

This is a brief for appearance on behalf of the Respondent

IN THE HIGH COURT OF NUJRANEZ

Writ Petition (Civil) No.. /2000

*A Writ Petition filed before the Hon'ble High Court of Nujranез
by the Association of Artists, seeking the quashing of the order of
acquisition as being grossly and flagrantly violative of their rights*

ASSOCIATION OF ARTISTS (AA).....(PETITIONER)

V.

STATE OF NUJRANEZ.....(RESPONDENT)

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THE INDEX OF AUTHORITIES

1. Prior Vs Landsdowne Pree Pty. Ltd, [1977] RPC 511
2. Heptulla V Orient Longman, (1989) FSR 598
3. Interlego A.G V Tyco Ind. Inc, (1988) RPC 342
4. Scott Vs Satamford, LR3 Eq, 723,
5. Macmillan & Co. Ltd V Cooper (1923) 40 TLR
6. Univ of London Press Ltd V Univ tutorial press ltd, (1916) 2ch, 601
7. Ladbroke(football) Vs William Hill (football))Ltd, (1964) 1 WLR 273
8. Price V Easton (1833)4 B&AD,433;
9. Tweedle V Atkinsan (1861) 1 B & S, 393

Books referred to and authorities thereunder:

- Copinger and Skone James on Copyright, 13th ed,
- Intellectual Property – Bainbridge,
- Copyright law - a comparative study - Dr F Mustafa
- “Whale on Copyright” – Jeremy Philips, Robyn Durie and fan Karet, 5th ed, 1997
- Cases and materials on IPR — W.R Cornish, 2nd ed, 1996
- J.E Stewart- International Copyright and Neighbouring rights,
- IPR law – Prof Sangal and Prof Ponnuswamy,
- Modern law of copyright – Laddie, Prescott and Vitoria
- Fleet Street Reports, Copyright World
- International review of Industrial Property and Copyright law (IIC), vol 1 8 to 28.

Statement of Jurisdiction

The Hon'ble High Court of Nujranetz does not have Jurisdiction to entertain this Writ Petition. To avail of the protection of the Berne Convention and the TRIPS agreement a country has to be a signatory to this vide Art 3 of the TRIPS agreement and Art 2 to 5 of the Berne Convention. It is not stated to that effect in the facts of the case.

Further on assuming that the Country of Dnanajar is a signatory to either the WTO or the Berne Convention, the "Principal of National treatment" applies, vide Art. 3 (1) (a) of the Berne Convention, which reads as:-

Art 3. (1) "The protection of this convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not.

Herein it becomes mandatory to exhaust the local laws of the country wherein the cause of action has occurred. Hence this Hon'ble Court enjoys the Jurisdiction to entertain this Writ Petition (only if above mentioned condition precedent is satisfied).

THE STATEMENT OF FACTS

In the year 2000, a common law country, by the name of NUJRANEZ (pronounced as 'newress') is hosting a grand six month Exposition. NUJRANEZ is not a Berne convention country or a universal copyright country, although it is a member of the WTO. Designers from 10 countries are invited by the Government of NUJRANEZ to design thematic areas on various themes.

Vurd, (pronounced as 'word') a famous Designer from a civil law country, DNANJNAR (pronounced as 'Nayelaya) having a long history and hundreds of tribal communities and indigenous people in preparing his theme "living with nature", so that their paintings, motifs, artifacts, musical compositions, performances and other contributions can be acquired and integrated into a composite work for a thematic area covering 50,000 sq. ft.

There are three groups of contributors, namely:

GROUP 1 ARTISTS:

Those who have motifs, art works and other folklore material which is in public domain but yet belonging to a well defined community of DNANAJAR.

GROUP 2 ARTISTS:

Small artists who have created works, be their paintings, logos, art form, musical compositions, lyrics etc. and are, for an affordable sum of money, inclined to assign all rights to Vurd. They are very conscious, however, that their contributions should not be distorted; and

GROUP 3 ARTISTS:

Well known artists including sculptors, musicians, lyricists and writers who do not intend to assign their rights but maybe willing to give exclusive licenses till the end of the six month Exposition. They are not, however willing to give any form of electronic rights whether relating to video or the internet. These artists enter into deeds which do not specify the period of license.

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 during the designing, he is unable to control this factor and the design gets produced in an area of 70,000 sq. ft.. The government of NUJRANEZ is unwilling to pay for the additional area and insists that the design be cut short.

Vurd expresses impossibility at which stage the governments hold him liable for breach of contract. Vurd says that the art directors over him are at liberty to cut any area that they want but insists that in future if the design is to be reduced or increased, it should be with the supervision of Vurd. Accordingly under the supervision of Vurd the design area is cut short by government.

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 acquisition, to be paid ND 2 Million. At the same time the Government of NUJRANEZ places an advertisement in all 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.

The Artists i.e. Group I, Group II and Group III form an Association of Artists (AA) and file a writ petition before the High Court of NUJRANEZ, seeking quashing of the order of acquisition as being violative of their rights.

THE STATEMENT OF ISSUES

1. Whether this Hon'ble Court enjoys the Jurisdiction to entertain this Writ Petition,
2. Whether the Petitioners have the Locus Standi to approach this Hon'ble Court for issuance of an appropriate Writ,
3. Whether the facts and merits of the case warrant the interference by this Hon'ble Court on the issue of validity of the statute/order acquisition,
4. To what extent are the mandates of the TRIPS agreement, the Berne Convention and the Universal Copyright Convention applicable and binding on the State of Nujranetz,
5. Whether the State of Nujranetz by passing the statute order of acquisition under a statute has violated the inherent rights of the Artists.
6. Whether the Government of Nujranetz is under any obligation vis-a-vis the artists.
7. Whether any Government by passing a Law can interfere in the private propriety rights of individuals,
8. Whether any rights subsisted in the contributions made by the individual groups of artists once their artistic works were integrated by Vurd in the thematic area.

SUMMARY OF ARGUMENTS / PLEADINGS ON BEHALF OF THE RESPONDENTS

– Government of Nujranез

This Writ application has been filed to seek the quashing of the order of acquisition passed under a statute enacted specifically for the acquisition of the thematic area. This is a counter to the same.

The arguments advanced in the subsequent pages can be categorised under the following sub-heads:

1. that this Hon'ble Court does not enjoy the Jurisdiction to entertain this Writ Petition, and if assumed that Djnanajar is a member of the WTO, then Jurisdiction exists,
2. that the Association of Artists does not have the Locus Standi to approach this Hon'ble Court as the order of acquisition does not violate any of their rights,
3. that the State of Nujranез being a signatory to the WTO, is bound by the TRIPS agreement and is not obliged to protect the rights of these artists in light of the principal of national treatment,
4. the contributions of Group 1 artists were in public domain, hence no protection,
5. though the intention of Group 2 artists was to assign all rights for an affordable sum of money, thus inference as to actual assignment having taken place,
6. though Group 3 artists did not mention the period of licence it is clear from their explicit intention that their mind was clear about the license for a much longer term,
7. hence the Slate of Nujranез has passed a legal and valid order and has not violated any of the inherent rights of the Petitioners i.e. their right to intellectual property,
8. in view of the above contentions and keeping in mind that Nujranез paid a sum of ND \$2 million, it is valid transfer of Intellectual property rights, Privity of Contract operates and Nujranез has no obligation or dealing with the artists,
9. the order of acquisition should be upheld as being legal and holds no water in law.

ARGUMENTS / PLEADINGS ON BEHALF OF THE RESPONDENTS
– State of Nujranez

To,

My Lord the Hon'ble Chief Justice and his Lordship's companion judges
of the Hon'ble High Court of Nujranez,

Most respectfully sheweth that:

1. The Respondents in this Writ Application before Your Lordship's is the State of Nujranez (Newness), the issue herein is the challenge to the executive order of acquisition by our government passed under an enabling law-ful statute.

2. The Respondents most humbly submit before your Lordship's that the petitioners do not have any locus standi in the present case as the facts no where state that the country Dnanajar to which these three group of artists belong is either a member of the Berne Union or a signatory to TRIPS agreement vide WTO. Therefore consequences which follow from this fact would be that the works first produced or published in the Dnanajar cannot claim protection in any of member countries of TRIPS agreement and vice-versa.

Your Lordship's **Article 3 of the TRIPS agreement** provides for national treatment in terms similar to those provided for in the Berne Convention, (Article 2 to 5). **Art 3** "provides that each member state will protect the works of the citizens of other member states in the same manner, as its national law protects its own citizens". The principal of National treatment in the copyright conventions providing minimum rights which may be claimed by only those countries who are members to that convention. Thus My Lord's this principal operates on reciprocity. As Dnananjar is not a member of any of the mentioned conventions or the WTO, they are not entitled to avail of this protection (national treatment).

3. Hence this Hon'ble Court has no Jurisdiction to entertain this Writ Application.

4. In an alternate situation, we take the country of Dnanajar to be member of the Berne Union or a signatory to the WTO, this Hon'ble Court would enjoy Jurisdiction on the issue at hand i.e. the National Law of Nujranes is applicable to the Petitioners in view of the principal of National treatment mentioned above and discussed in detail on Jurisdiction page,.

5. Without prejudice to the rights/causes of the Respondent it is most humbly submitted that despite this Hon'ble Court having Jurisdiction and inspite of we being bound by the mandates of the WTO (assuming in a situation that Dnananjar is a member of the TRIPS agreement or the Berne Union), this Writ Petition is not maintainable and is liable to be dismissed on merits (which have been discussed in detail in the preceding paragraphs).

6. Drawing My Lords' attention to the facts of the case:

The Government of Nujranetz invites designers from ten countries to design thematic areas on various themes. Vurd, a famous designer from the country Dnanajar accepting this invitation makes arrangements for "his thematic area" for the theme "living with Nature", there were three groups of contributors to "his theme" – Group 1, Group 2, Group 3 artists.

7. My Lords' the facts are self-explanatory that the three groups of artists in their individual capacity contributed their artistic works to Vurd for the purpose of "his thematic area". In other words, it can be said in simple terms that each group of artists was in a distinct relationship with Vurd i.e. to say that Vurd was dealing with these Groups of artists separately and individually as per their own terms and conditions without any involvement on the part of the Government of Nujranetz.

8. On the other hand, it must be borne in mind that Vurd was the invited designer of Nujranetz and the facts of the case nowhere indicate either expressly or impliedly that there existed some contract or dealing between any artist and the country Nujranetz. As Vurd was engaged / invited to design the thematic area by Nujranetz therefore no right accrues / flows from the artists towards Nujranetz i.e. Vurd was involved with Nujranetz on different platform where these groups of artists had no say thereby no locus standi.

9. My Lordships it is submitted that the facts of the case expressly state that the thematic area designed by Vurd was not a joint work and did not have a joint authorship. Copyright design and Patents Act, 1988 of Great Britain, a common law country, defines joint authorship as "A work produced by the collaboration of two or more authors in which the contribution of each author "is not distinct" from that of the other author or authors". Besides there was no agreement between Vurd and artists to the effect that both the parties should be treated as joint authors. In ***Prior Vs Landsdowne Press Pty. Ltd 1977 RPC 511, SC of Victoria*** it was held that unless express agreement exists between parties to this effect, no joint author ship exists .

10. This thematic area was in fact the brain child of Vurd only and these various groups of artists did not make any contribution in furtherance of a common design. (*Heptullah Vs Orient Longman Ltd 1989 FSR 598 DHC*). Vurd also put in sufficient skill and effort as is evident in terms of it being his creation, though he might have utilised their contributions, it resulted in a new design having new combination of features hence a separate and new copyright (*Interlego A.G V Tyco Industries, Inc. [1988] RPC 342, Scott V Stamford, L.R 3 E.q 723, Macmillan & Co. Ltd Vs Cooper, (1923) 40 TLR 186, University of London Press Ltd Vs University Tutorial Press Ltd. (1916) 2 ch 601 upheld and approved in Ladbroke (Football) Ltd Vs William Hill football) Ltd, (1964)1 WLR, 273.*) Hence it was Vurd's design "Living with Nature" and the three group of artists simply contributed their parts, which Vurd integrated and composed to form "his design" "Living with Nature". Thus Vurd who was the author of the thematic area integrated the contributions of these artists he did not become the co-author with these artists. The final outcome was the composite work over which only Vurd could exercise any right as it being a distinct, new and a different creation.

11. This being the background (which My Lord's must bear in mind) and without prejudice to our submission, we would like to take My Lord's through the individual cases of each of the artists as well.

12. **Group 1 artists** were those who had motifs, artworks, other folklore material but these contributions though in their possession were in the "public domain" (as stated in the facts). It thus becomes imperative to understand the meaning of the term "public domain" and its connotation/implications.

13. Your Lordship's under copyright laws a work is considered to be in public domain where either the term of the copyright protection expires or where an author by his conduct, or by his express desire, abandons his copyright and gives to the public a right to use his work before the period of copyright expires. There is no direct authority on the latter point and it is difficult to say what amount of evidence the court would require as to the fact of a dedication of a copyright to the public, but there are no two opinions on the issue wherein the artistic works are already in public domain, as in our case.

14. Further My Lords' it is humbly submitted that if a work is in the public domain, it does not matter as to why it is in the public domain. It may be because it is not eligible for protection. It may be because the term expired. It may be because essential formalities are not complied with. But the one and only conclusion which flows from the above statements is that the original work in no manner enjoys any copy right protection and the public is free to make use of it.

15. To clarify further it is most humbly submitted that “Public” does not constitute the population of the country or the region to which the original author belongs. The countries which are signatories to the WTO (TRIPS agreement) strongly adhere to the principal of National treatment which means that all the members to the WTO agreement gives a similar treatment to all the citizens of other member countries. Thus, My Lord’s to re-emphasise we submit that the word “Public” among the member nations of the WTO knows no boundaries. Since Nujranез being a signatory to WTO has a free right to make use of such artistic works which are in public domain.

16. Coming back to the facts of the present case, this Hon’ble Court may be pleased to note that the works of group 1 artists were in the public domain when acquired. Moreover, there does not exist a deed / agreement of any kind between Vurd and this group of artists . Or in other words any deed / agreement to such an effect would have been deemed to be infructuous. Thus Nujranез in no manner contravenes or abrogates any rights of the Group 1 artists and the order of acquisition thereunder are therefore valid and should be upheld.

17. In retrospect our second contention is that compilations, adaptations, arrangements translations or other versions of works in the public domain or of copyrighted works when used / produced with the consent of the proprietor of the copyright in such works shall be regarded as new works which would attract separate rights. Thus to say Vurd had a separate right when he acquired the contributions of group 1 artists and Nujranез by acquiring such contributions did not by any stretch of imagination under any branch of law violated their rights. Besides after passing the order of acquisition the defendants i.e. the government of Nujranез paid a considerable sum of money (ND \$2 million) to Vurd (which indirectly to an extent was a payment towards these artists) and his designed thematic area. And this payment is made irrespective of this fact that no rights to these artists existed which were recognised by law . Thus your Lordships the order of acquisition was legal, justified and holds water in law.

18. Drawing Your Lordship's attention to **group 2 artists**, the facts of the present case explicitly state that this group of artists for an affordable sum of money were inclined to assign all rights in their works to Vurd . Though the facts nowhere suggest any kind of actual assignment of all rights by these artists to Vurd, one cannot conclusively deduce from the facts that the agreement to such effect did not exist. This Hon'ble Court should keep in view the very inclination / intention of these very artists to assign all rights to Vurd while construing the relationship between group 2 artists and Vurd. Hence it must be interpreted in a stricto-sensu use of the term "intention to assign", and on such interpretation one cannot but reasonably infer/conclude that an agreement did exist to this effect without which there was no reason as to why Group 2 artists made any contributions towards Vurd's thematic area.

19. One must keep in view that these are particularly those small artists who for an exchange of an affordable sum of money are ready to assign their all rights. At this point your Lordships the meaning of the term assignment becomes imperative. "Assignment" is a legal term which means a complete transfer of ownership. (Unlike licencing where the original owner retains ownership rights and merely allows the Licensee the property, under an assignment the transfer results in passing all rights to a new owner). Your Lordships the fact that this group of artists have expressed their intention to assign makes it obvious that these artists must have entered into some form of agreement to assign their rights to Vurd without which there would be no contribution from group 2 artists in any manner. The question that arises at this juncture is that why this group of artist would convey their intention to Vurd if in contrast they did not intend to transform that very intention into words . Just because our present case does not mention an express agreement to that effect this Hon'ble Court should not construe it as an absence of agreement.

20. Drawing the Courts attention to another fact of the case which is related to the above contention, we would like to show that some form of agreement did exist. It is clear that Vurd was paid ND \$2 million towards the acquisition of his thematic area. This fact goes on to prove that Vurd in effect was paid the above sum towards these artists contributions (can be fairly assumed). One cannot forget that Vurd while accepting this sum did keep in mind the agreement with these artists . Therefore My Lord's this group of artists did not possess any rights over their contributions once they transfer these contributions to Vurd . In retrospect, Your Lordships the impugned order of acquisition does not by any stretch of imagination violate any rights of these artists whatsoever. This order of acquisition did not even make an attempt to violate any of their rights for the very reason that all rights ceased to exist vis-a-vis their contributions once they entered into the assignment with Vurd.

21. **Group 3 artists** were well known artists and had no intention to assign their rights but “may be” willing to give exclusive licences till the end of the six month exposition . Though it is indisputable that they did not intend to assign their rights but they were not even certain whether they were wholeheartedly willing to enter into exclusive licence agreements. Hence these artists enter into deeds which did not specify the period of licence. Your Lordships at this point it becomes definite that they did not exercise the option of providing exclusive licences . The fact that they were uncertain with regard to their willingness to give exclusive licences further strengthens this argument that the deed which they entered into did not provide for an “exclusive” licence. It is because of this apparent reason these group of artists did not intentionally mention /specify the period of licence . Though a licensor is at liberty to provide for a long or short term as per his choice but the case becomes different where the licensor deliberately does not provide for the period of licence in express terms . Thus, irrespective of the fact that they had an intention to give a licence for a particular period only and unless they manifest that very intention into words, deeds merely expressing that intention does not give rise to any rights and liabilities as the present deed in ’ question does not specify the licence period, it can only be deduced legally that it was a licence for an indefinite period. Whenever such kind indefinite period licences are granted the ultimate conclusion which can be drawn is that he wished to relinquish all his rights over his property as it is done by group 3 artists in our present case and it is important to note that licence for indefinite period tantamounts to assignment of all rights. Therefore Your Lordships these group 3 artists ceased to exercise any proprietary rights over their, contributions once they enter into an indefinite licence deed.

22. Furthermore, the application seeking restraining of making of the documentary is pre-mature, as only tenders have been invited. The Petitioners should have no cause of grievance as the documentary is meant to be made for the thematic area as a whole and not any individual group. This in any case is not the primary prayer before your lordship’s.

23. Irrespective of there being a law to the effect of acquisition or not, the Government of Nujranetz, has rightfully acquired the rights in intellectual property by paying Vurd a substantial sum of ND\$2 million, hence the grievance of the Petitioners is misdirected and the doctrine of privity of contract operates (*Price V Easton, (1833) 4 B & Ad 433, Tweedle V Atkinson, (1861) 1 B&S, 393.*

24. Concluding My Lord, we most humbly submit that the stand taken by the Petitioners in the present case is not substantiated in law, is devoid of valid grounds, whether in respect to their locus standi or in relation to their individual cases on merits. In view of the above contentions, for the sake of preserving justice and equity, this petition is liable to be dismissed.

PRAYER

The Respondent most humbly prays and craves for the indulgence of this Hon'ble Court, that this Hon'ble Court may be pleased to: -

1. dismiss this Writ Petition as this Hon'ble Court does not enjoy the requisite Jurisdiction to entertain this Petition,
2. in alternate, dismiss this Writ Petition filed by the Petitioners as being devoid of merits,
3. Uphold the statute order of acquisition as not being violative of any rights of the Petitioners, and further hold it as a valid, legal and proper exercise of sovereign powers,
4. award exemplary costs to the Respondent and against the Petitioners to discourage the filing of such frivolous, vexatious petitions thereby wasting the valuable time of this Hon'ble Court,
5. that this Hon'ble Court may decline the permanent injunction sought for as being inappropriate due to lack of rights, and/or being a premature application,
6. any such orders/directions that this Hon'ble Court deems fit in the bonafide interest of justice and the facts and circumstances of the present case.

FOR THIS ACT OF KINDNESS THE RESPONDENT AS IN DUTY BOUND
SHALL EVER PRAY

COUNSEL FOR THE RESPONDENT