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|----------------------|----------|-------------------|-----------|-----------|
| Filed on | : | 18/09/2019 | | |
| Registered on | : | 21/09/2019 | | |
| Decided on | : | 30/01/2024 | | |
| Duration | : | 04 | 04 | 12 |
| | | Y. | M. | D. |

**IN THE CITY CIVIL Court, AT AHMEDABAD
Court No.25
CIVIL SUIT No.1383 of 2019**

Exhibit: _____

| | | | | |
|-------------------|----------|--|--|--|
| Plaintiff | : | M/s. RED RIBBON ENTERTAINMENT PVT. LTD. | | |
| R/o | | Registered Office :Kaushambi, Opp. Chandanbala, Mahalaxmi Char Rasta, Paldi, Ahmedabad. | | |
| | | Also having address at: Bungalow No. A/8, S.V.P. Nagar, Near Versova Telephone Exchange, Four Bungalows, Andheri (West), Mumbai. | | |
| Versus | | | | |
| Defendants | 1 | KINJAL DAVE | | |
| R/o | | 201, Daksha Residency, Opp. Sahajanand School, Bapa Sitaram Chowk, Nava Naroda, Ahmedabad. | | |
| | 2 | M/S. RDC MEDIA (P) LTD. | | |
| R/o | | B-233, Oshiwara Ind. Center, Opp. Oshiwara Bus Depot, Goregaon(west), Mumbai | | |
| | 3 | M/S. STUDIO SARASWATI | | |
| R/o | | Nagar Road, Danapith Society, Junagadh, Gujarat. | | |

Appearances:-

Mr. Z.K. Shaikh- Learned Advocate for Plaintiff.

Mr. Y.J. Trivedi/N.N. Prajapati/P.K. Chaudhari - Learned Advocates for Defendant No.1.

None appeared on behalf of the Defendant No.2.

Mr. F.B. Sodha- Learned Advocate for Defendant No.3.

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Subject : Suit for Infringement of Copyright**: J U D G M E N T :**

- 1** Earlier the present suit has been filed before the Commercial Court and was registered as a Commercial Trade Mark Suit No.01/2019. Thereafter, under Order 7 Rule 10 of Civil Procedure Code, the then Hon'ble Commercial Court has ordered to return of plaint, and therefore, the present suit has been presented before this Court and it is renumbered accordingly.
- 2** The facts, in nutshell, leading to the institution of the present suit are as under :-
 - 2.1** It is submitted by the plaintiff that the plaintiff company is a private limited company incorporated under Companies Act 1956. The plaintiff's company was originally incorporated in the year 2008 and it is engaged in the business of acquiring and exploiting copyrights in and the sound recording, including the music related works at the address stated in the cause title of the suit.
 - 2.2** It is further submitted by the Ld. Advocate for the plaintiff that one Mr. Kartik Patel is the predecessor of the plaintiff in the said copyrighted musical and sound recording work. Mr. Kartik Patel is a professional music composer and producer of several music composition and videos of Gujarati language since a long time and has well established reputation and appreciation for his work

and genre. It is apt to state that music video is not a one night affair it is something created after days of hard work and labor. Early steps include formation of an idea to lead the whole work, bagged by lyrics of the song, video conceptualization, music composition in line with the lyrics and hiring professional team to give the idea a real image.

2.3 Further, it is submitted that the Plaintiff is associated with the music industry. The predecessor of the plaintiff i.e. Mr. Kartik Patel has conceptualized the idea of disputed song/ music composition/video of "Char Bangadi Wari Gaadi" in November 2015 and with the help of professional team "Kathiyawadi Kings" and turned the idea into a successful music video on 05/09/2016 and paid the desired remuneration for the professional service. Thereafter, Mr. Kartik Patel became the owner of the said copyright work. The trailer of the said song was uploaded on You Tube on 28th September, 2016 and final song was uploaded on You Tube on 29th September, 2016. Therefore, the plaintiff's predecessor is the first and true creator and owner of the said song.

2.4 Ld. Advocate further submitted that Mr. Kartik Patel being the owner of the copyright through a deed of assignment dated 18/04/2017, assigned the rights available on the said copyright work to the plaintiff company. Thus, after assignment of the said copyright, the plaintiff company has become the owner of the said

copyright, and therefore, the plaintiff is entitled to remedy against the present defendants.

2.5 It is further submitted that the defendant No.1 is a Gujarati singer who is singing for the defendant No.2. The defendant No.2 is a private limited company and carrying on business of producing and composing musical videos and sound works. The defendant No.3 is a music composition company. The defendant No.2 and 3 are working together. The defendant no 3 has provided each and every contention of disputed works to the defendant No.2.

2.6 It is further submitted that while the things stood, surprisingly after some time of the release of the song of the plaintiff's predecessor on website "www.youtube.com" and through various medium in the market region through CD, Cassette, and other medium. The Defendants had released the copied/imitation version of the original song "Char Bangdi Wari Gadi" on the same website "www.youtube.com" and also through various other medium sung and performed by defendant No.1. It is further submitted that after listening and watching the song, the Plaintiff's predecessor was shocked and astonished to note that the Defendants has substantially copied the lyrics and concept of the plaintiff's predecessor.

2.7 It is further submitted that plaintiff's predecessor through

their viewers and followers came to know about the impugned work uploaded by the defendants subsequent to upload of their work on www.youtube.com. Where the defendants substantially copied the lyrics, song and Music of the plaintiff's original work and tried to deviate the audience through this malafied and copied work. The plaintiff's predecessor immediately took an action against the defendants by way of filing a "Copyright Infringement Notice" on 03/01/2017 at YouTube claiming their original work being copied by the defendants and urged to remove such copied and malafied work immediately in good faith and bonafide action to secure rights of the intellectual labor and hard work of the plaintiffs. In response to this "copyright infringement notice" defendants filed a "counter copyright infringement" where they gave a vague reply and denied the alleged infringement and claimed the work to be their original work sung by defendant No.1 and lyrics by Manu Rabari.

- 2.8** The Plaintiff has further submitted that the defendants did not stop with this alleged infringement only, they continued infringing the rights of the plaintiff's predecessor through series of acts including Uploading various other versions of the same song. Performing stage shows at various places. Releasing music on internet which enables recording and downloading of the song in various data carriers like cassette, CD's, mobile

library. Sharing of the content to be played at various place and public gatherings such as marriage functions, social hubs, garba clubs and events etc.

2.9 It is submitted that when the defendant did not stopped the said illegal act thus the plaintiff's predecessor was left with no option other than to send a legal notice for alleged infringement and thereafter the predecessor of the plaintiff through their advocate sent a legal notice to the defendants alleging the infringement of the copyright on 23/02/2017. The defendants in reply as given on 07/03/2017 have themselves admitted that "they are indulged in promotions in respect of the alleged video and they are not aware of any copyright for the said song and never claimed any copyright over the impugned work". The defendants tried to shift their burden and hide themselves under the shade of agreement with Defendant No.3. All the defendants are continuously infringing the original work of the plaintiff without paying any due regard to the intellectual labor and hard work of someone's original work and they cannot shift the burden like this when they themselves are actively associated and are participating in the alleged acts of infringement. It is also submitted that not knowing about the copyright does not provided a green chit to exploit the content of someone else and bend and mold it for their use.

2.10 It is further submitted that the plaintiff came to know

about the whole dispute between their predecessor and the defendants after the assignment deed was executed. Thereafter immediately plaintiff contacted defendant No. 2 and 3. And intimated them to immediately stop such illegal acts and pay compensation for illegal use of the said copyright work and for earning the goodwill and reputation over plaintiff's copyright. Thereafter the defendant No.2 agreed and assured to pay the said compensation and immediately stop such misuse. The defendants also agreed to settle the matter by way of paying royalty to the plaintiff and took so much time to settle the matter. The defendants by one or the other reasons trying to avoid the settlement and trying to take the benefits by playing the song and thereby to en-cash the goodwill and reputation of the plaintiff music and song. Therefore the plaintiff is left with no option but to file the present suit.

2.11 The Plaintiff has further submitted that the defendants have clearly infringed the copyright as defined under section 51 of The copyright Act, 1957. The plaintiff has acquired all the right by the virtue of The Copyright Act, 1957 to ensure his exclusive right over the song. A rights under Section 2(d)(ii) being the author of the musical composition as composer and under provision 2(d)(iv) as the producer of the cinematographic work and sound recording. The Sound recording work of the plaintiff is defined under section 2(xx) as "sound

recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced" and under provision 2(y) read with section 13 work in which copyright subsists are defined as literary, dramatic, musical or artistic, a cinematographic work and a sound recording. The plaintiff is also entitled to avail his rights as envisaged in Section 14 of the Act.

2.12 At the end, the plaintiff has asked following prayers :-

2.12.1 The defendants, their successors, servants, agents, director and/or partners be restrained permanently and perpetually from selling, conducting live stage concerts, online download forum, in form of music cassette, CD's and imitating the said copyright work in any manner which is similar to the plaintiff's copyright work in the song having title "Char Bangadi Wari Gadi" they may be further restrained from committing act of infringement of copyright which is similar to the said copyright work and they be restrained to claiming any rights, titles or interests in the said copyright.

2.12.2 The defendants may be ordered to produce accounts for the sale of its copied musical work under the title "Chaar Chaar Bangadi Vali Gadi Laidu" and be directed to pay the profit whatsoever derived from said song under the illegal use with interest @ 18% from the date of filing suit till realization. The Hon'ble Court be

pleased to order the defendant to pay the damages on basis of reputation and goodwill which is ruined due to illegal use of the said copyright of the plaintiff, as may be deemed fit and proper in the interest of justice.

2.12.3 That the defendants be restrained from disposing of or dealing with his asset which may adversely affect the plaintiff's ability to recover damages, cost or other pecuniary remedies which may be finally awarded by this Hon'ble Court to the Plaintiff.

2.12.4 Kindly order defendants to pay the damages of the sum of Rs.1,00,00,000/- (Rupees One Crore only) towards the business loss and damages caused by the defendants by adoption of similar copyright work. Further, be pleased to order the defendant to give true account of the business of defendant, after getting said accounts, Hon'ble Court be pleased to derive amount of profits earned by the defendant and also order to give said amount to the plaintiff with 18% interest from the date of institution of the suit till realization.

2.12.5 The defendants be restrained from passing off in any manner whatsoever with the business of the plaintiff their agents, servants, distributors and retailers from rendering/ manufacturing, marketing, selling and advertising their services/ goods by using impugned Trade Marks which is similar to the plaintiff's registered Trademark.

3 The suit has been registered accordingly and process has been served upon all the defendants. The defendant No.1 has filed her reply vide Exh.26 whereby she has denied all the allegations mentioned in the plaint in toto. She has further stated that The plaintiff is claiming its rights through one Mr. Kartik Patel, presently residing in Australia. It is the case of the plaintiff that the said Kartik Patel has composed the song and uploaded the same on Youtube on 28/29th September, 2016 and since then Plaintiff is claiming its rights in respect of the work. It is of course claimed by the plaintiff that even before the above referred date, the idea of the song was conceived by said Kartik Patel. However, no proof in this regard is produced on record.

3.1 As a matter of fact, said Kartik Patel himself has a pirated and has copied the work from an already existing song in the country. It is claimed by the plaintiff that the essential parts of the entire work/song is "Char Char Bangadi Wali Gadi". However, the following songs are already uploaded on Youtube much prior to the claimed date of the said Kartik Patel, by defendant No.1 and others also which contains the word/lyrics "Char Char Bangadi Wali Gadi". It is submitted that, On Dated:30/04/2015, She herself had uploaded one song "Char Char Bangadi Wali Gadi, Meldi Mayalu". On Dated:12/01/2016, She has also uploaded another song "Mara Vira Ni Gadi Audi ho Raj". On Dated:31/05/2016,

Mr. Vijay Suvala has uploaded one song “Char Char Bangadi Wali Gadi”.

3.2 Further, it is submitted that the so-called musical composition claimed by the plaintiff is in fact, from the copy earlier work. The starting/beginning of the musical work of the plaintiff is the verse (Antra) taken from one popular Gujarati Movie "Lakho Fulani", Song sung by Mr. Praful Dave. The said movie was published on 08/11/1976.

3.3 She has further submitted that both the works are completely different as under:-

| POINTS | Work of Defendant No.1 | Work of Kathiyawadi King |
|------------------------------------|---|---|
| Intro | Dhamdhamat Dhamdhamat Vaage Aa Band TaalParni Gaya Badha Mara Yaar.....Lagna Mara Kyare Thaashe (Original Lyrics Of Manubhai Rabari) Used In Musical Album "Prem No Kheladi" Published On 7.4.2014. (Marriage Song) | Navrangi Gori Tari Chundadi..... (Sung By Praful Dave In Gujarati Movie Lakho Fullani, Published In 1976) |
| Sakhi (Adlip) (Duha) | No Such Adlip | It Begins With Adlip. |
| Instrument In Beginning | Mandolin + Guitar In Pause + Mandolin | Banjo + Sinth Instrument |
| Duration | 16 Seconds Approx | 8 Seconds Approx |
| Tempo(Speed) | 110 | Much Lower (Slow) |
| Style | Melody Of 4 Bar..... Thereafter Rhythm.... Thereafter Song Starts. | Melody + Rhythm Then Song Merges Into Above. |
| Lyrics | “Mara Vira Viral....” | “Hira Moti |

| | | |
|--------------------------------------|--|--|
| | | Bhareli..” |
| Repetition Of Lyrics In Verse | Maximum Repetition Is 2 Times. Almost All Lines Are Different. | One Line Repeats Thrice, Then Lyrics Of Char Bangdi Wali |
| Genre | Marriage Song | Romantic Lok Geet. |

These differences are only illustrative and not exhaustive, in any case, there is no unmistakable impression of copy between two works. Further, there is no substantial and material copy. Thus, there is no actionable claim.

3.4 It is further submitted that the disputed music composition claimed by plaintiff is also in fact copied from the public domain by the so called predecessor of the plaintiff. That the song is of "Sarang Raga" and thousand of song of the same "raga" is already part of the public domain. Therefore, tune per se can never be an original work in the present case. Further, the lyrics of both the songs are completely different and it is even the case of the plaintiff that except the words " Char Bangadi Wari Gadi" nothing is similar in the lyrics of both the songs. Now, as stated above, above words "Char Bangadi Wari Gadi" is not only public domain much prior to the so called adoption of the same words by the predecessor of the plaintiff but, several persons including defendant No.1 has sung the song using the same words much prior to the so called adoption of plaintiff.

3.5 Further, both the songs are having different notation i.e.

"Sargam" or "Swara". That the script of the lyrics of both the songs with its notation or "Sargam" or "Swara". Pertinently the present dispute is under the Copyright Act and therefore, confusion or deceptive similarity is not at all the case as the said cases are applicable in Trademark Law only. In the Copyright Law, when the work is different then no case of infringement is made out. Both the songs are having different graphical notations and cannot be said to be similar at all. Essentially the musical work of both the works are completely different and in any case, do not create unmistakable impression of copy or substantial copy.

3.6 She has further submitted that as a matter of fact, one Mr. Manubhai Rabari is the original lyricist of several songs which include words "Char Char Bangadi Wali Gadi" prior to the claim of Kartik Patel. The above named Manubhai Rabari has written one song starting with the word "Char Char Bangadi Wali Meldi Dayalu" and such others which also include the words "Char Char Bangadi Wali Gadi". Further, the very lyricist has also written several other songs where the words "Char Char Bangadi Wali Gadi" are included, which are also prior in point of time then the claim of Kartik Patel.

3.7 The song which is being sung by the answering defendant and which is disputed by the plaintiff is also originally written by said Manubhai Rabari on or about 2014-15. Thereafter, on the basis of above lyrics, the

song was composed by Musician Mayur Mehra in Ahmedabad. The answering defendant gave her voice and one musician Mr. Mayur Mehra gave his music. Thus, using the lyrics written by said Manubhal Rabari, the defendant No.1 sang the song and Mr. Mayur Mehra provided the music and this is how the original work i.e. the song challenged by the plaintiff is created. The above song was composed in the studio of Mr. Mayur Mehra in Ahmedabad on 2015 and thereafter the rights were also given to defendant No.3 in respect of disputed song. However, the rights of the answering defendant as performer, the rights of Manubhai Rabari as lyricist and rights of musician are unaffected and the defendant is entitled to exploit the same rights under the Copyright Act, 1957. Thus, as a matter of fact, the work in the disputed song is created prior to the date claimed by the so-called predecessor of the plaintiff. Thus, the song is original one and not a copy of any other work including the so called predecessor of the plaintiff.

3.8 In any case, the words "Char Char Bangadi Wali Gadi" is commonly being used in Gujarat and several persons are using the same either in folk songs or regional songs or such traditional work. Further, the car being manufactured by AUDI is having its trade mark / symbol which looks like four bangles. In Gujarati Language bangle is called "Bangadi". Therefore, AUDI car is usually referred to as "Char Char Bangadi Wali Gadi" in

Gujarat by Gujarati people, in several ways as above. Therefore, first of all no one can have monopoly over the word "Char Char Bangadi Wali Gadi".

3.9 It is further submitted that one such performer i.e. Mr. Vijay Suvana had also sung one song which also include words "Char Char Bangadi Wali Gadi". That, the said song sung by above artist is also uploaded on you tube and apart from that he has also sung the said song much prior to the claim of the plaintiff / its predecessor.

3.10 It is submitted that the plaintiff does not have the right at all to claim the copyright in the disputed work, which is based on assignment deed dated 18/04/2017. First of all, as per the record produced by the plaintiff itself the alleged copyright in the musical work / song is claimed by one Mr. Jay Pitrola and Mr.Kartik Patel jointly as owners of the copyright in the legal notice dated 23/2/2017. Further, as per the record of the competent authority of the UK Government, so called copyright in the disputed musical work/song is registered in the name of Jay Pitrola alone and Jay Pitrola is stated to be 100% owner of the copyright work. The mail conversation being relied upon by the plaintiff is not at all sufficient to establish that the predecessor of the plaintiff i.e. Kartik Patel was a proprietor / owner of the alleged copyright work. It is undisputed fact that the said Jay Pitrola has not assigned any right in the musical work to the plaintiff company. Thus, the assignee (i.e. Kartik

Patel) of the assignment deed dated 18.04.2017 had no right, title, interest or ownership of the claimed musical work and in any case had no right or authority to assign the work to anyone. Therefore, the assignment is completely bogus one and does not confer any right, title or interest in favour of the plaintiff.

3.11 She has further contended that the alleged assignment is in complete violation of the Copyright Act and, therefore or even otherwise, nullity. Further, the said assignment has also expired and at present there is no assignment in the eye of law in favour of the plaintiff. Further, there is no provision in the Copyright Act that the copyright in any work can be assigned by one of the joint owners of the copyright and, therefore, such assignment is even otherwise invalid and a nullity in law.

3.12 It is submitted that the plaintiff's present suit is on the face of it barred by delay, laches and acquiescence. First of all it is the claim of the plaintiff that Kartik Patel has uploaded the disputed song on You tube on 28/29th September, 2016. It is also the case of the plaintiff that in December, 2016, the disputed song was uploaded on the You tube by the Defendant. It is also the case of the plaintiff that thereafter the notice correspondence started from Kartik Patel and Jay Pitrola to the answering defendant and others on or about January/February, 2017. Thereafter, the assignment deed also stated to have been executed on 18/04/2017. When

the disputed song was uploaded on You tube by the answering defendant, said Kartik Patel had objected to the same by giving the strike. If somebody is giving strike to any uploaded material on You tube, then said uploaded material falls within the domain of dispute. If three strikes are completed, then said uploaded material shall be removed by the You tube itself and its contents shall not be available to the public. However, when the said Kartik Patel gave strike to the disputed song, a counter strike was given and the details as to how the objected work was created i.e. the origination of the lyrics of the work etc. was demanded from Kartik Patel. In short, the title over the work and the rights as first owner of the work was required to be given by Kartik Patel because of the above counter strike. However, at that point of time said Kartik Patel did not provide any details and further stopped objecting to the disputed song. From December, 2016, till the suit is filed, the disputed song of Defendant No.1 has received about 200 Millions (20 Crores) likes on you tube and thus became very popular and is associated with the defendant No.1 only. Further, Defendant No.1 is also performing the stage programs, singing Garba, performing in private parties and thus giving public performance where she used to sing the disputed song. Till date the Defendant No.1 has completed more than 200 stage programs. Further, Defendant No.1 is a girl aged about 20 and she started giving such performance as an artist at the age of

16 years.

3.13 It is submitted that by the time, the defendant No.3 had already exploited the musical work in the form of CD and such other media. However, public demanded Defendant No.1 only to perform the said song in live/stage program. Therefore, Defendant No.1 became eyesore for Defendant No.2 and 3 also. Further, the predecessor of the plaintiff had copied the disputed work from others but he could not commercial exploited the same as it is evident from the plaint. Despite the so-called assignment of the disputed song by Kartik Patel to the plaintiff in April, 2017, even the plaintiff could not commercially exploit the same as the plaintiff has failed to provide any such details in the plaint. Under such circumstances, plaintiff and defendant Nos.2 & 3 colluded with each other and decided to extort money from defendant No.1 herein illegally. Therefore, initially Defendant No.3, under the guise of talk of settlement for the dispute raised by the plaintiff obtained signature from Manubhai Rabari in the impugned manner by way of misrepresentation only. Thereafter, the plaintiff and Defendant Nos.2 and 3 decided to lodge the suit so as to accomplish their ill-motive. It is evident that in fact the plaintiff has no right to restrain Defendant No.1 in any manner. Under such circumstances, the entire suit is required to be dismissed at the threshold with heavy costs in favour of the answering defendant.

- 3.14** It has been further submitted that the notice dated 23/02/2017 issued by the Advocate of Jay Pitrola and Kartik Patel categorically demands the damages / compensation of Rs.7,50,000/- only. Thereafter what has happened that the plaintiff increased the same loss/compensation to the tune of Rs.1-crore is not at all averred in the plaint. In fact, the plaint is completely silent as to the determination of specified value i.e. how the specified value is arrived at by the plaintiff.
- 3.15** It is further submitted that the plaintiff has miserably failed to provide either any material or any pleading to prima-facie establish that whatever the work it is claiming is original one. There is no pleading as to whether the plaintiff is having any access of or possession of master CD's of the master recording containing all the songs forming part of the albums, in CD format or any detail about the tracks of the mastered album in WAV and MP3 format or CD masters containing international tracks / music tracks, etc. including unmixed track of all the songs inlay designs and images from the audio visual songs or master MOV of the video visual song along with song images or complete details and credits and lyrics and details of the singer or promos/trailer etc. of the songs.
- 3.16** She has submitted that the tune and the musical composition of the song claimed by the plaintiff is identical and in fact copied from one another religious

song publicly available in Gujarat since 2015, as per my knowledge. The said song is having the lyrics "Mavtar Male to Meladi Jeva Maljo".

3.17 Lastly she has stated that the so-called predecessor of the plaintiff is not at all the originator of the disputed work i.e. the song "Char Char Bangadi Wali Gadi". No copy right subsists in the alleged work of the said Kartik Patel and Mr. Kartik Patel himself has copied the said song from the public domain i.e. several songs already available freely either on youtube or such other media and in public. Therefore, as a matter of fact, the so-called predecessor of the plaintiff had no copyright at all in the disputed work. Further, the said predecessor in title is not the first owner of the disputed copyright. Under such circumstances, the entire suit lacks the merits and is required to be dismissed in limine.

4 Earlier, before the Hon'ble Commercial Court, the defendant No.2 was appeared. He has filed an undertaking for engaging his lawyer, but thereafter he did not appear. Hence, his all rights to defend this suit, have been closed at the relevant time. His undertaking is produced in present suit vide Mark:38/2.

5 The defendant No.3 was also appeared before the Hon'ble Commercial Court. He had produced a pursis before that Court and declared that he has innocently composed and recorded the song "Char Char Wari

Bangadi” as assigned by Manubhai Nagajibhai Desai @ Manubhai Rabari. At that point of time, he was not aware about the plaintiff song. He has agreed and accepted that the plaintiff is the only owner of the musical work for the song having title Char Bangdi Wari Gadi. He had also given undertaking that henceforth he will not use the dispute musical work which is identical and or deceptively similar to the plaintiff’s musical work. He has also declare that he had not given any permission to Kinjal Dave (defendant No.1) to sing the dispute song on stage and live concert and Kinjal Dave is singing the impugned song without permission and consent of us. Thereafter the defendant No.3 is also not appeared before this Court and did not participated in the trial. Hence, his all rights to defend this suit, also have been closed at relevant time.

- 6 After considering the pleadings of the parties, my Ld. Predecessor has framed following amended issues vide Exh.51.

: : ISSUES : :

1. Whether the plaintiff proves that Mr. Kartik Patel is the originator of the musical work of alleged song “Char Char Bangdi Wali Gadi”?
- 1(a). Whether Mr. Kartik Patel has legally assigned the copyright of the “Char Bagdi Wali Gadi” to the plaintiff herein ?
2. Whether the plaintiff proves that the plaintiff has firstly published the alleged

song ?

3. Whether the plaintiff proves that the song published by the defendant “Char Char Bangdi Wali” is substantial and material reproduction of the plaintiff’s song “Char Bangdi Wali Gadi “?
4. Whether the plaintiff proves that the defendants have deliberately infringed the rights of the plaintiff over the alleged suit song and thereby illegally earned profit ?
- 4(a) Whether the plaintiff proves that he is entitled to restrain the defendant No. 1 from performing the said song “Char Char Bangdi Wali Gadi” in the public ?
5. Whether the plaintiff is entitled to get the relief as prayed for ?
6. Whether the defendants prove that the suit of plaintiff deserves to be dismissed as alleged in the written statement ?
7. What order and relief ?

7 Both the parties have produced following documentary as well oral evidences.

Oral Evidence of plaintiff :-

| Sr.No. | Particulars | Exh. |
|--------|---|------|
| 1 | The plaintiff’s Witness – Mr. Nikunj Mansukhbhai Patel’s examination-chief affidavit along with cross-examination | 65 |
| 2 | The plaintiff’s Witness – Mr. Kartik Patel’s examination-chief affidavit along with cross-examination | 67 |
| 3 | The plaintiff’s Witness – Mr. Abhishek Ranjan’s examination-chief affidavit along with cross-examination | 72 |

Documentary Evidence of plaintiff :-

| Sr.No. | Particulars | Exh. |
|---------------|--|-----------------|
| 1 | Copy of Lyrics of Defendant's song | 82 |
| 2 | Copy of Notice dated 23/02/2017 | 83 |
| 3 | Copy of reply of notice | 84 |
| 4 | Audio CD of Defendant's song | 85 |
| 5 | Copy of Deed of Assignment | Tentative 86 |
| 6 | Copy of Mail received by the YouTube dated 27/09/16 | Tentative 87 |
| 7 | Copies of the transaction of Commonwealth Bank and ANZ Bank | Tentative 88 |
| 8 | Copy of Mails sent by plaintiff to YouTube for infringement of its copyright | Tentative 89 |
| 9 | Copy of mail communication of plaintiff for song production | Tentative 90 |
| 10 | Copy of declaration by Jay Pitroda | Tentative 91 |
| 11 | Audio CD of Plaintiff's predecessor' song | Tentative 92 |
| 12 | Copy of Power of Attorney | Tentative 93 |
| 13 | Certificate Under Section 65-b of Indian Evidence Act. | 54 |
| 14 | Closing Pursis | 74 |

Oral Evidence of Defendant No.1 :-

| Sr.No. | Particulars | Exh. |
|---------------|---|-------------|
| 1 | The Defendant No.1's examination-chief affidavit along with cross-examination | 77 |

Documentary Evidence of Defendant No.1 :-

| Sr.No. | Particulars | Exh. |
|---------------|---|-------------|
| 1 | Copy of screen shot from You Tube, Lyrics | 95 |

| | | |
|---|---|------------|
| | and DVD-R containing the various song sung by Defendant No.1 having lyrics of Char Char Bangdi Wadi Gadi, Meladi Mayalu | |
| 2 | Copy of screen shots, Lyrics and DVD-R containing the Char Char Bangdi Wadi Gadi sung by Vijay Suvada and Khushboo Asodia | 96 |
| 3 | Copy of screen shots, Lyrics and DVD-R containing the song Mara Vira Ni Gadi Aydi Ho Raj sung by Defendant No.1 | 97 |
| 4 | Copy of screen shots, Lyrics and DVD-R containing the song Maniyaru Te Halu Halu | 98 |
| 5 | Copy of screen shots, Lyrics and DVD-R containing the song Mavtar Maleto Ma Meladi Jeva Maljo | 99 |
| 6 | Copy of Aadhar Card and Birth Certificate of Defendant No.1 | 100 |
| 7 | Certificates Under Section 65-b of Indian Evidence Act. | 78 and 108 |
| 8 | Closing Pursis | 104 |

- 8** The defendant Nos.2 & 3 have never appeared after the suit had been re-instituted before this Court. Therefore, their all rights have been struck off at relevant stage.
- 9** I have heard the Ld. Advocates for the plaintiff as well as the defendant No.1 and also considered the written synopsis filed by the defendant No.1. To avoid repetition, it's discussions have been interwoven with the reasoning paragraphs.
- 10** After considering above oral as well as documentary evidences produced by the parties, my answer for the above said issues are as under :

| | |
|---------------|---------------------|
| Issue No.1 | :In Negative |
| Issue No.1(a) | :In Negative |
| Issue No.2 | :In Negative |
| Issue No.3 | :In Negative |
| Issue No.4 | :In Negative |
| Issue No.4(a) | :In Negative |
| Issue No.5 | :In Negative |
| Issue No.6 | :In Affirmative |
| Issue No.7 | :As per Final Order |

Now for the above answers my reasons are as per follows

:: R E A S O N S ::

ISSUE No. 1 :-

[Whether the plaintiff proves that Mr. Kartik Patel is the originator of the musical work of alleged song “Char Char Bangdi Wali Gadi”?]

- 11** It is claimed by the plaintiff that the predecessor Mr. Kartik Patel is a professional music composer and producer of several music composition and videos of Gujarati Language since long time. It is further claimed that Mr. Kartik Patel has conceptualized the idea of disputed song/ music composition/video of "Char Bangadi Wari Gaadi" in November 2015 and with the help of professional team “Kathiyawadi Kings” and turned the idea into a successful music video on 05/09/2016 and paid the desired remuneration for the professional service. Thereafter, Mr. Kartik Patel became the owner of the said copyright work. The trailer of the said song was uploaded on You Tube on 28th September, 2016

and final song was uploaded on You Tube on 29th September, 2016. Therefore, the plaintiff is the first and true creator and owner of the said song.

11.1 In support of above contention, the plaintiff has examined first witness viz. **Mr. Nikunj Mansukhbhai Patel** vide **Exhibit:65**. It emerges from his deposition that he is not working in plaintiff's company. He has no authority to depose on behalf of the plaintiff company. He is working in an private insurance company. He has not filed this suit. Further, he could not explain what is written in his own examination-in-chief, because it is in english. He has admitted that his examination-in-chief was already prepared and he has signed it without reading it. Therefore, after considering the above facts, it can be said that this witness has no knowledge regarding the pleadings and real controversy of the suit. Therefore, his evidence is not at all beneficiary to the plaintiff. Therefore, henceforth it will be not discussed further in this judgment.

12 Thereafter, the plaintiff side has examined second witness viz. **Mr. Kartik Patel** himself vide **Exhibit:67**. In his examination-in-chief, he has reproduced the claim of the plaintiff, and therefore, to avoid repetition, it has not been discussed again. It is admitted fact that he is not the plaintiff of this suit and he has not filed this suit.

- 12.1** He has deposed that he had prepared the song with the help of team *Kathiyawadi Kings*. He had also said that for helping him in the song, he had paid remuneration to the *Team Kathiyawadi Kings*. Now, in his cross-examination, he admitted that he himself is known as a *Team Kathiyawadi Kings*. It is his stage name. He has compose the song with the help of Jai Pitroda, whose stage name is *Ras Masters*. According to him these two people only compose this song.
- 12.2** In his cross-examination, he has deposed that he has produced an evidence regarding giving a remuneration to the *Team Kathiyawadi Kings* for helping him in composition of the song. But, if we peruse the plaintiff's whole evidence then this so-called evidence is not produced during trial.
- 12.3** It is true and I am also agree with the argument advanced by the Ld. Advocate for the defendant No.1, that the name of *Ras Masters* is first time introduced in his cross-examination. It is also true that in the plaint as well as in his examination-in-chief Mr. Kartik Patel has stated that the *Kathiyawadi Kings* is a team. He has paid remuneration to them. Now, team cannot be of one person only. It is also true as argued by the Ld. Advocate for the defendant No.1 that it is also first time came from the his deposition that Mr. Kartik Patel's stage name is *Team Kathiyawadi Kings*. Earlier nowhere it was declared. Now for the sake of claim of plaintiff, if

we believe that the Mr. Kartik Patel is the alone member of *Team Kathiyawadi Kings* then there would no question arose to pay remuneration by him to himself only.

12.4 Thereafter, in his cross-examination, he has admitted that he has not produced any evidence to prove this fact that he himself is a *Team Kathiyawadi Kings* rather he does not have any such evidence. Further, he has stated that his Facebook Posts, YouTube Channel, Facebook Page is run by him as a *Team Kathiyawadi Kings*, is the only evidence which he would have. Now, during trial, no screenshots or videos or any electronic evidence of Facebook Posts, YouTube Channel, FaceBook Page have been produced by the plaintiff to prove this fact that Mr. Kartik Patel and the *Team Kathiyawadi Kings* both are same person.

12.5 He has further added that the same position is with the stage name of *Ras Masters*. He has no evidence to prove that Mr. Jay Pitroda's stage name is *Ras Masters*. Herein also during trial, no screenshots or videos or any electronic evidence of Facebook Posts, YouTube Channel, FaceBook Page have been produced by the plaintiff to prove this fact that Mr. Jay Pitroda and the *Ras Masters* both are same person.

12.6 From above discussion, it can be concluded that the plaintiff is failed to prove that disputed song had been originated by Mr. Kartik Patel with the help of *Team*

Kathiyawadi Kings and also the plaintiff is failed to prove that Mr. Kartik Patel and *Team Kathiyawadi Kings*, are the same personality.

13 Thereafter, the Ld. Advocate for the plaintiff has argued out that earlier before the Hon'ble Commercial Court, the defendant No.3 has admitted in written that predecessor or plaintiff – Mr. Kartik Patel is the originator of the disputed song. Mr. Kartik Patel has conceptualized the song in November – 2015. First time it is published on 29/09/2016. First time it is uploaded on YouTube on 29/09/2016. It's trailer was first uploaded on YouTube on 28/09/2016. The defendants' song is published on 20/12/2016. Therefore, it is proved that Mr. Kartik Patel i.e. predecessor of the plaintiff is the originator of the song.

13.1 Now, only because the defendant No.3 has admitted that the plaintiff is the owner and originator of song itself is not sufficient to prove plaintiff's claim. Reason best known to him that in what circumstances and why ? He has made this admission. His admission cannot be believed as a gospel truth. The plaintiff or Court cannot rely only on his admission. The plaintiff has to prove his case on the strength of his evidence.

14 Thereafter, as per argument advanced by the Ld. Advocate for the plaintiff that Mr. Kartik Patel has first launched the song, therefore he shall be considered

originator of the song. Here, in specifically of this issue this Court is going to decide that whether the plaintiff has first originated the song or not ? and this Court is not going to decide that the whether the plaintiff has first launched the song or not ? This two aspects are completely different from each other. If we understand this aspect by taking a hypothetical example then earlier in past, when there would no print media, no electronic media, social media or no medium of published the creative music work and some artist had created a music composition, but due to inadequate technology they can't produce his creative work before the world. It might be in the form of lyrics or in any available medium. Thereafter, in today's era, someone got the knowledge of that past creative music work and copied it and produce it on all medium then in this situation, mere exposor of this art work before the world is not sole criteria to prove that he is the originator of the song. Simultaneously, the originator has to produced some cogent evidence like written lyrics or any medium on which it was either printed or written to prove that he is the originator of the song.

14.1 Now, keeping in mind this aspect if We weigh the additional evidence produce by the plaintiff side then the plaintiff side has produced a Audio C.D. of his song vide Tentative Exhibit:92. It is in simple Audio (MP3) Format. In the properties of this CD, no name of artist, no date

of creation of song can be seen. Therefore, from this CD it cannot be said that when Mr. Kartik Patel has created, uploaded the disputed song.

14.2 Further, the witness of the plaintiff including Mr. Kartik Patel has relied rather no one has referred this CD in their examination-in-chief. As it is an electronic document, the plaintiff side was required to produced an affidavit under Section:65-B of The Indian Evidence Act. Which is produced at Exhibit:54. Mr. Amrish Mehta has produced this certificate with his signature. He has also signed this plaint as a plaintiff but he himself has not come before Court and not step into the witness box. Therefore, the defendant side has not got chance to cross-examined him on this point. Therefore, it can be held that this certificate is not proved and if it is so then this CD at Tentative Exhibit:92 is also not proved. The Ld. Advocate for the plaintiff argued that with the same certificate of Section:65-B of Indian Evidence Act, they have produced a Audio CD of Defendant No.1's song and that had been regularly exhibited vide Exhibit:85. Answer of this query is already given by this Court in its Order passed below Exhibit:80. Even for sake of repetition, the defendant has admitted this document, therefore it does not require more proof, hence straightway it was given a regular exhibit. Considering above all discussion this Court is not inclined to consider the it's tentative exhibit into the permanent / regular

exhibit, but only to give answers of some of the arguments raised by both the sides, this CD has been heard by this Court.

- 14.3** The Ld. Advocate for the defendant No.1 has contended that if we hear the disputed song in this CD, then it starts with the another song "*Maniyaro te halu halu*" Which is the song of Gujarti film "*Lakho Fulani*". This song is sung by Mr. Prafful Dave. Therefore, the plaintiff himself has copied some other song and infringed his right. Now, plaintiff himself is a infringer of copy right then he could not claim that he is the originator of the song.
- 14.4** Against this, Ld. Advocate for the plaintiff has argued that it is not a part of the plaintiff's claimed song. The plaintiff has not made his claim over this song. Same facts have also been deposed on oath by Mr. Kartik Patel in his cross-examination at Exhibit:67.
- 14.5** I have carefully listened the song of the plaintiff through this CD (Tentative Exhibit:92). It is true that it is started from "*Maniyaro te halu halu*", but when we see the duration of this first part then it is only of 30 seconds. Thereafter, from 31 to 43 seconds, there was some voice and something like voice of chirping of bird came. Thereafter, from 44 to 1.02 seconds, some lines are sung without music and from 1.02 onwards, music started and disputed song started. If we compare the style of

recording, tune and beats of the disputed song with this song i.e. “*Maniyaro te halu halu*”, then its altogether different. It looks a like background music. It is true that it is not the part of the main song. It is a trifling act and by applying the principle of *De-minimis*, this Court thinks that such trifling act need not to be entertained by this Court. Therefore, merely because of disputed song is started with “*Maniyaro te halu halu*”, it cannot be said that Mr. Kartik Patel has infringed someone’s copyright and only because this reason the whole disputed song cannot be declared as copied song.

15 Thereafter, the plaintiff has produced a lyrics of his song vide Mark:57/1. In their oral evidences, the plaintiff has not even referred it. Even Mr. Kartik Patel has also not referred this document in his examination-in-chief. It is not signed by any body. The date & time has not been written on it, and therefore, it has not been exhibited. Hence, it can be said that the plaintiff has not produced / proved a lyrics of his own song.

16 Thereafter, the plaintiff has a produced an E-Mail printout vide Tentative Exhibit:87. It has been exchanged between Mr. Jay Pitroda and Mr. Kartik Patel. The date of E-Mail is 18/01/2017. First, this E-Mail was not exchanged between plaintiff company and Mr. Kartik Patel. Therefore, it is admitted fact that it was not stored on the plaintiff company's computer. Even though Mr. Amrish Metha who happen to be an authorized

person of the plaintiff's company, had issued a certificate under Section 65-b for this E-mail. Therefore, considering this facts, while exhibiting this document, to give one more chance to plaintiff to prove this E-mail exchange, this Court had given its a Tentative Exhibit, but unfortunately plaintiff has failed to prove this document. Therefore, it has not been exhibited, because it is not proved during the course of trial. On factual aspects of this E-mail is also required to be seen. As per this E-Mail, Mr. Jay Pitroda has registered the song as a sole composer/author of the song before the PRS Music Agency- UK on 27/09/2016. The reason for sole registration is given that because Mr. Kartik Patel was not the member of this society, therefore on his name this song cannot be registered. Now, if we see the date of E-Mail then it can be said that from last 2 years, before the date of filing of this suit, this E-Mail was either with Mr. Kartik Patel. Even though in whole plaint or in Mr. Kartik Patel's examination-in-chief (Exhibit:67) there is no mentioning of this E-Mail conversations or no mentioning of so called registration certificate. Therefore, when plaintiff or Mr. Kartik Patel himself is not relying on this document in his pleading, this Court is also not required to rely on this document also. Therefore, this document would also not helpful to the plaintiff's claim.

claiming himself as an originator of the song then the burden to prove this fact is certainly onto the plaintiff. Herein, the plaintiff has not produced any cogent evidence to prove that when and how he has conceptualized this song ? where and how he had recorded this song ? whose help he has composed this song ? where its lyrics was written or printed ? why it is not produced / proved ? On the contrary, as discussed earlier in cross-examination of Mr. Kartik Patel (Exhibit:67), some new facts against the plaint first time came on record which goes in the root of the controversy. In absence of very crucial documentary or electronic evidence regarding connection of *Team Kathiyawadi Kings* with Mr. Kartik Patel and connection of *Ras Masters* with Mr. Jay Pitroda, the plaintiff's claim heavily fall down. Therefore, mere oral statement of mental conceptualization of the song would not be sufficient to prove the claim of plaintiff. Therefore I am agreed with the arguments advanced by the Ld. Advocate for the defendant No.1, under Section 17 of the Copyright Act, 1957, herein the plaintiff's predecessor Mr. Kartik Patel is the originator of the song, is not proved. Hence, my answer for the Issue No. 1 is **In Negative.**

ISSUE No.1(a) :-

[Whether Mr. Kartik Patel has legally assigned the copyright of the "Char Bagdi Wali Gadi" to the plaintiff herein ?]

18 As per plaintiff's claim, Mr. Kartik Patel being the owner

of the copyright through a Deed of Assignment made on 18/04/2017, assigned the rights available on the said copyright work to the plaintiff company. Thus, after assignment of the said copyright, the plaintiff company has become the owner of the said copyright, and therefore, the plaintiff is entitled to remedy against the present defendants. In support of their claim, they have produced a photo copy of **Assignment Deed at Tentative Exhibit:86.**

18.1 Thereafter, Ld. Advocate for the defendant No.1 has argued that for the plaintiff it is most important document because whole suit is standing on this document. Therefore, it is the duty of plaintiff to prove this document as per provisions of the Indian Evidence Act. On behalf of the plaintiff company, one MS. Lalitya Munshaw and Mr. Kartik patel is the signatory of this deed. The recitals of this document says that it had been signed in the presence of Abhishek Ranjan, but Mr. Abhishek Ranjan had not signed it as a witness of it. It is a plain photo copy of the so-called original deed. During trial its original has not been produced even for comparison. Therefore, the eventualities described in Section 65 of the Evidence Act, 1872 is not fulfilled by the plaintiff. Therefore, it cannot go into the evidence as a secondary evidence.

18.2 In support of above arguments, Ld. Advocate for the defendant No.1 has relied on following citations :-

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| (A) | 2009(160) DLT 100 - Aktiebolaget Volvo Versus R.Venkatachalam. |
| (B) | 2003 (8) SCC 752 - R.V.E.Venkatachala Gounder Versus Arulmigu Viswesaraswarni And V.P.Temple. |
| (C) | 2016 (6) CTC 459 - M/s.Bajaj Auto Limited Bombay Pune Road Akurdi Versus M/s.Tvs Motor Company Limited Jayalakshmi Estates No.8, Haddows Road Chennai 600 006 Rep.By Its Authorised Signatory Harne Vinay Chandrakant |

18.3 Against this, the plaintiff has argued that one of the signatory of this document Mr. Kartik Patel has referred this document in his examination-in-chief. The contention raised by the other side is a hyper technical approach and it would not come in way to the plaintiff to get substantial justice.

18.4 After considering above legal as well as factual aspects of this document, as per Section 61 of The Indian Evidence Act, 1872, the contents of the documents may be proved either by the primary or secondary evidence. The Section 63 deals with what is secondary evidence. The Section 64 says that the documents must be proved by primary evidence. The Section 65(a) to Section 65(g) laid down that in what circumstances the secondary evidence relating to the documents can be given. Now, it is true that if plaintiff wants that this Court would read this deed as a secondary evidence then he has to prove any one or all eventualities as enumerated in Section 65(a) to Section 65(g). Herein during the trial, the plaintiff has not produced original deed for comparison. This deed was executed between the plaintiff company and Mr. Kartik Patel, therefore its original must be

either with plaintiff company or with Mr. Kartik Patel, but during the trial no whisper from the plaintiff side about who is in the custody / possession / power on this deed (as per Section:65(a)). Its Existence, Conditions or Contents of the original has not been admitted by the defendant in writing [as per section 65(b)]. The plaintiff has not proved rather stated that what happened to the original [as per Section 65(c)]. Rest of the eventualities i.e. Section 65(d) to Section 65(g) is not applicable to present case. Therefore, I am agreed with the arguments raised by the defendant side that the plaintiff is failed to prove these legal requirements to believe this Court to read this deed as a secondary evidence.

18.5 Thereafter, with profound respect I have gone through the citations on which the defendant No.1 has relied. In the para 23 of the first citation *Aktiebolaget Volvo (supra)*, Hon'ble Delhi High Court has held that :-

Para:23 -When at the stage of proof of documents, the requirement under Section 62 of the Evidence Act is only of production of original for inspection of the Court, Order 13 Rule 1 of the CPC requiring production of originals has to be necessarily meant as production of original for inspection of the Court and not as filing of the original. Significantly, Order 13 Rule 1 also uses both expressions "produce" in connection with original and "filed" in connection with the copies. The different expression used, together with definition/meaning of produce cited by Counsel for plaintiffs also lend me to hold that the original documents are only intended to be produced i.e. to be given inspection of while the copies are to be filed.

As per above ratio, it is the duty of the plaintiff to produce the originals for the inspections of the Court

and after complied it he may produced photocopy of the original. In the case on hand the plaintiff has not produced the original deed of assignment for the inspection also. Therefore, he is not permitted to rely on this document. Therefore the ratio laid down in this citation, would be helpful to the defendant No.1 side.

18.6 In second citation, the Apex Court, in para – 18 of another citation reported as *R.V.E.Venkatachala Gounder(supra)* has held following ratio:-

Para:18 - Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to

apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to here in above, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

Herein the defendant No.1 has raised the objections regarding giving exhibit because it is a photocopy and original is not produced even for inspection. Therefore, this Court has noted this objection and give tentative exhibit. Now, it is the duty of the plaintiff to cure this defect. He has to produce an original deed for inspection. It is admitted fact that he is failed to produce it during whole trial. Therefore, now considering above ratio, this assignment deed cannot go into the evidence as an admissible evidence. Therefore, the ratio laid down in this citation, would be helpful to the defendant No.1 side.

18.7 In the para 21 of the last citation which reported as *M/s Bajaj Auto Limited Bombay (supra)*, Hon'ble Madras High Court has held that :-

Para 21. PHOTOCOPIES:-

21(i) The first objection raised, is with regard to the marking of photocopies of documents and according to the applicant/defendant, Exs.P3 to P5, P11, P13 series, P15 to P17 and P19 are xerox copies of documents and since no explanation has been offered as to the non-marking of the original documents/non-availability of primary evidence, the said documents have to be eschewed from evidence. A Single Bench of this Court in the judgment reported in (2015) 2 MLJ 42 (Home Missionary Society of India And Others v. Vepery Auxiliary), has considered the similar issue and placed reliance upon the following decisions:-

(i) (2007) 6 MLJ 893 (Amutha Beellarmino Corera v. Elsie Villavarayer); (ii) (2007) 4 MLJ 958 (Yashoda v. K. Shobha Rani); (iii) AIR 1966 SC 1457 (Roman Catholic Mission v. State of Madras) And (iv) (2010) 8 SCC 423 (Shalimar Chemical Works Ltd. v. Surendra Oil And Dal Mills).

21(ii) In paragraph No.8 of the above cited judgment, it has been observed that Firstly, there is no application filed by the plaintiff under Section 65(a) of the Indian Evidence Act, seeking permission to mark those documents, which are admittedly the photocopies, the originals of the same said to be in the custody of the other side. Secondly, the above said order (1.7.2014) also did not discuss the objections raised by the defendants through their memo, dated 16.6.2014. It is well settled that photocopies cannot be marked as a primary evidence. However, if they are sought to be marked as secondary evidence under the circumstances as contemplated under Section 65(a) of the Indian Evidence Act, 1872, then the party who seeks to mark those secondary evidence must file an application under Section 65(a) of the said Act and seek permission of the Court. In this case, no such application was filed. That being the factual position, I am of the view that the impugned order of the Court below, dated 1.7.2014 marking Exs.A-1 to A-16 (Exs.A-3 to A-16 marked with objection on the side of the defendants), cannot be sustained and consequently, the same is liable to be set aside. The learned Judge having held so, granted liberty to the respondent/plaintiff therein to file an application under Section 65(a) of the Indian Evidence Act, 1872, before the trial Court, seeking permission to mark photocopies of those documents and as and when such an application is filed, it is open for the petitioners/defendants therein to file their counter affidavit to the said application, and the Court below

shall consider the said application and pass orders on the same, on merits and in accordance with law.

21(iii) A perusal of the proof affidavit of P.W.1 would prima facie disclose that no such leave has been obtained in the form of an application under Section 65(a) of the Indian Evidence Act.

21(iv) It is the stand of the respondent/plaintiff that in the light of the order passed in A.Nos.413 and 414 of 2015, copies of documents have been to the applicant/defendant and they did not raise any objections and thereafter only, the said documents were marked as exhibits and therefore, it is not open to them to take such a stand and in any event, the admissibility, relevancy and mode of proof can be decided at a later point of time during the course of arguments. However, in the light of the decisions rendered by the Hon'ble Supreme Court of India and reported in AIR 1966 SC 1457 (Roman Catholic Mission v. State of Madras) and (2010) 8 SCC 423 (Shalimar Chemical Works Ltd. v. Surendra Oil And Dal Mills), which was followed by this Court in the above cited decision, this Court is of the view that the objection as to the marking of xerox copies of the documents referred to, is to be decided now itself.

After considering above ratio, herein also the plaintiff has not offered a satisfactorily explanation regarding the non-availability of the original deed even after at the time of production of this document, a strong objection has been raised by the other side. Considering this objection and to give a plaintiff one chance to produce its original, this Court has given tentative exhibit, but plaintiff is failed to prove its original. Therefore, this deed would not go into the evidence as a secondary evidence. Therefore, the ratio laid down in this citation, would be helpful to the defendant No.1 side.

- 18.8** As per above discussion, this Court is not going to give permanent / regular exhibit to this deed, but as both the parties have argued on its factual aspect, and therefore, for the sake of answers, it is considered by this Court as a tentative documentary evidence.
- 19** Now, on the factual aspect of this deed, Ld. Advocate for the defendant No.1 has argued that as it is not proved that the Mr. Kartik Patel is the originator of the song, he cannot claim ownership over this song. Therefore, as per legal maxim "*Nemo Dat Quod Non Habet*" – *one cannot transfer the rights/title better than what he has*. Hence Mr. Kartik Patel has no right to transfer the ownership of the song to the plaintiff and this document is bad in law.
- 19.1** He has further argued out that, the Assignee has not entered into the witness box to prove this document. The witness to the said assignment deed claims to have signed the said deed, however upon perusal of the said document shows that the said deed bears no signature of the said witness. Further, the said agreement is claimed to have been made at Mumbai as per title of agreement, however in his cross-examination, in para 15, Mr. Kartik Patel admitted that he has signed the said agreement in Australia and not at Mumbai. Mr. Kartik Patel further claims to have notarized the said assignment deed, however the said document shows that the said deed has not been notarized. Therefore, the plaintiff is failed to

prove this assignment deed on its factual aspect.

19.2 After considering above all arguments and all above discussions made in the issue No.1, this Court believes that it is not proved that Mr. Kartik Patel is the originator of the disputed song. Therefore, his ownership over the song is hereby denied. When his ownership is denied, as rightly argued by the Ld. Advocate for the defendant that this deed is barred under legal maxim - *“Nemo Dat Quod Non Habet”* – one cannot transfer the rights/title better than what he has.

19.3 Mr. Kartik Patel has deposed in his cross-examination (Exhibit:67) that he has signed the said deed in the Australia and Ms. Lalitya Munshaw has signed this deed in India. He has not deposed that this deed was executed at Australia. It may presume that Ms. Lalitya Munshaw had sent this deed to take signature of Mr. Kartik Patel at Australia and Mr. Patel had returned it after signing it. Therefore, this argument did not create any cloud on the execution of the deed. Hence, I am not agreed with the defendant No.1 on this point of argument.

19.4 Thereafter, Mr. Kartik Patel has deposed that according to his belief, it was notarized. He was not sure that it is notarized or not ? Admittedly this deed was prepared in the year 2017 and Mr. Kartik Patel has deposed in the year 2023. In the span of these six years, it may happen

that Mr. Patel may not remember each and every minute details of this deed. Therefore, this point also did not create any cloud on the execution of the deed. Hence. I am not agreed with the defendant No.1 on this point of argument.

19.5 Thereafter, it is admitted fact that in this deed the signature of the witness has not been taken. However, only the name of one Mr. Abhishek Ranjan has been written as a witness, but he has not signed it. He was examined by the plaintiff as a witness at Exhibit:72. He himself is not sure that whether he has signed this deed as a witness or not ? Therefore, it can be said that this deed was not prepared rather signed in the presence of Mr. Abhishek Ranjan.

20 If we peruse the last schedule of this deed then in the column-name of Music Composer - *Raas Masters* has been written. In the columns of Lyricist and Singer – name of *Kathiyawadi King* has been written. Now, after discussing the Issue No.1 of this judgment, it is proved that the Mr. Kartik Patel is failed to prove this fact that he is the only member of the “*Team Kathiyawadi Kings*” and Mr. Jay Pitroda is the only member of “*Raas Masters*”. Therefore, the schedule 1 of this deed cannot connect the ownership of the song with Mr. Kartik Patel and with stage name of “*Team Kathiyawadi Kings*”.

20.1 Thereafter, upon perusal of the said deed, no facts regarding these alias name or stage name has been clarified at any where. It is also not clarified that this song has been created by these two persons i.e. Kartik Patel @ “Team Kathiyawadi Kings”. and Mr. Jay Pitroda @ “Raas Masters”. There is no mentioning of name of Mr. Jay Pitroda in this deed. Admittedly, he has not signed this deed. Therefore, even for the sake of argument if we considered this fact for a moment that these two persons have conceptualized and composed the disputed song even then in the absence of the written consent of other person i.e. Mr. Jay Pitroda, this deed become illegal and invalid. Of course, the plaintiff side has produced a photo copy of Mr. Jay Pitroda’s statutory declaration vide Tentative Exhibit:91. But, it is simple photocopy and no original is produced to compare it. Therefore, it is an inadmissible evidence. It cannot be regularly exhibited. Secondly, this declaration has been done after filing of this suit and it has signed on 31/01/2019 whereas the deed of assignment was executed on 18/04/2017. Therefore, it may be presumed that Mr. Jay Pitroda has relinquished his rights from 31/01/2019, but at the time of Deed of Assignment, his right was there. IPR is also considered as a property, therefore Mr. Jay Pitroda can be considered as a co-owner of this property. Now, to assign a property to someone else, consent of all the co-owner is necessary, which is missing here. Thereafter, as per the E-Mail

produced at Tentative Exhibit:87, it was claimed by the plaintiff that Mr. Jay Pitroda had registered the song before the Agency - PRS for Music, U.K. on his sole ownership. Even then in whole deed of assignment, there has no mentioning of his name or even not mentioning of this registration at all. Therefore, on these factual matrix also the said deed also becomes invalid. Hence, considering above all discussions, on factual basis and on legal basis, the said assignment deed becomes an invalid document. Therefore, in the light of above discussion my answer for this issue is also **In Negative**.

ISSUE No. 2 :-

[Whether the plaintiff proves that the plaintiff has firstly published the alleged song ?]

- 21** The plaintiff has claimed that the trailer of the said song was uploaded on You Tube on 28th September, 2016. Final song was uploaded on You Tube on 29th September, 2016. Therefore, the plaintiff's predecessor is the first and true creator of the disputed song.
- 21.1** However, in support of the same, as stated earlier, the plaintiff has not produced any screenshot of YouTube, to prove uploading dates and time of the disputed song. The plaintiff has not stated on which channel his predecessor has uploaded the said song. The plaintiff has only produced Audio CD of his predecessor's song vide Exhibit:92. This Audio CD is not at all helpful to the plaintiff to prove this claim. Therefore, this type of

documentary evidence itself has negated the plaintiff's claim.

- 21.2** Further, if plaintiff wants to rely on the E-Mail Conversions (Tentative Exhibit:87) then in earlier above discussions, this Court has already held that on legal as well as factual matrix this document cannot be read as an evidence. Therefore, I do not find that this issue requires more discussion. Hence, straightway my answer for this issue is **In Negative**.

ISSUE No. 3 :-

[Whether the plaintiff proves that the song published by the defendant "Char Char Bangdi Wali" is substantial and material reproduction of the plaintiff's song "Char Bangdi Wali Gadi ""]

- 22** The plaintiff has claimed that after the releasing of the song of the plaintiff's predecessor on website "www.youtube.com" and through various medium in the market region through CD, Cassette, and other medium, the defendants have released the copied/imitation version of the original song "Char Bangdi Wari Gadi" on the same website "www.youtube.com" and also through various other medium sung and performed by defendant No.1. It is further contended that after listening and watching the said song, the Plaintiff's predecessor was shocked and astonished to note that the defendants have substantially copied the lyrics and concept of the plaintiff's predecessor.

- 22.1** Ld. Advocate for the plaintiff has argued that in a

copyright of music matter, disputed two songs are materially and substantially copy of each other or not ? the Court should decide this question from an illiterate, layman's perception and not from the perception of an Expert of music- raag. The Court should see that if an illiterate, layman will hear these two songs then can he think that these two songs are same or not ? Herein, the defendants have copied the plaintiff's predecessor's song lyrics, rhythm, music arrangement and concept. As per plaintiff's predecessor's song concept, two persons are going in a car, a song "Maniyaro te halu halu" is playing in background and in between the car is breakdown then this disputed song starts. Now in defendants' song also, three persons are going in car. In car on radio – another song is playing. Thereafter their car stopped and then after their disputed song starts. Thus, the defendants have also copied the concept of the song.

22.2 In support of his arguments, the Ld. Advocate for the plaintiff has relied on following citations:-

| | |
|-----|--|
| (A) | 2006 (8) AD(Del) 217; Super Cassettes Industries Ltd. Versus Chanda Cassettes Pvt.Ltd. |
| (B) | 2002 (6) BCR 1; Asian Paints (India) Limited Versus Jaikishan Paints And Allied Products |
| (C) | 2011 (4) SCC 85; T.V.Venugopal Versus Ushodaya Enterprises Limited |

23 Against this, the Ld. Advocate for the defendant No.1 has argued out that the concept/idea is never protected

under the Copyright Act, 1957.

23.1 He has further argued that the lyrics ‘Char Char Bangdi Wadi’ has been used in several songs prior to the plaintiff song. Mr. Kartik Patel, in his cross-examination (Exhibit:67) has admitted that in Gujarati Char Bangdi means Four Bangles. The Gujaraties are used to call an Audi Car as ‘char bangdi’ because of its mark is look a like Four Bangels. Therefore, the plaintiff cannot claim his copyright over these words.

23.2 It is further argued by them that admittedly the plaintiff’s song had been sung by the male singer and defendants’ song had been sung by the Female singer. The first song is a romantic song having a different feel and music tempo. Whereas the theme of second song is a marriage theme song for the brother by a sister. The beats, tempo, theme and overall progression of the song sung by the defendant No.1, is absolutely different. It cannot be said a substantially and materially reproduction of the plaintiff’s song.

23.3 It has been further argued out that mere similarity of ideas would not amount to infringement of copyright. The principle of *De-minimis* can be applied in present case. The trifling act need not to be entertained by the Court.

23.4 In support of his argument, Ld. Advocate for the defendants has relied on following citations :-

| | |
|-----|---|
| (A) | 1978 (4) SCC 118 ; R.G.Anand Versus Delux Films |
| (B) | 2013 (2) CalJ 124 ; Saregama India Limited Versus Viacom 18 Motion Pictures |
| (c) | 2012 (192) DLT 502 ;India Tv Independent News Service Pvt.Ltd. Versus Yashraj Films Private Limited |
| (d) | 2003 (107) DLT 91 ;Super Cassette Industries Limited Versus Bathla Cassette Industries Pvt.Limited |

24 I have considered the submissions made by the rival parties. This issue is the core issue of the whole suit. It will be deal in detail. In present case, we are dealing with the Musical Work, and therefore, we will confine our discussion only for relevant provision regarding the musical work in the act. The plaintiff has claimed a copyright over his disputed song “Char Bangdi wari” against the defendants’ song “Char Char Bangdi Wali Gadi”. It is admitted fact that none of the disputed songs have license under the Copyright Act, 1957.

24.1 I am agreed with arguments advanced by the Ld. Advocate for the plaintiff as ratio laid down in the judgment on which he also relies reported as *Asian Paints (India) Limited (supra)*. In para 24 of this judgment Hon'ble Bombay High Court has held that :-

Para : 24 Registration under the Copyright Act is optional and not compulsory, registration is not necessary to claim a copyright. Registration under the Copyright Act merely raises a prima facie presumption in respect of the particulars entered in the Register of copyright. The presumption is however not conclusive. Copyright subsists as soon as the work is created and given a material form even if it is not registered.

24.2 Therefore after considering above ratio, an original owner of the disputed musical work may claim copyright without getting it registered before the authority.

25 Now in Section 54 of the Act and more specifically in **Section 54(b)**, the owner of copyright is defined. Which reads as under:-

(b) in the case of an anonymous or pseudonymous literary, dramatic, musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise establishment to the satisfaction of the 1[Appellate Board] by that author or his legal representatives.

25.1 Therefore, as per above provision, the owner of copyright is a publisher of the work until the identity of the author is disclosed before the public. The **Section 2(d)(ii)** defines that Who is author in musical work. It says as under:-

Section:2(d)- “author” means,- (ii) in relation to a musical work, the composer;

25.2 Now keeping in mind the above legal provisions, the plaintiff's whole claim is based on the Deed of Assignment (Tentative Exhibit:86). Though it is not legally and factually proven document even though one more attempt to give a proper answer to this question, just in interest of the justice, if we perused the

Schedule-1 of this deed, then in schedule-1, the composer of the song is “Raas Masters”. The “Kathiyawadi Kings” is only lyricist and singer. It is publicly declared that Mr. Jay Pitroda is the author/owner of the song. Therefore, for the sake of arguments, if we believe the unproven claim of the plaintiff that Mr. Jay Pitroda is the “Raas Masters” and he is “The Kathiyawadi King” even then also, as per above Section 2(d)(ii), Jay Pitroda is the owner of the song. He has right to make so-called claim of copyright over the so-called his original song, but he has not made a claim over the song at the relevant time. He has not signed the deed of assignment. Further, as per above discussion, he has relinquished his right after filing of this suit, and therefore, at the time of filing of the suit and at the time of executing of deed of assignment, he can be considered as an owner in terms of the legal provisions. Therefore, the plaintiff’s predecessor cannot be claim as an owner of the song as per above legal provisions.

26 Thereafter, the Ld. Advocate for of plaintiff has first argued that the concept of both the songs are identical. Therefore, the defendants have infringed the song on this basis also. As per plaintiff’s claim, in the concept of song of plaintiff’s predecessor, two persons are going in a car, a song “Maniyaro te halu halu” is playing in background and in between, the car has breakdown then

this disputed song started. Now, as discussed earlier, the plaintiff side has not produced a video footage of his song as well as video footage of defendants' song. Therefore, this Court is unable to see the concept of the plaintiff's song and from the audio, the concept cannot be visualized in proper manner.

27 The Hon'ble Apex Court in the case of *R. G. Anand (supra)* has held that :

para:46(1) :

“There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work”

Therefore, as per the above ration of Hon'ble Apex Court, the plaintiff cannot claim a copyright over the concept or idea/theme of the song. Therefore, this claim is hereby denied.

28 Thereafter, the plaintiff has made claim that the defendants have used their words of the song “Char Bangdi Wari” in their song “Char Char Bangdi Wali”. Against this, the defendant No.1 has produced a DVD vide Exhibits 95 to 98 and claimed that in this word “Char Char Bangdi Wadi” words had been used in several songs prior to the plaintiff song.

28.1 I have seen and heard the first song produced by the

defendant No.1 in VCDs which is on record at Exhibit:95. As per screenshot produced with this VCD, this song has been published on the YouTube channel on 30/03/15. The defendant No.1 with other male singer had sung this song. As per attached lyrics of this song is “Char Char bangdi vali Meldi Mayalu”.

28.2 Thereafter, I have also seen and heard the first song produced by the defendant No.1 in VCDs which is on record at Exhibit:96. As per screenshot produced with this VCD, this song has been published on the YouTube channel on 31/05/16. It was claimed in the screenshot that this song has been sung by Vijay Suvada and Khushbu Asodiya. The lyrics of this song is “Char Char bangdi vali Sona na Chhatarvali”.

28.3 I have seen and heard the first song produced by the defendant No.1 in VCDs which is on record at Exhibit:97. As per screenshot produced with this VCD. This song has been published on the YouTube channel on the You tube Channel of Defendant No.3 on 12/01/16. This song is also sung by the defendant No.1 and the lyrics of this song is “Mara Vira Ni Gadi Audi Ho Raj”.

28.4 Above all electronic evidences have been referred by the defendant No.1 in her examination-in-chief at Exhibit:77. They have been produced with Certificate under Section 65-B of the Indian Evidence Act. This certificate has

been signed and deposed on oath by the defendant No.1. The plaintiff side has also cross-examined the defendant No.1 on these all electronic evidences. During her cross-examination, the plaintiff could not bring adverse regarding these evidences. Therefore, it can be said that these all songs are in public domain before the plaintiff's song. In all these songs, either word "Char Char Bangdi" or "Audi" or "Mara Vira Ni Gadi" words have been used by the defendants or by other artists. Therefore, the main line of both disputed song "Char Bangdi or Char Char Bagdi" is not a unique or new word in Gujarati music industry. Therefore, it is not that the plaintiff or defendants have first time brought this word in the Gujarati songs. One another aspect also emerges from above songs is that the before the plaintiff's song, the defendant No.1 is used to sing a song for Brother and she used to call him "Vira" in her song. In third song which is produced vide Exhibit:97, the defendant No.1 is singing a Marriage Song or DJ Dandiya song for her brother. In this song also she is singing "Mara Vira ni Gadi, Mara Vira Ni Audi".

28.5 Now, to decide whether two claimed songs are materially and substantially similar or not ? and to compare speed of singing, Tempo, Music, Lyrics, rhythm of both songs, we have to fully hear both the songs. Therefore, I have again heard the both the disputed songs. The Plaintiff's predecessor song has produced in

audio format at Exhibit:92. The defendants' song is also produced by the plaintiff in audio format at Exhibit:85. I have compared each and every seconds and words in both the songs. On its comparison, I have found that if we by pass the starting 0.50 to 0.58 seconds of both the songs i.e. background voice and score, then both the disputed songs have started almost between 0.58 – 1.01 seconds. The first 10 to 11 seconds in which the starting music played, both the songs are ear similar. Thereafter, the main line of the plaintiff's predecessor song is "Char Bangdi Wari Gadi Lai Dau". In his whole song, he has not used the word "audi". Whereas, the main line of defendants' song is "char char bangdi wali gadi lai dau.... Char Char bangdi wali Audi lai dau". Therefore, there is a materially difference between the main line of the both the songs. Here, we should also kept in mind that no one can claim the copyright on the generic words.

28.6 Thereafter in between of the defendants' song near about 1.41 seconds, she has sung "Vira Ni Gadi". Thereafter, near about 1.48 seconds, she has sung "Lai Dau Audi". These lines I would find in her old song (Exhibit:97's song). Even otherwise in copyright, no one claim his copyright over the generic word, which are commonly used.

28.7 Thereafter, the music used by both the parties are of Gujarati Garba/ Dandiya Types. Which we would hear in

all Gujarati Garba or Dandiya types' songs. Almost similar to this music, an another song has been produced vide Exhibit:95. Therefore, if this type of music has been caged in the prison of copyright then no new Gujarati garba will be created. Thereafter, the speed of singing and tempo of musics are materially different in both the songs.

28.8 The lyrics of the song of plaintiff's predecessor suggests that it was sung by boyfriend for his girlfriend. Whereas the lyrics of the song of defendants' song suggests that it was sung by sister for her brother. The theme of song produced vide Exhibit:97 and the theme of her present disputed song is the same. Therefore, it cannot be said that the theme of the song has been copied by the defendant from the plaintiff's song.

29 With profound respect, I have gone through the citation of Hon'ble Apex Court relied by the defendant No.1, which is reported as *R. G. Anand (supra)*. The Para 45 - 46 of the said judgment is very material which says as under :-

Para:45 -Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person. It is always open to any person to choose an idea as a subject-matter and develop it in his own manner and give expression to the idea by treating it differently from others. **Where two writers write on the same subject similarities are bound to occur because the central idea of both is the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy.....**

X.X.X...

Para:46-Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge :

(1) There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

(2) Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the Courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted, work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

(3) One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

(4) Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

(5) Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

(6) As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.

(7) Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader perspective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

I have considered the above highlighted ratio laid down by the Hon'ble Apex Court. In present case also both the main party i.e. Mr. Kartik Patel and Mr. Kinjal Dave are the Gujarati Artists. They born and brought up by hearing and singing the Gujarati garba, Gujarati folk, Gujarati movie and Gujarati dandiya songs. Therefore, Gujarati Garbas' music, rhythm bound to come in their creation. This similarities you will found almost in all Gujarati garba / dandiya song, but it does not mean that mere this similarities, had intentionally breached some one's copyright.

- 29.1** As discussed in earlier paragraphs, in both the songs, starting musics upto 10 to 11 seconds found similar even the speed and tempo is different, but even then if we considered it same then also from almost 4.00 to 4.30 minutes' song, only 10 to 11 seconds' similar parts shall be considered a very nominal or small amount of similarities/trifles. Therefore, it shall not be considered as a breach of copyright of plaintiff's predecessor's song. Therefore. herein present case the principle of *De minimis* "The law does not concern itself with trifles; (ii) The law doth not regard trifles; and (iii) The law cares not for small things" would apply.

- 29.2** The Hon'ble Delhi High Court has explained this principle in it's judgment reported as *India Tv Independent News Service Pvt. Ltd. (supra)*. It was held

that :-

Para : 20. But, what qualifies as a trifle- And, when can de minimis apply- Applying de minimis as an adjective and giving it the meaning: trifling, unimportant or insufficient, Courts have held that trifling, unimportant or insufficient violations would be treated as minor legal violations and hence would either be non-actionable or would be a good defence to an action for violation of a legal right.

29.3 Thereafter, as discussed earlier by this Court, the music used by both the artists are seems like a Gujarati Folk/Garba music. Therefore, the similarities bound to happen. These similarities cannot be considered as an infringement of copyright. I am also relying on the ratio laid down by the Hon'ble Delhi High Court in the judgment reported as *Super Cassette Industries Limited (supra)*. It was held as under :-

Para 44. Thus by taking recourse to the traditional reservoir of Indian Classical Raags and traditional folk music, compositions based thereon may result in a sound recording. Such a derivative by a contemporary composer/performer may not refer to the original source in their sound recording. In such a situation, the current composer cannot claim exclusive rights to such a sound recording, which are assertable against any other performer/sound recording based on such traditional repertoire. Thus no enforceable rights can be acquired by any contemporary musician in rendering/recording traditional compositions. Consequently, the traditional repertoire of Indian music which may not now enjoy copyright protection due to passage of time in the public domain, cannot be appropriated by any individual by virtue of a later and current sound recording by excluding other performers and/or composers. The tradition of Indian classical and folk music is a valuable public heritage common to all adherents and cannot be purloined by a contemporary performer/composer by denying to others the benefit of the same.

29.4 Thereafter, the plaintiff side has also relied on the judgment reported as *Super Cassettes Industries Ltd (supra)*. Mainly the plaintiff side has relied on para – 4 & 5 of this judgment. Which can be read as under:-

Para 4. To form a prima facie view on alleged infringement of appellant's copyright, particularly in musical works, as complained of, the learned Additional District Judge, at the time of hearing on grant of ex parte ad interim injunction, allowed playing of musical tune of the title song "kailash KE RAJA EK baar AAJA. . . . AAJA" from the audio cassette of respondent No.1 and cassette of the film song "jhalak DIKHLA JA" from film "aksar" and to justify grant of ex parte ad interim injunction, she proceeded to observe thus:

". . on hearing the two cassettes, I came to the conclusion that on hearing the sound recording of the defendant No. 1 of the title song No.1, it appeared as if one was hearing the music of the film song of the plaintiff ' Jhalak Dikhla ja' of the film 'aksar', i. e. , despite the lyrics being different in that of the plaintiff song and that of the defendant, the musical tune of both the questioned songs of the defendant and of the plaintiff appeared to be the same. It appeared as if the composition of bhajan of defendant was being sung on the same musical tune as that of the plaintiffs film Aksar on the song ' Jhalak dikhla Ja'. "

Para : 5.The learned Additional District Judge continued to hold the same prima facie view on infringement count even after the respondent No. 1 had filed their written statement/reply and had the opportunity of making their oral submissions. Noting observations in para 46 of the decision in "r. G. Anand Vs. M/s. Delux Films and others", (1978) 4ssc 118 and relying on her impression which she gathered after hearing the musical tune of song No.1 "kailash ke Raja Ek Baar Aaja. Aaja" of the audio cassette of the respondent No.1 and as also the cassette containing song ' Jhalak Dikhla ja' of film Aksar, the learned Additional District judge proceeded to say:

"in the present case, on hearing the questioned song of the defendant i. e. Song No. 1 side A titled 'kailash Ke Raja ek Baar Aaja.. Aaja', one is left with the impression as if one is hearing the said bhajan on the musical tune of the song in question of the plaintiff namely 'Jhalak dikhla Ja' of the film Aksar. Undoubtedly, in the beginning of the musical work there are variations in the arrangements and the tune of the defendant and the plaintiff. Thereafter when the song begins

the tune accompanying both the songs appears to be the same.

With profound respect, I have gone through this citations. First, this is an interim injunction order and final rights have not been decided. Secondly, as per factual matrix of the cases, Hon'ble High Court has held that trial Court has wrongly relied on the affidavit of one Shri Godia and finally it had an ad-interim injunction application. In present case this Court is deciding final rights of the parties. After taking both sides' evidence, this Court finds that there is no materially and substantially similarities in both the songs. Hence no copyright has been breached. Therefore, this citations would not be helpful to the plaintiff side.

29.5 Lastly the plaintiff side has relied on the ratio of the judgment which is reported as **T. V. Venugopal (supra)**. With profound respect, I have gone through this judgment. It is decided on the Trademark suit and herein We are dealing in Copyright suit. Therefore, the legal aspects of both the suit are completely different and therefore it would not be helpful to the plaintiff side.

30 Finally to conclude this issue, crux of above discussions is that after hearing the disputed songs with the other songs produced by the rival parties, I have found that there is a minimal similarities of 10 to 11 seconds' starting garba type music in both the songs which is bound to come. Except this the plaintiff or his

predecessor is not in position to claim his copyright over the words, rhythm, theme of the songs. The tempo, voice and speed of singing are also different in both the songs. Therefore, I do not find a material and substantial similarities between these Two songs. Therefore, my answer for this issue is also **In Negative.**

ISSUE No. 4 :-

[Whether the plaintiff proves that the defendants have deliberately infringed the rights of the plaintiff over the alleged suit song and thereby illegally earned profit ?]

ISSUE No. 4(a) :-

[Whether the plaintiff proves that he is entitled to restrain the defendant No. 1 from performing the said song “Char Char Bangdi Wali Gadi” in the public ?]

- 31** Since both these issues are identical, it would be expedient to deal with them and dispose of them simultaneously. As discussed very earlier before the song of plaintiff's predecessor, the defendant No.1 used to sung the “Char Char Bangdi Wari” in different manner and for different purpose. This fact is proved upon perusal of the VCD produced at Exhibit:95 and Exhibit:96. The Music composed in the song produced at Exhibit:95 is very near to the music composed in present disputed song of the defendant No.1. Therefore, no question arise here for deliberate infringement of rights of the plaintiff. This Court has found in above paragraphs that the plaintiff is failed to prove that his predecessor – Mr. Kartik patel is the first publisher / user of the disputed song. This Court has also found that there is a nominal similarities in starting 10 to 11

seconds music of both the songs. Therefore, the principle of *De minimis* is applied. Therefore, it cannot be considered as breach of copyright. Hence, the plaintiff is not entitled to restrain the defendant No.1 from performing her song which is materially and substantially different from the plaintiff's predecessor's song. The defendant No.1 gets her right of performance under Section:38 of the Copyright Act,1957. Therefore, in the light of above discussions, my answers for these issues are **In Negative**.

ISSUE No. 6 :-

[Whether the defendants prove that the suit of plaintiff deserves to be dismissed as alleged in the written statement ?]

- 32** In the written statement as well as in his arguments, Ld. Advocate for the defendant No.1 has vehemently raised a very technical but important issue on the maintainability of the suit. It has been argued that the plaintiff – Mr. Amrish V. Mehta has no *locus-standi* to file this suit. The plaintiff company is a private limited company. As per contented by Mr. Amrish V. Mehta in his affidavit in chief at Exhibit:72 (which is later on not pressed by the plaintiff side), Ms. Lalitya Munshaw and Ms. Manorama Munshaw is the Two directors of the company. It is claimed that the said company has given a Power of Attorney in favour of the Amrish Mehta to file this suit. The photo copy of this power of attorney is annexed at Exhibit:93. No board resolution has been produced during whole trial of the suit. Whereby the plaintiff

company has resolved to institute the present suit against the defendants herein. Neither there is a resolution of the company authorizing Ms. Lalitya Munshaw to swear a Power of Attorney , authorizing a third person to institute the suit on behalf the company. Therefore, in absence of above all requisite legal documentary evidence the present suit is falls as per provision of Order- 29 of the Civil Procedure Code.

32.1 It has been further argued out that the power of attorney which is produced vide Tentative Exhibit:93, is not an original. The original is never produced for comparison. Neither the executor nor the executee of the power of attorney ever entered into the witness box. In the last page of this power of attorney, the signature of the Execute has not been taken for acceptance of this power of attorney. On the contrary, the recitals of this power of attorney says that the executor was appointing Mr. Amrish Mehta as a power of attorney holder, but on the last page of this power of attorney, the name of one Mr. Kartik V Mehta has been written as a acceptor of the power of attorney and also he had not signed it. Therefore, this power of attorney is not legally and validly executed. Therefore, from this power of attorney the present plaintiff Mr. Amrish Mehta did not get right to file this suit.

32.2 He has further argued out that in the whole suit, the original documents have not been produced. For

considering secondary evidence, the mandate given in Section 65-B of the Indian Evidence Act has not been followed. The said so-called power of attorney of plaintiff company - Mr. Amrish Mehta has not entered into the witness box. The directors of the company have not entered into the witness box. The plaintiff has produced only witnesses' evidence, but that can be considered only as a corroborative piece without support of plaintiff's himself evidence, it had no value in the eyes of law.

32.3 In support his argument, he has relied on following citation:-

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|-----|--|
| (A) | 1990 (41) DLT 633;Nibro Limited Versus National Insurance Company Limited |
| (B) | 2011 (11) SCC 524; State Bank Of Travancore Versus Kingston Computers(I) Private Limited |
| (C) | 1994 (1) LW 602;K.N.Sankaranarayanan Versus Consultations And Services Pvt.Ltd. |
| (D) | 1999 (3) SCC 457;Iswarbai C.Patel Versus Harihar Behera |

33 Against this, Ld. Advocate for the plaintiff has argued out that the dispute of maintainability of suit has been first time raised by the defendants in the final arguments. Earlier there was no pleadings regarding this dispute. Even though it is a mere procedural irregularities and it can be cured at any time and at any stage of proceedings. Therefore, it is hyper technical approach adopted by the defendant side. It is settled law that when Court has to strike a balance between technical irregularities and substantial question of justice,

then Court should give more weigh to the substantial justice. Finally while hearing the reply of defendant No.1 argument, the plaintiff side has produced photocopy of board resolution vide Mark : 113/1.

33.1 In support of the contentions, the plaintiff side has relied on following citations:-

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|-----|--|
| (A) | 2023 (4) BCR 862;Palmview Investments Overseas Limited Versus Ravi Arya, Adult Indian Inhabitant |
| (B) | 2011 (11) SCC 786;Kalyan Singh Chouhan Versus C.P.Joshi |
| (C) | 1996 (6) SCC 660;United Bank Of India Versus Naresh Kumar |

34 I have considered above all arguments of both the parties. First, the dispute regarding maintainability of the suit is very well raised by the defendant in her written statement. Therefore, the Issue No.6 has been framed by the Court. Henc,e the first argument of Ld. Advocate for the plaintiff is seems to be against the facts and records, and therefore, it is rejected accordingly.

34.1 It would be profitable to reproduce the provisions contained under Order 29 Rule 1 of the CPC which reads as under to decide the first controversy :

Subscription and verification of pleading.—In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

34.2 In present case also, it is an admitted fact that the power of attorney holder of plaintiff company – Mr.

Amrish Mehta has not signed as executant of the Power of Attorney (Tentative Exhibit:93). Even though he has filed this suit on its basis and represent himself as a authorized person of the company. Thereafter, during trial, Mr. Amrish Metha has not stepped into the witness box or the executor of power of attorney – Ms. Lalitya Munshaw has also not stepped into the witness box to prove this power of attorney. Thereafter, no other directors have stepped into the witness box to plaintiff's authorization. It is also admitted fact that during whole trial no board resolutions have been produced to established an authorization of the Ms. Lalitya Munshaw to give power of attorney to Mr. Amrish Mehta. It is also true that no board resolution has been produced to give authority to Mr. Amrish Mehta to file present suit. Of course on the last day of final hearing, a photocopy of resolution has been produced by saying that it is a procedural defect and it can be cured at any time. Now first if we peruse this very latest board resolution dated 24/01/2024 (Mark:113/1). The power of attorney was executed on 30/06/2017. Therefore, looking to the dates of this document, it is proved that on the date of filing of this suit, there would no such type of board resolution was passed in favour of directors or in favour of the present plaintiff to file present suit. Therefore if in a given case, this resolution would have been passed before the date of filing of the suit and mere its production was not done during trial of the suit, and if

it was produced at the fag end of the trial, then in that circumstances, it can be said procedural irregularities. Herein the case is totally different, no such resolution was in existence at the time of filing of this suit. Therefore it can not be said a mere procedural irregularities. It is called laches on the part of the plaintiff. The Plaintiff has missed the bus. It can not be cured now. It is very material, incurable defect, which directly hit the root of the case. Therefore, the arguments raised by the plaintiff 's advocate is not sustainable.

34.3 Thereafter, both the parties have relied on citations of Hon'ble Apex Court as well as Hon'ble Other High Courts. Now, to narrow down the discussion on citations, it will not prejudice to anybody, if we only discuss the ratio laid down by Hon'ble Apex Court. Therefore, with profound respect, herein I am skipping the citations from discussion of other Hon'ble High Courts.

34.4 The defendant side has relied upon the judgement delivered by the Hon'ble Apex Court in case of *Kingston Computers(I) Private Limited (supra)*. In para:16 of this judgment, Hon'ble Apex Court has held following ratio:-

Para: 16. In our view, the judgment under challenge is liable to be set aside because the respondent had not produced any evidence to prove that Shri Ashok K.Shukla was appointed as a Director of the company and a resolution was passed by the Board of Directors of the company to file suit against the

appellant and authorised Shri Ashok K.Shukla to do so. The letter of authority issued by Shri Raj K.Shukla, who described himself as the Chief Executive Officer of the company, was nothing but a scrap of paper because no resolution was passed by the Board of Directors delegating its powers to Shri Raj K.Shukla to authorize another person to file suit on behalf of the company.

34.5 In reply, the plaintiff side has relied upon the judgement delivered by the Hon'ble Apex Court in case of *United Bank Of India (supra)*. In the para 9 of the said judgment, the Hon'ble Apex Court has held following ratio:-

Para :9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

34.6 Upon distinguishing these both citations then first, in the factual matrix of the *United Bank Of India(supra)* case, the Hon'ble Apex Court has considered a public interest and permitted to be cure procedural irregularity. In present case, no such public interest is at stake. Secondly, the judgment relied by the defendant is of Year 2011 and the judgement relied by the plaintiff is of year 1996. Therefore later will always prevail. Therefore, considering all these facts, the plaintiff's suit is barred under O.29, R.1 of CPC.

35 Thereafter, second controversy is raised by the defendant No.1 is regarding production of the original documentary evidence. It is admitted facts that the original documents or a true copy of documentary evidences have not been produced by the plaintiff after knowing very well that this Court has given tentative exhibits to the plain photocopies of the documents. Therefore, as discussed earlier paragraphs some of the photocopies of the documents would not go into the evidence.

36 Lastly it was contended by the defendant side that the plaintiff himself has not entered into witnesses box and produce his claim. He has relied on the evidence of witnesses. It is also an admitted fact. The evidence of the witnesses is a corroborative peace of evidence and if plaintiff himself has no courage to stepped into the witness box then this conduct of plaintiff, would give this Court to draw an adverse inference against him.

36.1 In support of this view, this Court is also relied on the ratio which has been laid down in the citation, on which the defendant side is relying. It is reported as *Iswarbai C.Patel (supra)*. In para – 29 of the said judgment, the Hon'ble Apex Court has held that :-

Para :29. Applying the principles stated above to the instant case, it would be found that in the instant case also the appellat had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No. 2 in his statement on oath that it was at the

instance of the appellant that he had issued the cheque on the account of respondent No. 1 in the Central Bank of India Ltd., Sambalpur Branch, and the appellant, admittedly, had encased that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No. 1 in its entirety and passing a decree against the appellant also.

37 Finally to conclude this issue, I am agreed with the contentions raised by the Ld. Advocate for the defendant No.1 that on the basis of above all discussions, the present suit is not maintainable on its legal aspects. Therefore, in the light of above discussions, my answer for this issue is **IN Affirmative.**

ISSUE No. 5 :-

[Whether the plaintiff is entitled to get the relief as prayed for ?]

ISSUE No. 7 :-

[What order and relief ?]

38 Now before going on to the final conclusion of this issues, while giving reply of defendant No.1' argument, the Ld. Advocate for the plaintiff has argued that in the case of infringement of copyright, the mere delay in bringing action is not sufficient to defeat the plaintiff's claim. In support of the same, he has relied on following citations.

| | |
|-----|---|
| (A) | 2004 (3) SCC 90;Midas Hygiene Industries (P) Limited Versus Sudhir Bhatia |
| (B) | 2004 (111) DLT 616;Syncom Formulations (India) Ltd Versus Sas Pharmaceuticals |

38.1 With profound respect, I have gone through these

citations. First, Ld. Advocate for the defendant No.1 has not raised the issue regarding delay in their oral as well written submissions. Secondly, in these citations, the Hon'ble Apex Court and the Hon'ble Delhi High Court were decided an application of ad-interim injunction under O.39, R.1, 2 of CPC. Therefore, at interim stage. Courts would have to verify the facts on very primary level. Here in the present case, this Court is in final stage of delivering a final verdict of the case. Therefore, this Court has to see each and every minute details and evidence produced before it. Therefore, looking to the nature of proceedings carried out in above citations and nature of proceedings before this Court, these citations would not be helpful to the plaintiff side.

39 Finally, it is proved that the plaintiff is not entitled to get any relief as claimed for reasons are already discussed in above paragraphs. Crux of above discussions are given below :-

39.1 The plaintiff is failed to prove that his predecessor – Mr. Kartik Patel is the first publisher of the music video of his song on 05/09/2016, as there is no video CD, screenshot etc.. on record.

39.2 The Plaintiff is failed to prove that Mr. Kartik Patel and Team Kathiyawadi Kings are the same personality and Team 'Kathiyawadi Kings' is the originator of the song.

39.3 The plaintiff is failed to prove sole ownership of

Mr. Kartik Patel on the disputed song.

- 39.4** The Plaintiff is failed to prove the main pillar of his suit i.e. a Deed of Assignment, which had been executed between the plaintiff's company and Mr. Kartik Patel.
- 39.5** This Court do not find these two songs are materially and substantially similar. This Court has found that mere starting 10 to 11 seconds of beats are similar, but these beats are not that much unique, which are used first time in plaintiff's music. It is used in many of Gujarati garba, folk songs, movie songs, therefore that much similarities are bound to come.
- 39.6** Principle of *De-minimis* would apply for small similarities between two songs.
- 39.7** The defendant No.1 has proved that she is using the word "Char Char Bangdi wali" way before the so-called releasing of the song of plaintiff's predecessor.
- 39.8** This Court has held that the plaintiff can't claim copyright over the generic words like "Char Char Bangdi Wali" or on the idea, theme, concept of the songs.
- 39.9** The plaintiff's power of attorney holder has not proved his *locus standi* to file this suit. This suit is also barred under O.29, R.1 of the Civil Procedure Code, 1908.
- 39.10** Neither plaintiff nor any directors of the plaintiff company has shown courage to stepped into the witness box for deposition. They have only relied on deposition of witnesses. This facts has inspired this Court to draw adverse inference against them.

40 Therefore, in the light of above discussions, my answer for the issue No.5 is **in Negative** and for the issue No.7, I pass following **Final Order** in the interest of the justice :-

:: O R D E R ::

- A.** The present Suit filed by the plaintiff is hereby rejected/dismissed.
- B.** Ad-interim stay / injunction orders, if any, is hereby deemed vacated from the date of this judgment.
- C.** The Plaintiff is hereby directed to pay the cost of the suit to the defendant No.1.
- D.** Decree-sheet be drawn accordingly.

Signed and pronounced in the open Court today on this 30th Day of January, 2024.

Date : 30.01.2024
Place : Ahmedabad.

(Bhavesh K.Avashia)
Judge
City Civil Court, Ahmedabad
UNIQUE ID CODE GJ00816