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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 03.11.2022

+ CS(COMM) 572/2020

ELSEVIER LTD. AND ORS.

..... Plaintiffs

Through: Mr.Amit Sibal, Sr. Adv. with
Ms.Sneha Jain, Ms.Snehima
Jauhari, Ms.Surabhi Pandey,
Ms.R. Ramya & Mr.Saksham
Dhingra, Advs.

versus

ALEXANDRA ELBAKYAN AND ORS.

..... Defendants

Through: Mr. Gopal Sankaranarayanan,
Sr. Adv. with Mr. Rohan
George, Mr. Shrutanjaya
Bharadwaj, Ms. Shivani Vij,
Mr. Akshat Agrawal, Ms. Sriya
Sridhar, Mr. Nilesh Jainm,
Advs. for D-1.

Mr.Archi & Ms.Varsha Sharma,
Advs. for Intervenor in IA No.
590/2021.

Mr.K.G. Gopalakrishnan &
Ms.Nisha Mohandas, Advs. for
D-5.

Ms.Vrinda Bhandari,
Mr.Abhinav Sekhri,
Mr.Tanmay Singh &
Mr.Krishnesh Bapat, Advs. in
IA No. 14908/2021.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. 8355/2022

1. This application has been filed by the defendant no. 1 seeking amendment in the written statement to the effect that the ownership of the plaintiffs in the copyright is disputed.

2. In the application, it is explained that the occasion of filing of the amendment arose as the plaintiffs had filed certain agreements of assignment in its favour in a sealed cover. These agreements were disclosed to the defendants only pursuant to an order dated 14.01.2022 of this Court. The defendant no.1 is seeking to withdraw its admission to the fact of the plaintiffs being the owner of the copyright in their subject work, and to now dispute such ownership claimed by the plaintiff on the basis of the Assignment Agreements, on the ground that the Assignment Agreements are not enforceable in law.

3. In support of the application, the learned senior counsel for the defendant no.1/applicant places reliance on the judgment of the Supreme Court in ***Om Prakash Gupta v. Ranbir B. Goyal***, (2002) 2 SCC 256, to submit that as the disclosure of the Assignment Agreements was made subsequent to the filing of the suit, amendment in the written statement ought to be allowed.

4. Placing reliance on the judgment of the Supreme Court in ***Baldev Singh and Others v. Manohar Singh and Another***, (2006) 6 SCC 498, he further submits that the test to be applied to an amendment in the Plaint, *vis-a-vis* to one made in a written statement

is substantially different; it is more liberal in case of an amendment sought to be made in the written statement, inasmuch as, adding a new ground of defence or substituting or altering a defence can be allowed in a written statement as it does not amount to altering or substituting a new cause of action.

5. On the other hand, the learned senior counsel for the plaintiffs, placing reliance on the judgments of the Supreme Court in *Heeralal v. Kalyan Mal & Ors.*, (1998) 1 SCC 278; *Gautam Sarup v. Leela Jetly & Ors.*, (2008) 7 SCC 85; and *Ram Niranjana Kajaria v. Sheo Prakash & Ors.*, (2018) 10 SCC 203, submits that an application seeking amendment in the written statement so as to amount a withdrawal of an earlier admission made, cannot be allowed. He submits that the defendant no.1 is not merely trying to explain an admission made in its written statement but is, in fact, wishing to withdraw the same.

6. He further submits that the plea of the defendant no.1 that the amendment was necessitated only upon the Assignment Agreements being disclosed to the defendant no. 1, is also incorrect, inasmuch as, these Assignment Agreements had been filed along with the Plaint, albeit in a sealed cover; the defendant no. 1 never sought an inspection of these documents prior to filing of the written statement. In fact, the defendant no.1 went ahead and in unequivocal terms accepted the copyright ownership of the plaintiffs in the work.

7. He submits that, therefore, the plea of the agreements being disclosed later is merely a ruse for supporting the withdrawal of the

unequivocal admissions made by the defendant no.1 in its written statement.

8. I have considered the submissions made by the learned counsels for the parties. In the written statement filed by the defendant no.1, the copyright ownership of the plaintiffs in its work, which is the subject matter of the Plaint, was unequivocally admitted by the defendant no.1. In this regard the following paragraphs from the Plaint and the Written Statement may be usefully quoted:-

PLAINT

“17. Plaintiffs’ publications (viz. its journals, journal articles, books and book-chapters) being original publications of the Plaintiffs qualify as a “literary work” under Section 2(o) of The Copyright Act, 1957 (hereinafter ‘the Act’). Further, by virtue of Section 13(1) read with Section 13 (2) and Section 5 of the Act, as all of the Plaintiffs’ original literary works are released/published in India or in any other country included in the Schedule to the International Copyright Order, 1999, the Plaintiffs’ literary works would be entitled to all rights and protections granted under the Act for literary works.

18. It is submitted that the Plaintiffs’ publications have either been first published in India or in a country included in Schedule to the International Copyright Order, 1999. Therefore, by virtue of Section 13 read with Sections 40 and 41 of the Copyright Act, 1957, copyright in these works

subsists in India. Thus, all of Plaintiffs' literary works are protected as "works" as defined under Section 2(y) of the Act and would be entitled to all the rights granted under Section 14(a) of the Act.

19. *By virtue of agreements between the Plaintiffs and authors of the various literary works published by the Plaintiffs, the Plaintiffs have been assigned and thus are the owners of, inter alia, the exclusive rights to (a) issue copies of the literary works to the public (not being copies already in circulation) (i.e. distribution rights), (b) to reproduce the literary works in any form including the storing of it in any medium by electronic means (i.e. the reproduction rights), and (c) communicate the work to the public (i.e. communication rights) (hereinafter "Exclusive Rights"). The Plaintiffs are thus the owners of the copyright related to the Exclusive Rights under Section 17 read with Sections 18 and 54 of the Act, in the following illustrative list of literary works (hereinafter referred to as "Original Works") that are entitled to protection under the Act:*

| <i>Publisher</i> | <i>Book</i> | <i>Year</i> |
|-------------------------|--|-------------|
| <i>Elsevier Limited</i> | <i>Accident and Emergency Radiology: A Survival Guide (3rd Ed.)</i> | <i>2014</i> |
| <i>Elsevier Limited</i> | <i>Wall & Melzack's Textbook of Pain (6th Ed.)</i> | <i>2013</i> |

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|-----------------------------|--|-------------|
| <i>Elsevier Limited</i> | <i>Treatment of Skin Disease 5th Ed.)</i> | <i>2017</i> |
| <i>Elsevier Limited</i> | <i>MacSween's Pathology of the Liver</i> | <i>2017</i> |
| <i>Elsevier Limited</i> | <i>Dermatopathology (3rd Ed.)</i> | <i>2018</i> |
| <i>Wiley India Pvt. Ltd</i> | <i>Wiley's Problems in Organic Chemistry</i> | <i>2015</i> |
| <i>Publisher</i> | <i>Article (Journal)</i> | <i>Year</i> |
| <i>Elsevier Limited</i> | <i>Influence of mechanical properties, anisotropy, surface roughness and porosity of brick on FRP debonding force (Composites Part B: Engineering)</i> | <i>2017</i> |
| <i>Elsevier Limited</i> | <i>Effect of shearing rate on the behavior of geogrid-reinforced railroad ballast under direct shear conditions (Geotextiles and Geomembranes)</i> | <i>2018</i> |
| <i>Elsevier Limited</i> | <i>Review of supercapacitors: Materials and devices (Journal of Energy Storage)</i> | <i>2019</i> |

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|--|--|-------------|
| <p><i>Elsevier Limited</i></p> | <p><i>Modeling of dynamic crack propagation using rate dependent interface model (Theoretical and Applied Fracture Mechanics)</i></p> | <p>2016</p> |
| <p><i>Elsevier Limited</i></p> | <p><i>Current saturation and kink effect in zero-bandgap double-gate silicene field-effect transistors (Superlattices and Microstructures)</i></p> | <p>2017</p> |
| <p><i>Wiley Periodicals LLC (formerly Wiley Periodicals, Inc.)</i></p> | <p><i>Synthesis of amphiphilic homopolymers and their self-assembly into acid-responsive polymeric micelles (Journal of Polymer Science Part A: Polymer Chemistry)</i></p> | <p>2017</p> |
| <p><i>Wiley Periodicals LLC (formerly Wiley Periodicals, Inc.)</i></p> | <p><i>Thermal stability of end-capped and linear sulfonated polyimides, sulfonated polystyrene, and Nafion 117 (Journal of Applied Polymer Science)</i></p> | <p>2017</p> |

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|---|---|------|
| Wiley Periodicals LLC (formerly Wiley Periodicals, Inc.) | <i>Reduced stress-optical coefficient of polycarbonate by antiplasticization (Journal of Polymer Science Part B: Polymer Physics)</i> | 2017 |
| Wiley Periodicals LLC (formerly Wiley Periodicals, Inc.) | <i>High strength reversible adhesive closures (Journal of Polymer Science Part B: Polymer Physics)</i> | 2017 |
| Wiley Periodicals LLC (formerly Wiley Periodicals, Inc.) | <i>Effects of plasticizer on structures, non- isothermal crystallization, and rheological properties of polyarylates (Journal of Applied Polymer Science)</i> | 2017 |
| American Chemical Society | <i>Regioselective Intermolecular Sulfur- Oxygen Difunctionalization (Phenoxysulfonylation) of Alkynes: One-Pot Construction of (Z)-β Phenoxy Vinylsulfones</i> | 2019 |

| | | |
|----------------------------------|--|------|
| | (<i>Organic Letters</i>) | |
| <i>American Chemical Society</i> | <i>Triazine Functionalized Porous Covalent Organic Framework for Photo-organocatalytic E-Z Isomerization of Olefins (Journal of the American Chemical Society)</i> | 2019 |
| <i>American Chemical Society</i> | <i>Inducing Disorder in Order: Hierarchically Porous Covalent Organic Framework Nanostructures for Rapid Removal of Persistent Organic Pollutants (Journal of the American Chemical Society)</i> | 2019 |
| <i>American Chemical Society</i> | <i>Surface-Treated Nanofibers as High Current Yielding Breath Humidity Sensors for Wearable Electronics (ACS Applied Electronic Materials)</i> | 2019 |
| <i>American Chemical Society</i> | <i>Covalent Self-Assembly in Two Dimensions: Connecting Covalent</i> | 2019 |

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| | <i>Organic Framework Nanospheres into Crystalline and Porous Thin Films (Journal of the American Chemical Society)</i> | |
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WRITTEN STATEMENT

8. *That the Defendant No. 1 submits that in a claim for injunction for copyright infringement, the Court ought to be mindful of these exceptions that have been prescribed within the scope of the Act, and the same cannot be ignored by assuming the existence of “exclusivity” in the favour of the Plaintiffs. In the case at hand, although it is not disputed that the Plaintiffs are owners of the Copyright in their works, this exclusivity is subject to the provisions mentioned under section 52 of the Act, which **specifically limit** the exclusivity granted within this statutory schema. The Supreme Court in the case of *Academy of General Education, Manipal v. B. Malini Mallya* (AIR 2009 SC 1982) has clearly observed that the concept of Copyright is **subject to** statutory limitations as prescribed under section 52 of the Act, and the*

same cannot be ignored by Courts while passing an order of injunction.

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111. That the contents of paragraphs 17 to 19 are admitted only to the limited extent that the Plaintiffs have copyrights in their literary works under Section 13 and 14 of the Copyright Act. However, it is specifically denied that the Defendant No. 1 has infringed upon any of the rights of the Plaintiffs. It is reiterated that the actions of the Defendant No. 1 are squarely covered under the exception created for research purposes under Section 52(1)(a) of the Copyright Act. In this regard, the Defendant No. 1 craves leave of the Hon'ble Court to rely upon paragraphs 28 to 64 of the Preliminary Submissions above for the sake of brevity. Moreover, it is reiterated that based on the available data, it is evident that the Plaintiffs and especially Plaintiff No.1, have faced no monetary damage of loss of business due to the actions of the Defendant No. 1. Further, it is reiterated that the relevant market of publishers such as the Plaintiffs has been identified by this Hon'ble Court in The Chancellor, Masters & Scholars of University of Oxford & Ors. v.

Rameshwari Photocopy Services & Ors., 2016 SCC OnLine Del 6229, are the libraries that subscribe to their publications, and not individual researchers, students or others who may make use of such publications. In this regard, the Defendant craves leave of the Hon'ble Court to rely upon paragraphs 30 to 36 and 55 to 60 of the Preliminary Submissions above for the sake of brevity. The Plaintiffs are put to strict proof of their averments.”

(Emphasis supplied)

9. The defendant no.1, prior to filing of the written statement, did not seek inspection of the documents that had been filed by the plaintiffs, albeit in a sealed cover. In fact, such inspection was not sought by the defendant no.1 even thereafter. The agreements were removed from the sealed cover and shared with the defendant no.1 pursuant to an order dated 14.01.2022 of this Court, which reads as under:-

“1. Re-notify on 20th January, 2022.

2. The understanding given by Mr. Gopal Sankaranarayanan will continue till the next date of hearing.

3. In the meanwhile, the Court Master is directed to email to learned Counsel for all the parties the electronic copy of the record of this file as available to the Court so that the learned Counsel may

be able to assist the Court with relevant folders and page numbers on which the documents/pleadings are to be found.”

10. Clearly, the said order did not direct opening of the sealed cover, as this was not the prayer made by the defendant no.1. However, the fact remains that the Assignment Agreements were duly shared with the defendant no.1. This, however, cannot come to the aid of the defendant no. 1 to contend that the amendment now sought to be made is based on this subsequent event.

11. The submission of the learned senior counsel for the defendant no.1 that the amendment has been occasioned on account of disclosure of the Assignment Agreements that were earlier kept in a sealed cover at the behest of the plaintiffs, also cannot be accepted. Though the plaintiffs had filed these agreements in a sealed cover, the defendant no.1 did not seek inspection of the same prior to the filing of the written statement. It can be presumed that the defendant no.1 did not feel any necessity to inspect the said documents though they were on record and were relied upon by the plaintiffs in support of their claim. On the other hand, the defendant no.1 went ahead to categorically and unequivocally admit to the copyright ownership of the plaintiffs. The plea of the defendant no.1 that these agreements were later disclosed, though may be correct, but such later disclosure was on own account of and because of actions/in-actions of the defendant no.1 alone. The defendant no.1 cannot take any benefit of such actions/in-actions and

claim liberty to withdraw from its admission made in the written statement. It is not as if these agreements were later filed by the plaintiffs and, therefore, would qualify as a subsequent event. As noted hereinabove, the agreements were already on record and it was for the defendant no.1 to seek inspection thereof prior to the filing of the written statement, in case, they felt it was necessary to do so. The judgment in *Om Prakash Gupta* (*supra*), therefore, also cannot be of any assistance to the defendant no.1/applicant.

12. Further, the amendments now sought to be made in the written statement by the defendant no.1, do not merely state that on inspection of these Assignment Agreements, certain deficiencies have been found which may put the ownership of the plaintiffs in the copyright to any jeopardy, but only seek to withdraw the unequivocal admission regarding the plaintiffs' being the copyright owners of the subject work. The amendment is not in nature of a clarification or an explanation to the admission made in the written statement; it seeks a complete withdrawal of the said admission.

13. In *Heeralal* (*supra*), the Supreme Court has held that by way of an amendment, an admission of the defendants cannot be allowed to be withdrawn, if such withdrawal amounts to totally displacing the case of the plaintiff and would cause him irretrievable prejudice. The Supreme Court, in *Gautam Sarup* (*supra*), reiterated that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified; a defendant is entitled to take an alternative plea, however, such a plea cannot be mutually destructive of each

other; an explanation can be offered, provided there is any scope thereof and a clarification may be made where the same is needed.

14. In *Ram Niranjana Kajaria* (*supra*), the Supreme Court held that an amendment in the written statement can be sought for introduction of new facts or for explanations or clarification of an admission or for taking an alternative position, however, a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment.

15. In the present case, as is evident from the written statement filed by the defendant no.1, the defendant no.1 has categorically admitted to the copyright ownership of the plaintiffs in the work. In the amendment that is now sought, the defendant no.1 does not seek to only clarify or explain the said admission, but seeks to withdraw the same in full, while challenging the ownership of the plaintiff in the copyright work. Applying the above principles as laid down by the Supreme Court, such withdrawal of admission cannot be allowed to be made by the defendant no.1.

16. The reliance of the learned senior counsel for the defendant no.1 on the judgment of the Supreme Court in *Baldev Singh* (*supra*), also cannot be accepted. The Supreme Court was considering a case where a plea of limitation was sought to be raised as an additional defence by the defendants. It was held that adding a new ground or substituting or altering a defence does not amount to altering or substituting a new cause of action. However, the present is not a case of merely adding a new ground, or substituting, or altering a defence; it is to withdraw a

categorical admission made by the defendant in the Written Statement.
The same cannot be permitted.

17. In view of the above, I find no merit in the present application.
The same is dismissed.

**CS(COMM) 572/2020 & I.A. 12668/2020, 197/2021, 590/2021,
8366/2021, 11755/2021, 14908/2021 & 10297/2022**

18. List for hearing on 9th February, 2023.

NAVIN CHAWLA, J

NOVEMBER 03, 2022/RV

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