

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9979 of 2009

For Approval and Signature:

HONOURABLE THE CHIEF JUSTICE MR. K.S.RADHAKRISHNAN

HONOURABLE MR.JUSTICE ANANT S. DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVENDRAKUMAR RAMCHANDRA DWIVEDI - Petitioner(s)

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR MIHIR JOSHI SR ADVOCATE WITH MR HARSHIT TOLIA, MR YJ TRIVEDI, MR JATIN TRIVEDI, MR TEJAS TRIVEDI for Petitioner

MR DEVANG VYAS ASST GOVERNMENT PLEADER for Respondent(s) : 1 - 3,

MR MIHIR THAKORE, SR ADVOCATE WITH MR A M HAWA, MR HIMANSHU BAGGI, MR RAVI FOR SINGHI & CO for Respondent(s) : 4,

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CORAM : HONOURABLE THE CHIEF JUSTICE MR. K.S.RADHAKRISHNAN

and

HONOURABLE MR.JUSTICE ANANT S. DAVE

Date : 24/09/2009

CAV JUDGMENT**(Per : HONOURABLE THE CHIEF JUSTICE MR. K.S.RADHAKRISHNAN)**

Petitioner has come up with this public interest litigation apprehending disruption of Navratri Garba / Dandiya Mahotsav by the police at the instance of fourth respondent for alleged violation of provisions of the Copyright Act, 1957.

Petitioner claims to be a resident of Ahmedabad and is engaged in the business of serving Sharbat and drinking water etc. on religious occasions and also on various other festivals. Petitioner has submitted that he is not organizing any Garba / Dandiya festival or Mahotsav nor he is concerned with any organisation in any manner holding any such event but all the same he is concerned with the interest of the general public who assemble in various venues where Garba and Dandiya Mahotsav are organised. Petitioner has referred to the newspaper report appeared in "Sandesh" daily stating that notices have been issued by the fourth respondent society to various hotels, clubs and restaurants indicating the necessity of obtaining licence at the tariff rates applicable to the Public Performance of Music by way of Live Performance, DJ Music & Live with the DJ (Recorded Music) etc.

Petitioner further stated that there is no necessity to obtain licence from fourth respondent for conducting performance and religious ceremony of Garba / Dandiya in any manner and Garba / Dandiya is culture and tradition of Gujarat State since generation and public domain even before any kind of statute was enacted. Further, it is also stated that many folk dance, musical work and other dramatic work or action intended to be sung, spoken or performed with music work, are forming part of the religious heritage of the State, which is an art

adopted in number of movies also. Petitioner submits that purported actions of the fourth respondent is contrary to the public interest and would create serious law and order problem in the celebration of the Navratri Garba Mahotsav which is nothing but a religious ceremony and/or celebrated by the public at large with religious fervour. Petitioner has, therefore, sought directions to respondents No.2 and 3 not to act on the impugned communication issued by the fourth respondent and also other consequential reliefs.

Learned Advocate Mr. A. M. Hawa took notice for fourth respondent when the matter came up for admission. We heard learned Senior Counsel Mr.Mihir Joshi for the petitioner and learned Senior Counsel Mr.Minir Thakor for the fourth respondent and the learned AGP Mr.Devang Vyas. Detailed counter-affidavit has been filed on behalf of the fourth respondent. Fourth respondent has stated that it is a society registered under Section 33(3) of the Copyright Act, 1957 and it has been established to monitor, protect and enforce the rights, interest and privileges of its members comprising of authors, composers as well as music publishers. Fourth respondent is the owner or authorized administrators of Copyrights in a vast repertoire of literary and musical works assigned to them by its members. Owner of the Copyright in the Literacy or Musical Works enjoys a number of rights exclusively as set out in Section 14(a) of the Act and include the right to perform the work in public or communicate it to the public. Every event organizers / managers, broadcasting organisation, shop, departmental store, showroom, emporium, restaurant, hotel, club, disco, bars, office establishments, television channels, music concerts etc. which play music, impinges on this right unless it seeks permission of the fourth respondent society. Fourth respondent submitted that the exploitation of the works within the repertoire of fourth respondent during the course of

a show or event involving public performance to the public or communication to the public of work within repertoire of the fourth respondent, without a license from fourth respondent amounts to infringement of the copyright as per the statutory provisions of Copyright Act, 1957 read with Section 14(a)(iii) of the Act. Further, it has been stated that the petitioner has not supplied any material whatsoever that any entity organizing Garba / Dandiya is an amateur club or a religious organisation. Further, it has also been stated that entry to Garba / Dandiya venues is subject to entry fee and the fact that Garba / Dandiya events are social functions which is contrary to the claim of the petitioner that they are religious ceremonies. Further, it has also been stated that Section 52(z) of the Act would exempt “bona fide religious ceremonies” and under no circumstances, can an event where music is played, entry fee is charged be construed to fall within legislative intention of bona fide religious ceremony. Further, it has also been stated that “Pujas” or religious ceremonies where music is utilized including marriage functions or ceremonies associated with marriage functions are exempt for the very specific purpose of protecting the religious sensibilities of Indian. Counter affidavit also makes it clear that fourth respondent has not collected license fees for “Folk Music” or “Public Domain Music” in any manner. Fourth respondent has brought this to the notice of the general public. Further, it has been stated that all the same, the fourth respondent seeks to collect license fees is in respect of the exploitation of music and lyrics from within the repertoire of the fourth respondent only and not from public domain music or folk music. Further, it has also been stated that in the past, various entities conducted various Dandiya / Garba dance events wherein works administered by the fourth respondent have been publicly performed and it is for this reason such entities have also taken licenses from the fourth respondent for the use of works within the repertoire of the fourth

respondent. Further, it has also been stated that exploitation of music and lyrics from within the repertoire of the fourth respondent during the course of a show or event involving public performance amounts to infringement of copyright as per the statutory provisions of Section 51 read with Section 14(a)(iii) of the Copyright Act, 1957.

Fourth respondent has further stated the petitioner has no locus standi to file this writ petition since none of the statutory or fundamental rights of the petitioner has been violated in any manner. It is also stated that the petition is based on mere conjectures and hypothesis and none of the acts taken by the fourth respondent to safeguard rights of its members impinge upon any right of the petitioner or the general public at large. It is stated that if the petitioner, in any way, aggrieved, the remedy is to move Civil Court under Section 60 of the Copyright Act and the writ petition against the fourth respondent which is a private body comprising of owners of copyright and is not amenable.

Learned Government Pleader on instructions submitted that the police have not taken any action so far, on the letters received from the fourth respondent, and it has no intention to disrupt any function conducted according to law.

Petitioner, in this case, in our view, has approached this Court more on publicity than for espousing any public cause or interest. Petitioner has stated that he is not going to organize any Garba / Dandiya festival or Mahotsav and is not concerned with any organisation in any manner holding any such event, then we fail to see how the petitioner is aggrieved by various notices issued by the fourth respondent to the organizers of above mentioned functions and to the police alerting them of the possible violation of Copyright Act. Petitioner has placed

reliance on a paper report appeared in “Sandesh” newspaper dated 12.09.2009 which refers to notices issued to clubs, hotels etc. at the instance of the fourth respondent. They have not approached this Court challenging those notices or the communication sent by the fourth respondent to the Police and the District Collector. Petitioner has voiced apprehension of the possible disruption of Navratri Garba religious ceremony where public gathering in large number thereby it may disrupt public order and tranquility.

We find it difficult to accept to the prayer of the petitioner. Fourth respondent is registered as a Copyright Society under Section 33(3) of the Copyright Act, 1957 as amended. Members of the Society consist of lyricists, Music Composers, and Music Publishers etc. Necessarily, fourth respondent has to safeguard the interest of its members. Owners of the copyright in the Literacy or Musical Works enjoys a number of rights and such rights are enumerated under Section 14 of the Act. Section 51 of the Copyright Act, 1957 deals with infringement of the copyrights. Exploitation of work within the repertoire of the fourth respondent during the course of a show or event involving public performance would amount to infringement of the copyright as per the statutory provisions of Copyright Act, 1957 read with Section 14(a)(iii) of the Act. Question as to whether there has been any violation of copyright of the fourth respondent need not be gone into in this writ petition since none of the affected parties are before us raising any grievance against the action of the fourth respondent. Therefore, it is unnecessary to dwell upon those issues further. Further, the petitioner has not produced any material to show that the fourth respondent or police has interfered with regard to any acts which fall within the purview of Section 52(2) of the Copyright Act, 1957. Petitioner has stated that the notice issued by the fourth respondent would amount to contravene the provisions of Section 52(1)

(za)(k)(l) read with Section 2(p) of the Copyright Act. Section 52 deals with certain acts which would not amount to infringement of Copyright. Section 52(1)(za),(k) & (l) which are relevant for our purpose, are extracted hereunder for easy reference.

“52. (1)(k) the causing of a recording to be heard in public by utilizing it, -

(i) in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

(ii) as part of the activities of a club or similar organisation which is not established or conducted for profit;]

(l) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;”

Reference in this connection made to Section 52(1)(za) which is extracted hereunder for easy reference.

“52. (1)(za) the performance or a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.

Explanation – For the purpose of this clause, religious ceremony including a marriage procession and other social festivals associated with a marriage.]

No material has been produced before us by the petitioner to show that fourth respondent has initiated or that the police machinery has been moved to take action against the activities which fall under the above mentioned clauses which would not amount to infringement of copy right.

Section 52(1) exempts a variety of limits on the rights of the copyright owner in the form of compulsory licenses, complete exemptions from liability and other privileges such as fair or honest use. Section 52(1), (k), (l) and (za) generally refer to non-profit performances of music and other non-dramatic works. Basic thrust is to exempt live performances of such works when there is no commercial purpose and when there is no admission charge and are used exclusively for educational, religious or charitable purposes and not for any private financial gain.

Music recording to be heard in public or Garba and Dandiya dance performance in an enclosed room or hall for the common use of the residents in any residential premises as part of the amenities provided exclusively or mainly for residents therein would not amount to infringement of copyright. So also the activities of a club or similar organization which is not established or conducted for profit. Further, the performance of a literary dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience or for the benefit of a religious institution would not infringe copyright. So

also in the case of Folk Music or public domain music.

The Central Government – State Government or any local authority can arrange the performance of a literary, dramatic or musical work, officially which will not amount to infringement of copyright or also in connection with a bonafide religious ceremony like Navratri Pooja, Arati etc. so also marriage procession or other social festivities associated with a marriage, would not amount to infringement of copy right.

Therefore, the main thrust of Section 52(1) of the Copyright Act, 1957 is to exempt live performance of such works when there is no commercial purpose and when there is no admission charge and/or when admission proceeds are used exclusively for educational, religious or charitable purpose and not for private personal financial gain. Above principle is generally called “fair or honest use doctrine” which constitutes the most significant limitation on the exclusive rights held by a copyright owner. ‘Fair Use Doctrine’ was first articulated by Justice Story in *Folsom v. Marsh*, 9 F.Cas. 342 in the year 1841. Learned Judge, opined that quoting copyrighted material in the course of preparing a biography or a critical commentary might be excusable, but not if so much is taken, that the value of the original is sensibly diminished, or the labours of the original author are substantially to an injurious extent appropriated by another. Fair use doctrine has another object to achieve is to promote the progress of science and the useful arts. Fair use doctrine comes into play when a too literal enforcement of the copyright owner's rights would operate to the detriment of the public interest in access to and dissemination of knowledge, and unauthorized copying can be tolerated without significant economic injury to the copyright owner. Fair use doctrine is mixed question of law and facts and if the use

is commercial rather than nonprofit, it is presumed to be unfair and to have a likely adverse impact on the market for the owners work, the burden is on the organizers to prove otherwise. In *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417(1984) the Court sustained a claim of fair use for home videotaping of copyrighted television programme – a use rather clearly falling outside the enumerated categories. In *Harpaer & Row Publisher v. Nation Enterprises*, 471 U.S. 539, 560 (1985) involving a news magazine's quotations from the to-be published memories of President Ford relating to his pardon of President Nixon – a use falling rather clearly within the enumerated category of news reporting, the Court rejected the claim of fair use.

Question whether certain acts fall within exempted categories enumerated under Section 52(1) of the Act has to be decided according to facts of each case. The theory of presumed intention or fair use and infringement, public interest etc. are to be judged on the material we get in a given case. Difficulty would arise when such copy rights are exploited for commercial purpose, which may give rise to a complaint of infringement. It is unnecessary in this case to further expatiate on this issue since on the facts we have found that none of the statutory or constitutional rights of the petitioner has been violated.

We have no reason to think that the District Collector or the Police Authority would act in the high handed manner as apprehended by the petitioner. Petition lacks merits and the same is dismissed.

(K.S.RADHAKRISHNAN, C.J.)

(ANANT S. DAVE, J.)

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