



3rd May, 2023

Phiroze Jeejeebhoy Tower,
Dalal Street, Fort,
Mumbai - 400 001.
533151

Exchange Plaza, C-1, Block G,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.
DBCORP

INE950I01011

Dear Sir(s)/ Madam,

We wish to inform you that the Hon'ble Madras High Court passed a common Order dated April 27, 2023, in the matter of Civil Miscellaneous Appeals filed under Section 72(2) of the Copyright Act, 1957 (hereinafter referred to as 'Order'* attached herewith) by Phonographic Performance Limited ('PPL') & Ors wherein Synergy Media Entertainment Limited ('SMEL') has been one of the FM Radio Broadcasters and one of the parties to this Order.

The aforesaid Hon'ble Madras High Court Order is in respect of the appeal filed by PPL & Ors in year 2010, challenging the 2% Net Advertisement Revenue ('NAR') rate fixed by the then Copyright Board ('CRB') for a period of ten years ending September 2020 ('CRB Order'). As per the said Order, the appeal filed by PPL & Ors has been partly allowed and CRB Order is retained and further modified by fixing a minimum floor rate of Rs. 660 per needle hour (effectively 2% of NAR or Rs. 660 per needle hour, whichever is higher) for the period from 2010-2020.

SMEL (as mentioned aforesaid) was one of the subsidiaries of D. B. Corp Limited. In the year 2010, the Radio Business of SMEL demerged into D. B. Corp Limited ('the Company'). At present, one of the businesses of the Company is FM Radio Broadcasting.

In respect of the aforesaid Hon'ble Madras High Court Order, the Company is in the process of seeking legal advice and its impact and implications on the Company. Meanwhile, out of abundant caution, this intimation is being submitted to the Stock Exchanges.

Registered Office :

Plot No. 280, Sarkhej-Gandhinagar Highway,
Near YMCA Club, Makarba,
Ahmedabad - 380 051, Gujarat

Corporate Office :

501, 5th Floor, Naman Corporate Link,
Opp. Dena Bank, C-31, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051, Maharashtra

D. B. Corp Limited

CIN: L22210GJ1995PLC047208
Website: www.dbcorpltd.com
Email: dbc@dbcorp.com
Tel.: +91 22 7157 7000 Fax: +91 22 7157 7093



**The Order as sourced from the website of Hon'ble Madras High Court is attached herewith and should not be construed as a certified copy.*

Thanking you.

Yours truly,

Encl: a/a

Registered Office :

Plot No. 280, Sarkhej-Gandhinagar Highway,
Near YMCA Club, Makarba,
Ahmedabad - 380 051, Gujarat

Corporate Office :

501, 5th Floor, Naman Corporate Link,
Opp. Dena Bank, C-31, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051, Maharashtra

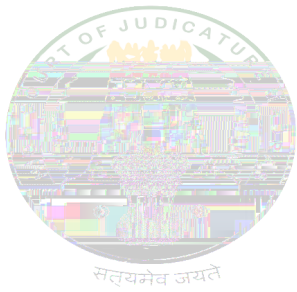
D. B. Corp Limited

CIN: L22210GJ1995PLC047208

Website: www.dbcorpltd.com

Email: dbc@dbcorp.com

Tel.: +91 22 7157 7000 Fax: +91 22 7157 7093



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2023

PRONOUNCED ON : 27.04.2023

CORAM

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

C.M.A.Nos.3293, 3382 to 3385, 3387 to 3390 and 3490 to 3502 of 2010

and

Rev.A.Nos.8 to 11 of 2011

and

M.PNos.1 of 2010, 1 to 21 of 2010, 2 to 21 of 2010, 3 of 2010,

C.M.P.Nos.22002 and 22005 of 2018

C.M.A.No.3293 of 2010:-

M/s.Phonographic Performance Limited

through its Authorized representative, M.Rajesh Rajan,

Mumbai-400 053.

... Appellant

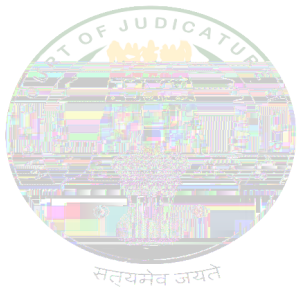
vs.

M/s.Entertainment Network (India) Limited,

Chennai-18.

... Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 72(2) of the Copyright Act, 1957, to set aside the impugned order, dated 25.08.2010 made in Case Nos.3-4 2008 CRB(NZ) passed by the learned Copyright Board of New Delhi.



WEB COPY



For Appellant :Mr.Vijay Narayan
Senior Counsel
assisted by Mr.Adithya Reddy
for Mr.Su.Srinivasan
For Respondent :Mr.G.Masilamani
Senior Counsel for M/s.King of Partridge

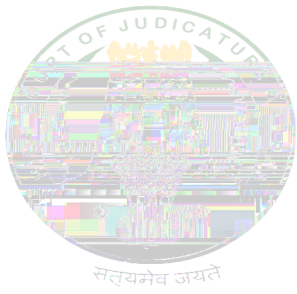
COMMON JUDGMENT

Backgr

All the Civil Miscellaneous Appeals have been filed taking advantage of Section 72(2) of the Copyright Act, 1957, as the provision then was, against the order, dated 25.08.2010 of the Copyright Board.

2.S

(2) Any person who infringes the Copyright Act, 1957, shall be liable to pay a fine of not less than one lakh rupees or more than five lakh rupees, or imprisonment for not less than one year or more than three years, or both, in the discretion of the court, and the costs of the appeal and the costs of the proceedings in the Copyright Board.



WEB COPY



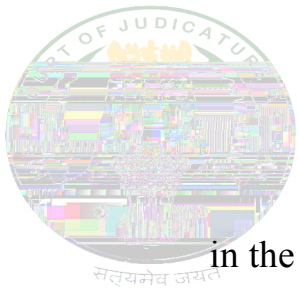
3.The appellants were the respondents before the Copyright Board.

The appellants are Music Companies, who were engaged in the production and acquisition of rights in sound recordings. They had copyright over a series of cinematographic films and sound recordings.

4.The respondents are private F.M. Radio Broadcasting Companies. They held licenses for running F.M. Radio Stations in various cities across the country.

5.Disputes and differences arose between the two parties relating to the playing of songs over which copyrights vested with the appellants herein.

6.Complaining that the appellants did not voluntarily grant licence



WEB COPY

in the recordings, the respondents had
filed an application under Section 57(1) of the Copyright Act, 1957,
before the Commission to adjudicate the dispute
between the parties.

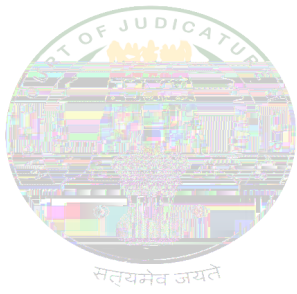
7.9

the
has
how
dire
lice

co

%&planation

4/158



WEB COPY



8. Application was first filed about 19.11.2002 for grant of compulsory license. The Copyright Board by a judgment and order, dated 19.11.2002 fixed the standard rate of

(a) Payment to be made at Rs.1200/ needle hour during prime time.

(b) For 12 normal hours = 60% of standard rate

(b) For ! lean (night) hours = 20% of standard rate and respondent also directed to furnish a security/bank guarantee of Rs.20,00,000/- per radio station to PP '.

9. The Copyright Board also held that the aforementioned standard rate shall be in effect for a period of two years and that it would be re-considered some time in September-October 2004.

10. Both the appellants and the respondents filed appeals before the Bombay High Court. The Bombay High Court by a common judgment and order, dated 13.04.2004, in a few of the appeals, remitted the matter



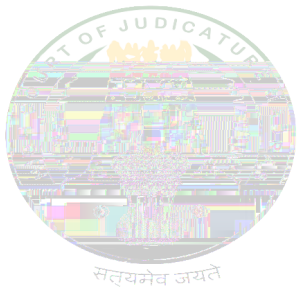
WEB COPY

back to the Copyright Board for re-consideration and fixation of license fees.

11.The respondents then filed a second application before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, on or about 28.01.2003. They sought that compulsory license must be given on terms and conditions, which were considered just and equitable by the Copyright Board.

12.Arguments were advanced and an order was passed granting compulsory license.

13.The respondents herein filed further appeals before the Bombay High Court questioning the rate of compensation. This appeal and the earlier appeals filed questioning the order, dated 19.11.2002 were examined by the Bombay High Court and the Bombay High Court remitted the matter back again to the Copyright Board for fresh disposal.



WEB COPY

14.Appeals had also been filed before the Delhi High Court and the Delhi High Court had however, held that grant of compulsory licence was not permissible.

15.The judgments of the Bombay and the Delhi High Courts were taken in further appeal before the Supreme Court. By judgment reported in ***(2008) 13 SCC 30***, in ***M/s.Entertainment Network (India) Limited and others vs Super Cassettes Industries Limited and other***, the Supreme Court set aside the order of the Copyright Board and remitted the matters back for fresh consideration by the Copyright Board and permitted examination of witnesses on either side.

16.The Copyright Board then took up the matter again and passed an order on 25.08.2010, which is impugned in these appeals.

17.In the order of the Copyright Board, it had been stated that the

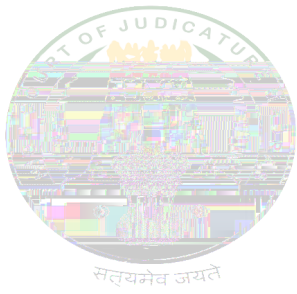


WEB COPY

order shall bind not only the applicants and the respondents before the said Board, but to “all Music Providers”. This had led the applicants before the Copyright Board, namely, the respondents herein, to issue communications not only to the respondents in the Copyright Board, but also to the other appellants before this Court, namely, SIMCA, though they were not parties before the Copyright Board. Claiming that the order binding them was violative of principles of natural justice, further appeals had been filed.

18.The primary contention of the said appellants, particularly, SIMCA, was that they had independent agreements for grant of license with the Radio Stations and that the said agreements would be binding and the order of the Copyright Board was not binding on them.

19.In the appeals filed by them, an interim stay was granted and later, a learned Single Judge had refused to extend the interim stay. Complaining of such refusal, Review Applications were also filed.

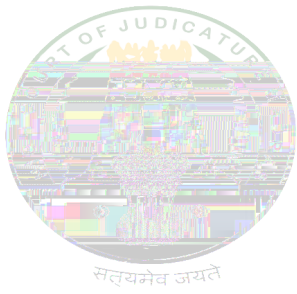


WEB COPY

20.As can be culled out from the aforementioned averments, the controversy between the appellants on the one hand and the respondents on the other hand were with respect to the compensation determined by the Copyright Board. The appellants have complained that the compensation was extremely prejudicial to their interest but the respondents contended that it was just and equitable.

21.Before proceeding further, it would only be appropriate that the compensation as granted by the Copyright Board is set out as this Court will have to adjudicate whether such determination of compensation should be upheld or set aside or modified/varied.

22.In this connection, it would be appropriate to set out the guidelines provided under Order XLI Rule 31 of CPC and Order XLI Rule 33 of CPC.



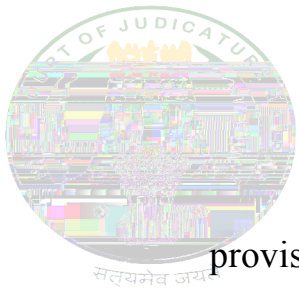
WEB COPY



23.0

24.0

25. Even though the appeals are simultaneous Appeal, they are so termed only because they are appeals from the Copyright Board and not against a judgment of a Court. The same

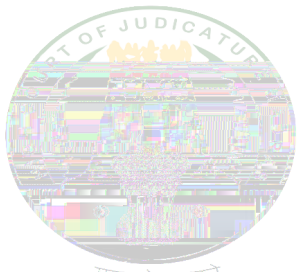


WEB COPY

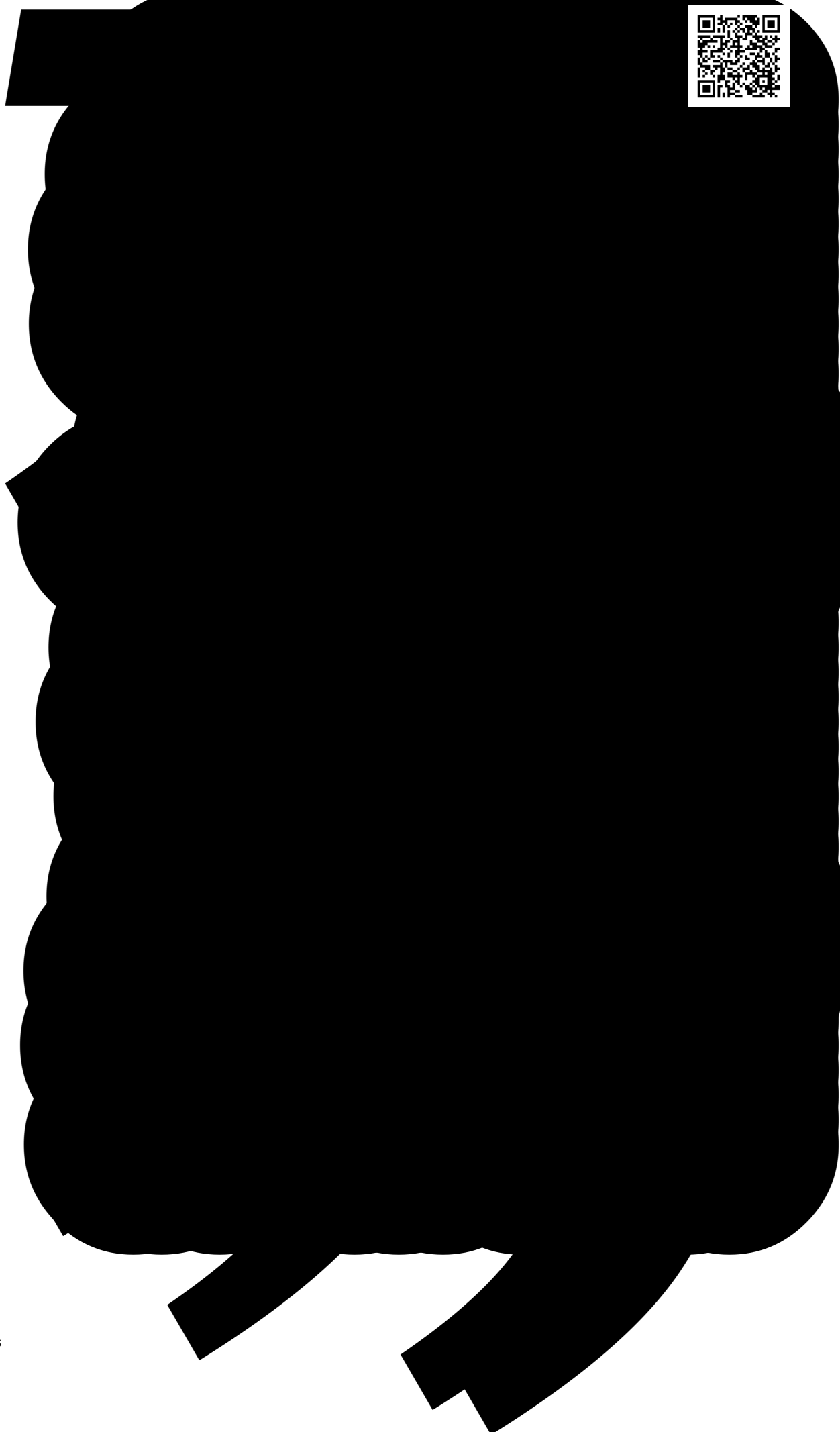
provisi under Order XLI CPC will
also ap

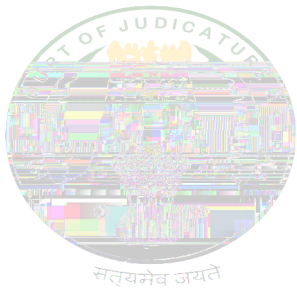
26. So far as the Review Applications are concerned, again the
principles u
which re

27
the reasons for
light of
() "2



WEB COPY





WEB COPY



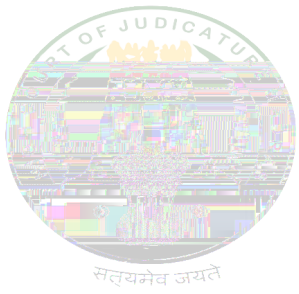
con
rec
futu
sha

advertis
paid, if a
such adve
earnings s

shall be on ()th September, 2022)

Arguments :-

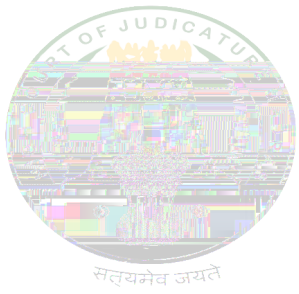
28.Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of the appellants in C.M.A.Nos.3293 of 2010, 3382-3385 of 2010, 3387-3390 of 2010 and 3495-33502 of 2010, led the arguments on behalf of the appellants.



WEB COPY

29.The learned Senior Counsel first took the Court through the provisions of Copyright Act, 1957 and drew a distinction between Section 30 and Section 31 of the Copyright Act, 1957 and referred to the definitions and the relevant provisions. He then took the Court through the scope of an appeal filed under Section 72(2) of the said Act. He also took the Court through the order of the Copyright Board and pointed out the grounds of challenge to the same. He then took the Court through the evidence of the witnesses particularly, the cross examination and argued very emphatically that the compensation as determined by the Copyright Board requires to be interfered with by this Court.

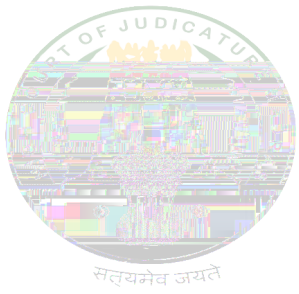
30.The learned Senior Counsel pointed out the definition of a “(or\$” as defined under Section 2(y) of Copyright Act, 1957. A “(or\$” would also mean under sub clause (iii), “a sound re#ording”. He then took the Court through the definition of “sound re#ording” under Section 2(xx), which provided it is a recording of sound irrespective of the medium by which the sounds are produced.



WEB COPY

31.The learned Senior Counsel then stated that in a production of sound recording of a movie song or a film song, which according to the learned Senior Counsel, is a very, very important component in every movie and also attracts the movie to the audience, there must be a Lyricist, who writes down the verses of the song, there must also be a Composer, who puts those verses in the form of music and then there must be a Singer, who sings the words in accordance with composition of music and there are also the Performers, who play the background musical instruments. A combination all these experts, who put in their efforts to produce just one song, which runs for about four or five minutes remains in memory for ages and ages.

32.The learned Senior Counsel stated that the words when first written down and then composed in the form of music and then sung melodiously with instrumental background and when recorded becomes a “Sound Recording”, as defined under Section 2(xx) of the Act. This sound recording is a “Copyright” as defined under Section 2(y)(iii) of the Act.

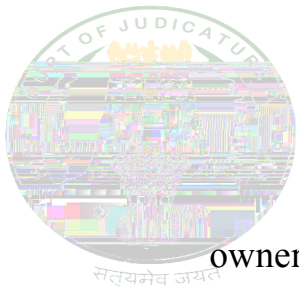


WEB COPY

33.The learned Senior Counsel then pointed out Section 13 of the Act, which deals with works in which a copyright subsists and specifically pointed out Section 13(1)(c), which includes a sound recording. Thus when a song consisting of words, composed in music form and sung by a singer with instrumental background is recorded in any form whatsoever, it becomes a sound recording and becomes a work under the Act.

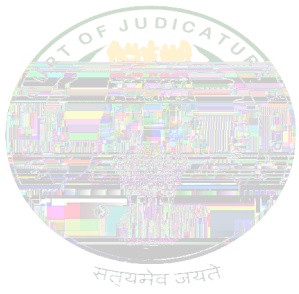
34.The learned Senior Counsel then pointed out Section 14 of the Act, which explains the meaning of copyright. Section 14(e) relates to sound recording and sub clause (iii) states that if there is a copyright, then such copyright right enables the communication of the sound recording to the public. In this manner, the concept of a sound recording and its possibility of being communicated to the general public was pointed out by the learned Senior Counsel.

35.Mr.Vijay Narayan, learned Senior Counsel then pointed out Section 17 of the Act, which deals with the owner or rather the first



WEB COPY

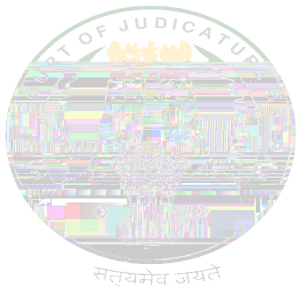
owner of the copyright. He pointed out Section 17(c), wherein, it is stated that if a work is made in the course of employment under a contract of service, then, the employer shall be the first owner of the copyright. This fact was explained by stating that when a movie or a film is produced by a Producer, he enters into a contract with a Director to direct the movie. The Director then, of-course with the consent of the Producer, determines the actors. Since songs are an important component of every movie, the Director also determines a Lyricist, who writes down a song in accordance with the fact situation in the movie. He then determines a Composer, who puts these words in the form of music and then he determines the singers both male and female, who would sing these words and the performers, who would actually perform them on the musical instruments. All of them, starting from the Director downwards enter into a contract of service with the Producer, who pays them for the efforts put in producing a work/a sound recording/a song in a movie. Thus under Section 17(c) of the Act, the Employer/Producer becomes the first owner of the copyright of that sound recording, as there is a contract of service.



WEB COPY

36.The learned Senior Counsel then took the Court to Section 18 of the Act, which relates to assignment of copyright. By this provision, the owner of a copyright, let us take the Producer, can assign the copyright of a sound recording/movie song either wholly or partially to be played as an audio recording in Radio Stations; he can assign it for being played both in audio and video in Television; He can even assign the words therein to be exhibited in the print media. All these options are available to the owner of a copyright. The learned Senior Counsel pointed that there was a time when the lyrics of the songs of a movie were reduced in the form of small booklets and distributed to the general public for a price.

37.It must be kept in mind that to conceptualise the issue in these particular appeals, we must take ourselves back to the period between 2002 and 2010.



WEB COPY

38. Under Section 18(2) of the Act, when there is an assignment, then the assignee will be treated as the owner of the copyright. There is also a provision under Section 18 of the Act that a future work can also be assigned. In this connection, the learned Senior Counsel pointed out that when a project of a movie is announced and the names of the Director, the Lyricist, the Music Director and the Actors are announced, then the songs which are advertised can be assigned even prior to the release of the movie. They have a value, even at the embryo stage, but would take effect only when the sound recording is actually made and the song is communicated to the public.

39. The learned Senior Counsel then stated that this assignment, namely, the right of the assignee to communicate the work to the public is reduced in the form of an agreement. Naturally, there is consideration paid to the first owner of the copyright by the assignee. He then pointed out the concept of such consideration, namely,

(a) by way of needle hour, namely, a particular rate for playing a particular song for one hour. It is to be kept in mind that a song is only

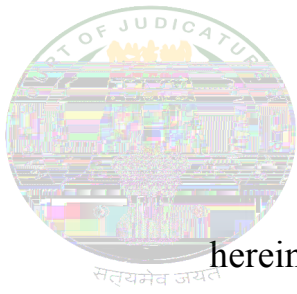


WEB COPY

for five minutes. Therefore, on various dates, when it is communicated to the public by Radio Companies like the respondents herein and the playing time touches one hour, then for that one hour, which is called a needle hour, a particular rate is fixed.

(b) The other concept is giving a percentage of the advertisement earned by the Radio Companies at the time when the songs are played. If a song is really popular, then there will be a clamour for advertisements to be played either before or some time even during or some time immediately after that particular song. The revenue earned through such advertisement has to be consolidated by the Radio Companies and a percentage of the net revenue will have to be paid to the first owner of the copyright.

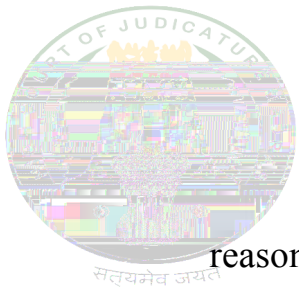
40. The learned Senior Counsel then took the Court through Section 30 of the Act. Section 30 of the Act provides that an owner of a copyright in any existing work or an owner of a future work may grant interest in that right in the form a licence by writing. This licence to play the songs is also granted to Radio Companies, like, the respondents



herein.

WEB COPY

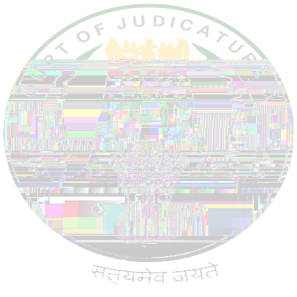
41. There may be occasions, when the first owner of a copyright may refuse to grant such licence. A movie would have been released. A particular song would have become extremely popular, may be because of the lyrics or may be because of the excellent composition and melodious manner in which it had been sung or even may be because of the background music or instruments played. The general public would expect a right that the song is communicated to them under various modes either through Radio Stations or through the Television or the lyrics being in the form of a small booklet. But, when the first owner of the copyright refuses to grant such licence and the reasons for such refusal are found to be unreasonable and a complaint is made in this regard, then the Copyright Board, after giving notice to the owner of the copyright, who could be the first owner or the assignor, as provided under Section 18 of the Act, and after granting a reasonable opportunity of being heard and holding such enquiry, as it deems to be necessary and after coming to a satisfaction that the grounds for such refusal are not



WEB COPY

reasonable, may direct the Registrar of Copyrights to grant licence to the complainant, in this case the Radio Companies/respondents, to broadcast the sound recording/songs and determine the compensation to be paid to the owner of the copyright or the assignor of the copyright. Thus, the primary aim is to ensure that the sound recordings are communicated to the public.

42. The old dog in the manger attitude of neither communicating the sound recording/song to be public nor granting licence to radio companies to do so is found fault and one of the objects of the Act is to ensure that a good song is heard by everybody in some medium, in this case, through the medium of the respondents/Radio Companies. The learned Senior Counsel then pointed out that Section 31 of the Act would come into play only when the owner of a copyright unreasonably withheld broadcast of a sound recording over which he has a right, since the public also have an equal right to hear the same. This balance is exercised by grant of compulsory licence by order of the Copyright Board.

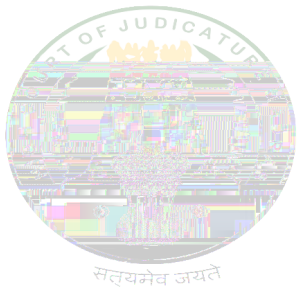


WEB COPY

43. In this connection, Article 300(A) of the Constitution was also referred to by the learned Senior Counsel. Article 300(A) of Constitution provides that no person shall be deprived of his property except, by authority of law, which would also include only in accordance with the procedure established by law. In this case, the right to hold on to the copyright by the owner/assignor can be interfered with and compulsory license granted to a Radio Company by authority of the law, namely, Section 31 of the Copyright Act, 1957, and only under the procedure established by law, namely, by granting opportunity of being heard, an enquiry being conducted and finding that the withholding of the right was unreasonable and then granting compulsory licence on payment of fees or compensation.

44. These aspects are the crux of these appeals.

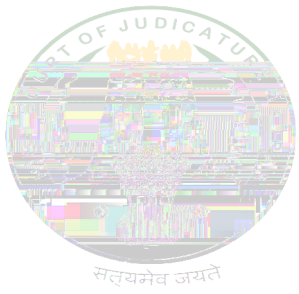
45. The central aspect is about the payment of fees.



WEB COPY

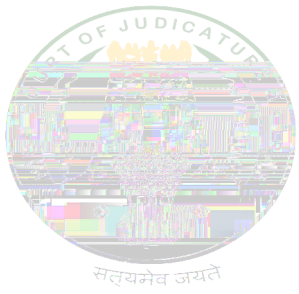
46. It must be kept in mind that a song in a movie which is withheld from being communicated by the owner of a copyright, just remains as a song. If the owner voluntarily grants licence, then he must enter into an agreement with the licensee. But if he does not so grant licence and if it is found that the reasons for not granting licence are unreasonable, then the Copyright Board can step in to examine the circumstances and direct grant of licence and determine the fees payable for such grant of license.

47. The learned Senior Counsel then pointed out Section 33 of the Act, which is about the registration of a Copyright Society. At the time when the appeals were filed, the appellants were a Copyright Society. The Central Government may register an Association of persons having regard to their interest and these persons can include the Authors and other owners of copyrights, as a Copyright Society under Section 33(3) of the Act. This society must be registered.



WEB COPY

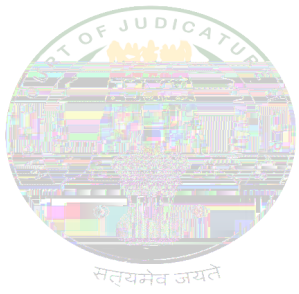
48. The learned Senior Counsel then stated that a song in any movie is permanent. However, this song can be exploited numerous number of times in a day, in a week, in a month and for years together. The more that song is played in Radio Stations, the more revenue is generated. This is unlike a painting, which is exhibited in a museum. It is a static work of art. He also pointed out that there were numerous FM Radio Stations that play music 24 hours across the range for which they have been granted license and every time the song is played independently, they earn revenue and therefore, pointed out that the compensation payable for such playing of the song should be in terms of the actual needle hour, for which the songs had been played and that rate per needle hour should be determined by the Copyright Board. It would depend on the value of the song and its general acceptance by the public and the demand by the public for which it replayed again and again. This could be on the basis of the lyrics. This could be on the manner in which the song was sung. This could also be on the basis of the background instrumental music.



WEB COPY

49. The learned Senior Counsel then pointed out the present appeals, which have been filed under Section 72(2) of the Act questioning the compensation determined by the Copyright Board. He stated that these appeals should be considered as a regular first appeal and the provisions of order XLI CPC should come into play. This would necessitate the Court to examine the facts and the law applicable to the facts and whether the facts have been properly appreciated. In this connection, he pointed out the definition of “error or law” of *Halsbury's Laws of England*, wherein, it was stated that it was a finding unsupported by evidence. Therefore, he urged that this Court should examine the principles adopted by the Copyright Board while determining the compensation and if those principles are found unreasonable, then this Court should set aside the same.

50. The learned Senior Counsel stated that if compensation is determined on the basis of net advertisement revenue earned, then there is always a possibility of window dressing of accounts and audit.



WEB COPY

51.He specifically pointed out the respondent, M/s.Entertainment Network India Limited which is a conglomerate, having business interests in the print media by way of publishing newspapers, by having a Television Station, by having FM Radio Stations and also other business interests. The learned Senior Counsel stated that there is always a possibility that when a prospective advertiser of a product, say a motor vehicle, approaches the respondent/M/s.Entertainment Network India Limited for advertising their product, then a bargain could be established by the respondent by stating that if the motor vehicle is advertised in the front page of their newspaper, then a concession would be granted for the advertisement rates to be paid, when the motor vehicle is advertised in their Radio Station. If that concession is granted, then the declaration of revenue earned through that particular advertisement by the Radio Station would naturally reflect a lower figure and since a percentage of the same alone is to be paid to the appellant, the revenue for the appellant would also proportionately reduce. Practically every advertiser would like to advertise their product not only in the print media but also in television and also in Radio Stations. There would naturally be an

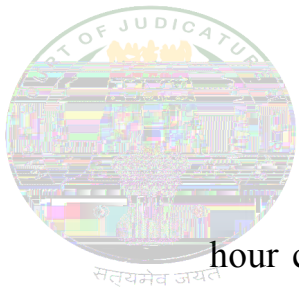


WEB COPY

adjustment of the cost and that adjustment could be reflected in the rate for advertisement by the Radio Station, which would project a lower figure. The appellants therefore would directly suffer.

52.The learned Senior Counsel was extremely insistent on his assertion that this is a real possibility and therefore stated that the appellants should not be put to disadvantage by the business manipulations of the respondents vis-a-vis, prospective advertisers, who are numerous. He thus stated that the appellants are directly affected by the methodology of payment of royalty suggested by the Copyright Board.

53.To further emphasise this particular point, the learned Senior Counsel pointed out that the respondents had not produced their accounts before the Copyright Board. There was no transparency on this issue. He therefore urged that there was suppression of income earned through advertisement in the Radio Stations and this directly affected the income generated by the appellants herein. He pointed that under the per needle



hour concept, a minimum amount was definitely guaranteed to be paid.

But if the respondents were to show nil return on advertisement earned, there would not be a minimum amount guaranteed to be paid.

54. The learned Senior Counsel then took the Court through the guidelines issued by the Supreme Court while remanding the matter back to the Copyright Board. He stated that originally the Copyright Board by a judgment and order, dated 19.11.2002, had fixed the standard rate of payment to be made at Rs.1200/- per needle hour during the prime time. It was also determined that for 12 normal hours, the payment should be 60% of the standard rate and for the lean (night) eight hours, it should be 25% of the standard rate. Questioning this particular determination, nine appeals were filed before the Bombay High Court. By a common judgment, in few of the appeals dated 13.04.2004, the Bombay High Court remitted the matter back to the Copyright Board for reconsideration and for fixation of licence fees. Thereafter, independently, M/s. Entertainment Network India Limited filed an application before the Copyright Board in New Delhi on 28.01.2003

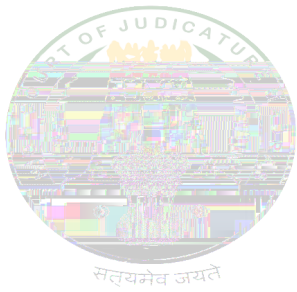


WEB COPY

seeking grant of compulsory licence against M/s.Super Cassette Industries Limited on terms considered just and equitable. An order was passed by the Copyright Board declining permission to adduce oral evidence, but compulsory licence was granted by an order, dated 20.10.2003. Questioning the rate of compensation alone, an appeal was filed before the Bombay High Court. This appeal was tagged with the existing other appeals by the Bombay High Court. There were further appeals filed before the Delhi High Court. The matter was remanded back to the Copyright Board. Questioning the judgments of the Bombay High Court and the Delhi High Court, appeals were filed before the Supreme Court. All these appeals were taken into consideration and a judgment was passed on 16.05.2008 in *M/s.Entertainment Network India Limited vs Super Cassettes and others* in *Civil Appeal Nos.5114, 5178-5180, 5180, 5182 and 5183 of 2005*, reported in *2008 (13) SCC 30*,

55.In the paragraph [REDACTED] it was held as follows:

“



WEB COPY

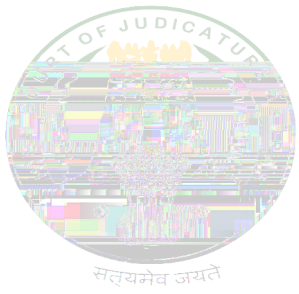


56.In

57. It has been seen that the Court had placed its reliance on the Copyright Board to permit examination of witnesses and to analyse the statements of the witnesses and then come to a just and equitable conclusion.

58.In this connection, it would be worthwhile to examine Section 12(7) of the Act, which reads as follows:

31/158



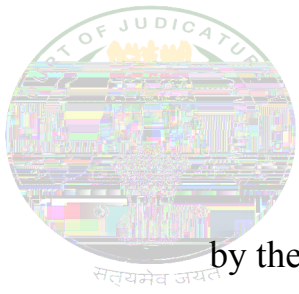
WEB COPY



Section

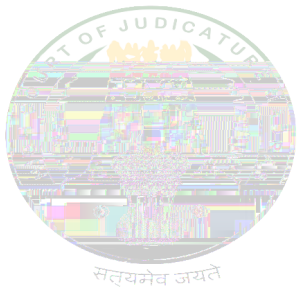
59. The learned Senior Counsel then pointed out that the Copyright Board should have examined the issues on the basis of materials on record. It should have taken into consideration that best judgment assessment is not possible. A private FM Radio Station cannot be equated with All India Radio. There was an obligation to balance the interests of both the parties keeping in mind the salient guideline under Article 300A of Constitution relating to right to property. The Copyright Board should have examined claim of the the Radio Stations independently in accordance with the playing of songs in metro cities, the time slots in which the songs are played and also the category of songs.

60. The learned Senior Counsel then pointed out the reasons given



WEB COPY

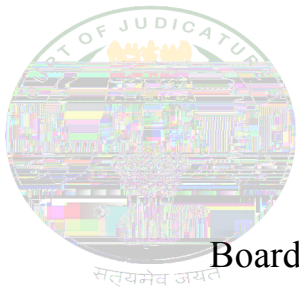
by the Copyright Board in the impugned judgment. The Copyright Board had stated that the privatisation of Radio had started in 1995 and private sector involvement in FM Radio Broadcasting was launched by the Government in the year 1999 to open up broadcasting for entertainment, education and information dissemination by commercial broadcasters and to make available quality programmes with localised flavour to encourage new talent and generate employment and to supplement the services of All India Radio and to promote expansion of broadcast network in the country. Thereafter, a technological shift from Medium Wave (MV) to Frequency Modulation (FM) Radio broadcasting was introduced. In March 2000, private sector broadcasters were invited for FM Band (87.5-108 MHz). The private broadcasters were given their own frequency to launch their channels. A total of 108 frequencies were made available in 40 cities. Large towns had 8 or 9 frequencies while small towns had one or two. There was a bidding process and licence fees were fixed. A reserve price was determined. When there were as many interested bidders left, as there were frequencies in that city, then bidding was stopped and successful bidders were allotted frequencies.



WEB COPY

61. In the order, it was further stated that the licensing policy was designed in such a manner that it was not possible for broadcasters to make any profit. It was therefore, stated that the private radio business was unviable from the very beginning. Thereafter, the Government had enhanced the FM coverage from 30% of the population to 60% of the population by the 10th Five Year Plan. Private participation was encouraged. North Eastern States were also opened for FM stations. FM Radio was to be used to spread literacy. In the impugned order, the appointment of a Radio Broadcast Policy Committee was examined.

62. All these aspects were highlighted by the learned Senior Counsel, who then stated that the Copyright Board had then diverted itself to examine what was called so#ial impa#t of the FM Radio broadcast sector. It was stated by the Copyright Board that FM Radio Station had a social obligation towards nation building. These reasons were criticized by Mr. Vijay Narayan, who stated that they were beyond the available evidence on record. It was also stated by the Copyright

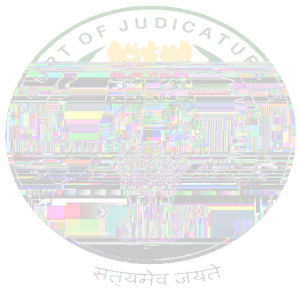


WEB COPY

Board that FM Radio Stations were vehicles for social upliftment and education. This point was also criticized by Mr. Vijay Narayan. The comparison with All India Radio by the Copyright Board was also charged as being an unequal comparison. The contention of the appellants herein that they had to spend more and more money for acquiring licence or assignment was rejected without any acceptable reasons.

63. The

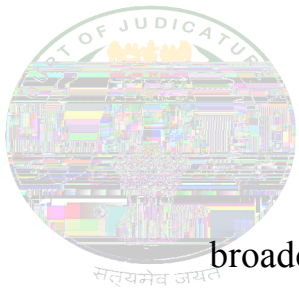
64. This statement was pointed out by Mr. Vijay Narayan, who expressed wonderment as to how the Copyright Board could have rejected the stand of the appellants. The above reasoning according to the learned Senior Counsel was bereft of fundamental logic.



WEB COPY

65. Again, the further statement that the FM Radio Stations were involved in social welfare was also criticised. The learned Senior Counsel therefore stated that right from the beginning, the Copyright Board was prejudiced against the appellants herein, who, after all, were the source providers for the song recordings broadcasted by the Radio Stations. They had primarily acquired these sound recordings/music/film music from the first owner or the assignee but were then relegated to the background by the Copyright Board. Their interests were simply not considered by the Copyright Board, which was concerned only about the growth of the Radio Stations. The statement by the Copyright Board that it must ensure that the Radio Stations survive was also criticized by the learned Senior Counsel.

66. The learned Senior Counsel pointed out that the Radio Stations survived not because of advertisement revenue, but because of the content of the songs which they broadcasted to the general public. Advertisement followed those songs. Advertisers advertised their product only because of the quality of the songs, which were

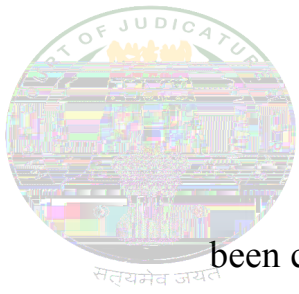


WEB COPY

broadcasted. The rights in those songs had been acquired by the appellants herein. The focus of the Copyright Board should have been on those songs and the value of those songs and the Copyright Board according to the learned Senior Counsel had misdirected itself by lamenting on the licence fee paid by the Radio Stations and the operating costs involved. Revenue was dependent only on the songs for which the appellants had copyright and existing licences. The Radio Stations cannot generate any income, if the songs were not made available for them to broadcast. The issue of social obligation and upliftment of society is a fundamental duty of every citizen and every corporation in this country and that cannot be a reason to give the Radio Stations preferential treatment by the Copyright Board.

67.The learned Senior Counsel criticised the reasons given by the Copyright Board, which in his opinion, were extremely biased in favour of the Radio Stations.

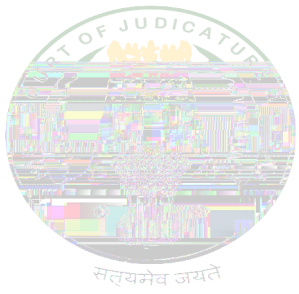
68.The fact that there was a reduction in the sale of cassettes had



WEB COPY

been completely overlooked by the Copyright Board. It is a fact, that if a song can be heard via Radio, then a cassette containing that song would not be purchased at all. Therefore, again the reasons given by the Copyright Board were attacked in all force by the learned Senior Counsel.

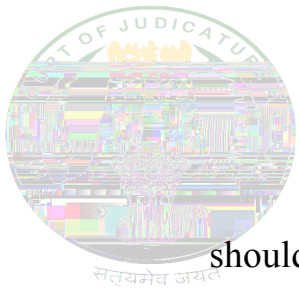
69. He was stated that though an alternative plan of tariff had been presented by the appellants, they were rejected. The Copyright Board rejected the alternate plan, holding it were against the basic philosophy of the Government's plans for infrastructure development. The learned Senior Counsel stated that these considerations went beyond the scope of the determination of the rates by the Copyright Board, which should have evaluated the stand of two contesting parties, namely, the applicants/respondents herein and the respondents/appellants herein. It should have not have entered into a harangue about social welfare and social upliftment, which is a basic duty to be performed and no credit should be attached for being part of that particular movement.



WEB COPY

70. The rejection of the needle per hour rate was criticised by the learned Senior Counsel. The statement that the central heartland of the country are inhabited by private societies, rich in mineral wealth and bio diversity and in traditional knowledge of art, folks, songs and dances were reasons, which according to the learned Senior Counsel should never have entered into any discussion by any judicial forum.

71. The learned Senior Counsel stated that the Copyright Board had completely misdirected itself in determining the compensation to be paid. He stated that the entire reasoning in paragraph 30 and its sub paragraphs amounted to more like a propaganda mission rather than a judicial analysis of the issues. The rejection of the needle per hour by stating that “it is riddled (with its own complexities of operational nature in a heterogeneous society like India,” was also criticized by stating that the statement conveyed no meaning at all. It was stated that such sentences should never appear in judicial pronouncements as they have no basis, have no meaning and convey nothing. The learned Senior Counsel pointed out all these aspects and stated that judgment under appeal



should be interfered with by this Court.

WEB COPY

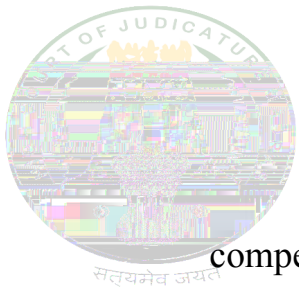
72.The statement at paragraph 30.24, “Needle per hour”, as a concept, looks at the music as a bare deal in the nature of selling of goods by the licensor to the licensee.....” was also criticized and the learned Senior Counsel who wondered as to what actually a bare deal meant and what that concept indicated. The further reasoning that the survival of Radio Stations is necessary for nation building was also criticised by the learned Senior Counsel. Finally, the application of the compensation for future acquisitions at the same rate of 2% of net advertising revenue and the further direction that the order applied even to those who were not before the Copyright Board and who were not at all heard by the Copyright Board, were criticised as being mala fide directions. It was very specifically stated that the evidence on record had not been properly appreciated. The learned Senior Counsel also pointed out the nature of expenses incurred by the Radio Station as salary and other perquisites and pointed out that substantial expenditures incurred by the respondents were deducted from the advertisement income earned



WEB COPY

and only from the reminder was 2% paid. He also stated that a minimum floor rate should have been fixed, which concept had been recognised even by the -erne and Rome . on*entions. The owner of the copyright should get an equitable compensation.

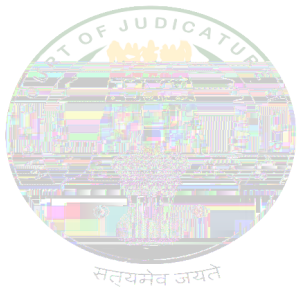
73.A further affidavit was filed on 03.01.2016, indicating the necessity to maintain the appeals. It was pointed out that there was an attempt to suppress accounts by the respondents. It was repeatedly stated that the advertisement rates were riddled with falsity and if a Radio Station fails, it would only be because of mismanagement by incurring expenditure for overheads, salary and perquisites and certainly not because of the quality of the songs which were broadcasted. Quality remains permanent and that it is a fact, which has to be recognised and should have been understood by the Copyright Board. The variables were only the advertisement rates. For that quality of the songs, advertisers swarmed and this necessitated that particular song to be replayed again and again and it was therefore emphasized that since there is manipulation of accounts of the earnings through advertisement, the



WEB COPY

compensation determined should be only on the hours for which the song was played or at the rate of needle per hour. This would guarantee a minimum amount to be paid to the appellants and over and above that, the net advertisement rate can be fixed but merely determining the compensation payable on a percentage of the net advertisement revenue indicated that even the minimum compensation would be breached. The learned Senior Counsel stated that it is a fact which has to be understood.

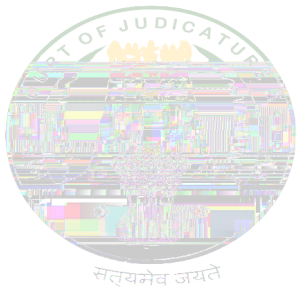
74. The learned Senior Counsel therefore stated that in exercise of the powers of any Appellate Court, this Court should interfere with the findings and re-examine the evidence and examine whether the findings were based on evidence or on the personal perception of the members of the Copyright Board and if they were based on the personal perceptions of the members of the Copyright Board, then the same should be rejected. A decision should be rendered on the basis of the evidence available on record. The learned Senior Counsel therefore stated that the appeals should be allowed and the order of the Copyright Board should be set aside.



WEB COPY

75.Mr.Sreenath Sridevan, learned Senior Counsel who also appeared for the appellants pointed out the references in Para 37 and 38 to the judgment of Supreme Court reported in **2008 13 SCC 30** relating to the -erne and Rome #on*entions. The learned Senior Counsel stated that there must be a floor rate determination and stated that whether 2% of the net advertisement revenue is equitable for compulsory licence or not is a matter for consideration. But fundamentally, there must be a floor rate fixed and therefore, the learned Senior Counsel stated that cutting out the needle per hour rate method exposed the appellants to the vagaries of accounting and bargain arrangements.

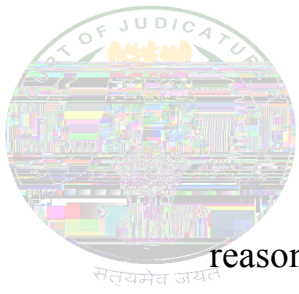
76.The learned Senior Counsel stated that Section 31 of the Copyright Act, 1957 contemplated payment of just compensation. A procedure, had been stated under Section 31 of the Act and fundamentally, compensation must be just and equitable.



WEB COPY

77.The learned Senior Counsel pointed out the evidence presented and urged that the said 2% fixed was on an unknown amount and that unknown amount was determined, not on the basis of determination by both the appellants and the respondents but solely by the respondents. This methodology of a percentage of the net advertisement revenue was not spoken by the witnesses for the respondents themselves. The learned Senior Counsel also pointed out the judgment of the Copyright Board and stated that comparisons with All India Radio were totally irrelevant.

78.The learned Senior Counsel stated that the reasons given by the Copyright Board should be interfered with as they have wandered beyond the factors for consideration. The factors for consideration are to first hold whether the refusal to grant licence was unreasonable and then to determine the compensation. This should be based on a song by song basis or on the basis of assignment and certainly not on the advertisement rate since that advertisement revenue was a revenue as projected only by the respondents and there was no cross verification of that particular revenue. The learned Senior Counsel was equally critical about the



WEB COPY

reasons given by the Copyright Board and also concurred with the arguments presented by Mr.Vijay Narayan.

79.Mr.M.V.Swaroop, learned Counsel for the appellants in C.M.A.Nos.3490 to 3502 of 2010 and for the review applicants, pointed out that the appellants in those appeals were not even parties to the proceedings before the Copyright Board. They were strangers. They never participated in any of the appeals before the Bombay or Delhi High Courts or before the Supreme Court. They cannot be bound by the order of the Copyright Board. The learned Counsel stated that one of the primary requirements of any order passed under Section 31 of the Act is that reasonable opportunity of being heard must be given to the owner of the copyright. If it is not given, then the order suffers. There cannot be any two views on that particular aspect. The learned Counsel pointed that the members of the appellants had individual agreements with the Radio Companies and there were no complaints about those agreements. The learned Counsel also pointed that the income earned prior to the determination by the Copyright Board and the income earned after the

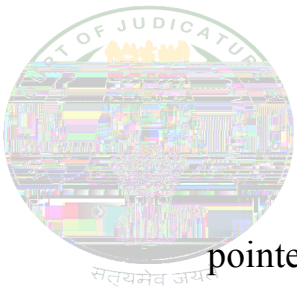


WEB COPY

order and stated that the income had drastically reduced. In this connection, the learned Counsel pointed out that for a particular period, the respondent had forwarded a cheque for just Rs.652/- and stated that this amount can never be termed just and equitable for the sweat and efforts taken in producing the sound recordings. He also stated that there were no complaints at all against the members of the appellant/SIMCA.

80.Insofar as the issue of maintainability was concerned, he stated that the issue of maintainability had already been decided by a learned Single Judge. He also stated that when there is an agreement, then the parties are bound by the agreement. The agreement determined the rate payable at per needle hour alone and not on any other rate. The extreme perversity of the order of the Copyright Board was pointed with anguish by the learned Counsel.

81.The learned Counsel also stated that the proceedings under Section 31 of the Act are not one in rem, but specific to those who refused to grant licence. It was not against the public at large. He

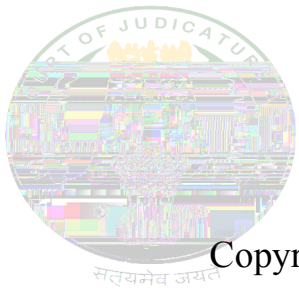


WEB COPY

pointed out that there were signed agreements between the members of the appellants and the Radio Stations which were to the advantage of both the parties to those agreements, till the year 2012. By the order under appeal, after 2012, there has been substantial decrease in the revenue earned by the members of the appellants. The learned Counsel attacked the judgment under appeal as being not only perverse, but bereft of any reason and as a matter of fact alleged mala fide in the application of the judgment to parties, who were not even present before the Copyright Board. Opportunity was not given and it was therefore stated that the order should be set aside and the appeals should be allowed.

82.The learned Counsel also advanced arguments with respect to the Review Applications filed by the said appellants questioning non extension of the stay granted. The learned Counsel stated that reasons have not at all been given by the learned Single Judge while vacating the order of interim stay.

83.It was obvious that the appellants were not parties before

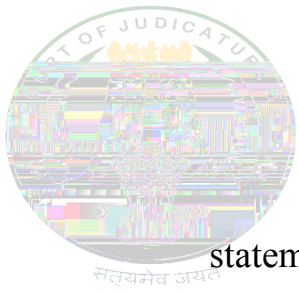


WEB COPY

Copyright Board. It was obvious that the appellants were never heard before the Copyright Board. It was obvious that they were directly affected by the order of the Copyright Board. The basic principles of natural justice had been violated. The learned Counsel therefore stated that the stay should have been extended and urged that therefore, both the appeals and the review applications must be allowed by this Court.

84.Mr.G.Masilamani, learned Senior Counsel led from the front and argued on behalf of the respondent, M/s.Entertainment Network India Limited. The learned Senior Counsel was quite brazen in his assertion that M/s.Entertainment Network India Limited was a conglomerate with interests in not just in Radio Stations, but also in print media, Television and in a wide spectrum of other business ventures. He stated that they never faced any economic recession and that the compensation as determined by the Copyright Board had been paid to the appellants herein without any default. They continue to do so.

85.The learned Senior Counsel was equally assertive in his



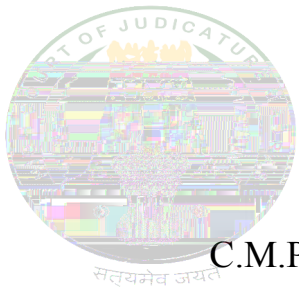
WEB COPY

statement that the Copyright Board was correct in its appreciation of various factors and in the adjudication of the compensation payable to the appellants herein.

86.The learned Senior Counsel pointed out the evolution of provisions of the Act from the establishment of the Copyright Board to the establishment of Intellectual Property Appellate Board and finally to the constitution of Commercial Courts, on date.

87.The learned Senior Counsel pointed out the Finance Act, 2017, the Tribunal Reforms Act, 2021 and the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021. He also, with much grace pointed out Section 6 of the General Clause Act and stated that the amendments in the Act would not affect the pending legal proceeding. He stated that Section 72(2) of the Copyright Act, 1957, provided an appeal to be filed before the High Court, but questioned the locus of the appellants to maintain the appeals and to continue the appeal in its present form. He then pointed out the order passed in

49/158



WEB COPY

C.M.P.No.21992 of 2018 dated 21.02.2020, wherein, this Court had kept all the contentions open to be advanced at the time of final hearing including the locus standi of the appellants to continue with the appeals.

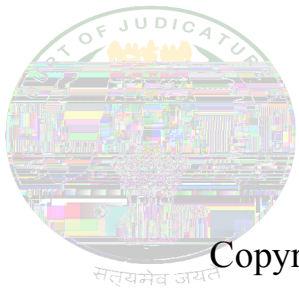
88.He pointed out that the appellant, M/s.Phonographic Performance Limited, was originally a non profit company registered under the Indian Companies Act and later, it was registered as a copyright entity under Section 25 of the Act, as a Limited Liability Company. The learned Senior Counsel then pointed out the parameters required for a copyright society, which required an Association of persons, a list of shareholders licensed to a Company or a copyright owner. The appellant had ceased to become a copyright society. They had filed an application for extension of registration, but for reasons best known to them and for reasons which they have not disclosed, have withdrawn those applications, which were pending before the Central Government. The learned Senior Counsel therefore asserted that the appellant, not being a Copyright Society cannot maintain the appeals. He stated that the appellant collected license fees, deducted their expenses



WEB COPY

and then paid a meagre amount to the creators of the sound recording, the Lyricist, the Music Composer, the Singers and the Instrumental Performers.

89.The learned Senior Counsel also questioned the locus of SIMCA to maintain the appeals as SIMCA was also not a Copyright Society, but a Society registered under the Tamil Nadu Societies Registration Act. The learned Senior Counsel pointed that ENIL had individual agreements with the members and those members had agreed to abide by the order of the Copyright Board. Therefore, the learned Senior Counsel stated that the argument that the order of the Copyright Board would not apply to SIMCA has to be rejected by this Court, since most of the members of SIMCA had agreed to abide by the order of the Copyright Board. He pointed out that therefore, whether they had participated or not participated in the proceedings before the Copyright Board could be made an issue and this Court need not examine the said issue. The learned Senior Counsel stated that the members had taken a conscious decision not to participate in the proceedings before the



WEB COPY

Copyright Board. The proceedings were conducted in open Court in a transparent manner and everybody involved in the industry knew about the ongoing proceedings before the Copyright Board. The learned Senior Counsel therefore stated that SIMCA not being a Copyright Society, having no licence for copyright and being registered only under the Tamil Nadu Societies Registration Act, can only espouse the cause of its members but none of the members had ever complained. He therefore stated that the appeals by the SIMCA against ENIL have to be dismissed as not maintainable.

90. With respect to the maintainability of the appeals by PPL, the learned Senior Counsel also pointed out that equally PPL, has ceased to be a Copyright Society. They were originally registered under the Companies Act, 1956. They claimed to be a non profit company under Section 8A of the Act. They then claimed to be a Limited Liability Company without shares and they also claimed to be registered as a Society, but they were not registered as a Society and as a matter of fact, it was again pointed out by the learned Senior Counsel that they had

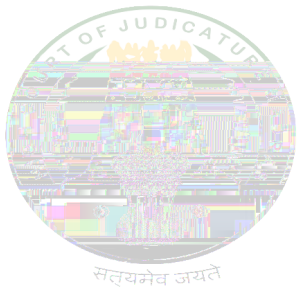


WEB COPY

withdrawn their applications which were pending before the Central Government seeking registration as a Copyright Society,

91.The learned Senior Counsel then pointed out that the real life of a song goes beyond 60 years, the life as determined under the Copyright Act, 1957. It was pointed out that the appellants had refused to disclose their purchase value of the songs. He also pointed out that they marketed the songs not only with FM Radio stations, like the respondents, but also in many other ways, including as Ring tones, as music played in aerostations, as music played in elevators and in so many ways. They had the authority under the licence to exploit every sound recording not only as a whole, but also in bits and pieces.

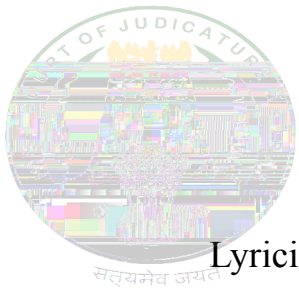
92.The learned Senior Counsel pointed out the agreements, which had been entered into with ENIL and stated that there were nine different forms of agreements and revenue earned had been paid to each one of the copyright owners, namely, actual copyright owners.



WEB COPY

93. With respect to the rates decided for future acquisition, the learned Senior Counsel pointed out the customary practice and the reality of the nature of business. He pointed out that ENIL had the capacity to draw advertisements. Their accounts, which were complained of, as not revealed, were also actually available by a touch of a button on the internet. He pointed that Phase-I was a fixed licence fee and Phase-2 was 4% of the income determined as licence fee. Even at that time, the learned Senior Counsel stated the concept of needle hour was never introduced.

94. The learned Senior then expanded his arguments to state that every music would have a Lyricist, would have a Music Composer, would have a Singer and stated that a Producer invested money on all these aspects and produced a cinematographic film, which included the music. When the film is played in theaters, the Producer received royalty for such telecast of film in theaters. But when it is shown otherwise or songs are played in Radio Stations, then the Producer get 50% and the



WEB COPY

Lyricist, Composers and the Singers get the other 50%. It was thus asserted by the learned Senior Counsel that a Producer of a sound recording can let on licence only 50% of the value and the balance 50% would be retained by the Lyricist, Composer and the Singers. Before 2012, the rights had been purchased. Now, they have a right to receive royalty.

95.He further stated that a Copyright Society had been originally formed to ensure that royalty goes to every individual contributor for a music/song. The Lyricist and the Composer were prohibited from selling their songs or their compositions. The music companies like the appellants herein, purchase music from Producers alone with permission to pay royalty.

96.The learned Senior Counsel then pointed out the provisions under Section 2(b) of the Act relating to authors, Section 14 relating to Copyright and more particularly to Section 14(a)(iii) and (d)(iii) and (e)(iii) relating to performers of music, communication and sound

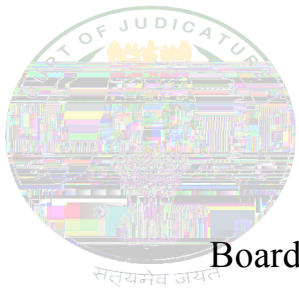


WEB COPY

recording to public. He also pointed out that the first owner of the copyright under Section 17 of the Act would be the Author. Under Section 18, assignment of future rights was also recognized by Legislation. The right to receive royalty was recognized. Section 19 relating to the mode of assignment and Section 30 about licence by owners of copyright. Section 31 related to compulsory licence and with respect to the issue in controversy, the applicable provision was Section 31(1)(b) of the Act.

97.The learned Senior Counsel pointed out the correspondences between the contesting parties. He stated that grant of licence should be routed only through a Copyright Society. He pointed out the obligation of the appellants, who should share 50% of the income with the Lyricist and Music Composers. He charged that the appellants had not disclosed their income and they are seeking more and more revenue from the respondents.

98.He then pointed out the evidence recorded by the Copyright



WEB COPY

Board PW-4, Dr.Bibek Debroy was the expert witness and he stated that revenue sharing is a far better method of distribution of income and royalty rather than needle per hour. The learned Senior Counsel pointed out that the Copyright Board had examined the evidence in detail and also pointed out the analysis of the evidence of RW-5, S.K.Laroiya. The witness had compared the reach of All India Radio with the reach of FM Radio.

99. There were two options insofar as sharing of royalty was concerned. Option 'A' was by needle per hour and option 'B' was by sharing of net revenue. The net revenue from advertisement involved, deducting from the gross revenue, the commissions and expenses involved for procurement of licences and rights and also Government charges.

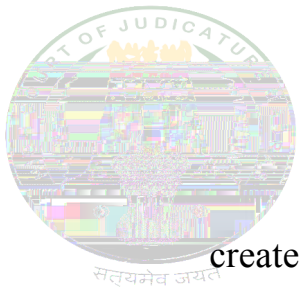
100. The learned Senior Counsel therefore, stated that the concept of compulsory licence is engraved and embedded with the policy of the public interest. He pointed out that he has been the



WEB COPY

public interest is involved and drew comparison with the Control Orders particularly, the Essential Commodities Act, 1955, relating to petrol, their storage and distribution and their price control by the Central Government. These steps were taken in public interest. Similarly, the Government had also recognized music as an art form with much public interest and therefore, had introduced the concept of compulsory licence. The Radio Stations are the media through which music is transmitted to the people. He drew comparison to a public distribution system, like a ration shop, which provides basic essential commodities like rice and sugar to the people.

101. The learned Senior Counsel also stated that there are also Control Orders relating to cement and gold and therefore, stated that FM Radio Stations must survive for the benefit of public interest. He pointed out the increasing number of Radio Stations from 206 in 2010 to 383 in 2020. He pointed out that the owners of the Copyright pay nothing to the Composer or Lyricist. The FM Radio Stations on the other hand generate advertisement income and pay the owners. He pointed out that music is

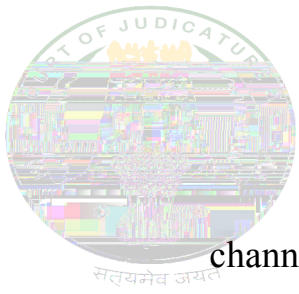


WEB COPY

created only once. A song is written once. It is composed once. It is sung once. The instrumentalists perform it once. But it is sold multiple, multiple number of times.

102.The learned Senior Counsel also pointed out the grant of permission agreement and stated that for each frequency, there can be only one station. He also pointed that it was the policy of the Government that FM Radio Stations should also have a social obligation to perform. They are an arm or tool for social upliftment. He stated that music is transmitted to the public free of cost. He compared this concept with that of Television Stations, where subscriptions have to be paid to watch a private channel television network. But music through Radio is available free to the general public. There is no subscription. There are no fees. There are no taxes. Music is now freely available. Therefore, it is a very important vehicle for social upliftment, which reaches the nooks and corners of the country.

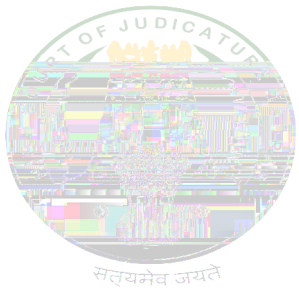
103.He also pointed out that FM radio Stations cannot act as news



WEB COPY

channels. They cannot provide news. That is the privilege of All India Radio alone. But there is an obligation to promote the welfare schemes of the Government. It was thus asserted by the learned Senior Counsel that survival of the FM Radio Stations is a core concept, which has to be kept in mind while determining the rates payable to the companies, like, the appellants.

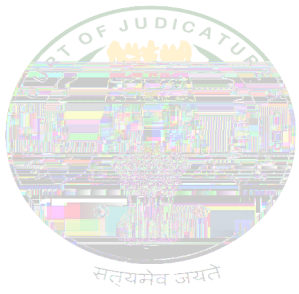
104.He pointed out the reasons given by the Copyright Board and justified each one of them. He contested the arguments of the learned Senior Counsels for the appellants and stated that the Copyright Board had applied its mind to the reality of the situation and had examined each and every aspect. He stated that without Radio Stations, the songs, which are written, which are composed would remain “still born/. They can never be transmitted to the public. It is only Radio Stations, which take them to the corners of the country and thereby, bring fame and name to the Lyricists, to the Composers, to those who perform the instrumental background music and to the Singers.



WEB COPY

105.He stated that over a passage of time, FM Radio Stations had increased and multiplied and this was crucial factor, which has to be kept in mind. He pointed out that needle per hour is based on only one factor, namely, on the song. However, a percentage of the advertisement revenue is based not only on the quality of the song, but also on the number of listeners and also on the time slot, and that advertisers flock there to advertise their products. During the peak hours, advertisement rates may increase and correspondingly, the amount paid to the appellants would also increase.

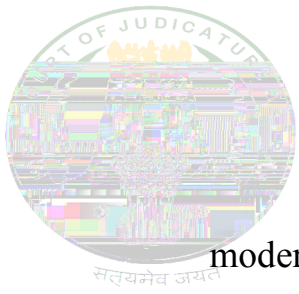
106.The learned Senior Counsel then placed a word of caution to the Court and stated that the order of the Copyright Board has to be either upheld or has to be set aside. He stated that the Court cannot go into an alternate price deal, like determining needle per hour. He stated that opportunity had been granted to the appellants by the Copyright Board and evidence had been adduced and that evidence had been discussed and a judgment had been pronounced.



WEB COPY

107. He then again pointed out the correspondences and stated that the appellants themselves offered existing and future recordings for licensing. He also stated that there cannot be a separate tariff for future production. He also pointed out Section 13 of the Act which also provided for future works. He then justified the order under appeals by stating that it had examined the interest of all the stakeholders. It had also kept in mind the policy of the Government relating to social upliftment and the impact on society, which FM Ratio Stations can have for projecting the social schemes of the Government. He also pointed out the financial status of the FM Radio Stations. He stated that all the materials and evidence had been considered by the Copyright Board. The comparative rates between All India Radio and the private Radio Stations had also been stated.

108. With respect to the specific allegation that there was a hidden arrangement with advertisers, the learned Senior Counsel stated that it is for those who make such allegation to establish that allegation. He pointed out that no proof had been provided. He also stated that 2% is a

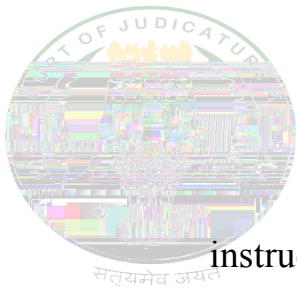


WEB COPY

moderate rate. It is neither high nor low. That decision was made taking into consideration the past, the present and the future. He also stated that no attempt was made to call for accounts from the respondents and when there were no attempts to call for accounts, the assertion that accounts have not been produced is only a hollow statement and should be rejected and cannot be a ground to reject the whole scheme of royalty at 2% of the net advertisement rate.

109.The learned Senior Counsel also pointed out that the reality of the situation was that all Radio Stations were running in loss, except ENIL. It was therefore necessary that a nominal rate is fixed and he asserted that determining the rate at 2% of the net advertisement revenue was extremely rational and there cannot be allegations of perversity being attached to it. He stated that the said rate was determined only on the basis of evidence adduced. The learned Senior Counsel was extremely emphatic in his assertion that the appeals should be dismissed.

110.Mr.Abishek Malhotra, learned Senior Counsel, who was



WEB COPY

instructed to argue on behalf of the respondents in C.M.A.Nos.3385, 3493 and 3494 of 2010 and Rev.A.No.11 of 2011, pointed out that the order under appeals cannot be categorised as irrational. He pointed out that the World Intellectual Property Organisation (WIPO) had three methods of valuation, namely,

(1) Market method (which is as a comparable licensing arrangement)

(2) Income method (which is as the income earned by intellectual property owner after deducting the additional expenses.

(3) Cost approach and process (which included the cost of acquisition and the profit on such acquisition.

111.He stated that one song would be played by 245 Radio Stations. The Radio Station had now increased to 388 Radio Stations. Therefore, there cannot be exclusive ownership of that particular song. Everybody can hear the music. It comprises of a bundle of rights.

112.The learned Senior Counsel pointed out Section 14(iii) relating to sound recordings and Section 2(ff) relating to communication to people. He pointed out that the Radio Stations made music available

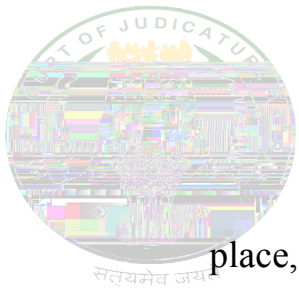
64/158



WEB COPY

to the general public. He also pointed out that Companies like the appellants, exploit music. They exploited the music by licensing it out to Television, to Radio Stations, to satellite telecasters on OTT platforms.

113.He contested the points raised that since FM Radio Stations have flourished, there had been fall in the sale of cassettes. He stated that it was an argument based on fallacy, since the procurement of music is a commercial decision. The risks are factual. The film must succeed. The shelf life of the music is also limited. As a matter of fact, Radio Stations also suffer because of piracy and 55% of income is lost to piracy. He pointed out that there has been no data provided about the drop in sale in music cassettes. The appellant had the data, but did not produce them. He charged that the appellants had deliberately suppressed accounts. He further stated that there was no data, even for physical sales of cassettes in the year 2008, when the impact of Radio Station was very minimum. The number of alternate platforms by which the music can be exploited has increased. Music is licensed to Radio Stations, as background music in elevators, aeroplanes and in every other

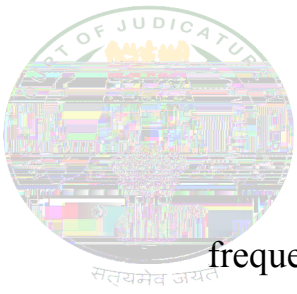


WEB COPY

place, even in lifts and elevators. The appellants exploit music in digital mode and have shifted their method of sale.

114.The learned Senior Counsel asserted that the rate should be determined only in according with the contract. What had been proposed by the appellants has no methodology and economic parameters have not been produced. Balance sheets have not been produced to show the income earned. The cost of acquisition of the music had not been disclosed. The absence of variables had not been taken into consideration, namely, variables in cost, in revenue, in source of exploitation, in actual users of the same music, in loss and profit and variables relating to alternate modes of exploitation.

115.The learned Senior Counsel pointed out that the best judgment method was specifically set aside. He also pointed out that televisions insist on subscriptions payments, but Radio Stations have no such payment of subscriptions. The reach of televisions are wide across the world, but the reach of a FM Radio Station was only limited to its

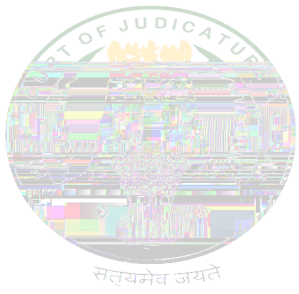


WEB COPY

frequency. It cannot also broadcast news. It had to purchase licences for broadcasting music/songs.

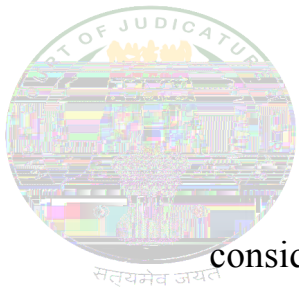
116.The learned Senior Counsel pointed out that advertisement is a variable and when the revenue increases naturally, the percentage of advertisement revenue would also increase. It was therefore only appropriate that future works are also covered under the order. The appellants are protected owing to inflation and increasing costs of advertisements. He also pointed out that FM Radio Stations have a duty to disclose their income to the Government and to pay taxes on those income and therefore, determining 2% of the net advertisement revenue is a just and equitable method. The learned Senior Counsel justified the reasons given and stated that the appeals will have to be dismissed.

117.Mr.N.L.Rajah, learned Senior Counsel advanced arguments in C.M.A.Nos.3382, 3491, 3492-3495 of 2010 and also with respect to the Rev.A.No.8 of 2011.



WEB COPY

118. The learned Senior Counsel pointed out that the Supreme Court had very specifically rejected the best assessment judgment method, which was what the appellants now seek. The proper manner in which any judgment should be rendered is by analysing and considering the evidence. He claimed that the Copyright Board had considered the evidence, which had been adduced. He stated that there cannot be any fencing of the jurisdiction of the Copyright Board. The Copyright Board had a right to examine the evidence adduced and to analyse that evidence and then come to a conclusion. He stated that the trial was a long drawn process. It swung like a pendulum from the Copyright Board to the Bombay High Court, to the Delhi High Court and then back to the Copyright Board and the Supreme Court and back to the Copyright Board. He pointed out that the appellant, SIMCA had every opportunity to participate, but they had taken a decision to peep through the window and not to enter into the arena. They cannot therefore claim ignorance and seek indulgence of this Court. He charged them with deliberate absence from the proceedings. He stated that they cannot be granted any

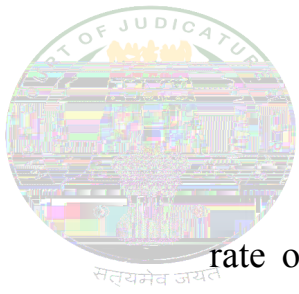


consideration at all.

WEB COPY

119.He further stated that any order passed is an order in rem and applies equally to everybody and anybody concerned with the subject issue. He also stated that the rate fixation method was done in accordance with the materials available on record. He claimed that the rates were fixed in proportion to the interest in the songs played and therefore, it was only just that the rate was fixed for a period of ten years and then reconsidered. He claimed that if needle per hour rate had been fixed for the years 2010-2020, then the entire Radio industry would have been strangled and would have collapsed. He stated that when needle per hour was fixed from the year 2002-2010, then the industry suffered. It was then fixed at a percentage of the revenue earned.

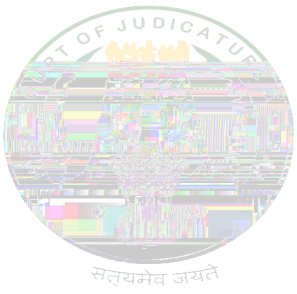
120.The learned Senior Counsel pointed out the number of channels, which were originally available. The learned Senior Counsel also stated that the Copyright Board had analysed the statemnts of the witnesses and had rendered a judgment determining a just and equitable



WEB COPY

rate of royalty payable. He further stated that opportunities had been granted not only to tender evidence but also to cross examine the witnesses. He stated that all the factors have been considered in the judgment.

121.He also stated that FM Radio Stations have a very important role in popularising any song and in enhancing the value of the song. There are several other advantages, particularly the reach of FM Radio Stations to the nooks and corners of the country. There was revenue generated at every stage. He also pointed out that Radio Stations only have a specific frequency unlike Television, which was global, owing to satellite connection. The learned Senior Counsel therefore stated that the needle per hour rate as claimed by the appellants would be extremely impracticable. The learned Senior Counsel justified the judgment under appeal and stated that the judgment does not require interference and stated that the appeals should be dismissed. He also stated that the review applications should also be dismissed.



WEB COPY

122.Mr.Vijay Narayan, learned Senior Counsel in his reply arguments reiterated the maintainability of the appeals under Section 72(2) of the Act. He stated that the appeals were maintainable on the date of filing of the appeals and the law as on date of filing of the appeals should be the deciding factor. With respect to the locus of the appellants on the ground that they were not a registered Copyright Society, he stated that the respondents had treated the appellants as Copyright owners. They having been making payments to the appellants. The respondents are dependent on the appellants to get licence for the songs either by way of licence under Section 30 or compulsory licence under Section 31 of the Act. It was therefore urged that contending that the appellants have no locus is a self defeating argument.

123.With respect to the agreements already entered, he stated that limited rights alone had been assigned. None of the assignees or assignors have complained about the said agreements. The learned Senior Counsel stated that this Court is vested with power to examine the issues in entirety in accordance with the provisions of Order XLI CPC

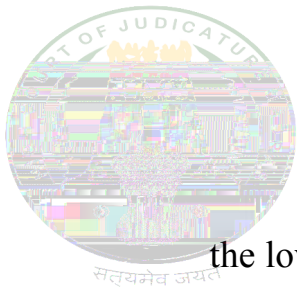


WEB COPY

and stated that the power is wide enough to examine whether the evidence had been properly analysed and whether the law had been properly applied.

124.The learned Senior Counsel stated that the appellants had disclosed their accounts and the cost of acquisition. He pointed out that the Supreme Court had placed an obligation on the Copyright Board that the evidence should be examined. He stated that the compulsory licence was only an exception. He also pointed out that out of the revenue earned through advertisement, nearly 26% had been expended towards salary. The learned Senior Counsel pointed that the comparative evidence about the audit of income had been completely ignored by the Board.

125.He also pointed out that the determination of 2% of net advertisement rate was based on foreign rates and should not have been applied. He also stated that the royalty rate had nothing to do with the financial condition of the Radio Station. He also urged that 2% was on



the lower scale.

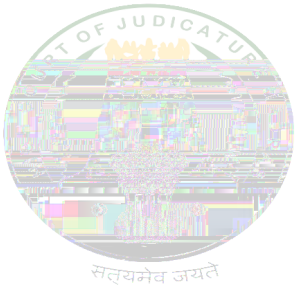
WEB COPY

126.He stated that there should be a hybrid determination of the rates with a minimum per needle hour determination. He stated that this would depend on market forces. He stated that the Board has to balance the equity of both sides, which unfortunately has not been done and royalty was based only on the survival of FM Radio Stations and not on the expenses incurred by the appellants towards acquisition of the assignment for the songs, which had been compulsorily licensed out to the respondents. The learned Senior Counsel therefore stated that the judgment under appeals required to be revisited by this Court.

127.I have carefully considered the arguments advanced and perused the material records.

128.The points which arise for consideration are:

(1)Whether PPL has locus to maintain the appeals?



WEB COPY

(2) Whether the appeals filed by PPL are maintainable?

(3) Whether the order of the Copyright Board is applicable to SIMCA?

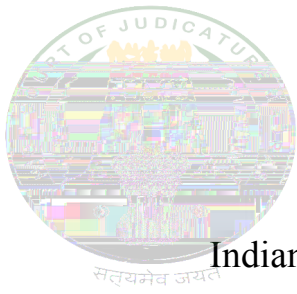
(4) Whether the appeals filed by SIMCA are maintainable?

(5) Whether the Copyright Board had misdirected itself in venturing into a discussion on social impact and Public Policy?

(6) Whether the Copyright Board was correct in comparing FM Radio Stations with All India Radio and the modalities of royalty payable with foreign Radio Stations?

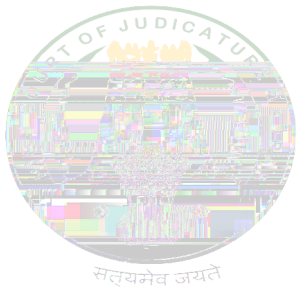
(7) Whether the compensation determined by the Copyright Board has to be upheld or set aside or modified/varied?

129.Evenaa



WEB COPY

Indian Copyright Act, 1914. This was based on the UK Copyright Act, 1911. The legislation was introduced after it was recognised by the invention of printing press, which enabled the re-production of books in large quantities. Thus, though creative persons like Artists, Musicians and Writers may compose or post their works for fam



WEB COPY

(i)the establishment of a Copyright Office under the control of a Registrar of Copyright, who would act under the superintendence and direction of the Central Government. One of the principal functions would be to maintain a Register of Copyrights in which, the names and addresses of the Authors and owners of Copyright could be entered into. It also provided that proceedings against infringement of copyright cannot be instituted unless the copyright was registered in the Copyright Office. An appeal to the Copyright Board was provided against the order of the Registrar of Copyright.

(ii)the establishment of a Copyright Board to determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, and also to consider applications for general licences for public performances of works and to assess compensation payable in certain circumstances. As against the order of the Copyright Board, an appeal can be filed in the High Court.

133.It is thus seen that two separate bodies came to be established, namely, a Copyright Office under the control of Registrar of Copyright



and a Copyright Board.

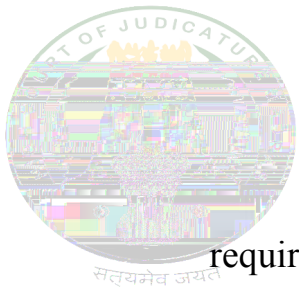
WEB COPY

134. Under the Bill, the definition of Copyright was widened to include the exclusive right to communicate works by radio-diffusion. A cinematographic film was recognised to have a separate copyright and also for its components, like, story and music.

135. While drafting the Bill, consideration was taken of the Copyright Report, 1952, and the suggestion of Ministries under the Government of India and the State Governments, Universities and interested industries and Associations.

136. The Copyright Bill, 1957, was passed by both the Houses of Parliament and received the assent of President on 04.06.1957 and came into force on 21.01.1958, as the Copyright Act, 1957 (Act 14 of 1957).

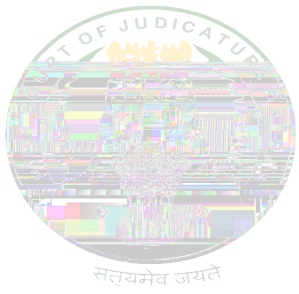
137. The following provisions of the Copyright Act, 1957, are



required to b

WEB COPY

appeals:



WEB COPY



(1)

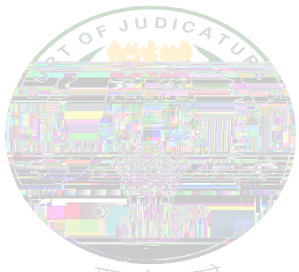
W

ording

Section 11" Copyright Board"

79/158

<https://www.mhc.tn.gov.in/judis>



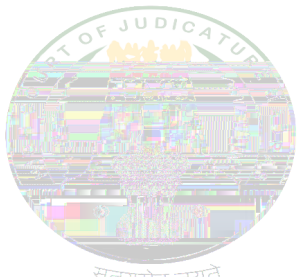
WEB COPY



[REDACTED]

[REDACTED]

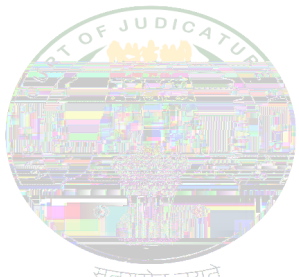
3e



WEB COPY



3ec



WEB COPY

Section

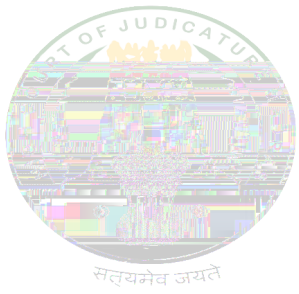
[REDACTED]

[REDACTED]

[REDACTED]

36

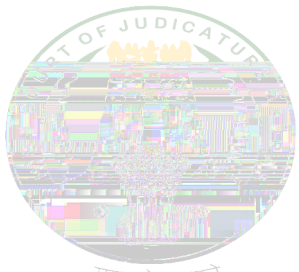




WEB COPY



sec



WEB COPY



SO



WEB COPY

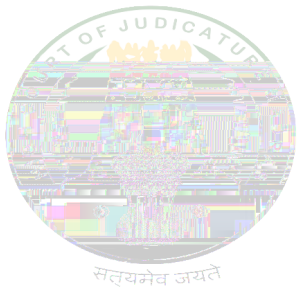


OW

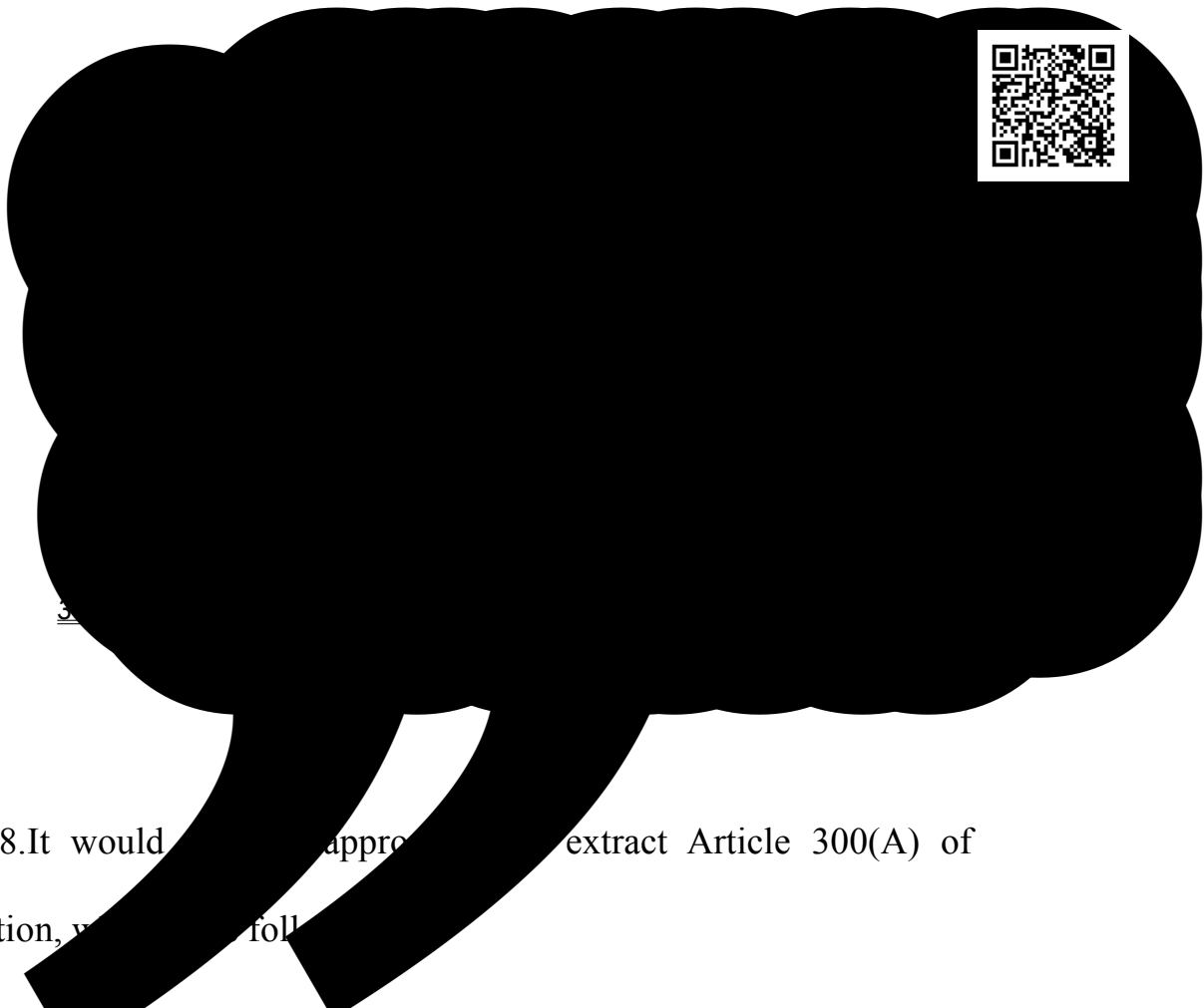
Cop

85/158

<https://www.mhc.tn.gov.in/judis>



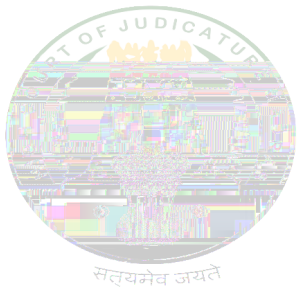
WEB COPY



138.It would be appropriate to extract Article 300(A) of Constitution, which follows

300A. Persons not to be deprived of property save by authority of law.— No person shall be deprived of his property save by authority of law.

139.It must be kept in mind that the Copyright Act, 1957, had undergone a sea change by subsequent introductions of provisions and amendments to the provisions extracted above. They had been introduced after the order passed by the Copyright Board, which is now questioned in these appeals and therefore, those amendments are not extracted, but the Law as on the date, when the Copyright Board passed its order and on the date of when the appeals were filed, have been extracted above.

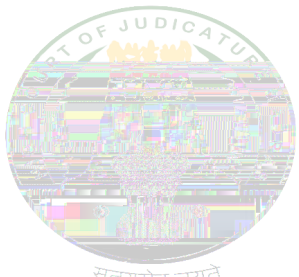


WEB COPY

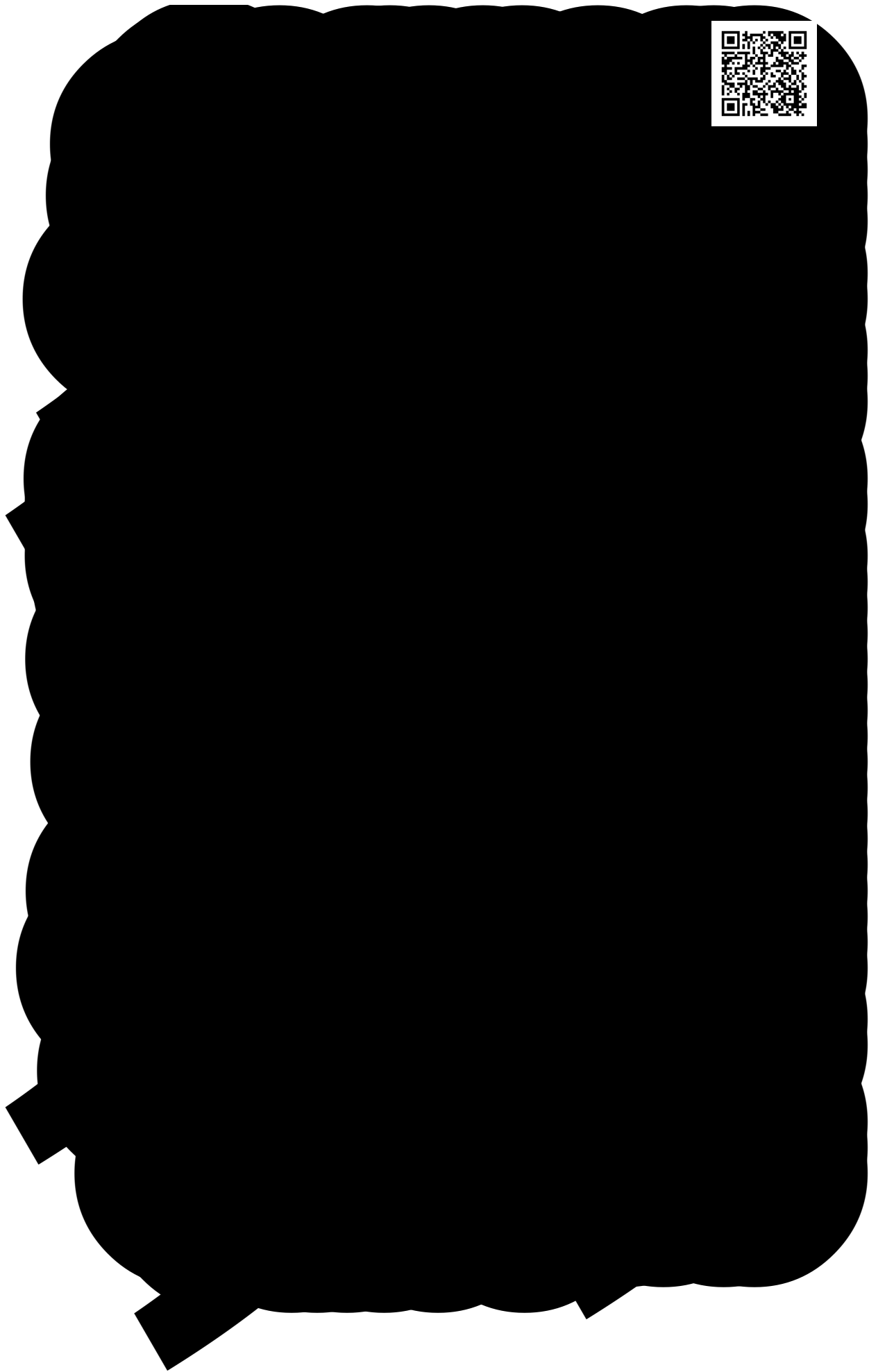
140. The judgment of the Supreme Court remanding the matter back to the Copyright Board was reported in *(2008) 13 SCC 30*, in *M/s. Entertainment Network (India) Limited and others vs Super Cassettes Industries Limited and others*:

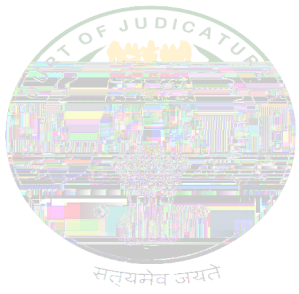
[REDACTED] is required, since in this judgment, the Supreme Court had remitted the matters back to Copyright Board and had given directions, as to how the issues were to be adjudicated and to analyse such evidence in the light of the above judgment.

<'=>

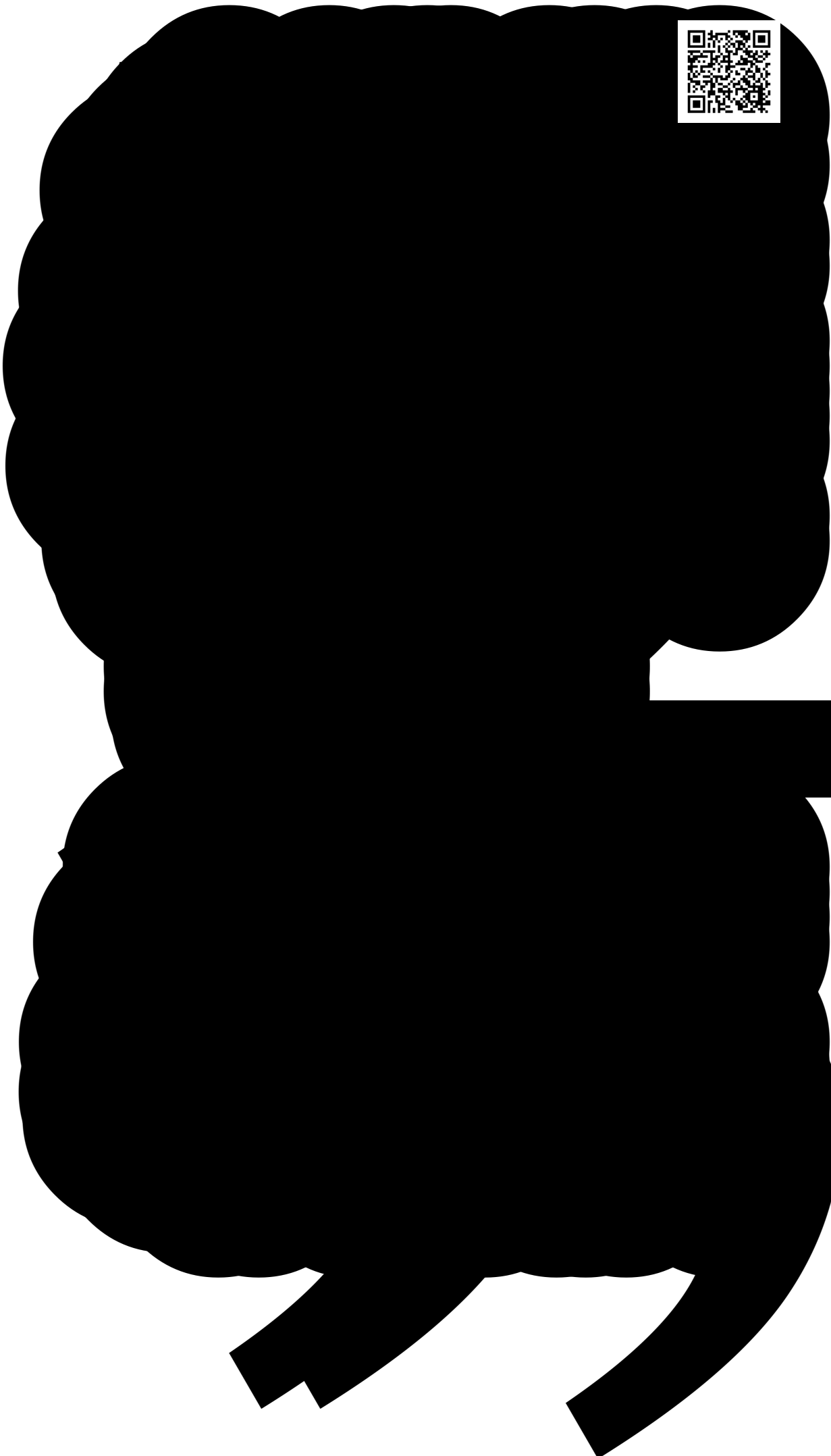


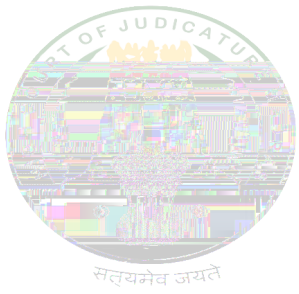
WEB COPY



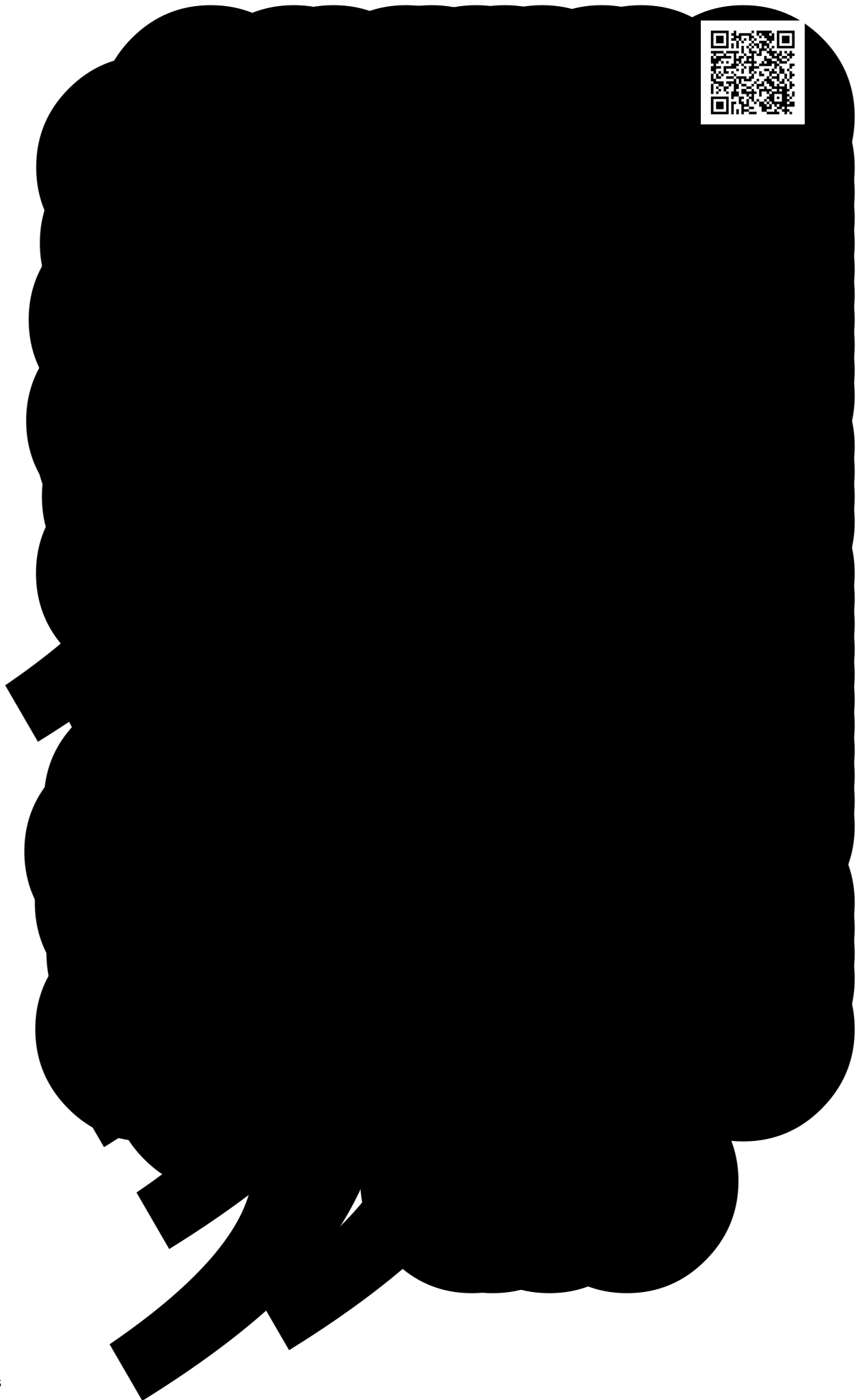


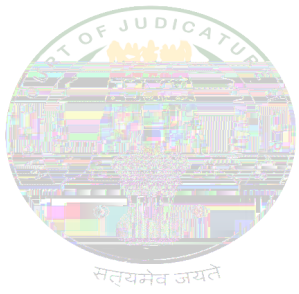
WEB COPY





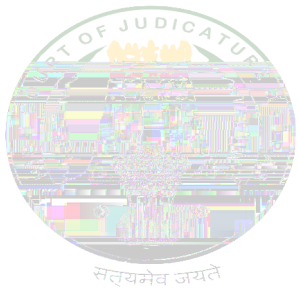
WEB COPY





WEB COPY

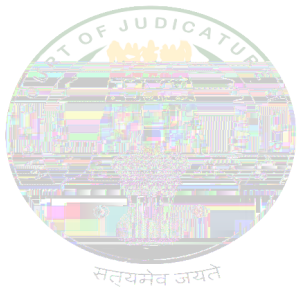




WEB COPY



Thus the matters [REDACTED] for fresh
consideration.



WEB COPY

142. These Civil Miscellaneous Appeals have been filed taking advantage of Section 72(2) of the Copyright Act, 1957, before it had been amended

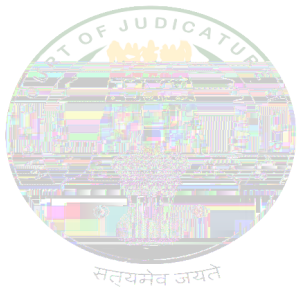
filed. S

and

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal, may, within the time specified in the order, apply to the High Court for leave to appeal. The High Court may, if it thinks fit, grant leave to appeal on such conditions as it may think fit. The High Court may also, if it thinks fit, make such order as it may think fit in relation to the appeal.

143. The Madras High Court in its Appellate Side Rules, had framed Rules for regulating the procedure with regard to the following:

- “(1) to regulate proceedings under Article 226 of the Constitution of India.
- (2) to regulate proceedings for contempt of subordinate courts and of the High Court.
- (2) to regulate the procedure in regard to references and applications made to the High Court under Section 226 of the



WEB COPY



,n#ome 4a+ 5#t.

(7)4o regulate the pro#educ [REDACTED] d to re eren#e
appli#ations made to the 6 [REDACTED] under)e#tion [REDACTED]
8state 9uty 5#t.

(")4o #ases under the . hartered 5##ountants 5#t% 1:7:.

(6) to regulate the procedure in regard to references and petitions made to the High Court under section 120 of Customs 5#.

(;)4o regulate the procedure in regard to references and petitions made to the High Court in relation to the central issue and alt 5#t.

(!)to regulate the procedure in regard to references and petitions made to [REDACTED] old .ontrol 5#.

14 [REDACTED] Appears under Section 72(2) of the

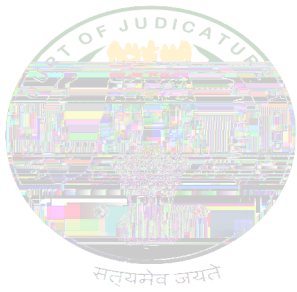
Copyri [REDACTED] n was, had not been framed. It is,

therefore, incumbent on the part of this Court to fall back to Section 96 of Code of Civil Procedure, namely Appeals from Original Decree.

145/

• • • • •

146. Order XL1 Rule 1 of Code of Civil Procedure is as follows:



WEB COPY



<(

4rov

(2)

((

147

<2

4rovided

148. The above provisions are to be kept in mind, since arguments in these appeals have traversed considerably beyond the grounds raised



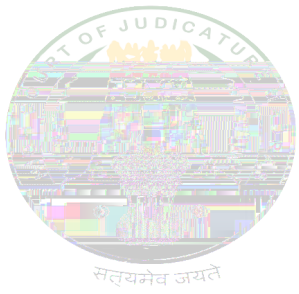
WEB COPY

and have widened the scope of the points for consideration in the appeals.

Points Nos.1 & 2:-

149.The first and second points to be addressed are issues relating to maintainability of the appeals and the locus of the appellants, particularly, M/s.Phonographic Performance Limited (PPL).

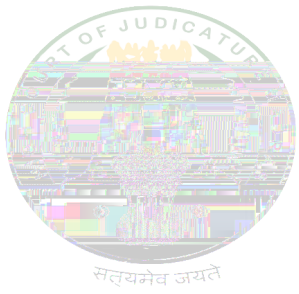
150.At the time when the appeals were presented, PPL was a Company registered under Section 27 of the Companies Act, 1913 and also a Copyright Society registered under Section 33 of Copyright Act, 1957. They were registered to carry on business in relation to sound recording on behalf of the members of the Society. They also claimed that they were entitled to charge and collect licence fee from the users of sound recordings as stipulated under Section 2(xx) of the Act, which right vested with its members. They also claimed that the members had authorised them to administrate performance/communication to the public.



WEB COPY

151. However, the Copyright Act, 1957 had been amended in the year 2012. The second proviso to Section 33(3A) of Copyright Act, 1957, r/w the Copyright Rule, 2013, which was brought into effect on 20.06.2012 and on 14.03.2013 respectively, necessitated the appellant, PPL, to register themselves as a Society within a period of one year from the date of the coming into effect of the Amendment Act, 2012. The appellant had forwarded their application for such registration on 09.05.2013. They however claim that even after one year, the registering authority/Central Government had not responded or passed any order. Therefore, the appellant withdrew the application.

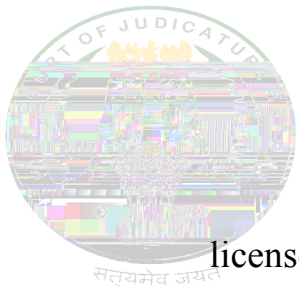
152. The fact that the appellant themselves have withdrawn their application was stressed by Mr.G.Masilamani, learned Senior Counsel for the respondents, who claimed that therefore, the appellant/ PPL ceased to be a Copyright Society under Section 33 of the Copyright Act, 1957, and that therefore, they have no right to maintain the appeals any further.



WEB COPY

153.However, this argument had been countered by Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of the appellants by stating that the appeals should be taken up as presented in the year 2010 and on that particular date, the appellant was a registered Copyright Society and intervening circumstances brought up by legislation cannot and should not be a bar for the Court to examine the order of the Copyright Board challenged in the appeals. It was also contended that the appellant had brought this fact to the knowledge of the Court and had filed a series of Civil Miscellaneous Petitions to amend the statement in the Grounds of Appeals and this Court had also allowed those application by order, dated 21.02.2020 and had left the issue open to be raised at the time of final hearing. It had been urged by Mr.Vijay Narayan, learned Senior Counsel that the appellants' right commenced from the date when the respondents had made an application for compulsory licence under Section 31 of the Act before the Copyright Board in the first instance.

154.The appellant had been contesting the issue of compulsory



WEB COPY

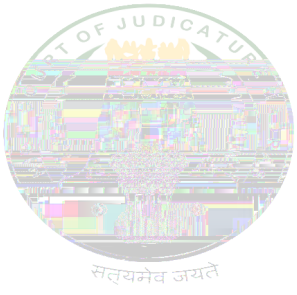
license and the compensation payable before the Copyright Board. The matters had travelled via the Bombay High Court and the Delhi High Court to the Honourable Supreme Court and finally, were remitted back to the Copyright Board. Evidence had been adduced. The appellant had filed these appeals, which were admittedly maintainable on the date when they were filed. The learned Senior Counsel therefore urged that the Court should examine the order challenged and thereafter, the issue of locus of the appellants to still maintain the appeals can be examined. It was further urged that the members have assigned the copyright of their own sound recordings to the appellant under Section 18 of the Copyright Act, 1957. It had also been stated that the appellant had stepped into the shoe of the member owners of various sound recordings. They were also assignees and/or exclusive licensees of the sound recordings.

155. In the light of the rival contentions more particularly since an amendment had been brought up to the Act pending the appeals and the appellant had made diligent efforts to register themselves as a Copyright Society and such application had not been rejected by the registering



WEB COPY

authority/Central Government, but had been kept pending for more than a year, when probably more out of frustration than for any other reason, the appellant withdrew the application, I would still hold that the appeals are maintainable, since the appeals have been filed against the order of the Copyright Board and it is that order, which has to be examined in the light of Section 72(2) of the Copyright Act 1957, and since Rules have not been framed by the Madras High Court, in the light of Section 96 and Order XLI of the Code of Civil Procedure. Enforcement of the order in these appeals would be a different issue altogether and this Court should not tie its hands and short-circuit the appeals and non suit the appellants. On the date when they filed the appeals, they had locus and the appeals were maintainable. The statute provided it. I would therefore hold that the appellant can still question the order of the Copyright Board and would order accordingly on both the points of maintainability and the locus. The points 1 and 2 are accordingly answered.



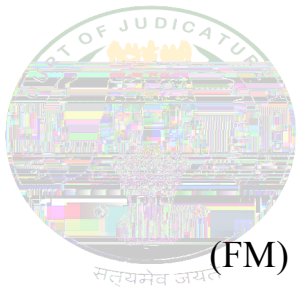
Points 3 and 4:

WEB COPY

156. These two points relate to appeals filed by the South India Music Company Association (SIMCA) in C.M.A.Nos.3490 to 3493 of 2010.

157. M/s. South India Music Company Association (SIMCA) was not a party in any of the proceedings before the Copyright Board. They had, however, filed the aforementioned Civil Miscellaneous Appeals as a person aggrieved under Section 72(2) of the Copyright Act, 1957. The appellant/SIMCA, which was founded in 1996, is an Association of Music Producers. Their object was to resolve the problems faced by the Music Industry in South India. The members included music production and distribution companies. They owned copyrights for various musical and other works including sound recordings. They are also the assignees of musical works and sound recordings of Tamil and Malayalam movies.

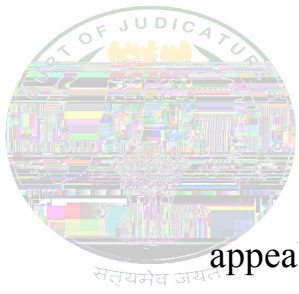
158. The Government of India in their IX Five Year Plan had brought in a shift from Medium Wave (MW) to Frequency Modulation



WEB COPY

(FM) Radio broadcasting and in March 2002, private sector companies were invited in FM Radio broadcasting by offering frequencies in Frequency Modulation Band (87.5-108 Mhz). The respondents had come out with their rates of royalties payable by FM Radio Broadcasters. There were disputes and the matter went before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, and an interim order was passed on 19.11.2002 fixing the rate of royalty at Rs.1,200/- per needle hour during prime time between 08.00 am and 10.00 am and 06.00 pm and 08.00 pm. This was the standard rate. There was also a further determination of the rates at 60% of the standard rates for a normal 12 hours and 25% of the standard for lean night hours. This came into effect from November 2002 till 31.12.2004. The FM Radio Broadcasters had some difficulties in effecting payment at this rate and the appellant/SIMCA had voluntarily agreed to lower the rates of royalty payable and had categorised the cities as A, B and C and had reduced the royalty for both B and C categories cities.

159.Challenging the order dated 19.11.2002, appeals and cross



WEB COPY

appeals were filed and finally, the Honourable Supreme Court had remanded the matter back to the Copyright Board for fresh consideration after examining the evidence available. Again, the appellant was not a party in any of the judicial proceedings.

160. The trial then proceeded before the Copyright Board. None of the parties to the applications had impleaded the appellant either categorizing it as a necessary party or a proper party. Even the Copyright Board did not think it necessary that the appellant must be heard. The Copyright Board then passed the order challenged in these appeals and even though the appellant was not a party, by the impugned order, dated 25.08.2010, it had been stated that the royalty, which had been determined, namely, 2% of the net advertising revenue would also be applicable to all other content owners.

161. The appellant was not named specifically in the order, but the respondents in the Civil Miscellaneous Appeal/ENIL unilaterally started making payment to the members of the appellant in accordance with the

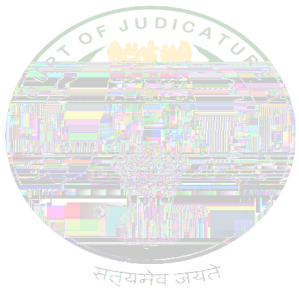


WEB COPY

order impugned passed by the Copyright Board. They should have given credit to the fact that the members of SIMCA had actually reduced the rates payable when it was determined as per needle hour in the first order of the Copy right Board. Further, every member of SIMCA had separate agreements with the Radio Stations.

162.Claiming that they were seriously prejudiced by the order and aggrieved by the order, the aforementioned appeals have been filed by SIMCA. It had been argued that there had been complete violation of principles of natural justice. The appellant had not even entered the arena before the Copyright Board. The order was however directly prejudiced and it had been passed and enforced by ENIL to the disadvantage of the members of the appellant herein.

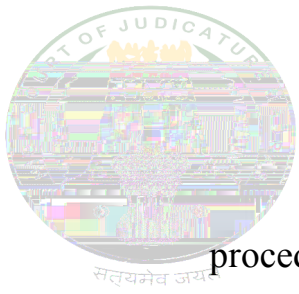
163.When the issue of applicability of the order to the appellant came up during arguments, Mr.G.Masilamani, learned Senior Counsel pointed out that in the agreements entered into by the members of the appellant, they had agreed to abide by the order of the Copyright Board.



WEB COPY

164.Mr.N.L.Rajah, learned Senior Counsel also pointed out that the appellants cannot play hide and seek and claim ignorance and innocence of the proceedings of the Copyright Board, which was conducted in a transparent manner in open Court. He pointed out that the appellant had taken advantage of the order, dated 19.11.2002 and when an order was passed determining an alternative rate of royalty to be paid, the appellant has now raised hue and cry, when they themselves had abided by the order, dated 19.11.2002, to which also they were not a party. He also contended that the appellant should have impleaded themselves as a party to the proceedings.

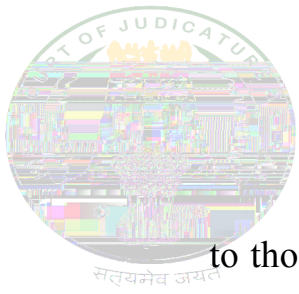
165.These arguments were countered by Mr.M.V.Swaroop, learned Counsel for the appellant, who pointed out that the appellant had no locus to join the proceedings before the Copyright Board. They were an independent entity altogether. It was pointed out that the jurisdiction of the Copyright Board to fix the royalty would arise only on a complaint filed under Section 31 of the Copyright Act, 1957. Thereafter, the



WEB COPY

procedure is inbuilt in the Act. Opportunity of hearing was not afforded to the appellant. It was claimed that the Copyright Board had exceeded its jurisdiction by bringing into its fold even parties who were not before it during the proceedings. The learned Counsel pointed out that even the Delhi High Court had stayed the impugned order filed by M/s. Super Cassettes Industries Limited, who like the appellant, was not a party to the proceedings before the Copyright Board. The Delhi High Court in its observation has stated that prima facie, it was evident that the order had been made applicable by the Copyright Board even to those who did not participate in the proceedings before it. The order had been stayed by the Delhi High Court.

166. I have carefully considered the rival contentions. Any authority, judicial or non judicial which ventures into decision making on the basis of evidence, can only restrict its orders to what had been pleaded and to the evidence that had been produced. Such evidence would be adduced by witnesses, who tendered evidence on behalf of a particular party. Such evidence cannot be analysed and made applicable



WEB COPY

to those who were not parties before the authority. They might have led different evidence altogether. They would have had a different set of facts to be pleaded. These are issues which should have been kept in mind by the Copyright Board before making the order applicable to parties, who were not even present before it.

167.The appellant/ SIMCA was not present before the Copyright Board. The Copyright Board could have, after passing the order and determining the rates, granted liberty to anybody else, who had not participated to seek clarifications/modifications. It is seen that the members of the appellant had independent agreements with the Radio Stations. They had agreed to abide by the order of the Copyright Board in the first instance: This agreement cannot be made to be universally and ever always applicable.

168.There can be an agreement over a definite issue or point, but there cannot be an agreement over undeclared/unpronounced judgments. Vagaries of law would take the decision maker through various paths and

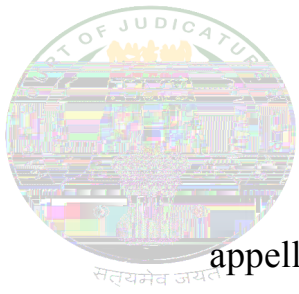


WEB COPY

no party can be bound unless they also had the opportunity of presenting their views before the decision making authority. A sweeping order and a statement that the order would apply everybody else cannot withstand the scrutiny of this Court. It has to be deprecated. I would therefore hold with respect to Point No.3, that the appellants had been seriously prejudiced by the applicability of the order passed by the Copyright Board and therefore the appeals filed by SIMCA are maintainable.

169.The issue then arises as to whether the appellant would be bound by any order passed by this Court. Before this Court, quite apart from the fact that they were not bound by the order of the Copyright Board, arguments were also advanced on merits against the order passed by the Copyright Board.

170.Determination of the rate at net value of 2% of the net advertising income had been very strongly questioned by Mr.M.V.Swaroop, learned Counsel for the appellant. The learned Counsel, in fact during his arguments produced statistics to show that the



WEB COPY

appellant had suffered loss owing to unilateral application of the order by ENIL. It was contended that the appeals are maintainable and arguments were also advanced on merits. Those arguments shall be addressed when those points are taken up for consideration.

171.Insofar as the points now under consideration. I hold that the appeals filed by M/s.South India Music Company Association (SIMCA) are maintainable and SIMCA has locus to file the appeals. The points for consideration are answered in favour of the appellant herein/SIMCA.

172.Having answered Point Nos.1 to 4, which can be termed as the preliminary points before entering into a discussion on Point Nos.5 to 7, let me now take up the background facts, the disputes between the parties leading to applications filed before the Copyright Board and finally evidence adduced and then order of the Copyright Board, dated 25.08.2010, which is the subject matter of the appeals.

173.M/s.Phonographic Performance Limited (PPL), was one of the

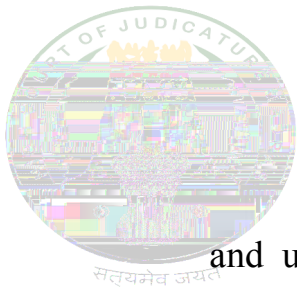


WEB COPY

leading music companies engaged in production and/or acquisition of rights in sound recordings. These recordings primarily related to film music. They were the holders of the copyright, which they had acquired from the first owner, namely, the Producer of the movie.

174.M/s.Entertainment Network India Limited (ENIL) and other such companies are FM Radio Broadcasters. They had licences to play songs. The private Companies were invited to set up FM Radio Stations. PPL and others had acquired licence after stiff competition and payment of licence fees. They had to play music, but they found that the copyrights vested with PPL and other such companies. They however played the music. This led to a series of correspondences between PPL and ENIL and other such Radio Companies and PPL questioned the authority to play the music and raised the issue of payment of royalty. Even when correspondences were on going, the music was played. There were offers of negotiation by both sides.

175.Complaining that the the offer made by PPL were unrealistic

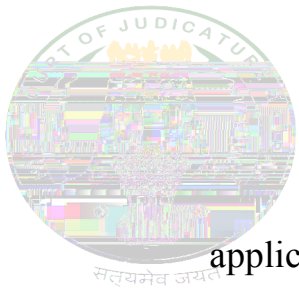


WEB COPY

and unreasonable and that if the said offers were accepted, it would prejudice them and therefore, the offer itself was only a screen, which actually indicated refusal to grant permission, applications were filed taking advantage of Section 31 of the Copyright Act, 1957, before the Copyright Board by ENIL and other Radio Companies seeking compulsory licence. In the first round of litigation, the Copyright Board by a judgment and order, dated 19.11.2002, fixed the standard rates of :

- (a) Payment to be made at Rs.1200/ needle hour during prime time.
- (b) For 12 normal hours = 60% of standard rate
- (b) For ! lean (night) hours = 20% of standard rate and respondent also directed to furnish a security/bank guarantee of Rs.20,00,000/- per radio station to PP '.

176. This was held to be in operation for a period of two years. Appeals were then filed before the Bombay High Court. In a few of the appeals, the Bombay High Court had remitted the matter back to the Copyright Board. In the year 2003, a further application was filed before the Copyright Board under Section 31(1)(b) of the Copyright Act, 1957, against M/s. Super Cassettes Industries Limited seeking compulsory licence. In the meanwhile, M/s. Super Cassettes Industries Limited had filed a suit complaining infringement of copyright and therefore, the

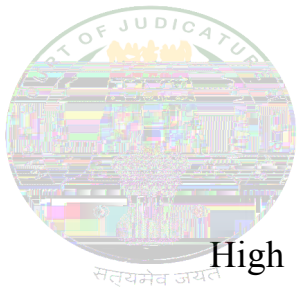


WEB COPY

application for compulsory licence was resisted by M/s.Super Cassettes Industries Limited. The Delhi High Court clarified that the Copyright Board can examine all the issues. Even though the Copyright Board directed witnesses to be present, but still compulsory licence was granted by an order, dated 20.10.2003.

177.Questioning that order, a further appeal was filed before the Bombay High Court questioning the rate of compensation and not the concept of compulsory licence. This appeal was clubbed with the pending appeals before the Bombay High Court. Appeals were also filed before the Delhi High Court. By an order dated 30.06.2004, the matter was remitted back to the Copyright Board. The Copyright Board was directed to give opportunity to the parties to adduce evidence.

178.As against this order, a Special Leave Petition was filed before the Supreme Court. The Supreme Court thus had two appeals, one from the Bombay High Court, which opined that the compulsory licence can be granted by reasonable remuneration and another from the Delhi

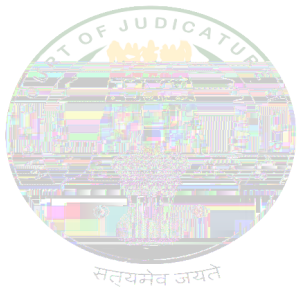


WEB COPY

High Court, which directed examination of all issues by the Copyright Board.

179. The judgment [REDACTED]
appeals was reported in (2008) [REDACTED] *Entertainment*
Network (India) Limited and others -vs- Super Cassettes Industries
Limited and others [REDACTED]

Honourable Supreme Court [REDACTED]



WEB COPY



180.The matter then went to the Appellate Board. There were

114/158

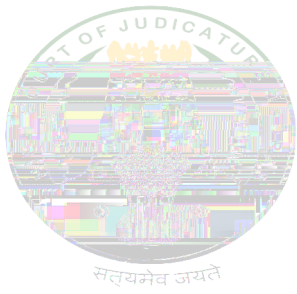


WEB COPY

nine applications filed under Section 31(1)(b) of the Copyright Act, 1957 for grant of compulsory licence for broadcasting sound recordings.

Three of the applications had been remitted back by the Honourable Supreme Court. Six applications were fresh applications. In deference to the direction of the Supreme Court, the Copyright Board permitted evidence to be adduced. The applicants before the Copyright Board were the Radio Broadcasters. The Copyright Board rendered a common order in nine applications. The details are as follows:

- (1). ase = 0.1 o 2002 > 0/s.0usi# - road#ast Pri*ate 'imited *s
0/s.Phonographi# Per orman#e 'imited
- (2). ase = 0.2 o 2002 > 0/s.8ntertainment =et (or\$ (,ndia)
'imited *s. 0/s.Phonographi#
Per orman#e 'imited
- (2). ase = 0.6 o 2002 > 0/s.Radio 0id 9ay ?est (,ndia) 'imited
*s. 0/s.Phonographi# Per orman#e
'imited
- (7). ase = 0.2&1 to 2&2 o 200! > 0/s.Puran 0ultimedia Pri*ate
'imited *s 0/s.Phonographi#
Per orman#e 'imited
- ("). ase = 0.2&" o 2002 > 0/s.)ynergy 0usi# Per orman#e 'imited
*s. 0/s.Phonographi# Per orman#e
'imited
- (6). ase = 0.2&7 o 200! > 0/s.8ntertainment =et (or\$ (,ndia)
'imited *s. 0/s.Phonographi#
Per orman#e 'imited
- (;). ase = 0.2&6 o 200! > 0/s.Ra@asthan Patri\$a Pri*ate 'imited



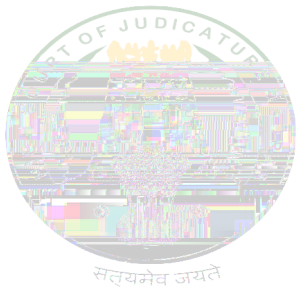
WEB COPY



*s 0/s.Phonographi# Per orman#e
'imited

181.On behalf of the applicants, 13 witnesses were examined. Out of them, Prof.Bibek Debroy, PW4 was the expert witness. On behalf of respondents, five witnesses were examined, of whom, RW-1, S.Suresh was the prime witness for PPL and RW-5, Prof.S.K.Laroiya, testified about his final conclusion based on his study. To be more precise, the followings were the witnesses examined:

P ?&1&5shish)ha
P ?&2&5yan . ha\$rbory
P ?&2&5pur*a Purhoit
P ?&7&Pro .- ibe\$ 9ebroy
P ?&"prashant Panday
P ?&6&9alpat Ra@ Aain
P ?&;&5arti Bathariya
P ?&!&=aresh 0al*iya
P ?&:&Ra@inder -atra
P ?&10&Poo*analingam
P ?&11&Ban (ar)ameer
P ?&12&Rahul <upta
P ?&12&)udeep Aain
R ?&1&).)uresh
R ?&2&)anu@eet -hu@abal
R ?&2&Ramesh 5rora
R ?&7&<irish Aain
R ?&"&Pro .).B. 'aroiya



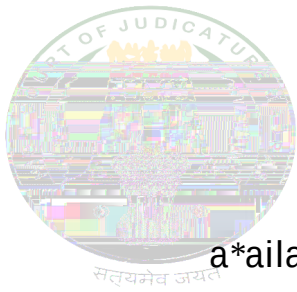
WEB COPY

182.The above details have has been stated since it has to be first examined whether the parties before the Copyright Board were provided with opportunity to adduce oral evidence. They had been granted that opportunity and to this extent, the Copyright Board had complied with the direction of the Honourable Supreme Court in its order remanding the matter back to the Copyright Board.

Point Nos.5 to 7:-

183.The discussion on point Nos.5 to 7 overlap and consequently they are taken up together for discussion. The findings relating to Point Nos.5 and 6 would be first rendered and after continuing with the discussion, the findings with respect to point No.7 would be given.

184.Applications had been filed before the Copyright Board seeking compulsory licence by the Radio Companies under Section 31(1)(b) of Copyright Act, 1957. In the application form in the clause relating to language o the (or\$, it had been stated as “all language



WEB COPY

available no (or any future (ithin the Repertoire o PP ' ./ . In the

application, it had been stated with respect to the purpose for which compulsory licence was required, to #ommuni#ate musi#% being sound re#ordings% to the publi# *ia Radio F 0)tations. The list of cities were also indicated.

185. With respect to the number of copies of work proposed to be published under the licence applied for, it had been stated that it (as not possible to estimate the number o times a (or\$ #ould be #ommuni#ated to the publi# or published. It had been stated that it would depend on the log sheets proposed to be submitted by ENIL at the end of each calender and that the log sheets are proposed to be in tabular form and will contain the details of the time of the day, name of the song, the sound recordings from which it had been played, the name of the publisher and duration for which the song was played. It was also stated that the estimated cost could not be determined.

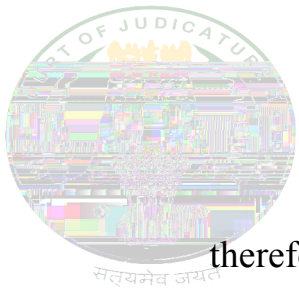
186. With respect to the rate of royalty, it had been stated, after



WEB COPY

extracting the previous correspondences between the parties, that PPL demanded as the fair market value at Rs.1,500/- per needle hour for broadcasting of sound recordings of PPL over the radio service. It was stated that a provision was also sought for 5% escalation. It was stated that the rate of royalty suggested by PPL was economically unviable for private FM Radio Stations, which were in its infancy in India.

187.It was also stated that ENIL had obtained separate licences from Indian Performing Right Society Limited (IPRS) under Section 33(3) of the Copyright Act, 1957, and had also entered into agreements in this regard with respect to musical and literary works that in the future will be included within its Repertoire. It was also stated that Indian Performing Right Society Limited (IPRS) had agreed to give several discounts on its total price depending on the cities, differentiating between metro and non metro cities. It had been stated that however, PPL had refused all offers made by ENIL. It was also pointed out that PPL had control of one category of copyright, namely, music, while IPRS controlled both musical and accompanying literary works. It was



WEB COPY

therefore stated that PPL should agree to the same rate of royalty as agreed by IPRS, which was originally determined at Rs.750/- per needle hour for Radio broadcast with discounts relating to prime time and relating to metropolitan and non metropolitan cities.

188.It is thus seen that at no point in their application, did ENIL sought the rate to be fixed as a percentage of the net advertising income. The concept was always rate per needle hour and the only aspect was the quantum of such rate. PPL demanded Rs.1,200/- per needle hour. From the applications, it is evident that ENIL had agreed to Rs.750/- per needle hour, as also agreed by IPRS with corresponding discounts relating to prime time and non prime time and metro and non metro cities.

189.In the application filed by M/s.Rajasthan Patrika Private Limited in the year 2008 in Case Nos.3-6 of 2002, the language of the work was stated as Call languages available in the (or\$ no(or in future (ithin the Repertoire o PP ' / . With respect to the royalty, after stating the background facts necessitating the filing of the application under

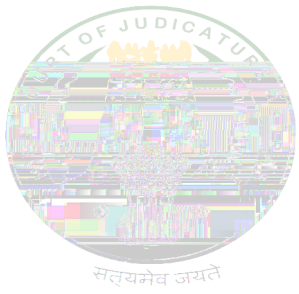


WEB COPY

Section 31(1)(b) of Copyright Act, 1957, it had been stated that PPL had refused to accept the terms of M/s.Rajasthan Patrika Private Limited, wherein, M/s.Rajasthan Patrika Private Limited had offered Rs.115 per needle hour for the cities of Udaipur, Raipur and Kotta and also for security deposit to be paid. A relief was sought to determine a reasonable rate of licence fee in accordance with the rate per needle hour. The rates were given in a separate annexure. It was a calculation relating to rate per needle hour.

190.Similar applications were filed by other Radio Companies.

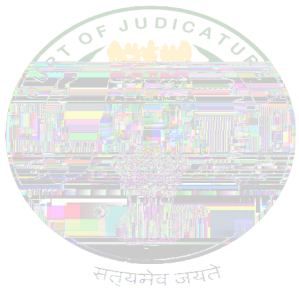
191.One fact to be straightaway pointed out is that all the Radio Companies had, in their written applications insisted on compulsory licence to be given, since PPL had stipulated a rate, which in their opinion was practicably usurious and therefore, sought a reasonable rate to be determined keeping in mind the concept of rate per needle hour alone.



WEB COPY

192. In their counter affidavit, PPL justified the rates offered by them. Again, the correspondences and the meeting and the discussions which took place had been stated in detail and the high rate was justified consequent to loss in sale of recordings/cassettes, CDs and the utility of the content, namely, the reach of the content, the marketing and the sales and it was stated that while examining the loss in sale owing to cassettes, CDs and recordings, that Rs.1,500/- per needle hour would be just and proper and while examining the utility that 20% of the net advertising revenue is also just and proper.

193. Thus, for the first time, it was PPL, the appellant herein who brought up the concept of payment of a percentage of the net advertising revenue. It was finally stated that a tariff of Rs.1,500/- per needle hour was justified and with specific reference to the language, which was given as future also, it was stated Cno #omments/. Thus PPL had never objected for future works to be included and taken for consideration while determining the rate of royalty.



WEB COPY

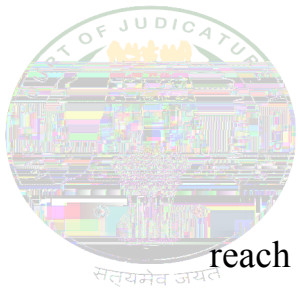
194.The conclusions, which can be reached from a reading of the applications and the counter are as follows:

(1)There had been a series of discussions over determining the rate of royalty and discussions centered around the concept of rate per needle hour.

(2)The applicants were of the opinion that reasonable rate per needle hour would be Rs.750/- and an agreement was reached with Indian Performing Right Society Limited (IPRS), who had control of separate licences both musical and literary works. They had also wanted necessary consideration to be given for the prime and non prime slots and for metro and non metro cities.

(3)On the other hand, PPL had stated that rate per needle hour would be just but stipulated that the rate should be Rs.1,500/- per needle hour.

(4)PPL had also expressed opinion about the net advertising rate, but had stipulated the nature of calculation to be undergone for determining the same and placed two conditions namely, the range of



reach and the extent of advertising to be done.

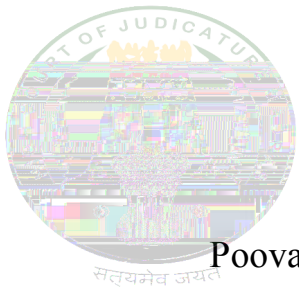
WEB COPY

(5) There had been no serious objection raised about future work being included while determining the rate of royalty by the Copyright Board.

195. These background facts have been placed only to determine the basis on which the parties had approached the Copyright Board. They are mere statements of facts.

196. Evidence was also adduced on behalf of ENIL and PPL.

197. On behalf of M/s. Music Broadcast Private Limited, Ashish Sha, Ayan Chakraborty, Ms. Apurva Purhoit, and Prof. Bibek Debroy were examined as PW-1 to PW-4. On behalf of M/s. Entertainment Network India Limited (ENIL), Prashant Panday and Dalpat Raj Jain were examined as PW-5 and PW-6. On behalf of Radio Mid Day West (India) Limited, Arti Katharaiya and Naresh Malaviya were examined as PW-7 and PW-8. On behalf of M/s. Puran Multimedia Limited, Rajinder Batra,



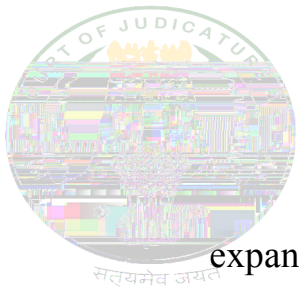
WEB COPY

Poovanalingam, Kanwar Sameer and Rahul Gupta were examined as PW-9 to PW-12. On behalf of M/s.Entertainment Network India Limited (ENIL) again, Sudeep Jain was examined as PW-13. Among the above witnesses, Prof.Bibek Debroy, PW-4 was the expert witness.

198.On behalf of M/s.Phonographic Performance Limited (PPL), S.Suresh, Sanujeet Bhujabal, Ramesh Arora, Girish Jain and Prof.S.K.Laroiya were examined as RW-1 to RW-5. Among them, Prof.S.K.Laroiya, RW-5 was the expert opinion.

199.I will take up for consideration the analysis of Prof.Bibek Debroy, PW-4 and Prof.S.K.Laroiya, RW-5 after I had examined the deposition of other witnesses.

200.The other witnesses, who were primarily employees of the stated companies spoke about the operating expenses, programming cost, royalty cost, licence fees, expenses towards employees, administration, selling and distribution, operating cost of running the Radio Stations,



WEB COPY

expansion of Radio Stations, change in Government licensing policy, music royalty based on advertising revenue share, terms of the licence granted by Ministry of Information Broadcasting, operating losses, brand value of the company, time slot voluntary licensing, voluntary licensing agreement, percentage of the royalty paid and payment towards advertisement expenses.

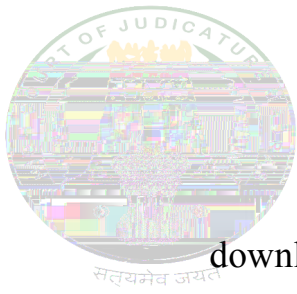
201. On behalf of PPL, RW-1 to RW-4 spoke about the piracy, anti-piracy raids, royalty income, All India Radio (AIR) advertising revenue, consultation by PPL before fixing tariff, decrease in physical sales of CDs and cassettes, cost of music rights, wholesale and retail business of CDs and DVDs and downloading of songs from internet.

202. More specifically, PW-1 Ashish Sha had spoken about the operative expenses, which included programming cost, royalty and licence fee paid to the Government of India and stated that operating cost had come down compared to staff costs.



204.PW-3, Apurva Purhoit, spoke about the closure of allocated

08% $\tilde{N}_q$



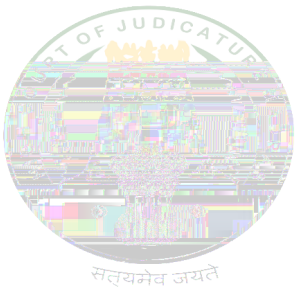
downloading of those hit songs from internet.

WEB COPY

206.PW-6, Dalpat Raj Jain, expresses his opinion on music royalty based on advertising revenue share.

207.PW-7, Aarti Kathariya stated that Radio Stations broadcast film music primarily. She also stated that Radio Mid-Day West (India) Limited had independent agreements with 'T' Series and Yash Raj and pay royalty to them in accordance with the order of the Copyright Board of the year 2002. She also stated that the change in policy in the payment of licence fee from an absolute amount to a revenue share model had been a reason for participation in Phase-II policy. She also stated that increase in the payment of royalties had led to decrease in revenue, thereby affecting Radio Stations.

208.PW-8, Naresh Malaviya again spoke about the operating loss of which royalty was a major component. He also stated that the reduction in the royalty rate would reduce loss for FM Radio operators.



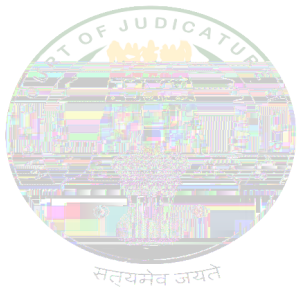
WEB COPY

209.PW-9, Rajindar Batra stated that opening of Radio Stations had increased the draw value of M/s.Puran Multimedia Private Limited, but still there was no profit. There was also no provision for payment of royalty in the balance sheet either to Indian Performing Right Society Limited (IPRS) or to M/s.Phonographic Performance Limited (PPL).

210.PW-10, Poovanalingam, stated that AM popularity in India was 90% and FM popularity was 10%.

211.PW-11, Kanwar Sameer stated that the compulsory licensing application had been filed only against PPL. He stated that royalty have to be paid for B, C and D categories of cities. He stated that the order of the Copyright Board, dated 19.11.2002, has been complied with respect to payment of royalties to other content holders.

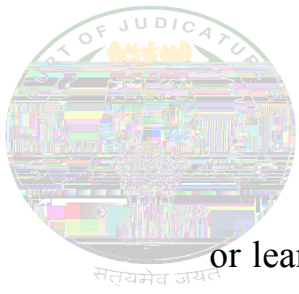
212.PW-12 Rahul Gupta stated that all agreements relating to payment of royalty had a revision of a rates clause.



WEB COPY

213.PW-13 Sudeep Jain stated that advertising expenses were not paid to their holding Companies as they were not in a position to pay the same. They had to take loan even to meet regular expenses.

214.On behalf of M/s.Phonographic Performance Limited (PPL), RW-1, S.Suresh, Chief Operating Officer PPL, who was previously with Sony Music, stated about piracy, which was rampant in CDs, cassettes and MP3 CD industry. Anti-piracy raids had been increased but physical sales had decreased. He also stated that he understood from newspapers report that All India Radio earns 40% of its revenue from advertisement. However, for Phase-II, the licensing policy had also changed from one time payment of licence fee to that of revenue sharing method. He also stated that the current tariff of PPL was Rs.2,400/- per needle hour or 20% of net advertising revenue, whichever was higher. However, he was not able to name any particular Radio Station with whom this agreement was entered into after consultation. He also stated that the revenue earning capacity would depend upon the city and also prime time



WEB COPY

or lean hours during which they broadcast songs. He also stated that the primary source of revenue for Radio Stations was advertising. He also stated that a percentage of net advertising revenue would be predominantly correct, but subject to a minimum tariff based on needle hours.

215.RW-2, Sanujeet Bhujabal, who was the Director-Marketing of Sony Music Entertainment (India) Private Limited, which was a member of PPL, again spoke about piracy, but since internet connectivity was not to that high level, discounted downloading of music as a reason for decrease in profits. He however stated that the revenue of Sony Music was confidential. He stated that Radio is the cheapest form of entertainment. He also stated that Radio FM Stations promoted only film music and not gazal, classical and devotional musics.

216.RW-3, Ramesh Arora, who was in the business of whole sale music under the name of CD House India Private Limited at Delhi stated that retailers have complained that their sales are steadily suffering. He



WEB COPY

also spoke about piracy of music and sales of such CDs. He however was not aware of any details about other regional FM channels.

217.RW-4 Girish Jain, Director, Venus Records and Tapes Private Limited, Mumbai, a member of PPL, stated that songs can be downloaded from the internet free of cost. He stated that PPL, paid his company a royalty of about 16 crores in 2009-2010. He also stated that the sale of music through digital modes like mobile downloads, internet streaming have increased.

218.A careful analysis of the evidence of the above witnesses would reveal that Radio Stations have expenses to meet which they termed operating costs and these included unavoidable costs like payment of royalty to the content holders, payment of licence fee to the Government and payment of salaries. The Radio Companies having taken on auction, the arduous task of running Radio Stations at various cities, which are categorised as metro cities and B, C and D categorized cities and were dependent on the songs being played continuously and

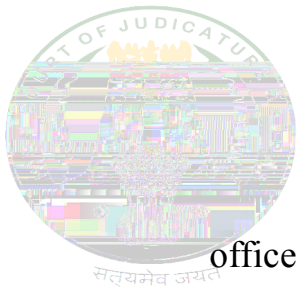


WEB COPY

those songs must attract advertisement. These songs would attract advertisement only when there is an increase in the number of listeners and there is reach to the remote corners of the frequency of such Radio Station.

219.It must also be kept in mind that private Radio Stations are not permitted to broadcast news, which was the exclusive privilege of All India Radio at that particular point of time. They however served as a medium to promote social awareness about the projects and schemes of the Government. They have to balance the operating expenses with the broadcast of songs and also the broadcast of various schemes of the Government and their only source of revenue was through advertisement. They cannot avoid payment of royalty to the content holders of the music, payment of licence fee to the Government and staff related expenses, like salary and other expenses.

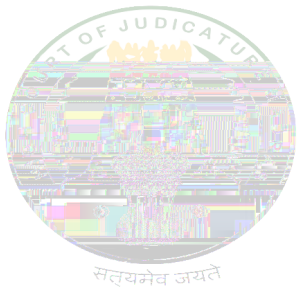
220.It must also be kept in mind that running a Ratio Station would require not just staff as required in a Corporate Office, like front



WEB COPY

office staff and secretarial staff, but highly technical staff, who are conversant with the technicalities of running a Radio Station. There must also be marketing for obtaining advertisers and a balance must be made with the advertisement fee which they charged and it must also be at par with other private Radio Stations. All these factors require managerial skills and also require what could be called a right to broadcast hit songs. The more hit songs are played during prime time, the more there will be flow of advertisement and the more there will be competition among the prospective advertisers, which would enable the Radio Stations to increase the advertisement rates.

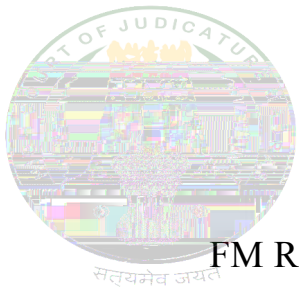
221. This has to be contrasted with the content providers, as they had already acquired copyright for the songs and PPL being a Copyright Society, has under its fold members like, Sony Music and Venus Music. They required royalty to be paid, if songs are broadcast by the Radio Stations, otherwise these songs would be, as Mr.G.Masilamani, learned Senior Counsel in the course of his arguments stated, still born.



WEB COPY

222.It is thus seen that though compulsory licence had been resorted to by the filing of applications before the Copyright Board, the concept of compulsory licence had not been seriously questioned by either of the parties either before the Copyright Board or before this Court. Compulsory licensing provides a (in&(in situation. The content holders or copyright holders, who had acquired copyright of the songs from the producers, cannot broadcast them without the assistance or without the platform provided by the Radio FM Stations. No doubt, All India Radio already exists, but the Radio FM Stations have their own charm and attraction for public at large. Songs could be interspersed with advertisements and also with the small quips of comedy and some times even quiz questions by Radio Jockeys.

223.Thus, the amount spent on cost of acquisition of copyright by PPL, is regenerated from the royalty paid by Radio FM Stations. The more popular and more hit the songs were, the more number of times they are played in Radio FM Stations and the more number of time they are played at prime time, the more is the advertisement generated by the

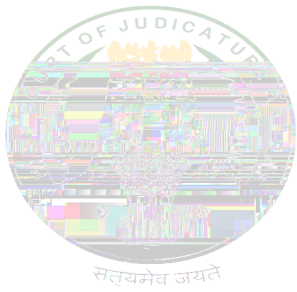


WEB COPY

FM Radio Stations. Thus, both the appellants herein and the respondents herein require monitoring of the licence and it is for their benefit that compulsory licence, as a concept, was accepted by them.

224. The only sore point would be the rate of royalty payable. There are two separate methods of royalties, namely, a share in the net advertisement revenue or rate per needle hour.

225. A share in the net advertising revenue would generate conflict, since the very word “net”, would mean, the share of the revenue after deducting expenses incurred in running a Radio Station. Primarily, these expenses include the licence fee and staff expenses. On the other hand, the rate per needle hour would be the rate payable for the songs depending on whether it is played during prime time or during lean hours at a fixed rate for every hour. In their applications, ENIL had projected that they are prepared to provide log sheets to show the number of needle hours every song was played.

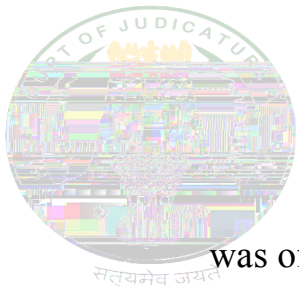


WEB COPY

226.Now it is necessary to examine the evidence of the expert witness on either side to determine which one of the two methods would be a more suitable method.

227.It must be kept in mind that in their applications, the respondents herein/Radio Stations had projected that rate per needle hour would be a just determination of royalty and they largely stated that Rs.750/- per needle hour would be a reasonable rate. On other hand, the appellant herein/PPL in their counter before the Copyright Board stated that the rate per needle hour should be Rs.1,200/- and also projected for the first time an alternate, namely, the net advertisement sharing method. But they placed a caveat that this should be resorted to only when there is reach to remote areas and proper marketing to fetch advertisement.

228.PW-4, Prof.Bibek Debroy, an expert with much distinction, stated that there could be one or two alternates, as royalty, namely, rate per needle hour, which he termed as absolute figure or a share in net advertising revenue, which he termed as a percentage of revenue. He

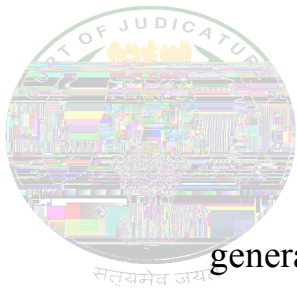


WEB COPY

was of the opinion that a share in the net advertisement revenue would be a better option, as it gives the actual revenue earned and that would be an indication of the actual value of the song or the actual popularity of that particular song. On the other hand, the rate per needle hour is uniformly fixed for all the songs and the only variable would be the lean hours/prime hours and metro cities/non metro cities.

229.He also stated that the rate per needle hour does not have flexibility to adjust to the fluctuations of economy and inflation. He was of the firm opinion that the revenue sharing method was more opt particularly, also because the Radio industry was at its infant stage. He stated that the global range of revenue sharing was between 0.4% and 5%. He also stated that the advertisement rates also fluctuated and these factors would address both the operational expenses necessary for the Radio Stations and the royalty payable to the content providers.

230.RW-5, Prof.S.K.Laroiya stated that the copyright holders quiet apart from granting licence to Radio Stations, also have an eye on profit



WEB COPY

generated from sale of physical cassettes and CDs. That part of sales were affected, when the songs are played in the Radio Stations since the songs could be downloaded. Piracy of CDs and cassettes also directly affected the profits. He also stated that there should be different royalty rates for different cities. The rate per needle hour would mean that the number of spins of the music that a broadcaster plays a particular track in a given hour. He was of the opinion that the royalty rate should be determined by realities of the market and cannot be thrust by a regulatory authority.

231. The evidence of the above two witnesses lead to the following facts:

(1) Copyright had been acquired on payment of fees to the copyright holders.

(2) After acquiring copyright, a particular song will have to be broadcast in a medium, which generates income to cover the acquisition costs.

(3) One of the mediums, which had been opened up to private



sector, were the FM Radio Stations.

WEB COPY

(4) FM Radio Stations during the period under consideration were in their infancy stages.

(5) They had paid licence fees for acquiring a right to broadcast a song in a particular frequency and in particular cities.

(6) They had set up Radio Stations, which have their own operating costs including the costs on technical expertise and the cost on staff and more particularly, costs on marketing.

(7) These Radio Stations require songs to be broadcast.

232. As seen from the judgment of the Supreme Court in *M/s. Entertainment Network (India) Limited and others -vs- Super Cassettes Industries Limited and others*, reported in (2008) 13 SCC 30, there were numerous discussions between the Radio Stations and the copyright holders to determine an equitable and just rate of royalty to be paid to the copyright holders for broadcasting these sound recordings. These discussions ultimately failed. This led to applications being filed under Section 31(1)(b) of the Copyright Act, 1957, by Radio Stations



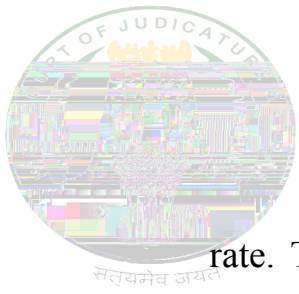
WEB COPY

seeking compulsory licence of the songs to be broadcast in their Radio Stations.

233.As a concept, neither side had objected to the very filing of these petitions. Their focus was only on the concept of royalty to be paid. It is thus seen that to a large extent, both the Radio Stations and the copyright holders have used the Copyright Board as a medium to determine the royalty payable, in view of the fact that they could not settle that the issue by themselves. They were always prepared to find fault with any solution provided by the Copyright Board.

234.In their applications before the Copyright Board, the Radio Stations, including ENIL had stated that a just method of payment of royalty would be rate per needle hour and they projected Rs.750/- as a just and equitable rate.

235.In their counter, PPL had also harped upon the payment of royalty per needle hour, but had given a sum of Rs.1,200/- as an equitable

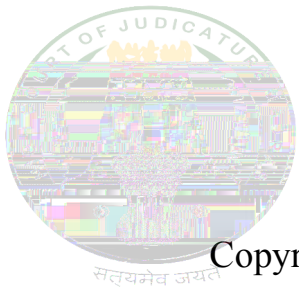


WEB COPY

rate. They had also in their counter opened up a discussion about net revenue sharing method, but stated that Radio Stations must reach out to remote corners and do effective marketing to generate advertisement.

236.The Copyright Board in its judgment had embarked upon the impact of All India Radio, and on a comparison with the rates paid and payable in foreign jurisdiction and on the social impact of Radio Stations and the necessity to ensure that Radio Stations survive the economic vagrancies and do not close down business.

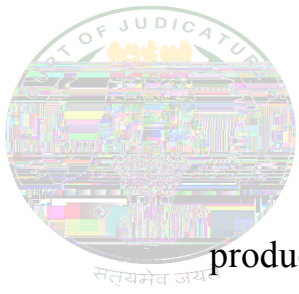
237.These are factors, which necessarily have to be kept in mind, but primarily it has to be examined whether the net revenue sharing method, which the Copyright Board had finally arrived at, was just and equitable. It has to be kept in mind that this Court cannot thrust its views nor would it be proper for embarking on an entirely independent path quite divergent from that stated by the Copyright Board. It has to be seen whether the factors taken by the Copyright Board were relevant and whether if those factors had not been taken into consideration, the



Copyright Board would have come to different conclusion.

WEB COPY

238. The Copyright Board had experts as members even though a judicial member was not present. Due respects should be given to the efforts taken by the Copyright Board to comply with the specific direction of the Supreme Court that evidence should be adduced and evidence should be analysed. The onus then shifted to the parties before the Copyright Board to adduce evidence, which would assist the Copyright Board to conclusively prove facts. Unfortunately, all the witnesses dithered in their oral evidence. Further, unfortunately, accounts were not produced. The matter cannot be held back for ever and ever. The Copyright Board had a duty to discharge and with the available records, they had passed the order now questioned before this Court. They have, I must admit, gone beyond the pleadings and evidence available. But if they had not, they would never have been able to come to any conclusion, because, the parties must accept that their evidence was not wholly satisfactory. Witnesses admitted during cross examination that they did not give particular details, that they did not

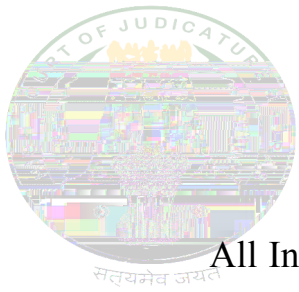


WEB COPY

produce accounts and that they were stating their individual opinion alone. It was for that reason, the Copyright Board had to travel far beyond the evidence available. But I must state that even though the reasons relating to social impact was stretched to a little far, still that is a fact to be kept in mind.

239.It must also be pointed out that the written arguments, particularly by the appellant herein/PPL went beyond the evidence. They produced tabular columns of income and expenditure without them being put to test during evidence. Accounts should have been submitted during the course of evidence and merely because, written arguments extended far wide, they cannot be basis of any judgment, as the written arguments were not substantiated by pleadings and evidence.

240.In view of the above findings, I hold with respect to Point Nos.5 and 6 that the Copyright Board had **not** misdirected itself in venturing into a discussion on social impact and public policy and that the Copyright Board **was correct** in comparing FM Radio Stations with



WEB COPY

All India Radio and the modalities of royalty payable with f
Stations.

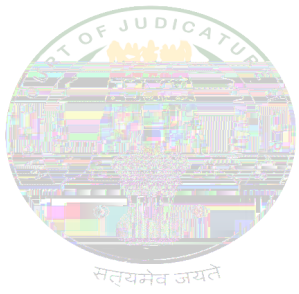
241.

As stated, this Court took back on the proviso of Code of
Procedure, while entertaining these appeals.

242. In the case of

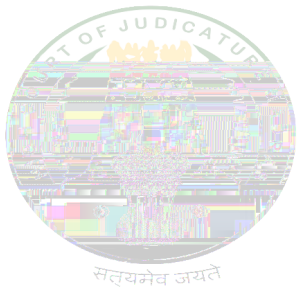
others, reported

held as for



WEB COPY

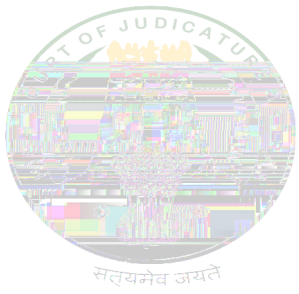




WEB COPY

243.This pronouncement of the Honourable Supreme Court was with respect to a notification under Section 4 of Land Acquisition Act, 1894, and whether additional compensation and grant of additional benefit can be granted and their permissibility. The Supreme Court had taken recourse to the provisions under Order XLI Rule 33 of Code of Civil Procedure to set right a denial of relief by the High Court to the appellants.

244.The Supreme Court however placed a word caution in applying the provisions under Order XLI Rule 33 of Code of Civil Procedure in the judgment reported in **2022 SCC Online SC 445**, in the case of ***Eastern Coalfields Limited and others vs Rabindra Kumar Bharti***. That was an appeal relating to the provisions of the Prevention of Corruption Act, 1988 and the liberty to proceed with the departmental enquiry. The Supreme Court had referred to Order XLI Rule 33 of Code of Civil Procedure, The relevant paragraph of the judgment reads as follows:



WEB COPY

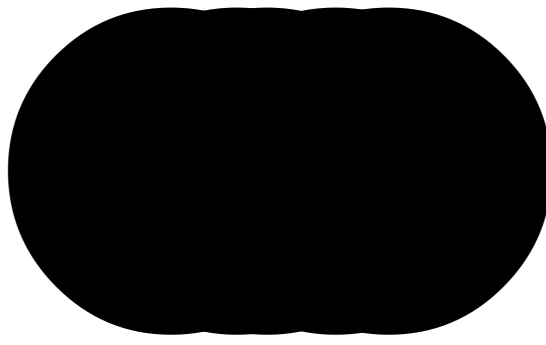
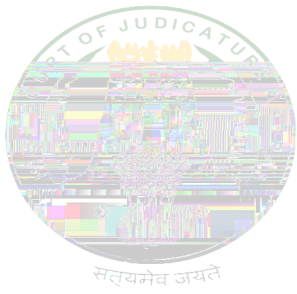


[REDACTED]

245. On the basis of the above ratio by the Supreme Court, the Court must exercise caution and be kept in mind before invoking the provision of Order XXI Rule 33 of Code of Civil Procedure, this Court must examine whether such provision can even be invoked in the facts of the present appeals.

246. It is trite in law to point out that any judgment or order must be based on the materials before the Court. In the present case, under Section 13 of the Tamil Nadu Civil Courts Act, 1956, the Court is empowered to

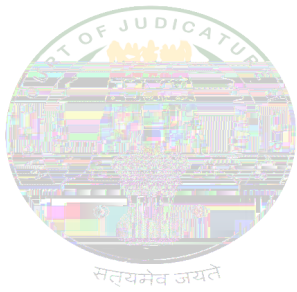
[REDACTED]



WEB COPY

247. Though this aspect can strictly be applied to an order in original by the original authority, still that fact or will have to be kept in mind, even while examining an appeal, particularly, a first appeal. The concept of just relief has been expanded in Order XLI Rule 33 of Code of Civil Procedure and the appellate Court can grant such relief.

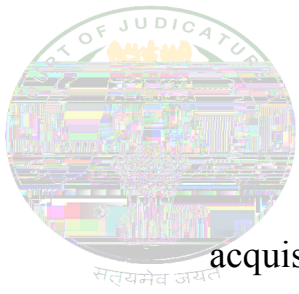
248. The discussions in these appeals thus far have led to a conclusion that compulsory licence works out to the advantage of both the appellants and the respondents. The issue is as to what should be the royalty payable. This should have been addressed by the parties themselves. Arguments have been advanced that consideration should be given to the social impact which Radio Stations have, which indicated that they must be permitted to survive. On the other hand, arguments were also advanced relating to the -erne and Rome #on*ention, to which India is a signatory. These emphasised that compulsory licensing as a reality between the two parties and must be accepted as a reality in the industry.



WEB COPY

249. The only question is the rate of royalty. On the basis of the materials available, the Copyright Board had determined 2% of the net revenue received from advertisers. This is broadly within the parameters of the international rates, which vary from 0.5 to 5%. It had been complained on behalf of the appellants that there is bartering done by the respondents, particularly, ENIL, who projected a high expenditure on staff and other overheads and thereby, have reduced the net value of the advertising revenue which they earned.

250. It had also been complained that by adopting a bartering policy, conglomerates like, ENIL, which have control over print and electronic media, as well as Radio Stations and Television networks, would offer substantial discounts to prospective advertisers, if they were to advertise their products or services in the print media and the discounts offered would directly affect the advertisement revenue earned by the Radio Stations. But, unfortunately, even though that might be a reality, the Court should strike a balance to ensure that the cost of



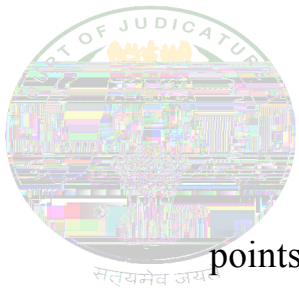
WEB COPY

acquisition of copyright is also balanced with the royalty paid by the Radio Stations.

251.It had been stated by Mr.Vijay Narayan, learned Senior Counsel that cost of acquisition has vastly increased and runs into mind boggling sums and that therefore, pegging the royalty to net revenue sharing method and determining it at 2% was in fact an insult to the appellants herein.

252.The strange fact is that the respondents herein had advocated only needle per hour method in their applications. The witnesses however spoke otherwise and that oral evidence was not substantiated by pleadings. But since at this stage of proceedings, it may not be proper on the part of this Court to direct collection of further evidence, I hold that I am justified in adopting a hybrid method for the royalty to be paid.

253.The scope under Order XLI Code of Civil Procedure is quite narrow. If it is found that the evidence is insufficient or that certain



WEB COPY

points are not answered, then the order has to be set aside and the matter has to be remanded back. This would, in my opinion to put it very mildly, be a horrible order. It would be to the disadvantage of all the parties. This Court will therefore have to balance equities with materials available on record. This Court cannot also embark on a calculation of the optimum percentage of the net revenue in advertisement, which could be thrust upon the parties. Any percentage would be only arbitrary. Striking a middle path is always the object of any judicious decision making. The Copyright Board had struck a middle path in determining 2%, as the optimum net sharing revenue rate.

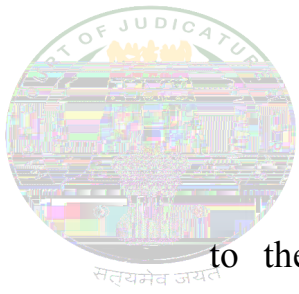
254.It should however be kept in mind that a minimum platform rate must also be devised. To this extent, I would fall back to the evidence of RW-1, S.Suresh, who stated that net advertisement rate would be a viable rate provided there was a minimum platform or minimum needle hour rate determined. To this extent, I would again fall back to the rate earlier determined and I would hold that 2% net advertisement revenue rate as stated by the Copyright Board with a



WEB COPY

minimum platform of Rs.660/- per needle hour would be a just and equitable royalty payable to the appellants herein.

255.I am deeply conscious of the limitations, which this Court has in adding this factum of minimum platform of rate to be paid, I however hold that it is only justified on the ground that there has to be some assurance on revenue being generated by way of royalty to the Copyright holders. Even if there is juggling of accounts by the respondent, as stated by the appellants, still they would be under obligation to pay this minimum amount for the songs, which they had played, for which they had generated advertisement and which advertisement income or revenue, according to the appellants have not been properly projected by the respondents. This minimum platform would apply only when the respondents state that they are not payable any royalty at all consequent to expenses incurred. They will have to pay this pay minimum Rs.660/- per needle hour, when the 2% net advertisement rate falls below this particular amount. This would give a (in&(in situation to all the parties and more particularly, sensitize them to render proper accounts relating

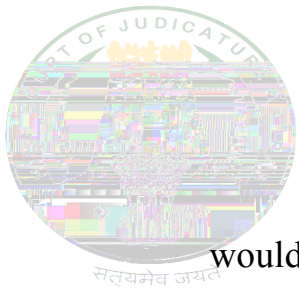


WEB COPY

to the revenue earned through advertisement. I would determine Rs.660/- per needle hour not on arbitrary basis, but only because that amount had been discussed even between the parties.

256.I must readily accept that any rate thrust on the parties by the Court can always be challenged as arbitrary. To avoid this situation, the parties should have resorted to alternate dispute resolution method to resolve the issue of royalty payable. Whether compulsory licence is to be granted or not is a legal issue. The issue of royalty has should have been determined by mutual consensus. But unfortunately, adversial litigation is so deeply ingrained that any alternate method though spoken in laudatory terms is rarely embraced with an open mind.

257.There were also discussions about the applicability of the order of the Copyright Board to future sound recordings. I would hold that since the net advertising rate is a flexible aspect, which point was stressed by Mr.Abishek Malhotra, learned Senior Counsel, this fluctuation of net advertisement rate would cover the future licences, I



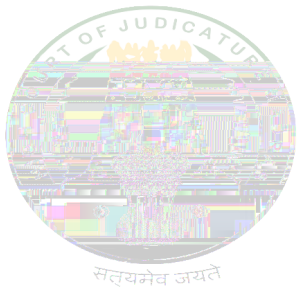
WEB COPY

would not interfere with that aspect of the order of the Copyrights Board. Further, provision of minimum of Rs.660/- as a minimum payable per needle hour would ensure that for every song played, royalty is paid to the copyright owners. It would also ensure that marketing is done to the maximum to generate income through advertisement by the Radio Stations.

258. In view of the discussion above and in view of the answers to Point Nos.1 to 6, Point No.7 is answered as follows:

(1) It is held that the order of the Copyright Board, dated 25.08.2010 is not applicable to SIMCA and SIMCA is not bound by the royalty determined by the Copyright Board by the said order.

(2) The royalty determined by the Copyright Board at 2% of the net advertising revenue is upheld and additionally, the order is also modified by providing a minimum floor rate payable to the appellants at Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour uniformly irrespective of the timing or city/town when the songs were played, since this order is with respect to the past decade 2010-2020.



259.In the result:

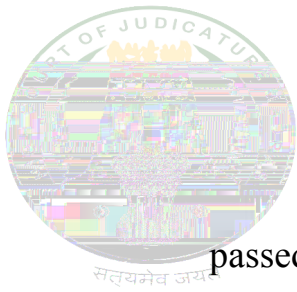
WEB COPY

(1)C.M.A.Nos.3490, 3491, 3492 and 3493 of 2010 filed by SIMCA are allowed and it is held that the order of the Copyright Board is not binding on SIMCA.

(2)C.M.A.Nos.3293, 3382 3383, 3384, 3385, 3387, 3388, 3389 and 3390 of 2010 filed by Phonographic Performance Limited, are partly allowed and the order of the Copyright Board is retained and further modified by fixing a minimum floor rate of Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour, as declared in para 258(2) supra.

(3)C.M.A.Nos.3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501 and 3502 of 2010 filed by Super Audio Madras Private Limited are also partly allowed and the order of the Copyright Board is retained and further modified by fixing a minimum floor rate of Rs.660/- (Rupees Six Hundred and Sixty only) per needle hour, as declared in para 258(2) supra.

(4)Rew.ANos.8 to 11 2011 are dismissed, since orders have been



passed in the corresponding Civil Miscellaneous Appeals.

WEB COPY

(6) All connected Miscellaneous Petitions are closed.

(5) No costs.

(6) The respective parties are directed to put into effect this order within a period of four weeks from this date.

Index : Yes / No
Internet : Yes
NCC : Yes/No

27.04.2023

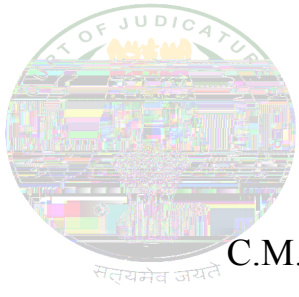
cmr

C.V.KARTHIKEYAN, J.

cmr

Pre Delivery Common Order made in

157/158



C.M.A.Nos.3293, 3382 to 3385, 3387 to 3390 and 3490 to 3502 of 2010
and
WEB COPY Rev.A.Nos.8 to 11 of 2011

27.04.2023