

IN THE HIGH COURT OF NUJRANEZ
WRIT JURISDICTION

**CASE CONCERNING THE ACQUISITION OF THE
THEMATIC AREA BY THE STATE OF NUJRANEZ**

ASSOCIATION OF ARTISTS

APPELLANT

VS

STATE OF NUJRANEZ

RESPONDENT

BRIEF FOR THE APPELLANT

ON SUBMISSION TO THE HIGH COURT OF NUJRANEZ
1998

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LIST OF ABBREVIATIONS

1. Berne Convention - Berne Convention On The Protection Of Artistic Works 24 July 1971 (Paris)
2. G.A. Res. - General Assembly Resolution.
3. I.L.O. 169 - Convention Concerning Indigenous and Tribal People In Independent Countries, 1957.
4. Int'l Law Review - International Law Review.
5. TRIPS Agreement - Agreement On Trade Related Intellectual Property Rights, 1994.
6. U.N. Doc - United Nations Document.
7. UNESCO Convention Model Provision for National Laws, 1985 - UNESCO Convention on Model Provision for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1985
8. UNESCO Convention 1970 - UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 Nov. 1970.
9. U.N.G.A.O.R. - United Nations General Assembly Official Records.
10. W.T.O. - World Trade Organization.

INDEX OF AUTHORITIES

TREATIES AND AGREEMENTS

1. Berne Convention for the Protection of Literary and Artistic Works dt. 24 July 1971 (Paris).
2. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November, 1970.
3. UNESCO Convention on Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions 1985.
4. Charter of Economic Rights and Duties of States 1974.
5. Charter of United Nations, 1945.
6. World Heritage Convention, 1972.
7. International Labour Convention, 169. Convention Concerning Indigenous and Tribal People in Independent Countries, 1957.
8. Agreement on Trade Related Intellectual Property Rights, 1994.
9. Universal Declaration on Human Rights, 1948.

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STATEMENT OF JURISDICTION

Article 41 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) clearly establishes the obligation of every State, party to this agreement, to provide necessary enforcement procedures, under their own law for any act of infringement occurring within their territory. The state of Nujranez is a party to the TRIPS Agreement.

Moreover, Nujranez is a common law country and the acquisition has been done by the State in violation of the most basic right of the artists, i.e., the right to control the uses, to which their creations are put. Hence, the High Court of Nujranez can try this case under its writ jurisdiction.

STATEMENT OF FACTS

In the year 2000, a common law country, by the name of Nujranez, is hosting a grand six month exposition, Nujranez is not a Berne Convention or a Universal Copyright Convention Signatory although it is a member of the WTO. Designers from 10 countries were invited by the Government of Nujranez to design thematic areas on various themes. Vurd, a famous designer from a civil law country, Dnanajar, having a long history and hundreds of tribal communities and indigenous people, in preparing his theme “living with nature”, contacts many artist for their contributions to his thematic area. There were three groups of contributors. The first group are those who have contributed motifs, art works and other folklore material which is in public domain but yet belonging to a well defined community of Dnanajar. The second are small artists who have created works, be their paintings, logos, art form, musical compositions, lyrics etc. They are very conscious, however, that their contributions should not be distorted; and the third well-known artists including sculptors, musicians, lyricists and writers who do not intend to assign their rights but may be willing to give exclusive licenses till the end of the six month Exposition. They were not, however, willing to give any form of electronic rights whether relating to video or the internet. Vurd, along with the other designers, creates a grand work putting together all the composite elements. Under the contract, he was to create the design for a thematic area of 50,000 sq.ft. but unable to control this factor, he produces of 70,000 sq.ft. The government of NUJRANEZ asks Vurd to abide by the terms of the contract and the reduction is done under Vurd’s supervision.

The exposition is a big success. At the end of the exposition, the Government of NUJRANEZ passes a law acquiring the entire thematic area created by Vurd. Vurd is, within two weeks of the date of the acquisition, to be paid ND 2 million. At the same time, the Government of Nujranez places an advertisement in all the leading newspapers of the country inviting tenders from film producers to make a documentary on the thematic area created by Vurd. An Earnest Money Deposit (EMD) of ND 45,000/- is to be enclosed with the tender. All the artists, who had made their contributions, form an Association of Artists (AA) and file a writ petition before the High Court of Nujranez seeking a quashing of the order of acquisition as being violative of their rights.

STATEMENT OF ISSUES

1. Whether the State of Nujranez is empowered to acquire the thematic area?
2. Even if the State has the power to do so, whether the acquisition is procedurally valid?
3. Whether the preparation of a documentary is an infringement of the artists rights?

SUMMARY OF ARGUMENTS

The applicant (Association of Artists) submits that the respondent (State of Nujranéz) has clearly acted in excess of its powers by acquiring the thematic area designed by Vurd with the contributions from various artists, who contributed them for the specific purpose of preparing the thematic area for the exposition. The acquisition and simultaneous efforts at making a documentary are a clear violation of the well recognised right of the artists to control the use to which their creations are put and also their copyright.

A substantial part of the contributions are in the nature of folklore material belonging to a well defined community of Dnanajar for which no individual can own a copyright. In order to acquire this material and to prepare a documentary on the same it is necessary that the permission of the community or the appropriate authority in Dnanajar be obtained and Nujranéz has failed to do so. The other artists who have contributed to the thematic area have either stated that their works should not be distorted or have clearly reserved the video and internet rights to themselves. The circumstances being so the act of preparation of a documentary is a violation of the artists rights. Further, the act of acquisition is invalid in that the compensation was paid to Vurd who does not hold the copyright in the material and only the thematic area created by Vurd with contributions of artists from Dnanajar was acquired which is therefore discriminatory in nature.

It is therefore submitted that the acquisition of the thematic area is invalid and the efforts at making a documentary are a further infringement of the rights of the artists belonging to the applicant association.

ARGUMENTS ADVANCED

1. THE STATE OF NUJRANEZ IS NOT EMPOWERED TO ACQUIRE THE THEMATIC AREA

1 (a) The contributions to the thematic area was specifically for the purpose of the exposition

The State of Nujranez had invited the designer Vurd along with 9 (nine) other designers to design thematic areas according to various themes.¹ The State entered into a contract with the designer for the purpose of designing a thematic area based on the theme ‘living with nature’ for an area of 50,000 sq.ft.² It was in pursuance of this contract that the designer had acquired the works of artists from his native State ie, Dnanajar.

The artists made the contributions specifically for the purpose of preparation of the thematic area for the exposition and a substantial number of the artists especially the well-known artists reserved the video and internet rights to themselves.³

¹ 1998 Raj K Anand Moot Court Competition on Intellectual Property Law at para 1, hereinafter called Facts of the case.

² Id para 2 and 6

³ Id. para 5.

Further the Agreement on Trade Related Intellectual Property Rights⁴ and hence the Berne Convention⁵ and several other conventions and declarations, ⁶ clearly place upon the State a duty to protect the intellectual property rights and also the traditional resource rights of all people engaged in creative work. In such circumstances the act of acquisition of the thematic area by the State of Nujranez is not only a violation of its international obligation but also a breach of the trust placed in the State by the artists belonging to the applicant association.

1 (b) The thematic area and its components being the product of the artists intellect cannot be treated like other property

The various components of the thematic area were acquired by Vurd from the artists belonging to the applicant association, for the purpose of preparing the exhibit.⁷ The artists have created this work employing their artistic talent and effort. It therefore stands to reason that the creative output of these artists' efforts should not be treated on the same footing as other kinds of property.

4 Agreement on Trade Related Aspects of Intellectual Property Rights", part II, Sec I, Art 9, hereinafter called TRIPS agreement.

5 Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971), Art 9, hereinafter called the Berne Convention.

6 International Labour Organisation 169, Art 2, WIPO-Copyright Treaty Nov.1970, Art 1(2), UNESCO Convention on the means of prohibiting and preventing the Illicit import, export and transfer of ownership of cultural property 17 Nov.1970. Universal declaration of Human Rights, Art 27, Preamble.

7 Facts of the case at para 2-5.

The basic reason for protection of intellectual property is that a man should own what he produces and if it can be taken away from him, he is no better than a slave.⁸ Human genius is the source of all works of art and invention. These works are the guarantee of a life worthy of men. It is the duty of the State to protect the arts and inventions with care.⁹

The copyright in a work cannot be taken away from the author of a work in the same manner as in some real property or personal property for which the only remedy is appropriate compensation.¹⁰ The copyright is really *sue generis*,¹¹ since its assignment and inheritance follow rules specifically laid down for it and hence, it cannot be treated in the same manner as personal property along with which it is quite often classified.

1(c) The State has an additional obligation to protect the artist rights in the work, which is an expression of their culture

The State of Nujranez being a member of community of States has a duty to abide by the norms of international law recognised by all States.

⁸ David Bainbridge, *Intellectual Property* p.17(3rd.ed.) (1996).

⁹ Vincent Porter, *Beyond The Berne Convention*, p.1,(1st ed., 1991)

¹⁰ Charter of Economic Rights and Duties of States, Art.2, (1974). See also D.J.Harris, *Cases and Material In International Law* pp.526-527 (4th ed.), (1991).

¹¹ Jeremy Phillip and Firth Allison, *Introduction to Intellectual Property Law*, p.125, (3rd ed.) (1995).

The very charter of the United Nations¹² places an obligation upon every State to co-operate in matters of economic, social, cultural or humanitarian character. This aspect, of the obligation of all States has been stressed upon by the General Assembly of the United Nation in its resolution.¹³

The thematic area being composed of sculptures and paintings of outstanding value ought to be considered as a cultural heritage.¹⁴ The work is also a cultural property according to the definition provided in the UNESCO convention.¹⁵ It is essential for every State to respect its own cultural heritage and that of all nations.¹⁶ Further, due to the fact that cultural property constitutes one of the basic elements of civilization and national culture and its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,¹⁷ it is necessary that the said thematic area be restored to its true owners and hence to the State of Dnanajar from where it originates.

It is submitted that the thematic area created by Vurd with the contributions of various artists is part of the cultural heritage of the State of

¹² Charter of U.N. Art.1(3).

¹³ G.A. Res 47/75, 47 U.N.GAOR Supp (No.49) at 32 U.N.Doc.A/47/49 (1992). See also G.A.res 46/128, adopted by the General Assembly on 17th Dec 1991.

¹⁴ World Heritage Convention, Art 1.

¹⁵ UNESCO convention, Art 1(g).

¹⁶ Id. Preamble.

¹⁷ Id.

Dnanajar, according to the provisions of UNESCO convention,¹⁸ because of the fact that the entire work is the product of the collective genius of its own nationals.

The UNESCO-WIPO model provision for National Laws states that the expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in the same manner as intellectual property rights.¹⁹ Further, it also clearly states that authorization must be obtained for the use of such folklore material whether it be reproduction, publication or transmission to the public in any form.²⁰ The contributions of the artists (belonging to Group I and to a great extent those of Group II and Group III also) constitute folklore and deserve to be protected as such.

Thus it is submitted that the components of the thematic area being the cultural heritage of the people of Dnanajar and the cultural property of Dnanajar has been wrongly acquired by Nujranез in total violation of its obligation²¹ to the entire world community, an obligation *erga omnes* to protect and respect cultural heritage of all people.

¹⁸ See supra note 14, Art 4(a).

¹

⁹ UNESCO-WIPO Model provisions for National Laws on the protection of expression of Folklore against illicit exploitation and other prejudicial actions, 1985, Preamble.

²⁰ Id. Sec Q8 See also Ploman W.Edward and L.Clarke, *Copyright - intellectual property in the information age*, p.155, (1st ed.), (1989).

²¹ ILO Convention 169, Art 2 and Art 23.

2. EVEN IF THE STATE IS EMPOWERED, TO ACQUIRE THE THEMATIC AREA, THE ACQUISITION IS INVALID

The provisions of the TRIPS agreement of which the State of Nujranez is a member by virtue of its being a member of the WTO²² clearly provides that if an acquisition of any intellectual property is made, the State while doing so is bound to follow procedures that are fair and equitable.²³ The State, in its act of acquiring the thematic area in an arbitrary and unfair manner has violated its obligation under international law, to carry out in good faith the provisions of treaties to which it is a member.

2(a) The copyright in the thematic area vests with the artists

The real owners of the copyright in the thematic area are the artists and not Vurd. This is especially so with respect to artists belonging to Group III who have given license exclusively for the exposition and reserved to themselves the right of video and internet.²⁴

The artists belonging to Group I whose contributions are in the nature of folklore, be it motifs or artworks have also not given any right to Vurd except to use their work in the preparation of the thematic area. Moreover the rights in these materials being in the nature of traditional resource rights can

²² Facts of the Case at para 1.

²³ Supra note 4 at Art 62(4), read with Art 41.

²⁴ Facts of the case at para 5.

belong to no human being individually²⁵ and hence, the respondent cannot acquire any rights in their works. The acquisition of the work by the State is also a violation of the right of the artists under the Universal Declaration of Human Rights according to which the creators ought to have the right to control the use of their work.²⁶ The acquisition of the work and subsequent documentary of the thematic area is in reality, an exploitation of the cultural heritage of Dnanajar.²⁷

Further, the thematic area being a compilation of works of artistic nature, there is no copyright in it for the designer Vurd.²⁸ In view of it, the copyright in the works, clearly vests with the artists belonging to the Association of Artists and not the person who designed it.

2(b) Compensation was paid to Vurd and not to the artists

Even if an acquisition of foreign property, within the territory of a State is authorized by law, international law provides that such State must provide appropriate compensation.²⁹

²⁵ World Wide Web, [http:// users.ox.ac.uk/~wgtrr/trr.htm](http://users.ox.ac.uk/~wgtrr/trr.htm).

²⁶ Universal Declaration of Human Rights (1948), Art 27.

²⁷ UNESCO-WIPO Model provision for National Laws, Preamble. See also, Mauch Phyllis Messenger, *Ethics of Collecting Cultural Property*, pg.8,9, (1st ed.), (1989).

²⁸ Jon Holyoak and Paul Torremans, *Intellectual Property Laws*, p.151, (1st ed.), (1995).

²⁹ The Charter of Economic Rights and Duties of a State, 1974, Art 2(2)(c).

This has also found recognition in various cases³⁰. The obligation of the State to provide appropriate compensation has not been satisfied by the State as the compensation ND 2 million, has been given to Vurd and not to the artists.³¹ A compensation paid to someone who is not, the owner of the property acquired cannot be appropriate under any circumstances.

2(c) The acquisition is discriminatory in that it was confined to the thematic design created by Vurd

Another aspect in expropriation of foreign property, is that such acquisition should not be discriminatory in nature. This has been recognised by international law in several cases.³²

In the present case the thematic area created by Vurd with the works of the artists of Dnanajar alone was acquired by the State of Dnanajar.³³ This is clearly an instance of unfair discrimination on the part of the State in that the works created by the other 9 designers was not acquired by the State.

30 AMOCO case-15 Iran-U.S.CTR 189, see also D.J.Harris, *Cases and Materials on International Law* (1st ed.,1991). Anglo-Iranian Oil Co. case I.C.J.Rep.1952, p.1. See also, Hillier, Tim, *Source Book on Public International Law*, p.1,'30, (1st ed.), (1998). Aramco case 27 ILR, p.117, (1963).

31 Facts of the case at para 8.

32 Supra note 30.

33 Facts of the case at para 8.

Therefore it is submitted that the act of the State of Nujranez, namely that of acquiring the thematic area created by Vurd, even if permitted by law, is invalid in that it was not only irregular because of the fact that the compensation was paid to a person other than the owner of the copyright but also discriminatory in that only the thematic area created by Vurd was acquired and hence the acquisition is liable to be set aside.

3. THE PREPARATION OF A DOCUMENTARY WILL FURTHER VIOLATE THE ARTISTS RIGHTS

Preparation of a documentary is a recording in sound and visual medium and it is therefore a reproduction .³⁴ The copyright in the composite work, as already stated before belongs to the Association of Artist and any reproduction of the work has to be done with the permission of the owners of copyright³⁵. The government of Nujranez has initiated the process of preparation of a documentary even before acquiring the thematic area according to their own newly enacted law .³⁶ The very fact that the State has acquired the work immediately after the successful exposition and called for tenders to prepare a documentary demonstrates the likely hood of the State exploiting the work commercially and denying the artists any benefit from it.

The artists have clearly stated that their works should not be distorted³⁷ and many of the artists have reserved to themselves and rights relating to video or internet³⁸.

The acquisition of the work against the wishes of the artist and preparation of the documentary without any involvement of the artists or their supervision will render the works of the artists likely to be distorted, which is clearly against their expressed wishes.

³⁴ Supra note 5, Art 9(3).

³⁵ Id. Art 9(1). See also UNESCO – WIPO Model Provisions for National Laws, Sec.3.

³⁶ Facts of the Case at para 8.

³⁷ Facts of the case at para 4.

³⁸ Facts of the case at para 5.

THE PRAYER

Wherefore, it is prayed that this Hon'ble Court be pleased to issue a writ ordering and declaring that,

1. The State of Nujranez is not empowered to acquire thematic area.
2. The acquisition of the thematic area by the State is invalid, in that the procedure was unfair and arbitrary.
3. The preparation of a documentary will infringe the artists' rights and the State is prohibited from doing so.