

2009 C L D 1133

[Lahore]

Before Syed Hamid Ali Shah and Sh. Azmat Saeed, JJ

Mrs. RIFFAT SARAJ through Special Attorney---Appellant

Versus

EYE TELEVISION NETWORK (PVT.) LTD. through Director/Chairperson and another---Respondents

F.A.O. No.69 of 2009, decided on 18th May, 2009.

(a) Copyright Ordinance (XXXIV of 1962)---

---Ss. 62 & 13---Copyright---Moral rights, doctrine of---Applicability--Author of the intellectual work when assigns the rights in the intellectual property, does not assign the 'moral rights', it is the moral rights of the author to have her/his name telecast with regard to the work which is his/her creation.

Whale on Copyright by Jeremy Philips Robyn Durie and Ian Karet, Fifth Edition (62); Copinger and Skone James on Copyright, Fifteenth Edition by Kevin Garnett, M.A. (657) and The Modern Law of Copyright and Designs, by Laddie Prescott and Vitoria, Third Edition (606) ref.

(b) Copyright Ordinance (XXXIV of 1962)---

---Ss.62 & 13---Civil Procedure Code (V of 1908), O.XXXIX, Rr.1 & 2---Copyright--Moral rights, doctrine of--Interim injunction, grant of---In the present case, agreement between the author of a novel and assignee of copyright thereof, had not imposed any restriction on the author to forego her right to claim authorship of her work---Assignee of copyright while telecasting the drama based on the said novel had failed to mention the name of the author of the novel---Author, in circumstances, had made out a prima facie, case on the premise of moral rights as balance of convenience lay in favour of the author and she would suffer irreparable loss if all the episodes were telecast without display of her name as author of the drama---High Court, accepting the appeal, set aside the impugned order and passed injunctive order in favour of the author to the effect that the assignee will telecast the name of the author as author of the script with regard to the episodes which will be telecast---Principles.

Smt. Mannu Bhandari v. Kala Vikas Pictures (Pvt.) Ltd. and another AIR 1987 Delhi 13; Shakeel Adilzadah v. Pakistan Television Corporation Ltd. and 2 others 1989 CLC 2447; V.T. Thomas and others v. Malayala Manorama Co. Ltd. AIR 1989 Ker. 49 and Munawwar Jamil v. Mst. Noshi (Nishat) Gillani and 3 others PLD 2000 Lah. 186 ref.

(c) Copyright Ordinance (XXXIV of 1962)---

---S.62--Author's special rights---Moral rights, doctrine of---Concept surveyed.

Whale on Copyright by Jeremy Philips Robyn Dune and Ian Karet, Fifth Edition (62); Copinger and Skone James on Copyright, Fifteenth Edition by Kevin Garnett, M.A. (657) and The Modern Law of Copyright and Designs, by Laddie Prescott and Vitoria, Third Edition (606) quoted.

Zulfiqar Ali Khan for Appellant.

Jawad Hassan for Respondents.

Date of hearing: 3rd April, 2009.

JUDGMENT

SYED HAMID ALI SHAH, J.---The suit under Copyright Ordinance, 1962 was instituted by the appellant wherein the appellant prayed for a decree for mandatory injunction seeking direction to the defendants for giving the plaintiffs name as writer of the Drama Serial "Tair-e-Lahoti" which is based on her novel. The respondents contested the suit on the ground that the appellant sold script of Drama Serial "Tair-e-Lahoti" through an agreement to Messrs Moomal Productions Private Limited. Clause 8 of the agreement provides that script will be sole and unnumbered property of the party of the second part Messrs Moomal Productions Private Limited. The consideration of Rs.5000 per episode was agreed to be full and final settlement in lieu of the script. The author after having sold the script and rights therein has no locus standi to file a suit. The suit was also contested on the ground that copyright within the provisions of Copyright Ordinance, 1962 relates to the right of printing, re-producing or otherwise embodies copies of an intellectual production. Publishing and vending the same, telecasting the serial does not fall within the definition of Copyrights while the act complained against does not fall within the infringement of Copyright as contemplated in Ordinance, 1962. Learned trial Court heard the application of the appellant for temporary injunction which the respondents contested and vide the impugned order dated 26-1-2009 dismissed the application for the grant of temporary injunction, hence this appeal.

2. Learned counsel for the appellant contended that learned trial Court while refusing the grant of temporary injunction has failed to appreciate that three pre-requisites for the grant of temporary injunction should co-exist in favour of the appellant. Learned trial Court has misinterpreted paras 8 and 9 of the agreement of assignment of the copyright. The appellant has no objection as to the use of an intellectual work of the appellant by the respondents. The only grievance of the appellant is that her name is required to be given at the title of the Drama Serial when it is telecast. Learned counsel emphasized that most of the episodes have already been telecast and if temporary injunction is not granted the appellant will become remediless. Learned counsel for the

appellant has placed reliance on the case of Smt. Mannu Bhandari v. Kala Vikas Pictures (Pvt.) Ltd. and another AIR 1987 Delhi 13.

3. Learned counsel for the respondents, on the other hand has reiterated the arguments which he addressed before learned trial Court. He has submitted that copyright infringement within the contemplation of section 56 of the Ordinance is anything done which is the exclusive right of the owner of the copyright without license, consent or permission of the owner of copyright. The appellant has sold copyrights to respondent No.2 including the rights for screening and exhibition through T.V. the intellectual work of the appellant. He after having sold his rights of the intellectual work has no right to claim in the script. The first owner of the copyright as envisaged in section 13 is the person for whom valuable consideration cinematographic work is made. The appellant has received a valuable consideration. To support his contentions, learned counsel placed reliance on the judgments of Shakeel Adilzadah v. Pakistan Television Corporation Ltd. and 2 others 1989 CLC 2447, V.T. Thomas and others v. Malayala Manorama Co. Ltd. AIR 1989 Kerala 49 and Munawwar Jamil v. Mst. Noshi (Nishat) Gillani and 3 others PLD 2000 Lah. 186.

4. Heard learned counsel for the parties and also Mr. Hassan Irfan Advocate (on Court call to assist on the issue of moral rights). Record perused.

5. There is no dispute inter se the parties that the appellant is the author of the script of Drama Serial Tair-e-Lahoti. The parties also not in dispute that all rights regarding Drama Serial Tair-e-Lahoti have been conferred and assigned to defendant No.2 through written agreement. The only dispute inter se the parties in the instant matter is that whether or not the appellant is vested with the right to get her name telecast as a writer of the Drama and non-mentioning of her name as a script writer has infringed the copyrights of the appellant. Learned trial Court while deciding the application has observed that by signing the agreement with respondent No.2 all rights pertaining to the script regarding screening, exhibition and telecasting the script stood assigned to respondent No.2, and after signing the agreement, the appellant is left with no claim in this regard whatsoever. There is no cavil with the proposition that vide agreement arrived at between the appellant and respondent No.2 the rights of telecasting and exhibition etc. have since been assigned and is the sole domain of respondent No.2 to use the script where he likes. The agreement, however, does not impose any restriction on the appellant to forego her right to claim authorship of her work. The author has the right to claim his/her authorship with regard to his/her intellectual A work which through an agreement has been assigned to another against a consideration. The contract of assignment has to be read according to the provisions of section 57. Section 57 is a special provision for the production of the special right of the authors. The object as held in the case of Smt. Mannu Bhandari (supra) is to put the intellectual property on a higher footing than the normal objects of copyright. The language of section 57 is of widest amplitude. Visually and audio manifestations are directly covered. The prayer of the appellant in the suit is that keeping the moral rights/copyrights as laid in the Copyrights Ordinance, 1962 a decree for mandatory injunction in favour of the plaintiff and against the defendants be passed. The Court while refusing the grant of injunction has ignored the moral rights of the appellant. It is mentioned in Whale on 'Copyright Fifth Edition that authors cannot assign their moral

rights which would be inconsistent with their general nature. The moral rights and assignment thereof has been held by various authors and reference to those books will be advantageous for the instant controversy:--

(i) Whale on Copyright by Jeremy Philips Robyn Durie and Ian Karet, Fifth Edition (62):--

While authors cannot assign their moral rights, which would be inconsistent with their general nature, section 87 of the Act provides that they may waive them or give consent to acts which would otherwise amount to an Infringement of such rights. Moral rights may be waived of by an instrument in writing signed by the person giving up the right. Waivers can relate to specific works, or be general. They may also relate to future works, be conditional or unconditional or revocable. If a waiver is made in favour of the owner or prospective owner of copyright in the relevant work, it would be presumed to extend to any licensees or assignees in the absence of contrary intention. The operation of the general law of contract or estoppel is expressly reserved, giving very limited protection to the moral right holder. He must either assert his rights regularly, or as required by the Act, or effectively waive such rights. Moral rights are transmissible on death either by a Will or to the individual to whom copyright in a work passes. In the absence of either a Will or some other form of disposition to a literary executor, the author's personal representative is entitled to exercise the rights.

(ii) Copinger and Skone James on Copyright, Fifteenth Edition by Kevin Garnett, M.A. (657):--

Moral rights are not assignable. They are personal, not proprietary rights. Since, however, they subsist beyond the lifetime of the author or director, provision has to be made for the exercise of these rights in the post-mortem period. Article 6 bits leaves it to the legislation of each country to provide by whom the post-mortem paternity and integrity rights should be exercised. The 1988 Act provides that on the death of a person who is entitled to be identified as author or director of a work, or to object to derogatory treatment of a work or to the right of privacy in respect of a photograph or film, the right passes to such persons as he may by testamentary disposition specifically direct. Not only may an author or director appoint more than one person under this provision, but it seems he may also appoint different persons in respect of the three different rights. If there is no specific testamentary disposition of the right in this way by the author or director, but the copyright in the work in question forms part of that person's estate, then the right passes to the person to whom the copyright passes, whether under his Will or on intestacy. If and to the extent that the right does not pass in either of these ways, it is exercisable by that person's personal representatives. Presumably in any of these cases, the right can be similarly transmitted after the death of the person in whom the right becomes vested. Although special provision is made as to the exercise of these rights where there is more than one person entitled, it is not clear whether on the death of one such person the entitlement passed to the survivor or survivors or whether it passes to the persons specified in a section 95(1). Since this section is the

only mechanism provided for the transmission of the rights, it is suggested that the latter is the correct answer in the case of the death of a person to whom the right has passed by virtue of either testamentary disposition or by following the copyright. Where the right has been transmitted to personal representatives under subsection (c), it is suggested that the position is different and that the right becomes exercisable by the survivor or survivors of two or more personal representatives, and then, where the chain of representation continues, by the personal representative of the survivor. Where the chain is broken, the right will be exercisable by whoever obtains a new grant to the original estate.

Unlike the various forms of property which, after the owner's death, vest in personal representatives and thereafter in beneficiaries or transferees, these rights cannot be transferred or divested, even, for example, by personal representatives after administration of the estate is complete. Again, where the right passes to the person entitled to the copyright, the right does not become attached to the copyright and pass with it on a subsequent assignment. It remains vested in that person until a subsequent transmission under section 95(1). It is unclear whether production of a grant is necessary to prove a person's title to these rights in an action, but it is suggested that it is. Where the right passes to the person specifically appointed by testamentary disposition, the right apparently vests in such appointee immediately on death and not for example, in his executors where he dies testate or in the Public Trustee where he dies intestate. Where the right passes with the copyright, the position is more complicated. On the death of the copyright owner, the copyright will vest first in his executors, or in the Public Trustee and then in his administrators, depending on whether he died testate or in estate. The copyright will then be subject to the usual trusts in the administration of the owner's estate and liable to be sold, along with his other assets, to pay his debts and testamentary expenses. Only if it is not sold in the course of administration will the copyright pass to the person beneficially entitled to it, whether under the will or under the intestacy rules, by assent or assignment, as the case may be. Presumably the intention is that the right passes to whoever, incidents of administration apart, is or would have been beneficially entitled to the copyright.

It was further discussed at page 661 as under:

The Act distinguishes between two types of act which affect the exercise of moral rights, namely consent and waiver. The apparent intention was that a waiver would be appropriate in cases where a release from any claim was required on a long-term or formal basis, while a simple consent would be appropriate in one-off cases when the right might otherwise be infringed'. Waiver Any of the rights may also be waived by an instrument in writing signed by the person giving up the right. A waiver by one joint author does not affect the rights of the other joint authors. A waiver may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works. A waiver may also be conditional or unconditional and may be expressed to be subject to revocation. If a waiver is made in favour of the owner or prospective owner of the copyright in the work or works to

which it relates, the waiver is presumed to extend to his licensees and successors in title, unless a contrary intention is expressed. The provisions as to formal waiver by instrument in writing do not exclude the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to the right to be identified, the right to object to derogatory treatment and the privacy right.

(iii) The Modern Law of Copyright and Designs, by Laddie Prescott and Vitoria, Third Edition (606):--

The moral rights are not assignable inter vivos. Thus neither the author nor those to whom the rights have passed on the author's death can assign the rights to third parties. The paternity and integrity rights and the right to privacy of certain photographs and films are transmissible by a specific direction in a Will and, in the absence of such a direction, the rights pass to the person to whom the copyright passes and in default of that is exercisable by the personal representatives. Consents or waivers previously given by the author or director are binding on his successors in title. Where, on death the copyright becomes partially owned by two or more persons either in respect of the rights owned or the period of the copyright, any of the above moral rights which pass with the copyright are correspondingly divided. Where, under the provisions of the will, a moral right becomes exercisable by more than one person the right of paternity may be asserted by any of them and the rights of integrity and privacy are exercisable by each of them. Waiver by one owner of the right does not affect the rights of the others. The false attribution right is treated differently and is not as such transmissible on death. However, any infringement of the right is actionable by the personal representatives. It should be remembered here that the right is not dependent on the existence of copyright but lasts for 20 years after death. Any damages recoverable by personal representatives for infringement of any of the moral rights, however, devolve as part of the estate as if the right of action had subsisted and been vested in the deceased immediately before his death. The fact that the moral rights are not assignable may make it more difficult for authors' and artists' societies to act effectively to protect their members' moral rights.

6. From the survey of above work, it is evident that an author of the intellectual work when assigns the rights in the intellectual property, does not assign the moral rights. It is the moral rights of the author/appellant to have her name telecast with regard to the work, which is her creation.

7. The appellant has made out a prima facie case on the premise of moral rights. The most of the episodes have been telecast and if name of the appellant has not displayed, she will be deprived of her right. The respondents, on the other hand, will not suffer if the name of the author is telecast. The balance of convenience, thus, lies in favour of the appellant and the plaintiff will suffer irreparable loss if all the episodes are telecast without display of her name as author of the Drama. Learned appellate Court while passing the impugned order has ignored this aspect of the controversy, therefore, impugned order is not legally sustainable.

8. For the foregoing, by accepting this appeal order impugned is set aside and the injunctive order is passed in favour of the appellant to the effect that the respondents will telecast the name of the appellant as author of the script with regard to the episodes which will be telecast. The parties will bear their own costs.

M.B.A./R-24/L Appeal allowed.

