

PGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Notice of Motion No.2847 of 2010
IN
Suit No.2692 of 2010

Twentieth Century for Film Corporation. .. Plaintiff
V/s.
Sohail Maklai Entertainment Pvt. Ltd. &
anr. Defendants

Dr.Veerendra Tulzapurkar, Sr. Advocate with Mr.Phiroz Palkhiwala i/by M/s.Neolegal Associates for Plaintiff.

Mr.Ravi Kadam, Advocate General, Mr.S.U. Kamdar, Sr. Advocate with Mr.Karthik Desai i/by M/s.Kartikeya & Associates for Defendant No.1.

Mr.Iqbal Chagla, Sr. Advocate with Ms.Madhu Gaoodia, Ms.Anshree Ravta, Ms.Yugundhara Khanwilkar & Mr.Vaibhav Bhure i/by M/s.Naik Paranjpe & Co. for Defendant No.2.

CORAM : SMT.ROSHAN DALVI, J.

Date of reserving the order : 14th October, 2010

Date of pronouncing the order : 14th October, 2010

ORDER :

1.The Plaintiff claims copyright in the literary and artistic work being the script and screenplay of its

film Phone Booth assigned to the Plaintiff under certain agreements. The Plaintiff claims that the Defendants have infringed its copyright in their film Knock Out which is to be released on Friday, the 15th October 2010. The Plaintiff claims injunction restraining the Defendants from releasing its film Knock Out in theatres or broadcasting or otherwise communicating it to the public in any manner or exporting its copies so as to infringe the script, screen, storyline and dialogues in its copyrighted work or so as to pass off the said film as and for the Plaintiff's film as an Indian version thereof. The Plaintiff has also prayed for an order directing the Defendants to destroy and/or deliver the script of its film and for appointment of a Receiver in respect thereof.

2. The Plaintiff, as the producer, is the author in respect of the cinematographic film under Section 2(d) (v) of the Copyright Act, 1957 (the Act), and its script as - an artistic work under Section 2(c)(iii) of the Act. The Defendants' film, if it is seen to be a copy of the Plaintiff's film, would be an infringing copy under Section 2(m)(ii) of the Act. The Plaintiff claims to have been assigned the copyright through one Daddy Entertainment Limited from the original author Larry Cohan under the Agreements dated 17th December

1998 and 18th December 1998 together with the Agreements of purchase and borrowing the rights of the film under the further Agreement dated 18th December 1998.

3. The Plaintiff's film Phone Booth was produced in 2002. The Defendants' film Knock Out has been produced much later. The Plaintiff claims to have received notice of the film in or about August 2010, upon which the Plaintiff entered into a chain of correspondence with the Defendants, alleging the infringement of its copyright and calling upon the Defendants to produce for the Plaintiff's inspection the original film itself containing the script, screenplay, dialogues and storyline therein. The Defendants have replied denying any infringement but refrained from showing the Plaintiff its film or even its written screenplay to substantiate absence of infringement of the Plaintiff's artistic work. The correspondence is contained in 9 letters by and between the parties prior to the filing of the suit between 9th September 2010 and 4th October 2010 resulting in the suit being filed on 6th October 2010.

4. Aside from the infringement, the Defendants contend that the Plaintiff's action is barred by laches. The Defendants have relied upon and produced certain

website print-outs relating to the two films. The Defendants have shown to Court the first of several website publications of Times of India dated 28th September 2009, reporting that the Defendants film is *apparently a rip-off of the English flick Phone Booth (2003)*. Aside from giving the cast of the films and the various roles played by the actors in the films, it gives in one line the description of the Plaintiff s film only thus:-

Phone Booth is about a man who is held hostage in a telephone booth by a sniper.

It does not give the description of the Defendants film.

The next print-out dated 30th November 2009, which also does not give any description of the Defendants film. A further print-out is dated 4th January 2010 sets out the description of the Defendants film without showing any relationship between *a man held hostage in the telephone booth by a sniper*. It makes a reference to a rumour that film is loosely based on the Plaintiff s film but mentions that it is a hardcore political thriller and expose.

5. These website print-outs produced by the Defendants are not material showing the description of the Defendants

film and which could be taken to be brought to the notice and knowledge of the Plaintiff in September 2009. It is only on 8th June 2010 that a reference is made that promos of the Defendants film give an impression that the makers seem impressed by the Hollywood film Phone Booth . It also contains a clarification of the Director that there is no similarity between the two films except that *the only similarity is that the guy (Irrfan) is trapped in a phone booth.*

6. The Plaintiff could have commenced its claim upon the Defendants from that day. There is indeed a delay between June 2010 and September 2010 though the Plaintiff claims that it learnt about the Defendants film in August 2010.
7. The case of laches by a Defendant is to be seen along side the motive and design of a Plaintiff. It cannot be a blackmail action taken at the eleventh hour to set at naught of the Defendants production. Consequently, it would be important to see whether in this case the Plaintiff s claim under its notices to the Defendants would bar the Plaintiff s remedy because it happens to be enforced on about the eve of the release of the Defendant s production. Of course, a motivated case of a Plaintiff cannot be assisted by a Court in an

equitable order of injunction. The test of whether the Plaintiff's case is motivated or substantiated could only be adjudicated upon seeing the merits of the two works. Once it is seen that an action is not only abruptly made without any previous effort on the part of the Plaintiff to notify the Defendants about the claim alleged by the Plaintiff, it would certainly not be countenanced by the Court at the penultimate hour. A chain of correspondence between the parties shows that that is not the present case.

8. My Chagla on behalf of the Defendants relied upon a number of unreported orders of this Court in **Notice of Motion No. of 2006 In Suit (L) No.2993 of 2006 dated 17th October 2006, Draft Notice of Motion No. of 2008 In Suit Lodging No.3821 of 2008 dated 26th December 2008, Notice of Motion No. of 2009 In Suit (L) No.629 of 2009 dated 4th March 2009, Notice of Motion No.3101 of 2009 In Suit No.2199 of 2009, dated 10th September 2009, Notice of Motion No.3391 of 2009 In Suit No.2417 of 2009, dated 4th November 2009 and Notice of Motion No.1023 of 2010 In Suit No.980 of 2010 dated 12th April 2010.** These orders do not show that when a claim is made in correspondence with the Defendants prior to the filing of the suit, though belatedly at the time of the first claim, the equitable relief to the Plaintiff has to be refused. In Suit No.

2961 of 2008, a relief of injunction came to be granted a day prior to the release of the disputed film by another order of this Court.

9. Mr. Chagla contended that there is a material suppression on the part of the Plaintiff which must disentitle the Plaintiff from obtaining equitable relief. That material suppression is the Plaintiff's assertion that the theme of the film in a person being held hostage in a telephone booth is the Plaintiff's novel idea and there has been no other film that has featured such an event as the main theme plot, storyline or expression of ideas. The Defendants contend that another film Liberty Stands Still conveyed such an idea earlier. The Defendants themselves concede that that is a woman tied to a cart and held hostage; it has no telephone booth. One of the website print-outs relied upon by Defendant No. 2 in the Affidavit-in-reply dated 11th October 2010 makes a reference to an impression of a viewer that, in fact, Liberty Stands Still was telephone booth. The two films have been released at about some time. It is not for this Court to go into the chronology of those events except to see whether the statement of the Plaintiff amounts to a material suppression so as to amount to such fraud as to disentitle the Plaintiff to equitable relief. It does not.

10.To see the merits, it has been insisted upon by Dr.Tulzapurkar on behalf of the Plaintiff that the Defendants produced their screenplay as well as an actual copy of their film for the Plaintiff s inspection as well as for the Court. This the Defendants have done only yesterday.

11.The Court has seen the comparison table made by the Plaintiff of the identical scenes and the scripts of the two films and has viewed both the above films. It may be mentioned that the Defendants have admitted, as reflected in the website print-out produced by Defendant No.2 itself in its Reply about one similarity in the two films thus:

The only similarity is that the guy (Irrfan) is trapped in a Phone Booth.

12.Consequently, the Court s impression about the two films where a guy is trapped in a Phone Booth must determine whether or not the second film is a copy of the first. The Defendants have, of course, emphasised various dis-similarities in the two films to show that theirs is a separate and special artistic work. Even if that be so, it does not really come up for the Court s adjudication except to allow the Defendants to exhibit or broadcast such dis-similar work. The

similarities in the concept of the two films must be first seen and enumerated. Given that both the films admittedly have a theme of *a guy trapped in a Phone Booth*, it has been seen that a guy, who is the protagonist of both the films, uses the otherwise unused telephone booth in the age of mobile telephones to hide or suppress his identify one from his wife whilst making a telephone call to his paramour and the other partly from his wife for the same purpose and partly because he was pursuing an unclean career in the crime of corruption. Both are trapped into conversation with a sniper. After their initial conversation is over, they both pick up the telephone which rings in the booth, they both are held hostage in a long and detailed conversation bringing to the fore their respective ill-designs. The conversation between the caller and the protagonist are rather similar; such similarity cannot be co-incidental. Its style as well as the content of the conversation and the design in bringing out the conduct of the man would leave an unmistakable impression that one was copied from the other. That is the basic concept of the two films.

13. There are peripheral incidents; whereas a Pizza delivery man intrudes upon the initial conversation in the former film, a man carrying a bag of ill-gotton money intrudes upon the actor in the later film.

Whereas the first intruder knocks on the Phone Booth, upon not being allowed to get in, with a rod, the other uses a gun instead. In both the cases the intruders get killed by the sniper. In both the cases the sniper deliberately misses his target when he shoots the hostage after a prolonged conversation. In both the cases the hostages talk to their respective girl friends and get disturbed by other people. The Police and the media step in and the Police try to trace the telephone line of the sniper, but are unable to do so because of a technological feature by which the sniper's line remains untraced. In both the cases the hostages obey the order of the sniper to make declarations to the public and ultimately the confession of their evil ways either personally or professionally upon the threat of killing their wives.

14. Whereas in the Hollywood film the identity of the caller is kept under wraps except for a blurred image towards the end of the film, in the Bollywood film the identity is revealed from the inception. Whereas in the Hollywood film the hostage uses a pistol in the Bollywood film the hostage uses the bomb under the said circumstances.

15. In the climax, both the villains literary fall to the ground and figuratively rise in the esteem of their

wife/people.

16.It is seen that the duration of both the films is rather different; though the first is long enough the second is far longer for the message it conveys. Consequently and naturally, the second has further and other aspects to convey and portray more specially the political drama with several more characters and scenes which are essentially embellishment and ornamentation in developing the expression of the idea or the prime thought of the first film. Hence these are the additions to the Plaintiff s film and they themselves would not come within the mischief of the infringement of any copyright. They could be shown, exhibited and broadcast bereft, only of expression of the idea of a person held hostage by a sniper in a telephone booth and made to confess his crime.

17.It is contended on behalf of the Defendants that there is no copyright in an idea. This is partly correct. Of course, an idea cannot be owned by a person. An idea, which is available in the world, cannot be the monopoly of anyone. That idea can be presented by various people in various artistic work. This essentially relates to an idea which is already available and not a theme which is a first time production. It could be best understood by an

illustration. If the idea of Mahatma Gandhi's death is to be viewed and broadcast, none would have monopoly over it. It can be used by any one dissimilarly from the previous users. But an idea which never was available or shown earlier is an original work. The monopoly and consequently the copyright would be implicit in such original work. These ideas can be understood by the distinction of a discovery and an invention. Whatever is there but not brought out would be discovered; but whatever is not there is invented for the first time. The inventor would, therefore, alone have copyright in the expression of that invention which is the artistic work. Hence copyright is contained in the original expression of the idea. It is expressed in the frame of the product. It is the thought that is sought to be portrayed and conveyed which carries a copyright and not the original idea. Hence whilst the idea may not be unique to the author, the image portrayed or the expression made is essentially unique to the author. If such an expression in the shots of a film is copied, lifted from an earlier film, the infringement is complete.

18. The axiom was set out in **University of London Press Ltd. vs. University Tutorial Press Ltd., (1916) 2 Chancery 610** - *What is worth copying is prima facie worth protecting* shows the fundamental principles of

what copying can be prevented as an infringement. The test that is laid down is that a man cannot *take away the result of another man s labour, or, in other words, his property* as laid down in **Hogg vs. Scott** cited with approval in **Murray vs. Bogue** in the judgment dated 9th December **1852 (1) Drewry 353 @ 487.**

19.The Defendants contend that only a tiny part of the film no matter that it is the basic concept of the film happens to be similar to the Plaintiff s film and that there is no infringement of the substantial part of the Plaintiff s film. Of course, the length of the film only shows that a rather good part of it is additional and consequently different. Resting on the main theme, what would be the substantial part of the copyright is to be seen.

20.In **Ladbroke (Football) Ltd. vs. William Hill (Football)Ltd., 1964 AER 465 (HL)**, this aspect came to be considered. It was the case of reproduction of a part of the literary work containing coupons showing matches played each week by a firm of Bookmakers. There were various lists of selected matches for as much as 148 different varieties of bets. A great deal of skill, judgment, experience and work was required in designing the coupons. The infringer adopted a closely similar form of making 15 lists as against the 16 lists

which were almost identical though was not copied. Holding that that would amount to a substantial part of the copyright which was infringed, it was observed that substantial part depends much more on the quality than on the quantity of what he has taken.

21. Reproduction in **Halsbury s Law of England, Fourth Edition 2006 Volume 9(2)** at page 316 shows the requirement of sufficient objective similarity between two works and also some casual connection between them.

22. Consequently, it is the quality of the copied work and not the quantity that would determine infringement of the work or substantial part thereof.

23. How this effect is to be considered is laid down in **Twentieth Century Fox Film Corporation vs. Stonesifer, (1852) 140 F 2d 579** thus:

The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator...

24. It is upon these sound, settled principles that the two films showing the aforesaid similarities even taking into account the aforesaid dis-similarities,

have to be adjudged as an infringement or not.

25. The test for determining the exact nature of the copyright and what constitutes its infringement upon seeing the texts of two artistic works based upon a single idea came to be considered in the case of **R.G. Anand Vs. M/s Delux Films (1978) 4 SCC 118** on which Mr. Chagla on behalf of the Defendants strongly relied. In that case initially a drama and later a film came to be made upon the idea of provincialism rampant in the Indian mindset. It was observed that:

“an idea, principle, theme or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. A person may choose an idea as a subject matter and develop it in his own manner and give expression to the idea by keeping it differently from others.”

What has to be seen is whether the Defendants had adopted the manner, arrangement, situation to situation, scene to scene with minor changes, additions or embellishments here and there.

If Defendants work is a transparent or fact or a copy of the material part of the original it would be infringement. It would be a work described as piracy.

Where the same theme is presented and treated

differently so as to form a completely new work, there would be no infringement.

If the totality of the impression is that the film is by and large a copy of the original play, infringement is proved.

In that case the play was read out and the summary of the film was given. Both dealt with the aspect of provincialism. The film also dealt with other aspects and other ideas being the evils of society like dowry, which was a completely different idea. Six dissimilarities were noticed.

The two works had a different story, different theme, different characteristics and different climaxes; the central idea being provincialism.

There was no infringement of the copyright seen in the idea of provincialism.

26. This judgment has been followed in the case of Barbara Taylor Bradford Vs. Sahara Media Entertainment Ltd. 2004 (28) PTC 474 (Cal)(DB) and NRI Film Production Associates (P) Ltd. Vs. Twentieth Century Fox Film Corporation in RFA No.67 of 2004, Karnataka, Bangalore

The idea in the former case was the women's social position having started from scratch to reach the top taken from the previous work *A Women of Substance* and in the latter an idea of traffic jams, disruption of communication, effects of nuclear missiles etc. These were held to be ideas with no novelty or uniqueness.

It was observed that even ideas such as prostitution, drinking and the like (like provincialism) were not new ideas. Hence what is understood in the concept idea is an idea which is as old as the hills and not a new idea hitherto not touched upon.

27. Upon viewing the two films which was subject matter an infringement action in **Zee Telefilm Ltd. Vs. Sundial Communication Pvt. Ltd** the Division Bench of this Court considered the concept of an idea the novel idea that was an idea developed into an expression. Hence the idea of Bal Krishna residing in a family whose life is disturbed and solving the problems of those family members was observed to be a novel idea developed into an expression capable of copyright.

The Division Bench of this Court in para 28 held that though abstract idea cannot be copyrighted, when embedded in tangible form it becomes subject of common

law property rights and protected by Courts when it is novel and new .

The Division Bench of this Court observed upon viewing both the films that the dominant impression that the Defendants serial would create was taken from the original work of the Plaintiff s film, despite dissimilarities therein, which were seen to be trivial and insignificant.

It quoted from Sheldon Vs. Metro Goldwyn Pictures Corporation) 1993 (81) F 2nd 49 that:

“it is enough that substantial parts were lifted; no play right can excuse wrong for showing how much of his work he did not pirate.”

28.The test of concluding whether the second work is a pirated copy is the impression of the average viewer. The other test is that if those parts were removed from the copied work whether the remainder would become meaningless and hence what must be seen is the substance, the foundation, the kernel and the copied work and to see if the rest can stand without it.

29.There is little doubt that a person seeing both the films at different times would come to the unmistakable conclusion that the Defendants film is a copy of the

Plaintiff s film. That cannot be allowed to prevail in the present form.

30.Mr.Chagla s contention is that only the larger broader picture and the ultimate message of the film in seeing whether it is a faithful reproduction in toto of the original should be seen to conclude whether or not it is a copy. The larger, broader picture as is that a person held hostage in a telephone booth and the confession extracted from him and not of removing the evil of corruption of the police and the political system.

31.The Defendants have indeed shown several dissimilarities because they are additions to the film. The Plaintiff has no objection to those parts being filmed or broadcast, but without the Plaintiff s novel idea of a caller in a phone booth held hostage by a sniper on a roof. If that portion is deleted and if the Defendants film can be exhibited upon such editing the Plaintiffs have no complaint and the Court cannot injunct such work. But until that is done the Defendants work does come under the mischief of the Plaintiff s copyright in its script.

32.The Defendants contend that third party rights have been already created on the film. The prints have been

delivered for exhibiting in India and abroad as is done one week prior to the scheduled release of the film. The Defendants contend that the prints of the film are beyond their control. Of course no relief can be granted if third party rights are shown to have been created. None has been shown on affidavit. The film is not released at least in India until today. Upon a case on merits being made out that release can be enjoined. If, however the Defendants have created any third party rights they would not be held liable for breach of any order of injunction.

33. On merits a case for an order of injunction is made out.

34. The original novel expression of the idea in both the films of the Plaintiff and the Defendants relate to a man held hostage in a telephone booth by a sniper. Consequently, the injunction as prayed for in prayers (a)(i) and (ii) are required to be granted.

35. The Defendants shall not exhibit, release for exhibition or broadcast their film Knock Out in any jurisdiction in the present form so as to infringe the Plaintiff's copyright in the script, screenplay, story and dialogues so as to pass off the suit film as that of the Plaintiff's film Phone Booth without the consent

of the Plaintiff.

36. Since Affidavits have been filed by all the parties to the suit and the claim of the respective parties is heard extensively the Notice of Motion itself is disposed off in terms of the above reliefs.

(SMT.ROSHAN DALVI, J.)