the adjudicatory decision of the tribunal.

It is further added that citation of an order passed by an authority before a legal forum is absolutely different than a precedent. We say no more on

this score as we expect the tribunal will be assisted by the counsel, who shall argue on the legal position on the law relating to precedent, etc.

10. The appeal is allowed to the extent indicated hereinabove.

11. Before parting with the case, we must note something which has come to our notice. We have been apprised that the Copyright Board has not

yet been constituted. In view of the aforesaid, we command the competent authority of the Union of India to constitute the Copyright Board within

a period of eight weeks from the date of receipt of the copy of the order passed today. Mr. A.S. Chandhok, learned Additional Solicitor General

is requested to intimate the said authority.

12. Copy of this order be given dasti to the learned Counsel for the parties under signature of the Court Master.