

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.12.2009

CORAM

THE HON'BLE MR. JUSTICE G.RAJASURIA

O.A.Nos.786 and 787 of 2009

and

Application No.3691 of 2009

in

C.S.No.701 of 2009

ORDER

Heard both sides.

2. A 'resume' of facts, absolutely necessary for the disposal of these applications would run thus:

a) The applicant/plaintiff filed the suit seeking the following reliefs:

- a permanent injunction restraining the defendants by themselves, their partners/proprietor, heirs, representatives, successors in business, assigns, distributors, agents or any one claiming through them from in any manner infringing the plaintiff's copyright in the literary work 'THANGAM/BANGARAM/GANGA' by adaptation/translation/substantial reproduction, making any cinematograph film, sound recording, producing TV serial, of such literary work 'THANGAM/BANGARAM/GANGA' or any other teleserial/cinematograph film/sound recording amounting to infringement of copyright of the plaintiff's literary work 'THANGAM/BANGARAM/GANGA' or in any other manner whatsoever. - a permanent injunction restraining the defendants by themselves, their partners/proprietor, heirs, representatives, successors in business, assigns, distributors, agents or any one claiming through them from in any manner broadcasting, telecasting, distributing, marketing or dealing directly or indirectly with the teleserial titled 'THANGAM' in Tamil language or in any other language with any other title using the plaintiff's story, literary work 'THANGAM/BANGARAM/ GANGA' or by making any adaptation or falsely claiming authorship thereof or in any other manner whatsoever. - the defendants be directed to pay a sum of Rs.10,00,000/- per episode from 30th June 2009 towards royalty to the plaintiffs for exploiting their copyright in the story, literary work 'THANGAM/BANGARAM/GANGA' in Tamil language in the defendants teleserial 'THANGAM' or any other teleserial by means of adaptation/translation/substantial reproduction/making of cinematograph film, sound recording thereof. - the defendants be ordered to pay to the plaintiffs a sum of Rs.10,05,000/- as liquidated damages for committing infringement of copyright in the plaintiff's literary work.

- a preliminary decree be passed in favour of the plaintiffs directing the defendant to render account of profits made on account of telecast of the Tamil language daily soap TV serial 'THANGAM' and a final decree be passed in favour of the plaintiff for the amount of profits thus found to have been made by the defendants after the latter have rendered accounts. - for costs of the suit.

b) The same applicant/ plaintiff also filed these three applications with the following prayers:

i) O.A.No.786 of 2009 - to grant an order of ad-interim, interim, temporary injunction restraining the respondents by themselves, their partners/proprietor, heirs, representatives, successors in business, assigns, distributors, agents or any one claiming through them from in any manner broadcasting, telecasting, distributing, marketing or dealing directly or indirectly with the teleserial titled THANGAM in Tamil language or in any other language with any other title using the applicant's story, literary work, THANGAM/BANGARAM/ GANGA or by making any adaptation or falsely claiming authorship thereof or in any other manner whatsoever, pending disposal of the suit. ii) O.A.No.787 of 2009 - to grant an order of ad-interim, interim, temporary injunction restraining the respondents by themselves, their partners/proprietor, heirs, representatives, successors in business, assigns, distributors, agents or any one claiming through them from in any manner infringing the applicant's copyright in the literary work 'THANGAM/BANGARAM/GANGA' by adaptation/translation/substantial reproduction, making any cinematograph film, sound recording, producing TV serial, of such literary work 'THANGAM/BANGARAM/ GANGA' or any other teleserial/cinematograph film/sound recording amounting to infringement of the applicant's copyright in the story, literary work 'THANGAM/BANGARAM/GANGA' or in any other manner whatsoever pending disposal of the suit. iii) Application No.3691 of 2009- to grant an order directing the respondents to pay a sum of Rs.10,00,000/- per episode from 30th June 2009 towards royalty to the applicant for exploiting her copyright in the story, literary work 'THANGAM/BANGARAM/GANGA' in Tamil language in the respondents teleserial 'THANGAM' or any other teleserial by means of adaptation/translation/ substantial reproduction/making of cinematograph film, sound recording thereof, pending disposal of the suit.

3. For convenience sake, the parties are referred to here under according to their litigative status and ranking in the suit.

4. Counters have been filed refuting and remonstrating, denying and gainsaying the averments/allegations in the affidavits accompanying these applications as well as in the plaint.

5. The points for consideration are as to:-

(1) Whether the defendants 1 to 4 have infringed the plaintiff's copyright in the literary work 'THANGAM/BANGARAM/GANGA' by adopting it in making and telecasting the T.V.Serial "Thangam".

(2) Whether the defendants 1 to 4 have infringed the plaintiff's copyright in the literary work 'THANGAM/BANGARAM/ GANGA' ?

(3) Whether the defendants 1 to 4 are liable to pay any royalty to the plaintiff?

6. The tour d' horizon of the learned counsel for the plaintiff would succinctly and precisely, tersely and briefly be set out thus:

a) D5 suo motu by exploiting her own experience and intelligence brought out a script comprised of 30 paragraphs under the caption "Thangam", wherein she also set out the names of various characters and also various incidents. b) The purpose of that script is to make a mega serial out of it after providing it with sufficient flesh and blood and she also got it registered in the T.V.Producers Council, Hyderabad as early as on 19.01.2005. c) In the process of D5 getting the script blossomed into a mega serial, she had discussion with D2 and the former also parted with a copy of the script with the later. But subsequently, D5 felt that D2 was not helping her to convert that script into a mega serial. d) Whereupon, she assigned her copy right over that script in favour of the plaintiff as per the assignment deed dated 26.06.2008 and the plaintiff also has been taking sincere steps to convert it into a mega serial. e) In the meanwhile, the plaintiff came to understand that D1 to D4 with a conspiratorial attitude and spirit was about to bring a mega serial by copying

illegally the said script of D5.

f) The said T.V.Serial, Thangam, as of now, crossed nearly 100 and odd episodes and unless injunction is granted, the right of the plaintiff would be jeopardized.

g) Relating to each episode, the defendants 1 to 4 are earning not less than Rs.10 lakhs and that they should also be ordered to deposit the same in court in connection with the damages claimed by the plaintiff.

7. Whereas by way of torpedoing and pulverising the argument as put forth on the side of the plaintiff, the learned senior counsel appearing for D1 to D4, has set forth and put forth his arguments, the nitty gritty, the gist and kernel of them would run thus: a) The alleged T.V.Producers Council, Hyderabad became a defunct organisation long ago and in such a case, the question of D5 having got such a script registered with them would not arise at all.

b) D4's brainchild is the original script, which constituted the basis for the mega serial by name Thangam and nearly 110 episodes have been telecasted.

c) The plaintiff who claims to be the assignee is having no right or locus standi to file the suit as, even as per the plaint averments, she got the alleged copyright assigned in her favour on 26.06.2008 but for one year she was dormant and she never acted upon it and no mega serial was engineered by her. On the other hand, the defendants 1 to 4 started telecasting the mega serial with effect from 29.06.2009 onwards. d) It is therefore glaringly clear that as per Section 19 (4) of the Copyright Act, the plaintiff has got no right to maintain the suit.

e) There is extinguishment of the plaintiff's alleged copy right statutorily and in such a case, she cannot enforce that right even as against third parties.

f) Without admitting, even for argument sake, if it is taken that a bare synopsis emanated out of the intelligence of an individual and subsequently, the mega serial is telecasted having that synopsis as the source, it would not constitute piracy. If the entire mega serial telecast is over and on comparison of that mega serial with the script in dispute, if an impression would arise in the mind of the viewer that much of a muchness could be seen between that script and the play, the question of piracy might arise and at this stage, when the T.V.serial itself is not yet over, the question of piracy does not arise. g) The mega serial "Thangam" is only half way through. The alleged script is an incomplete one as nothing has been found suggested as to what should be the end of the story.

h) There is no prima facie and ex facie evidence in support of plaintiff's plea. The script Thangam, which D5 claims to be her brain child is actually the brain child of D4 and it is D5, who copied it and creating trouble with the help of the plaintiff. i) In a suit for damages, the question of furnishing security does not arise.

j) In a suit of this nature, no injunction also could be granted.

8. I would like to observe here that there are contentious issues involved in this case. On the one hand D4 claims that the said script Thangam found enclosed in page Nos.1 to 13 of the typed set of papers belongs to him; whereas D5 would claim that it is the artefact of her own intelligence and experience. All these matters should be gone into detail at the time of trial and in these interim applications those issues cannot be decided.

9. Placing reliance on the typed set of papers, the learned counsel for the plaintiff, would argue that the communication, which D5 received from TV Producers Council, Hyderabad is much earlier to the commencement of the mega

serial and in such a case, that could be taken as prima facie evidence in support of the plaintiff's case.

10. Whereas the learned senior counsel for the defendants 1 to 4, placing reliance on a photocopy of a letter dated 20.08.2009 received from the erstwhile Secretary of the said T.V.Producers Council, would submit that the said organisation became dormant long before and that they were not in the habit of registering the very scripts with them.

11. As such, virtually it tantamounts to oath against and oath and only during trial by summoning appropriate witnesses and the record, the details could be gone into and a verdict could be given.

12. The learned counsel for the plaintiff would also place reliance on the communication sent by the South Indian Film Writers' Association and develop his argument that the said script was registered with them by D5.

13. Axiomatically and obviously, pellucidly and palpably, it is clear that such registration with these organisations are not compulsory and simply because a particular writer has not got his work registered with such organisation and the other one has not done so, the latter would not lose his real copy right. As such, even prima facie case could not be made out from the perusal of those documents purported to have been issued by those organisations in favour of D5 and those facts also could be gone into only at the time of trial.

14. The invoking of Section 19(4) of the Copy Right Act by the learned senior counsel for D1 to D4, is objected to by the learned counsel for the plaintiff on the ground that Section 19(4) could be pressed into service only by the assignor and not by third parties. This law point at this stage hypothetically need not be decided by this court as evidence to prove the relevant facts concerning that point are required.

15. Broadly, the contentions are two fold, that is D4 would claim that the said script is his own script; whereas, the plaintiff would contend that it is D5's own creation and the next contention as per D1 to D4 is that the said script of D4 did not get converted into the said mega serial verbatim. Absolutely there is no convincing evidence on either side regarding these two main contentions and only during trial, after entertaining oral evidence, the details would be gone into.

16. In this factual matrix, I am of the view that the balance of convenience should be considered.

17. The learned counsel for the plaintiff would cite the decision of the Hon'ble Apex Court reported in (1978) 4 SCC 118 (R.G.Anand vs. M/s.Delux Films and others) and certain excerpts from it would run thus:

"46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to

violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved." In fact both sides placed reliance on the aforesaid excerpts and would try to find support from it in favour of each of them.

18. A plain reading and poring over of the said precedent would unambiguously and unequivocally, pellucidly and palpably make the point clear that interim injunction as a matter of course, in matters of this nature should not be granted. If injunction in this case is granted and the mega serial is stopped and that too when it is half way through, neither of them would be benefited; but on the other hand, if the serial comes to its logical end as correctly pointed out by the learned senior counsel for the defendants 1 to 4, this court also at the time of trial would be in a position to compare the telecasted mega serial with the script and find out whether both are having similarities and whether it could be stated that the mega serial emanated from the said script only.

19. There is also one other point which should be taken into consideration in this case.

20. Mega serial comprises of various episodes and dialogues whereas in the script Thangam, the skeletal structure alone could be seen for which the learned counsel for the plaintiff would submit that even a "single story line" would be sufficient to convert it into a mega serial. Be that as it may, the mega serial naturally comprises of several episodes involving various scenes and dialogues and that requires intellectual power and experience on the part of the person who makes the mega serial and telecast it. Wherefore, one cannot be heard to contend that the basic synopsis or skeletal script would by itself be treated as paramount to the risk of pooh-poohing, belittling the effort to convert it into a mega serial.

21. Whereas the learned senior counsel for D1 to D4 would submit that in the

mega serial 'Thangam' telecasted, it is not as though the synopsis concerned got reflected in its entirety and only during trial he would be able to establish the said fact.

22. It is a trite proposition of law that in matters of this nature, by injuncting the person who is proceeding with the telecast neither of them would get benefited and I am of the considered view that granting injunction in no way would serve the cause of the justice. The plaintiff also already claimed damages, which claim she has to prove during trial.

23. However, the learned counsel for the plaintiff would submit that in the plaint at para No.16, the plaintiff had foreseen that the mega serial "Thangam" would be dubbed and telecasted in other languages also and if this is allowed to be carried out, then further damage would be caused to the right of the plaintiff.

24. At this juncture, I would like to point out that in view of the tussle going on between the plaintiff on the one hand and the defendants 1 to 4 on the other hand, certain protections have to be given. As of now, I make it clear that I have not finally decided any of their contentious issues.

25. In such a case while this court is of the view in not granting injunction, it has to protect the right of the plaintiff by giving a direction to the defendants 1 to 4 that in the event of they intending to telecast it in some other language or languages either by dubbing it or by shooting it afresh, they should well in advance inform this court so that the plaintiff would have the right to approach this court seeking appropriate reliefs.

26. It is a trite proposition of law that in a bare suit for damages, normally, the defendants are not called upon to furnish security. However, the learned counsel for the plaintiff would submit that in matters of this nature relating to intellectual property, calling upon the defendants to furnish security, is not something unknown. Whereas the learned senior counsel for D1 to D4 would submit that even in money suits as a matter of course, the defendants cannot be called upon to furnish security.

27. I recollect and call up the decision of the Hon'ble Apex Court reported 2008-3-L.W.744 RAMAN TECH AND PROCESS ENGG.CO. AND ANOTHER VS. SOLANKI TRADERS, it is just and necessary to consider the said decision. Certain excerpts from it would run thus: "5.The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgement and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgement. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 C.P.C. Courts should also keep in view the principles relating to grant of attachment before judgement (see Prem Raj Mundra v. Md.Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.) wherein the Hon'ble Apex Court pointed out that an unsecured debt cannot be made into a secured debt

by obtaining interim orders from the court. Inasmuch as this is a suit for damages, the onus of proof is on the plaintiff to prove that the plaintiff is entitled to get damages and in such a case, I am of the view that it would not be just and proper to direct the defendants 1 to 4 to deposit any amount in court so as to safe guard the recovery of damages, if any that would be awarded in favour of the plaintiff. However, in matters of this nature, the defendants 1 to 4 could be directed to maintain accounts of the said T.V.serial. As such, the following order is passed: The defendants 1 to 4 are directed to inform this court well in advance, in the event of they intending to telecast the mega serial "Thangam" in some other language(s) either by dubbing it or by shooting it afresh; so that the plaintiff would have the right to apply to this court seeking appropriate reliefs. The defendants 1 to 4 shall maintain accounts of the said T.V.Serial Thangam and furnish it to court whenever it is ordered to be produced before court.

28. At this juncture, the learned senior counsel for the defendants 1 and 4 cited appropriately and appositely, the decision of the Hon'ble Apex Court reported in 2009(5) CTC 76 (Bajaj Auto Limited vs. TVS Motor Company Limited) for disposing of the suit at an early date. An excerpt from it would run thus: "9. As has been observed by us in the aforesaid case, experience has shown that in our country, suits relating to the matters of patents, trademarks and copyrights are pending for years and years and litigation is mainly fought between the parties about the temporary injunction. This is a very unsatisfactory state of affairs, and hence we had passed the above quoted order in the above-mentioned case to serve the ends of justice. We direct that the directions in the aforesaid order be carried out by all courts and tribunals in this country punctually and faithfully.

10. In the present case, although arguments were advanced at some length by the learned counsel for both the parties, we are of the opinion that instead of deciding the case at the interlocutory stage, the suit itself should be disposed of finally at a very early date.

11. Hence, without going into the merits of the controversy, we direct the respondent-defendant to file written statement in the suit, if not already filed, on or before the last date for closing of the Madras High Court for Dusshera Holidays. We would request the learned Single Judge who is trying the suit to commence the hearing of the suit on the re-opening of the Madras High Court after Dusshera holidays and then carry it on a day to day basis. No adjournment whatsoever ordinarily will be granted and the suit shall be finally disposed of on or before 30th November 2009."

29. Accordingly, I would like to direct both the parties to co-operate with the court in the trial to dispose of the suit within a period of six months.

30. Accordingly, all these applications are disposed of.

vj2