

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L.) NO. 23100 OF 2021
IN
COMMERCIAL IP SUIT (L.) NO. 22985 OF 2021

Solflicks Filmworks Pvt. Ltd. ... Applicant

In the matter between :

Solflicks Filmworks Pvt. Ltd. ...Plaintiff

Vs.

Zee Entertainment Enterprises Ltd. ...Defendant

Dr.Birendra Saraf, Senior Advocate a/w. Dr.Abhinav Chandrachud, Mr.Rohan Savant and Mr.Anand Pai i/b Arun Panickar for plaintiff/applicant.

Mr.Venkatesh Dhond a/w. Mr.Ashish Kamat, Mr.Rohan Kadam, Mr.Sanjay Kadam, Mr.Sanjeel Kadam, Mr.Nitish Lad, Ms.Sayli Rajpurkar i/b Kadam and Company for defendant.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 19TH JANUARY 2022
PRONOUNCED ON : 27TH JANUARY 2022.
(THROUGH VIDEO CONFERENCE)

ORDER :

1. This suit is instituted for injunctive and/or compensatory reliefs on account of the alleged illegal termination of the Production Agreement, dated 22nd February 2021 ('Production Agreement') and for restraining the defendant from usurping the Concept and Works done in respect of the show tentatively titled, "Mission to Pakistan", in which the plaintiff claims to own the copyright.

2. The plaintiff has taken out this interim application seeking, *inter-alia*, an order and injunction restraining the defendant and the persons claiming through or under the defendant,

(i) from in any manner acting and/or causing to act in pursuance of the termination letters, whereby the Production Agreement was purported to be terminated and/or entering into an agreement with any third party to perform the works to be performed by the applicant under the Production Agreement, and

(ii) from in any manner utilizing any intellectual property rights belonging to the applicant in the show known as 'Mission to Pakistan' and/or the concept, title, script, screenplay, title and related creative work in the proposed web-series 'Mission to Pakistan'.

3. The factual backdrop necessary for determination of the prayer for ad-interim reliefs can be summarized as under :

(a) The plaintiff is engaged in the business of Content Production. The defendant is engaged in the

business of operating an Over-the Top (OTT) platform/on-demand services, known as “Zee-5”.

(b) In August 2018, the plaintiff (then through a partnership concern named Ahaana Productions) developed a concept tentatively titled ‘Tiger-Kaushik-Nawab (alternative title ‘Black Tiger’) on the book, “Mission to Pakistan”. Post negotiations, on 21st February 2019, the plaintiff (then Ahaana Productions) and the defendant executed a Development Agreement dated 25th January 2019 (‘Development Agreement’), whereby the project was commissioned by the defendant for scripting and/or writing the episodes. It was specifically agreed between the parties that the intellectual property rights in the Initial Concept, annexed to the said Agreement as Annexure ‘A’, shall exclusively vest in the plaintiff. The plaintiff came to be appointed as a Producer on exclusive basis to create the Developed Concept for the creation of the said series based upon the Initial Concept and undertake the relevant services to complete the Development Work and provide the Deliverables to ZEEL, in accordance with the terms of the Agreement.

(c) It is the claim of the plaintiff that the plaintiff rendered the services in accordance with the terms of the Agreement and developed the Developed Concept and the Development Work. The plaintiff availed the services of the several noted Writers in the industry. The plaintiff had meetings with the Script Writers and noted Actors. The proposed Screenplay was shared with the defendant. The latter was apprised of the shooting locations shortlisted by the plaintiff. The defendant was fully satisfied about the progress of the proposed work.

(d) Subsequently, on 22nd February 2021, the Production Agreement was executed by and between the plaintiff and defendant. Under Production Agreement, the plaintiff came to be appointed as the 'Line Producer' to execute the production of the Concept into an audio-visual program comprising of episodic content tentatively titled as "Mission to Pakistan".

(e) In consideration of discharge of the obligations and responsibilities as the 'Line Producer', the defendant agreed to pay to the plaintiff an amount of

Rs.2,12,45,750/- (Rupees Two Crore Twelve Lacs Forty-Five Thousand Seven Hundred and Fifty only) per Episode aggregating to Rs.16,99,66,000/- (Rupees Sixteen Crores Ninety-Nine Lakhs Sixty-six Thousands only) for eight Episodes all inclusive *inter-alia* artist cost, production of program, packaging and assignment fee etc. 5% of the agreed consideration, i.e., Rs.84,98,300/- (Rupees Eighty Four Lakhs Ninety Eight Thousand Three Hundred only) was paid by the defendant to the plaintiff as adjustable/refundable advance, as per agreed Schedule of payment under the Production Agreement.

(f) The plaintiff shared the Screenplay for all Episodes on 1st March 2021, for final evaluation. On 7th March 2021, the plaintiff was given a go-ahead by the defendant to proceed with the next stage of writing the dialogues and to provide the shoot time-line with regard to the commencement of shoot from 20th March 2021. However, on 10th March 2021, the defendant proposed substantial changes and demanded the Screenplay to be re-written.

(g) On 16th June 2021, the defendant, without any

justifiable reason, proceeded to terminate the Production Agreement, by relying upon Clause XIII(1)(ix) of the Production Agreement, taking a specious plea that there were creative differences/discontent warranting termination of the contract.

(h) The plaintiff asserts that the said action of the defendant was wholly illegal and unjustified. The correspondence between the parties would indicate that there were no creative difference/discontent and the defendant was satisfied about the work hitherto executed by the plaintiff. The termination of the Production Agreement is thus null and void and non-est in law.

(i) Post-termination, further correspondence was exchanged between the parties. Vide communication dated 28th August 2021, the defendant informed the plaintiff that it was in the process of appointing a third party to take over the plaintiff's work of Line Producer and was proceeding with the web-series "Mission to Pakistan". Since the plaintiff has the copyright in the concept, title, format and/or any other underlying works in relation to

the proposed web-series and the plaintiff had expended huge amount for the production of the episodes, under the terms of the Production Agreement, the plaintiff is constrained to approach this Court.

4. A short affidavit-in-reply is filed on behalf of the defendant to oppose the ad-interim reliefs. It is *inter-alia* contended that plaintiff's claim to ownership of copyright and intellectual property rights is baseless and misconceived. The defendant is the owner of the copyright in the web-series "Mission to Pakistan" and its underlying works and constituent elements. The defendant claimed to have acquired the rights of the underlying literary work "Mission to Pakistan" for the purposes of adaptation, translation, editing and incorporation in a web-series, cinematograph film, play, television series etc., under an Agreement dated 16th March 2019. The plaintiff's predecessor in interest, under Development Agreement, assigned to the defendant all copyright and intellectual property rights in the "Initial Concept", "Developed Concept" and "Development Work". The Production Agreement reinforces the said acquisition of all copyright in intellectual property in the said work.

5. The defendant contends that the Production Agreement was lawfully terminated in accordance with Clause XIII(1)(ix), after due notice. The Production Agreement, being essentially a contract for service, cannot be specifically enforced. Nor the prayer for restraining the defendant from appointing a new Line Producer can be entertained as the defendant has already appointed Line Producer to render the production services. Thus, at this stage, the plaintiff is not entitled to any of the ad-interim reliefs.

6. I have heard Dr.Saraf, the learned Senior Counsel for the applicant-plaintiff and Mr.Dhond, the learned Senior Advocate for the defendant at some length, on the aspect of ad-interim reliefs.

7. Dr. Saraf, the learned Senior Counsel for the plaintiff submitted that the instant case epitomises the manner in which the creators/authors of original work are denuded of all their rights. Taking the Court through the clauses of the Development Agreement and Production Agreement, Dr.Saraf canvassed a fervent submission that the terms of the Agreements are required to be construed keeping in view the unequal bargaining power. It was submitted that the Development Agreement stipulates in

clear and explicit terms that the plaintiff shall be the exclusive owner of the copyright in the Initial Concept. The subsequent clauses in the Development Agreement and the clauses in the Production Agreement, whereby the defendant was sought to be robbed of the copyright in the original work, are of no assistance to the defendant as there can be no valid assignment under section 18 of the Copyright Act, 1957. Laying emphasis on the proviso to section 18(1), which explicitly provides that the assignment of copyright shall take effect only when the work comes into existence, Dr.Saraf would urge that till the episodes were complete in all respect, there could be no valid assignment.

8. As regards the termination of the Production Agreement, Dr.Saraf would urge that the resort to Clause XIII(ix), to terminate the contract on the ground of creative differences/discontent is a subterfuge. It was urged that in the affidavit-in-reply, an endeavour has been made on behalf of the defendant to demonstrate that there were breaches of obligations on the part of the plaintiff. However, while terminating the Production Agreement, the defendant did not advert to sub-clause (i) of Clause XIII(1).

9. It was further submitted that the material on record indicates that, on the one hand, there was no breach on the part of the plaintiff and, on the other hand, there were no creative differences/discontent as the defendant had expressly approved and complimented the work of the plaintiff. Since the plaintiff had incurred expenses of more than Rs.4 Crores for execution of the work under the Production Agreement, the defendant needs to be restrained from releasing web-series “Mission to Pakistan” and commercially exploit the same till the application is finally heard, submitted Dr.Saraf.

10. As against this, Mr.Dhond would urge that the case of unequal bargaining, now sought to be canvassed, has not at all been pleaded. Secondly, the submission on behalf of the plaintiff that the plaintiff still owns the copyright in the underlying work is belied by the express terms of the Development Agreement and Production Agreement. Whatever intellectual property rights the plaintiff had in the “Initial Concept” only, came to be assigned to the defendant and now the plaintiff cannot claim any semblance of intellectual property right in any of the works; developed or underlying. Taking the Court through the contentions in affidavit-

in-reply, Mr.Dhond would urge that there were multiple breaches in the development of the Developed Concept and Developed Work, under the Development Agreement, and execution of the Concept under the Production Agreement, resulting in serious prejudice to the defendant. Mr. Dhond would further urge that 'discontent' is a term of wide import. The material on record would indicate that for the widespread discontent, on account of actions and omissions on the part of the plaintiff, the defendant was justified in terminating the contract.

11. To begin with, it may be appropriate to note few clauses in the Development Agreement. "Initial Concept" was to mean the Initial Concept owned and pitched by the Producer (Plaintiff) for a new web-series based upon the book 'Mission to Pakistan'. The Initial Concept along with release form was attached as Schedule 1 to the said Agreement. The nature of the appointment was indicated under the Clause 'Appointment of Producer". It reads as under :

"2. Appointment of Producer :

ZEEL hereby appoints the Producer on exclusive basis to create the Developed Concept for the creation of this Series based upon the Initial Concept and undertake the relevant Services to complete the Development Work and provide the Deliverables to ZEEL, in accordance with the terms of this Agreement. For the avoidance of doubt, the

Initial Concept is the sole and exclusive property of the Producer and the Development Work shall be the sole and exclusive property of ZEEL including all rights, title and interest not limited to the results and proceeds of the Development Work thereof, in perpetuity for the Territory.”

12. The Consideration was provided in Clause 4.1 as under :

“4.1 In consideration of rendering Services and assignment of all the rights in relation to the Initial Concept, Developed Concept and Development Work, i.e., Works (as defined under clause 5.2 below), ZEEL shall pay to the Producer total sum of Rs.87,90,000/- (Rupees Eighty-Seven Lakhs and Ninety Thousand Only) (“Consideration”).

13. The assignment of rights was provided for, in Clause 5, as under :

5. Assignment of Rights

5.1 The Producer hereby exclusively, irrevocably and unconditionally grant, assign, sell, convey and transfer to ZEEL solely and absolutely (including, without limitation, by way of present grant and assignment of future copyright), all rights, title and interest in and to the Initial Concept and Developed Concept, Services Deliverables and all constituent elements thereto resulting into Development Work, in and to the production and all constituent elements thereto, in whatever stage of completion, as may exist from time to time, and all elements therein (collectively, the “Works”), in perpetuity and in all languages in each country and area and space throughout the universe (collectively), the “Rights”). Such rights in and to the works shall include, but shall not be limited to, all copyrights as vested and to the results an proceeds of Producer’s services and all constituent elements thereto including literary works, musical works, dramatic works and/or artistic works as defined by the Copyright Act, 1957 (as amended from time to time) as well as copyright statues or law subsisting in any other parts of the Universe. The Producer hereby confirm, represent and warrant that the

ownership of the Rights in and to the Works shall vest with ZEEL, free of all encumbrances with effect from the moment of conceptualization, development or creation of such Works. The Producer shall have no rights in or to, or to use, copy or otherwise deal with, the Works in any manner.

....

5.3 Producer and ZEEL agree that, wherever applicable under law, all of the Works under this Agreement, in whatever stage of completion and/or after completion, shall be considered and deemed a work-made-for-hire specially ordered and/or a commissioned work made for valuable consideration, commissioned by ZEEL, and ZEEL shall be deemed the sole "owner" thereof. In the event that the Producer shall have any rights in and to the Works that cannot be assigned to ZEEL as provided above, whether now known or hereafter to become known, Producer, on behalf of herself and on behalf of their successors or assigns, hereby unconditionally and irrevocably waives such rights. To the extent of any of the foregoing provisions is ineffective under applicable laws, Producer hereby provides and shall provide any and all ratifications and consents necessary to accomplish the purposes of the foregoing. The Producer shall confirm any such ratifications and consents from time to time as requested by ZEEL.

14. From the aforesaid stipulations in the Development Agreement, it becomes evident that the Initial Concept was pitched by the plaintiff for a web-series, based upon a book, "Mission to Pakistan". The plaintiff was appointed on exclusive basis to create the Developed Concept for the creation of the said web-series upon the Initial Concept and undertake all the relevant services to complete Development Work. It was specifically provided that Initial Concept was to be the sole and exclusive

property of the plaintiff. Whereas the Development Work would be the sole and exclusive property of the defendant.

15. Clause 4.1 makes it abundantly clear that the sum of Rs.87,90,000/- was to be paid to the plaintiff in consideration of rendering services and assignment of all the rights in relation to the Initial Concept, Developed Concept and Developed Work. Under clause 5.1, the plaintiff exclusively, irrevocably and unconditionally assigned all rights, title and interest in and to the Initial Concept and Developed Concept, Deliverables and all constituent elements resulting into Development Work. Clause 5.3 further provided that the parties agreed that the work shall be considered and deemed a work-made-for-hire specially ordered and/or a commissioned work made for valuable consideration, commissioned by the defendant.

16. In the backdrop of the aforesaid provisions in the Development Agreement, the thrust of the submission on behalf of the plaintiff that the plaintiff still retained the copyright in the Initial Concept and the underlying work does not, *ex-facie*, merit countenance. Undoubtedly, the plaintiff pitched and claimed the

copyright in the Initial Concept. However for lawful and valuable consideration, the plaintiff not only duly assigned the copyright in the Initial Concept but also agreed that the further work based on the Initial Concept, shall be in the nature of the work made for hire. It is trite that in a work executed pursuant to such commissioning, in the absence of any agreement to the contrary, the person creating the work does not hold a copyright as the ownership of the copyright vests in the person getting the work commissioned.

17. Dr. Saraf, the learned Senior Counsel for the plaintiff would canvas a submission that the Development Agreement stood superseded by the Production Agreement. And under the Production Agreement, though the parties provided for the ownership of intellectual property rights and assignment thereof, yet all those clauses were in the form of standard terms and conditions. The element of unequal bargaining power thus must enter the judicial verdict, submitted Dr. Saraf.

18. I am afraid to accede to this submission. In the light of the relative position of the parties and the situation in life and

experience that the key persons of the plaintiff found themselves in, I find it difficult to accede to the submission of unequal bargaining power sought to be urged by Dr. Saraf. Mr. Dhond was justified in refuting the said submission on the ground that there is no justifiable foundation in the pleadings.

19. In any event, from the clear and explicit terms of the Production Agreement, it becomes abundantly clear that whatever residuary rights the plaintiff had in the Initial Concept, stood assigned in favour of the defendant under the Production Agreement. Clause C of the Production Agreement declares that the plaintiff and defendant have jointly developed the concept and the defendant owns the sole and exclusive copyright, derivative and underlying rights and all other rights including without limitation the entire Intellectual Property Rights related to the Concept, including right to produce audio-visual content and/or series based on the Concept. Under Clause D, the plaintiff was appointed to execute the production of the Concept into an audio-visual program comprising of episodic content tentatively titled as “Mission to Pakistan” and for further exploitation thereof by the defendant in any manner it deemed fit as its sole discretion.

Under the standard terms and conditions, appended to the said Production Agreement, the status of the plaintiff as “Line Producer” was reiterated.

20. On the aspect of intellectual property rights, under Clause III (1), it was provided that that plaintiff agreed and acknowledged that the episodes of the programe produced and delivered by the plaintiff and all other products resulting from services rendered by the plaintiff shall at all times constitute and shall be deemed to constitute works-made-for-hire / commissioned works developed at the instance of the defendant in accordance with the Copyright Act, 1957 and the defendant shall be the first and exclusive owner of all rights including but not limited to Intellectual Property rights and copyright in all the Episodes of the Program for all purposes. Sub-clause (4) of clause III further provided that the plaintiff acknowledged that the defendant shall be the sole and exclusive owner of the Derivative Rights as well.

21. Sub-clause (11) of clause III further provided that, if for any reason, the defendant is not considered as the First Owner of the Program pursuant to Section 17 of the Copyright Act, 1957 or any

of the Works by operation or interpretation of law, then the same shall be considered to be assigned to the defendant pursuant to section 18 of the Copyright Act, 1957. For the said purpose, the assignment shall be deemed to include absolute ownership of all the copyrights. Under the said sub-clause, the plaintiff specifically assigned in favour of the defendant the Derivative Rights and the sole and exclusive right to produce Derivative Works based on the Program or any of the underlying literary, musical, dramatic works or performances.

22. Clause XI(2) puts the issue of assignment of the rights beyond cavil. It reads as under :

“(2)All intellectual property in the Program and artistic, literary, dramatic, vocal and musical materials of the Program including the copyright to the Concept, script, title, segments, music, set designs, costume designs, dialogues, catch phrases, characters and Episodes of the Program and all other allied, ancillary and subsidiary rights in any and all media whether now known or subsequently invented for the full period of copyright and all renewals, revivals and extensions throughout the world in and to the Program as per the terms of this Agreement shall stand assigned and vested with ZEEL in perpetuity and for the territory of the entire world.”

23. In the backdrop of the aforesaid nature of the comprehensive contract between the parties as regards the

intellectual property rights not only for the Episodes but the underlying work as well, *prima-facie*, an inference of assignment for consideration becomes sustainable, for reasons more than one. Firstly, under the Development Agreement itself, there was assignment of copyright in the Initial Concept as well. Secondly, after the position of the plaintiff changed from a 'Content Creator' to 'Line Producer' by virtue of the Production Agreement, the plaintiff acknowledged the ownership of the defendant in the entire concept. The plaintiff thereafter was to perform the role of a production house. Thirdly, under the Production Agreement also, the intellectual property rights for the entire programme, including the underlying work, stood assigned in favour of the defendant.

24. On the aspect of the legality and validity of the termination of Production Agreement, it may be apposite to note the relevant part of clause XIII of the Production Agreement :

XIII TERMS & TERMINATION

1. ZEEL shall have the right to terminate this Agreement in the following circumstances :

(i) the Line Producer fails to deliver the Delivery Materials in accordance with the Delivery Schedule as set out under Schedule A, ZEEL shall provide a 15(fifteen) business days' notice to the Line Producer to meet the delivery. The Agreement shall stand terminated upon the expiry of the notice if the delivery is not completed by the Line Producer.

.....

ix. Notwithstanding anything stated herein, ZEEL shall be entitled to terminate the Agreement in the event there is any creative difference/discontent between ZEEL and the Line Producer without specifying any reason by issuing prior written notice of 14 (fourteen) days to the Line Producer.”

25. Indisputably, the defendant has resorted to sub-clause (ix) of Clause (1) to terminate the Production Agreement. Dr.Saraf made a strenuous endeavour to draw home the point that the material on record does not indicate that there was any creative difference between the plaintiff and defendant. A mere divergence of views on peripheral issues cannot be termed as a ‘creative difference’. To fall within the ambit of the term ‘creative difference’, according to Dr.Saraf, the differences should be on the matters of substance. Since the defendant had appreciated the work of the plaintiff, in the correspondence which preceded the termination, the resort to aforesaid clause is a subterfuge to ease off the plaintiff.

26. In opposition to this, Mr.Dhond made an equally strenuous effort to take the Court through the correspondence exchanged between the parties, which evidence the acts and omissions on the part of the plaintiff allegedly prejudicial to the expeditious commissioning of the project. Mr.Dhond further submitted that

the said correspondence, at any rate, manifests the discontent, which justified the invocation of sub-clause (ix).

27. At this stage, it may not be expedient to delve deep into this aspect of the matter. The questions as to who was at fault and whether there was such discontent, as to warrant termination of the Production Agreement, are essentially rooted in facts. At an ad-interim stage, such issues can hardly be determined either way, even *prima-facie*.

28. What is of significance is the fact that the Production Agreement provided a mechanism for addressing the consequences which entail pre-mature termination of the contract. Once the Court finds that the claim of the ownership of copyright in the underlying work and the developed work or for that matter episodes, is not *prima-facie* sustainable, the issue of remedy on account of unlawful or unjustified termination of the Production Agreement, squarely falls in the realm of damages.

29. Since the defendant has already appointed another production house for producing the web-series, at this juncture,

the balance of convenience tilts in favour of the defendant. An order restraining the defendant from releasing the web-series, despite completion of the production and post- production work, would cause irreparable loss to the defendant.

30. For the foregoing reasons, I am persuaded to hold that, at this juncture, the plaintiff is not entitled to any ad-interim relief.

31. Hence, the following order :

ORDER

- (i) No ad-interim relief.
- (ii) The defendant is at liberty to file further affidavit-in-reply within a period of four weeks.
- (iii) The plaintiff is at liberty to file an affidavit-in-rejoinder thereto within a period of two weeks of being served with the further affidavit-in-reply.
- (iv) The interim application be listed on 10th March 2022.

(N. J. JAMADAR, J.)