IN THE HIGH COURT OF JUDICATURE AT NUJRANEZ
WRIT PETITION NO. _____ OF 2000

ASSOCIATION OF ARTISTS ...PETITONER

VS

THE UNION OF NUJRANEZ ...RESPONDENT

BRIEF SUBMITTED BY COUNSELS ON
BEHALF OF PETITIONER

TABLE OF CONTENTS

SR.NO	PARTICULARS	PAGE NO.
I	The Index of Authorities	2
II	The Statement of Jurisdiction	3
III	The Statement of Facts	4-5
IV	The Statement of Issues	6
V	The Summary of Arguments	7-8
VI	The Arguments Advanced	9-18
VII	The Prayer	19

INDEX OF AUTHORITIES

TREATISES AND CONVENTIONS

1. General Agreement on Tariff and Trade [GATT] 1994.
2. Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]
3. Berne Convention
4. Universal Copyright Convention

JUDICIAL DECISIONS

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STATEMENT OF JURISDICTION

The Petitioner submits before the jurisdiction of this Hon'ble Court, in filing this writ petition, under the laws of Nujranez, as the cause of action has arisen within the territory of Nujranez.

The Petitioner has filed this writ of Certiorari, as the order of acquisition is violative of their rights.

STATEMENT OF FACTS

In the year 2000 AD, NUJRANEZ, is hosting an exposition wherein designers from ten countries are invited to design thematic areas. NUJRANEZ is a common law country and is neither a signatory to the Berne Convention or to the Universal Copyright Convention. It is a member of The World Trade Organization (WTO).

Government of NUJRANEZ invited VURD, a designer from DNANAJAR, to design a thematic area on the theme – "living with nature". VURD contacted hundreds of artists, sculptors, musicians and performers and acquired their works so that, he could use them in his design.VURD was to use the art works of each of the contributors, to develop a composite design for the thematic area, covering 50,000 sq.ft.

The Petitioner, Association of Artists, is formed by three groups of contributors.

GROUP 1: Well defined communities of men who have motifs, art works and other folklore material.

GROUP 2: Artists who have created works such as paintings, logos, art forms, musical compositions, lyrics, etc., who may want to assign all rights to VURD provided they are paid appropriate consideration. These artists will never permit any distortion of their works.

GROUP 3: Famous artists, including sculptors, musicians, lyricists and writers who will not assign their rights but will, however, only give VURD an exclusive license for the period of the exposition.

These well-known artists will however not permit the use of their art works in any electronic media, like video or the Internet. They are not willing

to give any form of electronic rights. These artists entered into license deeds with VURD, which have not specified the time period. VURD along with other designers creates The Thematic area using the art works of the artists. However, the design exceeds 50,000 sq. ft, as stipulated in his contract with the government, and gets produced for 70,000 sq.ft. The government of NUJRANEZ asks him to cut short his design as they are unwilling to pay for the additional area. VURD says that the art directors above him can cut short any area, but only with the supervision of VURD. The government of NUJRANEZ cuts short the design.

The exposition is a big success. On its completion the government of NUJRANEZ passes a legislation acquiring the thematic area designed by VURD. The law stipulates that VURD is to be paid ND 2 Million within two weeks of acquisition. The government then wishes to make a documentary on the thematic area. It places an advertisement in newspapers and asks for earnest money deposit, along with the tenders.

The artists in Group 1, 2, and 3 have formed The Association of artists(AA) - The Petitioners have filed this writ of certiorari in this Hon'ble court seeking the quashing of the order of acquisition as it violates their intellectual property rights.

STATEMENT OF ISSUES

1. To prove to this Hon'ble court the supersedence of International treaty law over domestic law and whether a state can act in breach of these laws by taking defense of their own municipal laws.
2. To justify to this Hon'ble court the locus standi of the Petitioner in filing this writ petition.
3. The jurisdiction of the high court of the respondent to try the same, since the cause of action has arisen in Nujranez, in accordance with the provisions of International law.
4. To seek a remedy from this Hon'ble court for the rights that have been infringed by this order of acquisition by the respondent, since it contravenes various provisions of International conventions which the respondent is a party to and are now bound by.
5. The extent of applicability of the relevant provisions of the Berne Convention which are applicable by virtue of such an act of the respondent.
6. Whether Vurd has any rights, in either case assignment or license, to authorize sale.

SUMMARY OF ARGUMENTS

1. Nujranez is a common law country, which by definition is a state comprising of a body of principles derived from usages and customs or judicial precedents. The influence of one particular state by virtue of existence of a practice is not usually binding on other common law states. However, if a common law country is a party to any International laws, treaties and conventions, as is the case with the Respondents, then the rules of International justice and equity prevail. In order that the rights of the nationals of non-signatories be protected, the provisions of the aforesaid are binding on all states, irrespective of the nature of domestic law.
2. The Petitioner therefore state their most humble claim before this Hon'ble Court that they have a justified locus standi to file this writ petition in the light of their rights being infringed by the Respondents by way of the order of acquisition. This order of acquisition has violated the rights of artists belonging to various groups who had contributed works of art for the thematic area. Therefore they have a common right which has been affected by the order of acquisition which they sought to remedy and thereby justify their interest in filing this petition.
3. In consonance with the principles of territorial jurisdiction the Petitioner humbly submits to the jurisdiction of the Respondent, since the cause of action has arisen within the territory of the Respondent and the remedy which is sought by the Petitioner as a result of the violation their rights pertains to their original expressions and contributions.
4. It is important to bring to the notice of this Hon'ble Court, relevant international treaties and agreements, and the provisions therein, which are enforceable for the purpose of this writ petition. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) sets standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, The Paris convention for the Protection of Industrial Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with.

5. The Petitioner submit before this Hon'ble court and thereby also prove how various articles of the Berne Convention come into application in order to protect various rights that nationals of non-member states have for protection of their works, first published in a member state. The relevant articles that the Petitioner has relied upon are: Articles 1 to 21, more specifically Article 3(1)(b), Article 9(1) – 9(3), Article 11 bis (1) and (2), Article 14(1)(2) of the Berne Convention, and Article 41(5), and Article 65 of the TRIPS Agreement.

6. The Petitioner have contributed their original works of art and have given expression to an idea of the chief designer Vurd, in such a situation, Vurd has no rights, in either case of assignment or license, to authorize sale, to the Respondent.

ADVANCED ARGUMENTS ON BEHALF OF THE PETITIONER:

1. The *Black's Law Dictionary* defines COMMON LAW "as distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decree of the courts recognising, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."[1]

1.01 Customary law develops through the evolution of state practice; international conventions are in the form of contracts, binding upon the signatories. For a custom to emerge it is not always necessary for several states to act in a certain manner, believing it to be in conformity with the law. Therefore in normal circumstances the influence of one particular state is not usually decisive. In the case of treaties, the states involved may create a new law that would be binding on them irrespective of previous practice or contemporary practice. In other words, the influence of the executive is generally of greater impact in as far as treaty law is concerned than is the case of customary law.[2] Hence, within the internal sphere and the international sphere, a logical unity is forged. States owe their legal relationships to one another and to the rules of international law, such as the one guaranteeing equality. Since states cannot be equal before the law without a rule to that effect, it follows that international law is superior to, or more basic than municipal law.[3] Therefore, the general rule with regard to the position of municipal law within the international legal situation, is that a state which has broken a stipulation of international law cannot justify itself

[1]Black's Law Dictionary – Ed
[2]Shaw, Malcolm – INTERNATONAL LAW, Cambridge, 1997(4th Ed.)

by referring to its domestic law. Simply put, it is no defense to a breach of an international obligation, to argue that the state acted in such a manner because it was following the dictates of its own municipal laws.

1.02 State practices and several decided cases have established this provision and thereby prevented countries involved in legal litigation from pleading municipal law as a method of circumventing international law.

1.03 The International Court of Justice, in the *Applicability of the Obligation to Arbitrate case*[4], has underlined "the fundamental principles of international law, is that international law prevails over domestic law". Similarly in the *Lockerbie* case[5], it was emphasised that "inability under domestic laws to act was no defence to non-compliance with an international obligation".

1.04 By way of contrast it may be pertinent to note what was held in the *Electtronica Sicula SpA (ELSI)* case[6] by the International Court of Justice "the fact that an act of a public authority may have been unlawful in municipal law did not necessarily mean that the act in question was unlawful in international law"

1.05 Within a domestic sphere, legislative jurisdiction refers to the supremacy of the constitutionally recognised organs of the state to make binding laws within its territory[7], and although legislative supremacy within a state cannot be denied it may however be challenged. A state that adopts laws that are contrary to the provisions of international law, for example, as regards the treatment of aliens or foreign property within the common law country will render itself liable for a breach of international law in the

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[3]Kelsen, PRINCIPLES, pp.557-559
[4]ICJ Reports, 1988, pp. 12, 34; 82 ILR, pp. 225, 252
[5]ICJ Reports, 1992, pp 3, 32; 94 ILR, pp 478, 515
[6]ICJ Reports, 1989, pp 15, 73-4; 84 ILR, pp 311, 379-380
[7]Akehurst, JURISDICTION, pp. 179

international scene[8], and will no doubt find itself faced with protests and other action by the foreign states concerned.

1.06 Similarly what may also occur is a conflict of obligations, that is, when the state within its own domestic sphere, does not act in accordance with its obligations as laid down by international law. In such a situation although on the one hand the domestic position remains unaffected, but on the other hand, the state as it operates internationally, has broken a rule of international law and the remedy for which lies in the provisions of that international law which is available to the affected party.

2. In respect of what has been aforesaid the Petitioner therefore state their most humble claim before this Hon'ble Court that they have a justified locus standi to file this writ petition in the light of their rights being infringed by the Respondents by way of the order of acquisition. This order of acquisition has violated the rights of artists belonging to various groups who had contributed works of art for the thematic area. Therefore they have a common right which has been affected by the order of acquisition which they sought to remedy and thereby justify their interest in filing this petition.

3. The government of Nujranez has acquired the thematic area under a law of acquisition thereby infringing the rights of the artists. This Hon'ble Court has the power to entertain all matters of disputes arising within the territory of Nujranez (under principles of territorial jurisdiction) and also to declare any law passed by the government as violative of the rights of the Petitioner. Moreover, the Petitioners would not be able to enforce their rights in courts of Dnanajar, as the government of Nujranez would not be under any obligation, either international or domestic, to recognize or enforce a judgement, decree, or award of a foreign court. The order of acquisition that has been passed by the Respondent, which has affected the rights of the Petitioner, is within the State of Nujranez. The Petitioner has filed this writ

[8]Shaw, Malcolm - INTERNATIONAL LAW, Cambridge, 1997(4th Ed)

petition before this Hon'ble Court because the cause of action has arisen within the territory of the Respondent and the remedy which is sought by the Petitioner pertains to their original expressions and contributions.

4. Furthermore, it is important to bring to the notice of this Hon'ble Court relevant international treaties and agreements, and the provisions therein, which are enforceable for the purpose of this writ petition and all that has been stated above, forms the very bases of this argument. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) sets standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, The Paris convention for the Protection of Industrial Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with.

4.01 The TRIPS Agreement is a minimum standards agreement, which allows members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the agreement within their own legal system and practice.

4.02 The criteria for determining which persons must thus benefit from the treatment provided for under the agreement are those laid for this purpose in the main pre-existing intellectual property conventions of WIPO, applied of course with respect to all WTO Members whether or not they are party to those conventions. These conventions are the Paris convention for the Protection of Industrial Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC)

4.03 The TRIPS Agreement gives all World Trade Organization (WTO) members transitional periods so that they can meet their obligations under it. The transitional periods, which depend on the level of development of the country concerned, are contained in Articles 65 and 66, the relevant provisions of which are reproduced below for ready reference. Article 65 of the TRIPS Agreement reads as follows[9]:

> *1....., no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the Agreement Establishing the WTO.*

Therefore from these statutory provisions it is very evident to this Hon'ble Court that the Respondents are bound by the provisions of the WIPO and other pre-existing conventions and that they are bound by rules of international law and jurisprudence to comply with the same. The Petitioners therefore would like to reiterate their claim to remedy their rights which have been infringed by way of this acquisition.

4.04 The provisions on enforcement are contained in part III of the agreement, which is divided into five Sections. The first Section lays down general obligations that all enforcement procedures must meet. These are notably aimed at ensuring their effectiveness and that certain basic principles of due process are met. The following Sections deal with civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures. These provisions have two basic objectives: one is to ensure that effective means of ensurements are available to right holders; the second is to ensure that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. According to paragraph 5 of Article 41, it is understood that the provisions on enforcement do not create any obligation to put in place a

[9] INTERNET DOCUMENT- http://www.wto.org/wto/intellec/5-ipenf.htm

judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general. The aforesaid Article 41 para 5 has been reproduced under for ready reference[10]

> *5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.*

5. The Petitioner submits that though they are not nationals of Nujranez by virtue of Article 3 (1) (b) of the Berne Convention they enjoy the protection of the Berne Convention. Article 3(1) (b) is reproduced below for easy and ready reference

"The protection of this Convention shall apply to:

(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the union and in a country of the union."

The works of the Petitioners having been first published in Nujranez which though not a Berne convention country or a Universal Copyright Country by virtue of being a member of the WTO, Article 1 to Article 21 of the Berne Convention must none the less apply. As such irrespective of whether Dnanajar is a Berne Convention Country the authors who are nationals of Dnanajar will be afforded protection in Nujranez.

5.01 The Petitioner submit that such of the authors in respect of whom conditions of Article 3(supra) are not fulfilled shall still enjoy the protection

[10]INTERNET DOCUMENT- http://www.wto.org/wto/intellec/5-ipenf.htm

of this convention in respect of works of architecture or other artistic works incorporated in a building or other structure by virtue of Article 4(b). Article 4 reads as follows:

“ The protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(b) authors of works of architecture erected in a country of the union or of other artistic works incorporated in a building or other structure located in a country of the Union.

5.02. The Petitioner has the exclusive right of authorizing the reproduction of their works in any manner or form. Any sound or visual recording shall be considered a reproduction by virtue of Article 9 (3) of the Berne Convention. The right of reproduction rests exclusively in the authors i.e. the Petitioners by virtue of Article 9 (1) of the Berne Convention. Though Article 9 (2) of the Berne Convention authorizes through legislation the countries of the Union to permit the reproduction in certain special cases, even then such reproduction must not conflict with the normal exploitation of the work nor must it unreasonably prejudice the legitimate interests of the authors. Article 9 is reproduced below:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

That the Petitioner are the authors and as such enjoy the exclusive right of reproduction is not in dispute. The Legislation by Nujranez to acquire the works of the Petitioner does not reveal any special circumstances. In any event it conflicts with the normal exploitation of the work of the Petitioner and also unreasonably prejudices the legitimate interests of the artists.

5.03. The Petitioner submits that by virtue of Article 11 bis (1) they enjoy the exclusive right of authorizing the broadcasting of their works or the communication thereof to the public. Article 11 bis (1) reads as follows:

"(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;"

The government of Nujranez can only determine the conditions under which the rights mentioned above may be exercised. It has no right to take over the exclusive rights vested in the Petitioners thereby jeopardizing the rights of the Petitioner to obtain equitable remuneration. Article 11 bis (2) clearly lays down the limits of the permissible legislation in this regard. Article 11 bis (2) reads as follows:

"It shall be a matter of legislation in the countries of the Union to determine the conditions under which the rights mentioned in paragraph 1 may exercised but these conditions shall apply only in countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

5.04 The Petitioner submits that the right of adaptation, arrangement or other alteration even in favour of Vurd is for a limited duration and purpose.

The authors retain the exclusive right except for the limited duration and purpose for which such rights have been temporarily assigned to Vurd. Art 12 the Berne Convention reads as follows:

"Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

This provision clearly preserves the rights of the Petitioner. The government cannot acquire through Vurd the rights in Petitioner's works, which even Vurd does not possess. Vurd rights being for a very limited duration and purpose. As a matter of fact group 3 artists have specifically declined to give any form of electronic rights.

6. The Petitioner submits that even though there is a right of adaptation in favour of Vurd for a limited duration and purpose, the author will have exclusive right of authorizing the public performance of the adapted work. Art 14(1)(2) states:

"(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(ii) the public performance and communication to the public by wire of the works thus adapted of reproduced." It clearly lays down that even in the cases of adapted work the author will have the exclusive right of authorizing the cinematographic adaptation and reproduction of these works.

6.01 The infringement takes place even when an attempt is made and not necessarily when the attempt is fully successful. The above proposition is borne out from the decision in '*Falcon v, Famous Players Co.* [11] Atkin L.J., held as follows: *"It was urged that if the appellants had sold the copyright that might amount to an infringement but a mere offer to sell as contained in the newspapers advertisement and in the placards would merely amount to an intention to sell and would therefore, not amount to an infringement of the copyright. We think that the language of Sec.2, Imperial Copyright Act, is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempted sale, and the plaintiff can in such a case claim a declaration and if necessary, an injunction."*

[11](1926) 2 K.B. 474 (498)

PRAYER

1. The Petitioners pray before this Hon'ble Court, that this petition be heard on its merits and that a writ of Certiorari be passed, quashing the order of acquisition, and thereby nullifying the law passed for acquiring the thematic area.

2. The Petitioners also pray for a permanent injunction restraining the Respondents from continuing with the tender offer.

3. For costs, and any other order that this Hon'ble Court may deem fit to pass in the nature of justice, equity and good conscience.