Before the Hon'ble Mr. R. M. Kantawala, Chief Justice and Mr. Justice S. K. Desai.

M/S. FORTUNE FILMS INTERNATIONAL *v.* DEV ANAND.*

Copyright Act (14 of 1957), Secs. 2(c), (d), (f), (h), (q) and (y), 13, 14, 17, 18 and 19—Whether the performance of a cine artiste in a cinematograph film would be "work" protected by the Copyright Act, 1957.

The plaintiff was a cine artiste of a Hindi motion picture entitled "Darling Darling" produced by the first defendants. In the course of correspondence exchanged between the parties, it was *inter alia* provided that in consideration of his services to the producers he would be paid remuneration of Rs. 7 lakhs in certain amounts on or before the release of the picture in the territories of Delhi-U. P., Bengal, Nizam, Mysore, C P.-C.I., Tamil-Nadu and Andhra. It was further provided that the copyright in the cine artiste's work in the motion picture was to vest in the cine artiste till full payment of the agreed amount was made to him on which it would automatically vest in the producers. The plaintiff alleged that the producers were releasing the picture in the Bombay and overseas territories without full payment of the remuneration to him, and he sued to restrain the producers from doing so.

Held, that the performance by an artiste in a cinematograph film cannot be equated to any of the five categories of "artistic work" (namely, a painting, a sculpture, a drawing, an engraving or a photograph) in s. 2(c). A cinematograph film was expressly excluded in the definition of a dramatic work in s.2(*h*). In view of the definitions of "artistic work", "dramatic work" and "cinematograph film" in s. 2(*f*), it would appear that the Copyright Act, 1957, *does not recognise the performance of* an actor as a "work" (defined by cl. (*y*) of s. 2), which is protected by the Copyright Act.

I. P. R. Society v. *E. I. M. P. Association,*[1] referred to.

Held further, that on a proper construction of the agreement the rights of the cine artiste are restricted to the seven territories which would mean that any injunction to which he is entitled must be restricted to the Bengal, Nizam, Tamil Nadu and Andhra territories *since the motion picture had been released in the* other three.

Ramkishorelal v. *Kamalnarayan,*[2] referred to.

I. M. Chagla, with *Anil Mehta* of *Anil Mehta & Company,* for the appellants.

A. H. Desai, with *P. M. Amin* and *R. A. Kapadia,* instructed by *Bachubhai Munim & Company,* for respondent No. 1.

DESAI J. This appeal is from the order of Gadgil J. dated January 3, 1978 made on the plaintiff's Notice of Motion, dated December 15, 1977. By the said order the learned single Judge confirmed the *ad-interim* injunction already granted, as he was of the opinion that the terms of Ex. 'A' to the plaint, particularly paragraph 7, was *prima facie* in the plaintiff's favour. He rejected the defence contention that exh. 'B' amounted to a *novatio* and in his view the same appeared only to change in the mode on payment. The respective arguments as to copyrights were not considered at that stage.

In this view of the matter the learned single Judge confirmed in favour of the plaintiff the substantial reliefs which the plaintiff had already obtained at the ad-interim stage; and it is the defendants No. 1, who, being aggrieved by the said order, have preferred this appeal.

**Decided, March 14, 1978.* O.C.J. Appeal No. 17 of 1978 : Suit No. 1825 of 1977.

1 [1977] A.I.R. S.C. 1443.

2 [1963] A.I.R. S.C. 890.

Before setting out the facts shortly, it may be stated that on February 27, 1978 we heard fairly detailed arguments lasting for nearly three to four hours on the appellants' Notice of Motion, and after this hearing we reduced the ambit of the injunctions granted in favour of the plaintiff and restricted them to four of the specified territories mentioned in cl. 6 of Exh. A and vacated the injunction for the territories not specified in cl. 6. At the conclusion of the arguments and before passing the order on the Notice of Motion we had asked counsel for the parties whether they desired to convert the hearing of the Notice of Motion in the appeal to the hearing of the appeal itself. After taking instructions the learned counsel for the appellants was agreeable for this course; but on behalf of respondent No. 1 (Original plaintiff) it was stated to us that the respondents did not wish to convert the hearing of the Notice of Motion into the hearing of the appeal. Accordingly we only made the operative order. It is in these circumstances that the appeal has subsequently been re-heard, though it must be stated that somewhat more detailed arguments have been advanced today.

In order to appreciate the rival controversy, a few facts may be stated: The plaintiff (the respondent No. 1 before us) is a cine artiste and will be hereinafter referred to as "the cine artiste" for the sake of brevity. The appellants before us are the producers of a motion picture in Hindi language entitled "DARLING DARLING"; they will be hereinafter referred to as "the producers". The defendants No. 2 to the suit were M/S Navrang Cine Centre Private Ltd., a laboratory carrying on business of processing cinematograph films; they will be hereinafter be referred to as "the laboratory".

According to the producers, they engaged the cine artiste's services some time in December 1972 and the production of the film commenced some time in May 1973 with the "Muhurat" shot. It is alleged by the producers (though disputed by the cine artiste) that in July 1973 they had entered into an agreement with one Mavani for the East Punjab territory and in July 1974 with one G. N. Shah (HUF) for the Bombay and Overseas territories. It is their case further, which is again disputed by the cine artiste, that by August 1, 1974 about eight reels of the said motion picture were completed. It is on that day that a written agreement (exh. 'A' to the plaint), was entered into between the producers and the cine artiste in the form of a letter written by the producers and confirmed by the cine artiste. Both sides have pleaded that some changes were thereafter orally made; but it will be sufficient for our purposes to refer only to certain arrangements recorded in the correspondence exchanged between the producers, the laboratory and the cine artiste in the form of letters, which are collectively annexed as Exh. 'B' to the plaint.

Now, for the purposes of disposing of this appeal, we are not inclined to attach much importance to the case of any oral variation and are of opinon that the rights of the parties must stand governed by the written agreement recorded in the letter dated August 1, 1974 (exh. 'A' to the plaint) as modified, governed, controlled or clarified by the subseuqent letters, part of exh. 'B' (collectively) to the plaint. It may be stated that the first of the two letters which are part of exh. 'B' bears the date November 8, 1976, but the admitted position is that the proper date is December 3, 1976, and it is this very same letter which is referred to in the next letter dated December 4, 1976; and indeed a photostat copy of the letter of the 3rd was enclosed along with the later letter dated 4th addressed by the laboratory to the cine artiste which was duly confirmed by the cine artiste.

Before dealing with the agreement (exh. A to the plaint), it may be mentioned that the motion picture was censored on May 11, 1977. It was released in the Delhi-U.P. territories on and after September 2, 1977. According to the producers, it was released in the East Punjab territory on September 30, 1977. As far as this territory is concerned, it is the cine artiste's case that such release was a surreptitious one and without his knowledge or consent. It was also re-

eased in the Mysore and C. P. C. I. territories; but this, it is admitted, was with he knowledge and consent of the cine artiste and in accordance with the rights of the parties. It is also the producers' case that between November 3, 1977 and November 23, 1977 the laboratory had prepared and delivered thirteen prints for distribution and release in "Overseas" territory. According to the cine artiste, this was also done without his knowledge or consent and was in breach of his right under the agreement dated August 1, 1974, to which we must now turn to ascertain what exactly the rights and the reciprocal obligations of the parties were.

The agreement in the form of a letter sent by the producers and confirmed by the cine artiste records that the cine artiste was to perform and play as the leading male artiste for the picture. We are really concerned with cls. 6 and 7 of the said agreement and they provide as follows:

"6. That in consideration of your all the services to us for the said picture, you will be paid remuneration as under:

(a) Rs. 1,00,000 on or before the release of our above picture in the Delhi-U. P. territory.

(b) Rs. 3,50,000 on or before the release of our above picture in the Bengal territory.

(c) Rs. 75,000 on or before the release of our above picture in the Nizam territory.

(d) Rs. 75,000 on or before the release of our above picture in the Mysore territory.

(e) Rs. 50,000 on or before the release of our above picture in the CPCI territory.

(f) Rs. 25,000 on or before the release of our above picture in the Tamil Nadu territory.

(g) Rs. 25,000 on or before the release of our above picture in the Andhra territory.

Rs. 7,00,000.

7. The aforesaid amount shall be paid to you by procuring suitable annuity policies of LIC of India. That your work in our above picture on completion will belong to you absolutely and the copyright therein shall vest in you and we will not be entitled to exhibit the said picture until full payments as per clause 6 above are secured to you by way of annuity policies of LIC. It is, however, agreed that upon the deliveries of the said annuity policies as per clause 6 above to you as stated above, your copyright will automatically vest in us. We therefore agree that until the said policies are delivered to you, we shall not release the said picture nor exhibit or distribute or exploit or part with any prints of the said picture to any party directly or indirectly for the purpose of exhibition, distribution and exploitation in the territories specified above."

It may be pointed out that in the body of the agreement, exh. A to the plaint as annexed, there is a mistake inasmuch as item (d) to be found in the original agreement providing for the payment of Rs. 75,000 to be made on or before the release of the picture in the Mysore territory is missing. We have set out the clauses by reference to the original letters.

On behalf of the cine artiste it was contended that the following rights are clearly conferred on and/or retained by the cine artiste by reason of the agreement contained in the bargain to be found in cl. 7 or para. 7 of this letter: (1) That it is agreed that the copyright in the motion picture viz. the Hindi film 'DARLING DARLING' is to vest in the cine artiste subject to the condition that upon deliveries of the annuity policies of the L.I.C. of the value of Rs. 7,00,000 the cine artiste's copyright would automatically vest in the producers. (2) There was a total prohibition and a negative covenant given by the producers in respect of the producers being entitled to exhibit the said picture anywhere until the full payment of the amount of Rs. 7,00,000 was secured to the cine artiste by way of annuity policies of the L.I.C. It was submitted by counsel on behalf of the cine artiste that this prohibition or negative covenant was made subject to a specific provision or relaxation made in favour of the producers that the producers would be entitled to a limited right of exhibiting the picture in the seven territories mentioned in cl. 6, provided payment of the amount indicated for each territory in the said clause was made on or before the release of the

picture in that territory. Such payment was to be in accordance with the manner indicated viz. by procuring suitable annuity policies of the L.I.C. This was, according to his submission, a clarification or an exception by way of relaxation of the absolute prohibition in respect of the total release unless the full amount was paid. (3) In the alternative to the contention that the copyright in the film was by agreement specifically vested in the cine artiste, it was submitted that the copyright in his performance was expressly agreed to be vested in the cine artiste and, at any rate, this copyright was to remain vested in him till the full amount of Rs. 7,00,000 was paid to him in the manner indicated in the said agreement. As far as payment is concerned, it may be mentioned at this juncture that it is the plaintiff's case that out of Rs. 7,00,000 a sum of Rs. 1,25,000 has been received by him leaving a balance of Rs. 5,75,000 as payable for the work done by him. On the other hand, it is the contention of the producers that a further amount of Rs. 3,50,000 has been paid to the cine artiste (of which Rs. 3,00,000 was claimed to have been paid toward the enhanced amount of Rs. 4,00,000 payable for Bengal territory), leaving, therefore, only the balance of Rs. 2,25,000 of the total amount. Thus, according to the cine artiste, there could be no release in the territories not specified in cl. 6 including Bombay and overseas until full payment was made.

As far as the agreement contained in the letter of August 1, 1974 is concerned, it was submitted by learned counsel on behalf of the appellants before us (producers) that: (1) the agreement did not provide for the vesting of the copyright in the said motion picture in the cine artiste, but it merely referred to the copyright in the cine artiste's work in the said motion picture. (2) That as there was no specific agreement regarding the copy-right of the said picture to be found in this agreement, under the provisions of the Copyright Act the copyright in the motion picture would belong to the producers. (3) It was submitted that under the provisions of the Copyright Act, 1957, the copyright in a cine artiste's performance was not any "work" which was protected and, therefore, despite the specific provision in the agreement, there was no legal vesting of such copyright in the cine artiste. In other words, it was submitted that this provision conferred on the cine artiste a non-existent right or a right which was not protected by the law in question viz the Copyright Act, 1957. (4) As far as the prohibitions or the negative covenant was concerned, it was submitted that if cls. 6 and 7 of the agreement are read harmoniously and properly, rights were conferred on the cine artiste and prohibitions imposed on the producers only in respect of the seven territories indicated in cl. 6 with a provision that on payment of the respective amounts mentioned against each territory, the producers were entitled to release the said motion picture in the said territories. (5) Finally, it was submitted that even if the Court were of opinion that the Copyright Act, 1957, conferred protection on and did protect the copyright in an actor's performance in a motion picture and if it further held that the copyright in the cine artiste's performance had been specifically vested in him by the letter of August 1, 1974, it would not necessarily follow that the cine artiste by reason of the vesting of such copyright in him would be entitled to the wide injunctions sought for if in the opinion of the Court under the agreement, which conferred the copyright and the prohibition against the producers releasing the picture, was expressly restricted to the seven territories mentioned in cl. 6. In this connection it may be stated that on behalf of the appellants (the producers) a submission has been urged that it was the cine artiste who has come to the Court in order to secure the wide injunctions which he has sought for; and in case rights were not clearly and unequivocally conferred on the cine artiste by the agreement, the principles of balance of convenience require that wide injunctions should be refused to the plaintiff and the plaintiff should have only a limited injunction which we had in fact granted by our order dated February 27, 1978 on the Notice of Motion in

appeal and that the cine artiste was not entitled to any wider injunctions. In this connection it was also submitted that if there was any doubt as to the impact and implications of the agreement dated August 1, 1974, it must be resolved in favour of the producers by reading the letters dated December 3 and 4, 1976 (exh. 'B' to the plaint).

The first question to be considered is whether the cine artiste is right in his contention that under the agreement recorded in the letter of August 1, 1974 the copyright in the film was agreed to be vested in him until the appellants had procured the annuity policies of the full amount of Rs. 7,00,000, when, it was provided that the copyright should automatically vest in the producers. The relevant words of the letter read as follows:

> " ..That your work in our above picture on completion will belong to you absolutely and the copyright *therein* shall vest in you... It is however agreed that upon deliveries of the said annuity policies as per clause 6 above to you as stated above, your copyright will automatically vest in us." (Italics ours.)

The short question is whether does the word 'therein' refer to the work of the cine artiste in the picture or to the picture? On a fair reading of the language employed, it would appear to us that the word 'therein' can only refer to the work of the cine artiste in the picture and not to the picture as a complete entity. This is also borne out by the opening portion of the sentence under consideration which provides for the work of the cine artiste in the picture belonging to him on completion, and it is the copyright in that work, which, by the subsequent part of the sentence is declared as vesting in him till the payment of the full amount of Rs. 7,00,000 by way of procurement of the annuity policies. Reading these provisions as sought for by the learned counsel for respondent No. 1 (the cine artiste) would, in our opinion, be a strained reading not borne out by the words used nor by the construction of the sentence.

If, in our opinion, by the agreement it was agreed between the producers and the cine artiste that the copyright in the cine artiste's work in the motion picture is to vest in the cine artiste till full payment of the agreed amount is made to him, on which it would automatically vest in the producers, it becomes necessary to examine the contentions advanced at the Bar on behalf of the appellants (producers) that such a copyright was not recognised or protected by the (Indian) Copyright Act, 1957. It was submitted that the Copyright Act properly read would seem to protect only "work" as therein defined and if the works indicated in the definition of "work" to be found in s. 2(*y*) of the Copyright Act properly considered, only 'work' which is tangible in nature was protected. It was submitted that there could be a copyright in a motion picture or a cinematograph film as also in the story, scenario or music (if written on sheets or if put on a sound track or a tape, but not otherwise), which were all tangible, but not in the performance of an artiste (although it was part or component element of a film). On the other hand, on behalf of the cine artiste it was contended that the performance of an actor was covered by the definition of "artistic work" or "dramatic work" to be found in ss. 2(*c*) and 2(*h*) of the Copyright Act, 1957. Alternatively the argument which was advanced was that a cinematograph film would include portions of the film or components of the film and an artiste's work in the film must be regarded as a component or a part of the film which would be entitled to protection as falling within the definition of "work". It becomes necessary, therefore, to examine the relevant provisions of the Copyright Act, 1957, to which our attention was drawn at the Bar, in order to consider which of the rival submissions are to be accepted.

Section 2 is the interpretation section and we are concerned with the words "artistic work", "author", "cinematograph film", "dramatic work", "perfor-

mance" and "work" to be found in sub-ss. (*c*), (*d*), (*f*), (*h*), (*q*) and (*y*) respectively of s. 2. These may be fully set out:

"2. (*c*)—'artistic work' means,—

(*i*) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(*ii*) an architectural work of art; and

(*iii*) any other work of artistic craftsmanship.

2. (*d*) 'author' means,—

(*i*) *in relation to a literary or dramatic work, the author of the work;*

(*ii*) in relation to a musical work, the composer;

(*iii*) in relation to an artistic work other than a photograph, the artist;

(*iv*) in relation to a photograph, the person taking the photograph;

(*v*) in relation to a cinematograph film, the owner of the film at the time of its completion; and

(*vi*) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of the plate;

2. (*f*) 'cinematograph film' include the sound track, if any, and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography;

2. (*h*) 'dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film;

2. (*q*) 'performance' includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film, or by means of radio diffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture;

2. (*y*) 'work' means any of the following works, namely:—

(*i*) a literary, dramatic, musical or artistic work;

(*ii*) a cinematograph film;

(*iii*) a record;"

Section 13 of the Copyright Act, 1957, provides that subject to the provisions of the section and other provisions of the Act, copyright shall subsist throughout India in three types of works indicated therein, viz. (1) original literary, dramatic, musical and artistic works; (2) cinematograph films and (3) records. Sub-section (*4*) of s. 13 provides as follows:

"13. (*4*) The copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made."

Section 14 gives what is meant by 'copyright' by and under the Act and sub-s. (*1*)(*c*) thereof provides for the case of a cinematograph film. Section 16 *makes it clear that there is no copyright except as provided under and in accor*dance with the Copyright Act. Section 17 provides for the first owner of copyright, and it is provided that the author of a work shall be the first owner of the copyright therein. In respect of a cinematograph film provision is to be found in cl. (*b*) of the proviso to s. 17, which is in the following words:

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

Sections 18 and 19 deal with the assignments of copyright and under s. 19 it is provided that no assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent. Section 30 provides for granting of licence by the owner or a prospective owner of any copyright. There is only one other section to which reference was made at the

Bar during the course of arguments, and it was to s. 55 which provides for civil remedies for infringement of copyright. The relevant portion of sub-s. (*1*) provides that the owner of the copyright shall, except as otherwise provided by the Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

It now becomes necessary to consider in the light of these provisions whether the performance of a cine artiste in a film would be a 'work' protected by the Copyright Act, 1957, and, if it is so protected, what would the rights of the cine artiste be in the case under consideration?

We will have in this connection to consider the submission made on behalf of the cine artiste that such performance would be covered either by the definition of "artistic work" or "dramatic work" or "cinematograph film" to be found respectively in sub-ss. (*c*), (*h*) and (*f*) of s. 2 of the Copyright Act, 1957. If it is so covered, such performance would fall within the meaning of the word 'work' to be found in sub-s. (*y*) of s. 2.

It therefore becomes necessary to examine these definitions one by one to consider whether such submission can be accepted. 'Artistic work' has been defined as meaning a painting, a sculpture, a drawing, an engraving or a photograph, and it would be clear and obvious that the performance given by an artiste in a cinematograph film cannot be equated with any of the five categories indicated, as it is a comprehensive definition; unless expressly covered, sub-s. (*c*) would not be of any help to the cine artiste.

The definition of "dramatic work" to be found in s. 2(*h*), however, is an inclusive definition including any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise. The definition, however, expressly excludes a cinematograph film by the closing words of sub-s. (*h*) of s. 2.

It was submitted that the performance of the cine artiste is acting, the form of which is fixed in the film and, therefore, would be within the definition of "dramatic work". Alternatively in connection with this definition itself it was submitted that since it was an inclusive definition, even if an actor's performance fixed in the film negative was not expressly covered by the portion of the definition commencing with the words "any piece..." and ending with the words "or otherwise", it must be regarded as a dramatic work by the very nature of things. In connection with the closing words of the sub-section which excluded a cinematograph film from the definition of "work", it was submitted that either a cinematograph film must be construed as a total film and, therefore, only the film which is the final product of various dramatic works would be excluded, so that the performance of the actor would still remain within the definition of "dramatic work"; alternatively, it was urged that if the dramatic work of an actor being part of a cinematograph film were to be excluded by the specific words of sub-s. (*h*) of s. 2, then it must necessarily be included within and must be held covered by the definition of a "cinematograph film" as defined by sub-s. (*f*) of s. 2 which is also an inclusive and not a comprehensive definition.

Our attention was drawn at the Bar to the definition of "dramatic work" to be found in the English Copyright Acts viz. the Copyright Act, 1911, and the Copyright Act, 1956. Under the Copyright Act, 1911, "dramatic work" is defined by s. 35 in the following words:

> "35. 'Dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;"

"Dramatic work" has been defined in the following words in s. 48(*1*) of the Copyright Act, 1956:

> "'dramatic work' includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film;"

It is apparent that the definition in the Indian Copyright Act is substantially the first part of the definition of "dramatic work" under the English Copyright Act, 1911, excluding the later portion in the definition under the English Act concerning cinematograph production.

On a plain reading of the definition of "dramatic work" it is not possible to accept the submission of learned counsel for the cine artiste that the motion picture could be regarded as a piece for recitation or a choreographic work or entertainment in dumb show. Under the definition to be found in sub-s. (*h*) of the Copyright Act, 1957, only for a dramatic work of any of these three types specified i.e. (i) piece for recitation, (ii) choreographic work or (iii) entertainment in a dumb show would be included, and then further only where the scenic arrangement or acting form of which (in the three types) is fixed in writing or otherwise, when this requirement is satisfied then the work under consideration will amount to a "dramatic work" which will be protected by the provisions contained in the Copyright Act. It is true that the words "or otherwise" are to be found in the definition of "dramatic work". But in our opinion these words are there, it seems, only to provide for the modern means of recording such as a taperecorder or a dictaphone and similar instruments. Again, it must be observed that the concluding portion of the definition of "dramatic work" in the sub-section, which excludes a cinematograph film, would seem to clearly shut out any contention that the dramatic performance of a cine artiste which is fixed or recorded in the film negative will be "dramatic work" within the meaning of this definition and therefore protected by the Copyright Act. It is true that the definition is an inclusive definition; but it would not be permissible to extend it to cover all cases where the work can be popularly described as exertions or efforts of a dramatic nature. In this connection it may be clarified that we are not concerned with the work on a stage or performance in a drama (which may be of several types) which may or may not be covered by the definition of "dramatic work". Again, the words "fixed in writing or otherwise" would seem to suggest a point of time prior to the acting or scenic arrangement, which requirement would be required to be satisfied before the work can qualify to be a "dramatic work" and secure protection. It is debatable whether the record of the acting or scenic arrangement made on a film after the scene is arranged or acting done or contemporaneous therewith, would be covered by the definition.

We now have to consider whether the performance of the cine artiste would fall within the definition of "cinematograph film" to be found in sub-s. (*f*) of s. 2. The definition only protects film as well as the sound tract which is married to the film proper (i.e. the visual sequences). The copyright in the entire film may cover portions of the film in the sense that the owner of the copyright in the film will be entitled to the right in portions of the film; but this idea or concept cannot be extended to encompass an idea that there would be one owner of the cinematograph film and different owners of portions thereof in the sense of performers who have collectively played roles in the motion picture. In this connection reference may be made to *I. P. R. Society* v. *E. I. M. P. Association.*[1] In para. 21 of the report Krishna Iyer J. in an aside (as expressly indicated in para. 20) refers to cinematograph film in the following words (p. 1452):

1 [1977] A.I.R. S.C. 1443.

"A cinematograph is a felicitous blend, a beautiful totality, a constellation of stars, if I may use these lovely imageries to drive home my point, slurring over the rule against mixed metaphor. Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance and dialogue and, indeed, more than dramatic story, exciting plot, gripping situations and marvellous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities. Copyright in a cinema film exists in law, but S. 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any 'work' notwithstanding its confluence in the film. This persistence of the aesthetic 'personality' of the intellectual property cannot cut down the copyright of the film qua film."

These words, however, do not take the case of the cine artiste any further. The question is: whether he has any copyright in his performance? If there is and it is covered by the definition of 'work' to be found in sub-s. (*y*) of s. 2, then it will be protected notwithstanding that the copyright in the entire film, the composite work, may vest in the producers. If, however, the performance of the cine artiste does not satisfy this definition, then there is no question of any dichotomy and co-existence, since there is no 'work' in the cine artiste's performance which is protected by the Act. In the view that we have taken of the definition of "artistic work", "dramatic work" and "cinematograph film", it would appear that the Copyright Act, 1957, does not recognise the performance of an actor as 'work' which is protected by the Copyright Act. It may be pointed out that apart from the Supreme Court case earlier referred to viz. *I. P. R. Society* v. *E. I. M. P. Association,* we had not been referred at the Bar to any judicial decision of the Supreme Court or of a High Court in India or of any English Court in connection with the claim of copyright of a cine artiste in his performance considered apart from the copyright in the entire film. Accordingly the matter appears to be *res integra* and is required to be decided in accordance with the statutory provisions.

As digression, to utilise the metaphor of Krishna Iyer J. in the above Supreme Court decision, it would appear to us that the film in its entirety viz. the mixture or blend in its totality is protected as also perhaps the small portions of the mixture or blend. The protection, however, is not available to certain components and elements of this mixture viz. the actor's performance but may be available to the story, screenplay, scenario, or the music, in case these satisfy the requirement of a written or similar record.

Even if we were to proceed on the footing that there is such copyright limited to his performance in the artiste which was vested in him expressly by the agreement dated August 1, 1974, it would not follow that the cine artiste would be entitled to the injunctions as he has sought for. If we were of the opinion that by the very agreement or subsequently he has allowed the producers the right to release the picture unconditionally in certain territories and only preserving for the protection of his interest certain specified or limited areas, certainly a cine artiste possessing such copyright (assumed) will be entitled to protection; but such protection also must be in accord with the provisions of the agreement and cannot be allowed to travel beyond it. In other words, applying the above considerations to the actual agreement, the submission was that even on the assumption that the cine artiste did possess the copyright in his performance, he had either given a licence to the producers to exploit the picture in the territories not specified in cl. 6 of the agreement or had indicated that he had no objection to such release or exploitation in these territories and therefore, considering either as a licence or as an enabling provision, relief by way of injunction was required to be refused in respect of these territories. In the view that we have taken that there is no such copyright (as protected by the Copyright Act, 1957), it is unnecessary to consider the result of such submission. But it appears that there

is considerable force therein. However, in order to succeed as a result of such submission, the producers have to establish satisfactorily that there was no restriction on the producers in respect of the territories not specified in cl. 6 of the letter dated August 1, 1974 and there was no negative covenant or prohibition against the producers in respect of the non-specified territories.

It is, therefore, necessary to consider whether under cl. 7 of the said letter of August 1, 1974 the bargain between the parties was that until the full amount of Rs. 7,00,000 was paid to the cine artiste, the producers would not be entitled to exhibit the picture at all in any of the territories. It is the cine artiste's case that there was such absolute prohibition with a relaxation to be found in the last sentence of cl. 7 which enabled the producers to release the picture in the seven specified territories mentioned in cl. 6 on payment of the respective amounts mentioned in the said clause. This, however, according to learned counsel for the cine artiste, could not affect the prohibition against the release of the said picture in all other territories not mentioned in cl. 6, which would include the Overseas and the Bombay circuit as known to the film trade. It was submitted by him that unless the last sentence of cl. 7 is read in the manner as suggested by him as containing a relaxation or enabling the producers in certain contingencies to get out of the absolute bar imposed by the earlier part, it would mean that there are two prohibitions or negative covenants to be found in cl. 7—(i) the wider absolute one covering all territories, and (ii) the one to be found in the last sentence, a restricted one, pertaining only to the seven territories mentioned in cl. 6. In connection with this aspect of the argument it was submitted that where a wider right was conferred under the earlier part of the disposition or agreement, the later direction should be disregarded as an unsuccessful attempt to restrict or abridge the wider right already conferred. In this connection the learned counsel for the cine artiste cited before us a decision of the Supreme Court in *Ramkishorelal* v. *Kamalnarayan*,[2] where the aforesaid principle of construction is indicated with approval in para. 12 of the report. It is, however, to be noticed from this very decision that an attempt is required to be made in the first instance to read all paragraphs of a document harmoniously if possible. Further—and this caveat is indicated by the Supreme Court itself—if it is found with some certainty that an absolute or a wider right is earlier given, then only the later purported curtailment or restriction thereof may be ignored or disregarded. In the case of the document under consideration i.e. the letter dated August 1, 1974, when cls. 6 and 7 thereof are read together harmoniously, as we must do, it is impossible to hold that any wider prohibition was imposed on the producers or an absolute right given to the cine artiste, as contended on his behalf, pertaining to all territories including the territories other than those specified in cl. 6. The words containing this alleged wider prohibition themselves suggest and indicate that the restriction or prohibition in confined to the seven territories mentioned in cl. 6. This will be found and must be the effect to be given to the words "until full payments as per clause 6 above are secured". Read in this manner, we will find no conflict between these words and the last sentence of cl. 7, nor will we be forced or constrained to read the last sentence of cl. 7 as the enabling provision or relaxation by way of *locus penetentia* given to the producers, mitigating or reducing the rigour of the absolute earlier prohibition. On a proper reading of the letter dated August 1, 1974 we have no doubt that the rights secured by the cine artiste were confined to and only for the seven territories mentioned in cl. 6 and these were also the subject-matter of the express negative covenant enjoined against the producers by cl. 7. If that were so, it would follow that there is no negative covenant which could be enforced against the producers in respect of the territories not specified in cl. 6; and even if in

2 [1963] A.I.R. S.C. 890.

respect of these seven territories the negative covenant which can be declared or enforced must be in accordance with what is provided therein. It may be mentioned here that the order passed by us on February 27, 1978 is expressly in accordance with what is provided in cl. 6 as modified by the letters dated December 3 and 4, 1976 though in respect of one territory viz. the Bengal circuit, our order provides for retaining in Court the amount of Rs. 3,00,000 (three lakhs) as it had been contended by the producers that there is payment in respect of this amount though no receipt was passed.

It was submitted by counsel on behalf of the producers that if the bargain between the parties was not clear and unequivocal and it was capable of either construction, then the benefit of the doubt must be given to the producers as it was the cine artiste who was applying to the Court for necessary relief by way of interim injunction. On the other hand, it was submitted on behalf of the cine artiste that bearing in mind the fact that the provisions in the agreement were for protection of the amounts payable to him and as admittedly a large amount is still remaining outstanding, the benefit of the doubt, if any, should go to the cine artiste and he should be protected by necessary deposit even in respect of the territories not specified by cl. 6. It was further submitted on behalf of the producers that applying the principle of balance of convenience also, relief was required to be refused to the cine artiste at the interim stage since the injury which was likely to be caused to the producers by granting such relief in a doubtful case was far likely to outweigh the injury to the cine artiste who was refused release in such a doubtful case at the interim stage. Finally, it was submited on behalf of the producers that if proper construction of the agreement was doubtful and the rights and obligations of the parties not clear, the injunction ought to be refused in respect of the unspecified territories as rights of third parties were likely to be affected and the third parties prejudiced, particularly the distributors who had secured the rights in respect of the Bombay and Overseas circuit on payment of substantial amounts. Reliance was also placed on the release of the picture in the East Punjab territory, which is one of the territories not specified in cl. 6. We do not wish to base our order on the release in the East Punjab territory or on the purported agreement with G. N. Shah (HUF) for the Bombay and Overseas circuit. These involve disputed questions of fact which cannot be satisfactorily decided on affidavits. We have based the order to be made in the appeal which is in accordance with the order earlier made by us on the Notice of Motion on a proper reading of the agreement of August 1, 1974 which contains the bargain between the parties. We have construed the agreement applying the principle of harmonious construction as enunciated by the Supreme Court in *Ramkishorelal's* case above cited.

If there had been some doubt in our mind as to the proper construction to be placed on the said agreement, it is found that this doubt is resolved and the position clinched in favour of the producers by reason of the letters dated December 3 and 4, 1976, part of exh. B (collectively) to the plaint. These letters do not constitute mere communication between the producers and the cine laboratory. The letter of the cine laboratory encloses a photostat copy of the producer's letter and is subsequently addressed to the cine artist; the same is duly confirmed by him at the foot thereof. Thus we must proceed on the footing that the arrangement recorded in these letters which is confirmed by the cine artiste is in accordance with the bargain between the parties. We have then to consider whether the arrangement recorded in the letters is consistent with the claim of the cine artiste to have a negative covenant in respect of all territories or is more consistent with the claim of the producers that there was no protection or prohibition *qua* the unspecified territories i.e. the circuits not specified in cl. 6. It may be mentioned that by these letters the seven territories specified in the ear-

lier letter are again mentioned though the amounts provided against them, on payment of which release can be made in the territories, have been altered. To turn first to the letter of the producers to the laboratory, we find in the penultimate paragraph an agreement and undertaking to the effect on the part of the producers that they would not direct the laboratory to deliver any release print or prints for the seven circuits mentioned in the letter (identical with the seven circuits mentioned in cl. 6 of the letter of August 1, 1974) till certain dues as specified remain with the laboratory for payment to the cine artiste. The cine laboratory thereafter on the next day addressed their letter to the cine artiste confirming that they would not part with the release prints of the motion picture for the said seven territories until the amounts specified against each territory are available for being paid to the cine artiste. The letter concludes with the following words: "Please note that we shall not be responsible or liable in any manner, if any print or prints delivered to any other territory are released directly or indirectly in the above territories or part thereof." It is this letter of the laboratory together with the enclosed photostat of the letter of the producers which is confirmed by the cine artiste. Now, what does this letter indicate? It indicates that the obligation not to release the print or prints of the film is restricted to the seven territories or circuits specified in the letter which are identical with the seven territories specified in cl. 6 of the agreement dated August 1, 1974. In the final paragraph the Cine Laboratory claims protection in respect of any misuse which may be made by the distributors or exploiters or exhibitors in the circuits or territories other than these seven and this clearly postulates, in our opinion, that such release was not protected or prohibited but was contemplated, which is in accordance with the construction sought to be put on the agreement dated August 1, 1974 by the producers and is expressly contrary to the construction sought to be put on that agreement by the cine artiste. Our attention was drawn to similar provisions to be found in the letters addressed by the laboratory to Mavani and G. N. Shah. It was submitted that these were identical paragraphs included by the laboratory in all their correspondence seeking a similar protection against misuse and must not be regarded as qualifying or restricting or clarifying the rights of the parties, which would depend only upon the proper construction to be put on the agreement dated August 1, 1974. It is, however, to be noted that whereas Mavani was concerned with the East Punjab Territory only and G. N. Shah with Bombay and Overseas circuits only and therefore not concerned with or entitled to any right in other territories, the cine artiste claims right not merely in respect of the seven specified territories but an absolute and wider right in respect of all other territories. What may be proper to be put in the case of Mavani and G. N. Shah would appear to be totally improper to be put in the letter addressed to the cine artiste if he had any right in the territories other than the seven specified in that letter. The very fact that he had confirmed the letter of the laboratory would seem to suggest that the rights of the cine artiste are restricted only to the seven specified territories and do not extend to the other unspecified territories. This is fully in accord with the interpretation which we have put on cls. 6 and 7 of the agreement dated August 1, 1974.

One final fact may be mentioned. The only correspondence between the parties prior to the filing of the suit is the cine artiste's advocate's letter dated December 10, 1977 which confirms a telegram having been sent on that day, which is fully set out. It may be mentioned that in the said telegram the claim of the cine artiste is founded on a claim of copyright in the picture and not on any express negative covenant or prohibition. It would not be proper, however, to construe an agreement or agreements by reference to what is stated in this letter inasmuch as it is obvious that it was addressed in a hurry and was merely the record

of a telegram which by its very nature cannot indicate fully all the contentions of the parties.

In the view that we have taken of the proper construction of the agreement, we find that the rights of the cine artiste are restricted to the seven specified territories, which would mean that any injunction to which he is entitled must at present be restricted to the Bengal, Nizam, Tamil Nadu and Andhra territories (since it has been released in the other three). By our order dated February 27, 1978 we have in the Notice of Motion in the appeal modified the wide injunction granted by the trial Court and restricted the injunction for the cine artiste only to these four territories in the manner as indicated in our order. As that order was in the Notice of Motion pending the hearing and final disposal of the appeal, which is being disposed of finally by this judgment and order, we pass the very same order in this appeal in the following terms:

The appeal is allowed and the order passed by Gadgil J. on January 3, 1978 in the Notice of Motion is set aside and the same shall stand substituted by the following orders and injunctions:

Pending the hearing and final disposal of the suit, the defendants No. 1 to the suit are restrained in terms of prayer (h) (i), (h) (ii) and (h) (iii) of the plaint from releasing the said motion picture "DARLING DARLING" in the territory known to the film trade as the Bengal territory before depositing in this Court the sum of Rs. 4,00,000 (four lakhs).

Pending the hearing and final disposal of the suit, the defendants No. 1 are restrained in the above terms from releasing the said motion picture "DARLING DARLING" in the Nizam territory before depositing in this Court or paying to the plaintiff the sum of Rs. 75,000 (seventyfive thousand).

Pending the hearing and final disposal of the suit, the defendants No. 1 are restrained in the above terms from releasing the said motion picture "DARLING DARLING" in the Tamil Nadu territory before depositing in this Court or paying to the plaintiff the sum of Rs. 25,000 (twentyfive thousand).

Pending the hearing and final disposal of the suit, the defendants No. 1 are restrained in the above terms from releasing the said motion picture "DARLING DARLING" in the Andhra territory before depositing in this Court or paying to the plaintiff the sum of Rs. 25,000 (twentyfive thousand).

It is declared that the plaintiff is not entitled to any interim injunction in respect of the territories other than the four territories designated above, with the result that the interim injunction in respect of the release of the said picture for all other territories, which had been granted by the trial Court, is set aside. Indeed, by our order on the Notice of Motion we have already vacated the interim injunction in respect of these territories.

In the event of the defendants No. 1 depositing in this Court the sum of Rs. 4,00,000 (four lakhs) prior to the release of the said picture in the Bengal territory as hereinabove ordered, the plaintiff to be at liberty to withdraw therefrom the sum of Rs. 1,00,000 (one lakh). The balance of Rs. 3,00,000 (three lakhs) to be kept as deposit pending the hearnig and final disposal of the suit. The Prothonotary and Senior Master is directed to invest the same in fixed deposit in the State Bank of India or any other nationalised bank for a period of 13 (thirteen) months in the first istance; such deposit to be renewed from time to time for each subsequent period of 13 (thirteen) months in the principal amount together with the accrued interest until further orders of the Court.

In case the other amounts for the other territories are deposited in this Court, the same to be paid to the plaintiff.

As the appeal has succeeded, the appellants are entitled to the costs of the appeal as well as the costs of the Notice of Motion in this Court and before the trial Court. These costs are quantified in the aggregate at Rs. 1,500 (one thousand and five hundred). The appellants are also entitled to the usual order

for refund of the amount deposited by them in this Court as security for costs of the appeal. There will be orders accordingly.

Mr. Desai on behalf of the cine artiste applies for continuation of the *status quo* and for stay of the order passed in this appeal.

In our opinon, the application is totally misconceived inasmuch as the order passed in appeal merely confirms the order which we made on the Notice of Motion in the appeal, which order was passed on February 27, 1978. Thus the *status quo* existing today is in accord with the final orders passed in appeal. There can be no question of any stay therefore or of reviving the order which was in force prior to February 27, 1978.

Mr. Desai then applies for a certificate under art. 133(*1*) of the Constitution of India for leave to appeal to the Supreme Court of India. Mr. Desai submits that the claims of a cine artiste of the nature involved in the suit are decided for the first time and the question whether the Indian Copyright Act, 1957, would protect his performance is now decided by this order.

The ultimate order, in our opinion, mainly turns upon the proper interpretations of the agreement dated August 1, 1974 and we are, therefore, of opinion that this is not an appropriate case for the grant of a certificates under art. 133(*1*) of the Constitution as it now stands. The application of Mr. Desai is, therefore, rejected.

The Prothonotary to act on the minutes of this order on the usual undertaking of the appellants' advocate to have the order drawn up.