

**IN THE COMMERCIAL COURT
AT RAJKOT**

COMMERCIAL TRADE MARK SUIT NO. 01/2022

ORDER BELOW EXH. 5

01. It is pertinent to note that present suit originally filed before the Hon'ble District Court by the plaintiff, which was registered as a Regular Copyright Suit No. 4/2021 on dated 22/3/2021. Then, the defendant duly served with the summons/Notice and appeared before the District Court and submitted their Written Statement. Then after as per the Notification under the Commercial Court Act-2015, Commercial Court notified in Rajkot District vide Notification No. B/1199/2020 dated 4/11/2020, District Court, Rajkot and the present suit valued is about 5.0 Lacks is more than Rs. 3.00 Lacks and for that jurisdiction lies with Commercial Court as per Sec. 2(1)(c), hence, the original Regular Copyright Suit is Ordered removed from the register of Trade Mark suit and re-registered as Commercial Trade Mark suit in lieu of said Order, this suit registered as Commercial Trade Mark Suit No. 01/2022 and transferred to the Commercial Court as per Order passed by 3rd Addl. District Judge, Rajkot on dated 11/3/2022. Then after, as a Commercial Court, this suit received and proceeded further in accordance with the Provisions of Commercial Court Act and

both the parties furnished their respective pleadings along with statement of truth as per the Provisions of Commercial Court Act, which are kept with original plaint and Written Statement of the respective parties.

02. Plaintiff has filed present suit against the defendant for the declaration, injunction and damages for the infringement of copyright under the Copyright Act in respect of alleged two videos namely '**MOGAL CHHEDTA KALO NAG**' was removed from 28/10/2020 to 12/11/2021 due to illegal act of the defendant and therefore, plaintiff has preferred present suit as a Legal Heir of his deceased father Aapabhai Kalabhai Gadhvi, who was a well known poet with nickname 'Aap' and his father having popularity and well known poet of Gujarati literature amongst the people with nickname 'Aap'. It is stated by the plaintiff that he uploaded the well known song '**MOGAL CHHEDTA KALO NAG**' of his father, which was sung by folk singer Kirtidan Gadhvi and due to strike of defendant on 28/10/2020, the said video came to be removed by the You Tube from its platform and the said fact came to the notice of the plaintiff that the defendant used the name of Aapabhai Gadhvi with nickname 'Aap' in its strike as lyric and composition of Aapabhai Gadhvi. Therefore, plaintiff had issued counter notification to You Tube on 29/10/2020 stating

that the alleged video is original content of the plaintiff and he has rights on it and the lyric and composition is of his deceased father Aapabhai Kalabhai Gadhvi and as a Legal Heir, plaintiff has never given any copyright assignment in respect of this song and his late father had given assignment to someone else in his livelihood then plaintiff has no any information regarding the same.

03. Further, he had made Yadi to the You Tube to restore his both videos, which were removed by the You Tube as per strike of defendant and defendant failed to provide evidence regarding infringement of copyright by the plaintiff, therefore, considering plaintiff's request, You Tube had restored both the videos on 12/11/2020. Further, You Tube had intimated plaintiff on dated 17/11/2020 that the videos of plaintiff's above song, which was uploaded by the defendant was sung by folk singer Hemant Chauhan along with URL of the said video. Therefore, plaintiff had issued Copyright strike against defendant on 26/2/2021 and therefore, the said video of defendant came to be removed by You Tube and informed plaintiff on 2/3/2021 by You Tube. Against plaintiff's copyright strike, defendant issued counter notification to You Tube on 8/3/2021, therefore, plaintiff issued Notice to You Tube on dated 11/3/2021. Therefore, plaintiff has

filed present suit against the defendant for the infringement of his copyright regarding song '**MOGAL CHHEDTA KALO NAG**' composed and written by his late father Aapabhai Kalabhai Gadhvi, who was a well known poet with nickname 'Aap' and also asked ad-interim injunction against the defendant by preferring present Exh. 5 application.

04. The defendant is duly served with the summons/notice of suit and Exh. 5 application and defendant appeared through his Ld. Advocate and filed Written Statement vide Exh. 32. It is contended that the suit and the Exh. 5 application are false, frivolous and vexatious and not maintainable in eye of law and denied all the averments made in Exh. 1 and Exh. 5 application in toto. Further, it is contended that defendant is the publisher of the song i. e. video title '**MOGAL CHHEDTA KALO NAG**' since 1993 with the focus of spiritual nourishment that inculcates values of the faith, love and devotion for God. Thus, present suit of the plaintiff is baseless and not maintainable in eye of law, therefore, it requires to be dismissed with cost. Further, it is contended that the plaintiff is not continuous and real author song/ video title above named song under the Copyright Act and plaintiff also failed to prove his continuous use and acquiring and repudiation and goodwill. Further, it is contended that present suit is barred

by Provisions of Sec. 45 of the Copyright Act as it is unregistered and therefore, suit is not maintainable. Further, it is contended that plaintiff has not furnished any documents regarding his right on paper lyric of his father and writing and plaintiff's father wrote down '**MOGAL CHHEDTA KALO NAG**' song and not a publisher of the said song. Thus, in absence of evidence, plaintiff has no right to file present suit. Thus, it is asked to reject the Exh. 5 application with cost. Further, it is contended that defendant gets registered trademark 'Shiv' for Class-9 and uses it since 1/1/1985 and the said registration valid till 1/1/2028 issued for audio cassette, song recording and song producing equipments and appearties, audio tape registration. Further, it is contended that the defendant is the Proprietor of the said song since 1993 and honest and bonafide adopter and use the same in open, continuous, extensive, voluminous and uninterrupted the same. Thus, it is asked to dismiss the suit as well as Exh. 5 application with cost.

05. Ld. Advocate for the plaintiff has submitted Written Arguments vide Exh. 46, which are taken into consideration, while deciding the present application. Ld. Advocate for the defendant has argued that present suit filed by the plaintiff for the infringement of copyright and on the same grounds, another suit also filed. Thus,

multiplicity of proceedings are there on record. Further, it is argued that looking to the pleadings, there is no specific cause of action shown in plaint, therefore, present suit is not tenable in absence of cause of action. Further, it is argued that after death of plaintiff's father, how he acquired rights is not pleaded by the plaintiff and not furnished any evidence for the same. Further, it is argued that defendant running video on You Tube since 2011. Thus, defendant is the prior user and adopter of the said copyright against the plaintiff. Further, it is argued that looking to the documents Mark 34/1 furnished by the defendant, there are hundred persons sung the said alleged song and they are not restrained by the plaintiff till date. Further, it is argued that defendant running 'Shiv' studio as per agreement dated 3/6/2019 and produce the songs and also prepared C. D.. Further, it is argued that trademark is got registered by the defendant. In the circumstances, plaintiff has no prima facie case to prove that he is the prior user and adopter of the said alleged song. Thus, it is asked to reject the application with cost. Further, it is argued that defendant's father had filed suit against the Hemant Chauhan in the year 1994, which was dismissed by the Court and said dismissal Order, defendant's father had preferred R. C. A. regarding said alleged song and in the complaint filed by the defendant, the statement of Hemant Chauhan was recorded on

17/6/1993 by the concerned investigating Officer of A Division Police Station, which is quite sufficient to establish the prima facie case of the defendant against the plaintiff. Further, it is argued that there is no any evidence on record to show that plaintiff's father having right, title and interest on the alleged song. Further, it is argued that looking to the compromise agreement executed between Rasikbhai Khakhhar and Hemant Chauhan, it transpires that defendant is the prior user of the said song. Further, it is argued that plaintiff has not furnished any evidence regarding lyric and composition is of his deceased father. Further, it is argued that plaintiff has no copyright registration regarding the said song. Further, it is argued that defendant has filed complaint against the plaintiff in the year 2007, at that time why plaintiff had not filed any proceedings to protect his rights. Further, it is argued that defendant has filed Criminal case against Hemant Chauhan in the year 1993 and Chargesheet was filed in the year 1994, therefore, defendant is the prior user and adopter of the said copyright. Further, it is argued that plaintiff has not come with clean hands before this Court. Further, it is argued that at the interim stage, no final relief can be granted to the plaintiff. Thus, it is asked to reject the Exh. 5 application of the plaintiff with cost. In support of the arguments, defendant has submitted following Authorities:

- (1) LAWS (MAD) 2008-9-455 IN THE CASE OF BHARAT MATRIMONY COM Pvt. Ltd. CHENNAI Vs. PEOPLE INTERACTIVE Pvt. Ltd.
- (2) LAWS (SC) 2015-10-75 IN THE CASE OF LAL BABU PRIYADARSHI Vs. AMRIPTPAL SINGH
- (3) LAWS (SC) 2001-5-62 IN THE CASE OF NIPLY INDUSTRIES Vs. UNICORN PLYWOOD Pvt. Ltd.
- (4) LAWS (SC) 2017-12-45 IN THE CASE OF TOYOTA JIDOSHA KABUSHIKI KAISHA Vs. M/s. PRIUS AUTO INDUSTRIES LTD. AND OTHERS

06. It is pertinent to note that while deciding interim injunction application regarding copyright, it requires to make out prima facie case, balance of convenience and irreparable loss, injury or damage is must for the plaintiff. Further, it is well settled law that this Court is not required to go into the merits of the entire matter at this stage and what is required to be seen is whether the plaintiff has made out a prima facie case or not for grant of interim injunction.

07. Now, in present case on hand, plaintiff filed present suit as copyright holder of the song '**MOGAL CHHEDTA KALO NAG**' written and composed by his Late father Aapabhai Kalabhai Gadhvi, who was a well known poet with nickname 'Aap' and the said song was uploaded by the plaintiff on You Tube in his official channel 'Aapabhai Gadhvi Official' from 2018 as a Legal Heir of

Late Aapabhai Kalabhai Gadhvi. The said song was sung by folk singer Kirtidan Gadhvi.

08. Against this defendant raised his claim that he is the prior user and adopter of the said song and contended that plaintiff is failed to prove his ownership over the said song '**MOGAL CHHEDTA KALO NAG**'. Now, in this regard, this Court has referred Sec. 14, 17, 21, 27 and 51 of The Copyright Act -1957, which are as under:

SECTION: 14:

[14. Meaning of copyright.-- For the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely--

(a) in the case of a literary, dramatic or musical work, not being a computer programme,--

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme:

(i) to do any of the acts specified in clause (a);

[(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programmer:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.]

(c) in the case of an artistic work,--

[(i) to reproduce the work in any material form including--

(A) the storing of it in any medium by electronic or other means; or

(B) depiction in three-dimensions of a two-dimensional work; or

(C) depiction in two-dimensions of a three-dimensional work;]

(d) in the case of a cinematograph film,--

[(i) to make a copy of the film, including--

(A) a photograph of any image forming part thereof; or

(B) storing of it in any medium by electronic or other means;]

[(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.]

(iii) to communicate the film to the public;

(e) in the case of a sound recording,--

(i) to make any other sound recording embodying it ⁶[including storing of it in any medium by electronic or other means];

[(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;]

(iii) to communicate the sound recording to the public.

Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation].

SECTION: 17:

17 First owner of copyright:- Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that—

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;

(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall,

in the absence of any agreement to the contrary, be the first owner of the copyright therein;

[(cc) in the case of any address or speech delivered in public, the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of any other person, such other person shall be the first owner of the copyright therein notwithstanding that the person who delivers such address or speech, or, as the case may be, the person on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf or premises such address or speech is delivered;]

(d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

[(dd) in the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Explanation. —For the purposes of this clause and section 28A, “public undertaking” means—

- (i) an undertaking owned or controlled by Government; or
- (ii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or
- (iii) a body corporate established by or under any Central, Provincial or State Act;]

(e) in the case of a work to which the provisions of section 41 apply, the international organisation concerned shall be the first owner of the copyright therein.

SECTION: 21:

21. Right of author to relinquish copyright.—

(1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon

such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1).

SECTION: 27:

27. Term of copyright in 2[sound recording].—In the case a 2 [sound recording] copyright shall subsist until 1[sixty years] from the beginning of the calendar year next following the year in which the 2[sound recording] is published.

SECTION: 51:

51. When copyright infringed.—Copyright in a work shall be deemed to be infringed—

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or 1[(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or] 1[(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or]"

(b) when any person—

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports 2[***] into India, 2[***] into India," any infringing copies of the work: 3[Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work, for the private and domestic use of the importer.] Explanation.— For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

09. Now, on perusing the pleadings and documents furnished by both the sides, it transpires that plaintiff's father Late Aapabhai Kalabhai Gadhvi was a well known poet of Gujarat and he had created lots of folk songs, Bhajan etc. and said song '**MOGAL CHHEDTA KALO NAG**' is one of his creations. Moreover, he had also composed the said song and it is established as per documents furnished by the plaintiff vide Mark 30/2 to 30/117, in which plaintiff's Late father was honoured by many institutions for his various poetry, songs etc. i. e. Khadi Gram Udyog, Morbi, All India Radio, Aakashvani, etc. On perusing said documents, it transpires that plaintiff's late father was a well known poet for Gujarat Literature, who had given many folk songs, Bhajans in his own lyrics and composed by him and he was also awarded by

various Government Authorities for his renowned work in field of literature. Not only that as per the documents furnished defendant in respect of his claim vide Mark 13/1 to 13/7, wherein it is stated that the alleged song '**MOGAL CHHEDTA KALO NAG**' sung by Kirtidan Gadhvi and lyric of Aapabhai Gadhvi. Thus, it is established that defendant admit that this song was written and composed by Aapabhai Gadhvi, who was a well known poet with nickname 'Aap'.

10. Now, the defendant contended that it has having copyright in the name of 'Shiv' studio then defendant has to show that how and in which mode, it has acquired copyright from the plaintiff's Late father Aapabhai Kalabhai Gadhvi because there is no any document furnished by the defendant to show that said song assigned by plaintiff's father through Official Assignment or defendant is the owner of the said song. Because, as per the Provisions of the Copyright Act, it is sound recording as per Sec. 2 (y) (3) and it was written and composed by plaintiff's Late father, thus, prima facie it is established that plaintiff's father was an author of the alleged song and he died on dated 22/6/1994, therefore, being a son, plaintiff Narharbhai Aapabhai Gadhvi acquired rights on it and as per Sec. 13 (c) of the said Act, the registration is not mandatory for the same. Further, as per

Provisions of Sec. 17 of the said Act, plaintiff's father is the first owner of the alleged song as an author of it and he had not assigned copyright of the said song to the defendant as per Sec. 18 of the said Act.

11. Now, defendant has to establish that he had acquired assignment of the said song from plaintiff's father Aapabhai Kalabhai Gadhvi prior to his death on dated 22/6/1994. But, defendant failed to furnish any documents in this regard. In the citizens, the ownership of the song remains with the plaintiff in absence of any assignment came on record. Further, as per the Provisions of Sec. 27 of the said Act, the term of sound recording is subsist until 60 years from the beginning of the calendar year next following the year, in which the record is published. In the circumstances, from the papers of present case on hand, it transpires that the ownership belongs to plaintiff instead of defendant.
12. Now, defendant furnished documentary evidence regarding the dispute between the defendant and Hemantbhai Rajabhai Chauhan, for which defendant had filed R. C. S. No. 1810/1994 for the declaration and declaration and permanent injunction in respect of 101 cassettes of songs, which were sung by defendant Hemant Chauhan for the plaintiff 'Shiv' studio and asked to

restrain the defendant from singing song for others. Thus, this document cannot be ownership document for defendant to raise his claim on the alleged song in present case on hand. Thus, defendant is failed to establish that he is the copyright holder of the said song. On the contrary, it is on record that said song was written and composed by plaintiff's late father and he died in the year 1994. In the circumstances, plaintiff's father is first owner of the said song and remains first owner till 60 years. Now, defendant has not produced any document to show that the said song is 60 years old or he has acquired assignment regarding this song from plaintiff's late father. Thus, at this juncture, prima facie it transpires that plaintiff is the owner and balance of convenience is also in favour of plaintiff and if defendant is not restrained than there is ample chance that plaintiff will suffer irreparable loss, which cannot be compensated in terms of money.

13. Further, defendant has put reliance on the Authorities **(1) LAWS (MAD) 2008-9-455 IN THE CASE OF BHARAT MATRIMONY COM Pvt. Ltd. CHENNAI Vs. PEOPLE INTERACTIVE Pvt. Ltd., (2) LAWS (SC) 2015-10-75 IN THE CASE OF LAL BABU PRIYADARSHI Vs. AMRIPTPAL SINGH, (3) LAWS (SC) 2001-5-62 IN THE CASE OF NIPLY INDUSTRIES Vs. UNICORN PLYWOOD Pvt. Ltd. and (4) LAWS (SC) 2017-12-45 IN THE CASE OF TOYOTA JIDOSHA KABUSHIKI KAISHA Vs. M/s. PRIUS AUTO**

INDUSTRIES LTD. AND OTHERS. On perusing these Authorities, it transpires that facts and circumstances of the cited Authorities are quite different from the present case on hand because as discussed earlier above, it is established that plaintiff is the owner of the said song '**MOGAL CHHEDTA KALO NAG**', which was written and composed by his Late father Aapabhai Kalabhai Gadhvi, who was a well known poet with nickname 'Aap'. Hence, with due respect these Authorities are not helpful to the defendant in present case on hand.

14. In light of above discussion, I pass following final Order in the interest of justice.

: ORDER :

- Present Exh. 5 application preferred by the plaintiff is hereby allowed.
- The defendant is hereby restrained from telecasting the alleged two videos of song '**MOGAL CHHEDTA KALO NAG**' on any media till final disposal of the present suit.
- Cost of this application shall be decided at the time of final disposal of the suit.

Signed and Pronounced in the open Court, today this 31st day of August, 2023.

Place: Rajkot
Date: 31/08/2023

(BHARAT BHASKARBHAI JADAV)
Judge Commercial Court
RAJKOT.
UIC No.GJ00714

