

Calcutta High Court

Barbara Taylor Bradford vs Sahara Media Entertainment Ltd. on 16 July, 2003

Equivalent citations: 2004 (1) CHN 448, 2004 (28) PTC 474 Cal, 2003 47 SCL 445 Cal

Author: A N Ray

Bench: A N Ray, J Banerjee

JUDGMENT Ajoy Nath Ray, J.

1. This is an appeal from an interlocutory order in a copyright action. The order is dated 30th of June, 2003, when his lordship refused injunction to the plaintiffs/applicants who are also the appellants before us. However, the order directed furnishing of a bank guarantee to the extent of Rs. 25 lakhs, such guarantee to be given by the respondents.

2. The suit was filed in Calcutta on or about the 7th of May, 2003 by the plaintiffs, who are the authoress and her husband of the book named "A Woman of Substance". The copyright in that book has been, or is likely to be, allegedly infringed. Claims for infringement are also made with regard to two sequels of the said book and the serialised television version thereof which were produced by the authoress' husband namely the 2nd appellant.

3. The complaint is against a serial called "Karishma - The Miracle of Destiny" which has been financed and is quite ready to be produced and televised by the 1st Respondent who are a public limited company. They bear the Sahara name, and under that name there are several business undertakings running in India.

4. The respondents say that they intend to televise many more than two hundred episodes, in the evenings, not covering weekends starting from 9.30 P.M. According to them, eighty episodes have been completed and are ready to be televised. They say that they have spent a lot of money over two years for this project and the expenses are to be counted in rupees tens of crores and have gone to 100 crores and more. The expected annual turnover out of the serial including advertising is expected by Rs. 75 crores. They have already taken advance of Rs. 11 crores from intending advertising agents. Well known actors and actresses have already been engaged in the serial.

5. The only episode which has been broadcast so far is the first one and this happened on the 12th of May, 2003 in the evening. The circumstances thereof we shall relate hereafter.

6. The claim for infringement is not based upon what was televised on the 12th of May, 2003. The reference to that serial would be found only in one portion of one page in an affidavit-in-reply. The claim could not be based on the 12th of May serial because the plaint, or the statement of claim, was filed five days before that.

7. The only substantial material on the basis of which the claim for infringement has been supported, if substantial material it is at all, is an interview taken by a freelance journalist named Ms. Pammi Somal from the Respondent No. 2, Akashdeep Sabir, who is described by all concerned as "the creative director and producer". It is, however, to be mentioned that there is no evidence of Sabir having financed the project to any extent though that is the usual role ordinarily played by

producers. His wife Sheeba is associated with the producer to whom Sahara has assigned responsibilities. Sabir and Sheeba are both parties but not Pammi.

8. Hereafter we give a brief resume of the facts, as those appeared to us to be reasonably acceptable, for interlocutory purposes. Almost every other fact alleged by one party is disputed by the other, but the disputes are not mentioned, not only for the purpose of brevity and readability, but also because the following gives our interlocutory assessment of the facts, as most likely, as on date.

The above interview took place in the evening of the 2nd of May, 2003. But a lot of important things had happened before that. On or about the 28th of April, 2003 the 1st appellant alone had filed a suit in the Bombay High Court claiming for protection against infringement in relation to the very same items which are covered by the Calcutta suit.

9. A petition for obtaining injunction in Bombay was also affirmed. On the 2nd of May, 2003 during Court hours, the suit was withdrawn with liberty to file a fresh suit. The interlocutory application suffered the same fate. The order of the Bombay Court shows that learned Counsel mentioned (no doubt upon instruction) that fresh material has come to light and it would be inconvenient and cumbersome to amend the plaint.

10. No fresh material of any importance whatsoever could be disclosed on behalf of the appellants to us which had come to light between the 28th of April, 2003 and the rising time of the Bombay Courts on the 2nd of May, 2003.

11. The fresh material and the only material which was relied upon came into being in the evening of 2nd of May, when Pammi visited the studio of Sabir where Talat Jani, another party to the suit and a director of the T.V. serial "Karishma" was also present.

12. The plaintiff No. 1 Barbara says that she came to know of the serial and the clash with her book from a letter of one Ms. Rituparna Roy, a Calcutta based lady, written to her sometimes in the middle of April, 2003. That letter, according to it, sent newspaper clippings. But neither the letter nor the clippings are mentioned in the Bombay plaint or petition.

13. Pammi has stated in her affidavit that after obtaining the studio tape from Sabir she made a copy of that audio tape into another audio tape and sent it to Barbara. What Pammi sent was produced before the interlocutory Court but the learned Judge did not listen to it as its admissibility was in dispute. It was kept in a sealed cover. The cover came before us. We had it opened. We had large parts of it played out to us in open Court using a player provided by Mr. Sen, who was arguing the case of the appellants. We heard the interview on the tape mainly for the purpose of assuring ourselves that what the envelope contains is really a tape of the interview, and not something like the wizard of Oz, From the sound quality, Pammi's questions were hardly audible but answers of Sabir are reasonably clear. Mr. Sen submitted that as the playing took place on the desk top before us, the words so Sabir were not audible to the Bar. After the playing, the tape was caused by us to be put into another fresh cover and sealed once again.

14. Pammi has not given a word for word reproduction of the totality of the interview, although she has filed an affidavit; not has Barbara done it although the tape has been tendered to Court. Since an audio tape is corroborative evidence, no doubt the corroborative value of which can go very high in certain circumstances, yet, the entirety of the interview should have been reproduced for the benefit of all concerned both by Pammi and by Barbara.

15. One version, or extract of the interview is available in the papers which were filed in Court. Another version came out in the Cine Blitz issue of June. But these issues are published in the month before the month of publication mentioned and as such the interview appeared openly for public perusal in the month of May.

16. On 7th of May the plaintiffs filed the suit and approached the Interlocutory Court for obtaining an ex parte order of injunction.

17. They mentioned nothing about the Bombay proceedings or the withdrawal thereof either in the plaint or in the petition.

18. Suppressing this they succeeded in obtaining an interim order on 7-5-2003 which had the effect of blocking the televising of the serials altogether.

19. It was well known to the plaintiffs that the first telecast was to take place on the 12th of May, 2003. However, the matter was made returnable before the Interlocutory Court on the 13th, i.e. on a day after the intended first televising.

20. This would mean that the matter would appear in the list on the 13th of May the next time and ordinarily speaking that would be the first time when the respondents could ventilate their grievances in regard to the ex parte order. But by that time the 12th May telecast would already have been blocked.

21. The order obtained on the 7th of May was not served on the respondents either on the 7th of May or on the 8th of May.

22. The 9th of May was a Friday. It was also the birth centenary of Rabindranath Tagore and it is quite proper that such a date should have occurred during a copyright action. The Courts were closed on the 9th of May. The next two days were the weekend. On the 12th of May Mr. Ray who presented the case of the first respondent Sahara before us mentioned the matter before the Interlocutory Court and prayed for summary vacating of the interim order on the simple and single ground of suppression of the Bombay suit. It was submitted that the party having first gone to Bombay, and not having gone back there once again, even after obtaining leave to file afresh from there, a material fact which, if pointedly brought to the notice of the Interlocutory Court, would have, in all likelihood, materially affected the way the Court used its discretion in the matter of grant of the first interlocutory order.

23. The first interlocutory order has had a very great effect. It is that order which has caused, although not directly, (because even the Hon. Supreme Court's orders and our own have intervened), but certainly indirectly, the stopping of televising of the serials for about the past two and a half months. According to Sahara's programme this span of time would have seen the televising of some 40 serials already.

24. The Hon'ble Interlocutory Judge in the morning of the 12th of May did not vacate the interim order of injunction and turned down the prayer of Mr. Ray. However, in the order of 12th May there is no finding at all by the Hon'ble Judge that his Lordship did not consider the suppression of the Bombay material to be a material suppression at all. This is a matter of great importance because if the Judge who passed the interim order had himself said that what was suppressed was not material, it would become very difficult for any Appellate Court to say otherwise in the fact of such a finding.

25. As the televising of a highly financed serial was at stake, the respondents went before the Division Bench in the afternoon of 12th May itself. The point of suppression was argued before that Bench. The reaction of the Division Bench was sharp and quick (the same is said with the greatest of respect) and their Lordships vacated the interim order on the basis of suppression of the Bombay episode.

26. The very same day the plaintiffs approached Supreme Court which was on Summer Vacation. An order of injunction was passed in the evening but before that could be communicated the telecast on the 12th May had already taken place.

27. A special leave being granted counsel submitted their views to the Hon'ble Supreme Court on the 22nd of May, 2003 and their Lordships disposed of the matter by directing that the stay order would continue until disposal of the interlocutory application was finally made on affidavits.

28. This was done more or less at the suggestion of the learned counsel appearing. However, the Supreme Court Order is quite clear that their Lordships had kept all points open for argument before the High Court including the point in issue in the appeal before their Lordships. That point was the point of suppression.

29. As such, the effect of the first order of 7th May continued, and is still continuing.

30. The Interlocutory Court in passing the final order of 30-6-2003 granted a stay of operation of the order for a fortnight. By that time we had started hearing the appeal. We felt that it was not possible, there being an injunction operative for so long, not to continue the interim order until we had a chance to dispose of the appeal, no doubt, on an expeditious basis. Thus, we ourselves continued the interim order too. The order of 7th May thus got continued by the Hon'ble Supreme Court, by the Interlocutory Court disposing of the matter on affidavits and also by us.

31. While the matter was sub judice and very probably after the Supreme Court had passed the above order, the second version of Pammi's interview came out in the Cine Blitz, which is in some

parts, different from the interview annexed to the Calcutta petition.

32. The main portion where the two versions differ is where it is mentioned in Cine Blitz but not in the petition annexures that the writer of the story of Karishma is Sachin Bhowmik, who is the fourth respondent before us. In our opinion, this is a most material portion and it was not proper to give a truncated version of the interview in the petition annexures.

33. The two versions of the interviews are so important for the purpose of deciding the interlocutory matter that those have to be read and perhaps re-read by anybody deciding this case. But the substance and the circumstance of the interview as found by us is given here for brief reference.

34. Although hotly denied by the appellants, there is not much doubt that Pammi was sent for obtaining a nice interview either by the plaintiffs or by their agents or by persons with whom the plaintiffs have no clash of business interest. It has been mentioned that the publishers of the first plaintiff and Star T.V. had important common owners and the whole suit is a T.V. rivalry game. We do not have to decide finally today on this issue. For all practical purposes we have no doubt that Pammi came to obtain evidence for the plaintiffs without which, as the Bombay episode shows, they had nothing to say to a Court of law.

35. When Pammi came there was Sabir and there was Talat Jani. Talat Jani is a Director of the serial. He says that he does brain storming sessions with others including Sachin Bhowmik for the purpose of producing dialogues which will make the serial popular. He says, he was also interviewed by Pammi. Pammi does not admit it but for interlocutory purposes we believe Talat Jani. He says, his interview was taken on video tape. According to him, he has never read "A Woman of Substance". His interview gave Pammi no reportable matter whatsoever. That is why she has said nothing about it.

36. Sabir's interview was, on the other hand, good material. There was a letter from Barbara to Pammi thanking her for the "lovely interview". When we heard the tape, we could hear a dog's bark which appeared from the related words of Sabir to be Sabir's. There is no mention about this in the Cine Blitz or in the Calcutta petition annexures. We also heard numerous statements about the actress Karishma, who seemed to be very much on the mind of Sabir, This is not unnatural as the serial itself is named after her and employs her in a big way.

37. The questions of Pammi are leading and directed towards obtaining materials which will help the plaintiffs. She never pointedly asked Sabir whether he had read the book (A Woman of Substance) and, if so, how long before the serial was conceived by him. Reading the interview one might perhaps form the impression, as even the learned Judge of the Interlocutory Court has formed, that Sabir appears to have read the book. In one part, he airily says to Pammi, "If you have read the book...." implying that of course he himself has read the book.

38. In Sumit Roy's affidavit filed on behalf of Sahara and also others including Sabir it is denied that Sabir has read the book.

39. There is enough internal evidence in the interview, which we shall point out hereafter, to show that Sabir has not read the book; nor, incidentally, have either Mr. Sen or Mr. Ray who respectively presented the cases of the appellants and the respondent No. 1. In the interview, Sabir first says that the Karishma serial is his conception and his baby. Then he says, the story was got written by Sachin Bhowmik (because he is a genius, which we heard on the tape). He says that he did not want to take a risk. So he based the serial on "A Woman of Substance" a tested subject, the same being the saga of a woman's life from 20 to 80.

40. He then said, in the end, the grand daughter gets everything and that again is Karishma. He told Pammi "... if you have read the book..." and then referred to "the electrician... Neill... Blackie". He talked about the illegitimate son of the lady of the serial. To Pammi's question, about what the empire of the lady was called, when she became rich, he answered it was the Devjani Group of Industries. He gave the names of actors who played some roles, he gave the name of an army officer who marries Devjani, he also gave the name of another man who is Devjani's true love.

From these, the appellants seek to draw the conclusion that the similarity between "A Woman of Substance" and the intended T.V. serial is too striking to be ignored. In the book, Emma Harte become pregnant by the younger son of the aristocratic house, namely Edwin Fairlie, She goes away from the village; later on she marries Joe, a shop keeper. Joe is conscripted, goes to war and is killed by the Germans in the First War, After another marriage with a lawyer's son, she falls in love with an Australian who is her true love, A daughter, Daisy, is born to her from him, She is still married at that time to the lawyer's son when her true love is killed. Daisy comes to console her. Later on Daisy gives birth to Paula, whom she names after Emma's Australian lover. Emma comes to know then that she had all along known whose daughter she really was and apologises to her. Paula becomes a rich lady getting money both from Emma and her Australian natural father.

41. The story writer Sachin Bhowmik says that there is a lot of difference between what he has written and what the story of Emma Harte is; she might have had a successful chain called Heart Enterprises, but this similarity is nothing; it might be that of the two Thakurs with whom Devjani lived, she got pregnant by the younger one, but even this is no breach of copyright.

42. Mr. Pal, appearing for Sachin Bhowmik, put forward his case. Mr. Mitra, appearing for Akashdeep Sabir, both before us and in the court below made arguments on his behalf. He had given in the lower court a chart of differences in the story line between the book and Sachin Bhowmik's yet unpublished story which is called Aparajita. It is not a published work at all or as yet. The story was given in cyclostyled form to the learned Judge but the respondents did not agree to give inspection of Sachin Bhowmik's story was also kept in a sealed cover. We had that opened, we read through the story cursorily in court, not even taking the script back home or to our chambers; then we caused the story to be put again in another fresh envelope and sealed up once again.

43. Since the appellants have not seen what we have read, although cursorily, we do not intend to rely upon the contents of Aparajita at all.

44. We go by what is started in Sachin Bhowmik's affidavit and by what has come to be known to me of the book. I do not lay claims to having read "A Woman of Substance" carefully myself either.

45. The respondents argued that their serials are not yet fully filmed; although the broad storyline is there, it is not immutable. Depending on the wishes of the viewers and the necessities of keeping the serial continuously popular, changes and even violent changes might have to be made to the story and to the sequences of events and the events themselves.

46. They also argued that even if the interview is taken in the most favourable light possible to the appellants, yet there remain such differences between Aparajita and "A Woman of Substance" that one cannot be said to be a copy of the other. Sachin Bhowmik has stated that he read the book "A Woman of Substance" only after he had written Aparajita. He had the idea of somebody becoming rich from poor, from a person living in London, who was initially a sewer of buttons, but became thereafter very rich supplying uniforms to the London Constabulary and many others.

On the above basis, after setting out the differences given by Mr. Mitra item by item, which according to him, existed between the book and the serial, his Lordship has come to the conclusion that there is such sufficient substantial similarity between the two, as to make a case of infringement of copyright prima facie arguable.

47. Three factors his Lordship has considered to be of turning importance and those are as follows:

(i) The basic theme of the book, i.e., the rise of a woman from poverty to extreme wealth;

(ii) The existence of common characters, those being the two Fairlies and the two Thakurs. The illegitimate child of Devjani (and Emma), the 'electrician', the army officer husband, who goes to war and is killed, and the true lover of Devjani (or Emma) who are named by Sabir and identified by him in the interview with Pammi; and

(iii) The interview itself, which says that Sabir's serial is based on the book.

On the 12th of May, when the first episode was telecast, it was seen on behalf of the appellants. They said in a reply that in the episode the army officer to whom Devjani was married is seen to go war and is killed, like in the book. Since the last affidavit had itself not been replied to, we asked questions from the Bar, and it seemed to be agreed, that the army officer had not been finally shot and killed, but had been shot at and had been shown as collapsing.

48. Mr. Pal submitted that he was not actually going to be killed; and also said, that instances in Hindi films are not rare, where the hero appears to die but just a few scenes later he is seen dancing near the waterfalls. The submission is quite in tune with actualities,

49. We are of the prima facie opinion that Sabir, who gave the interview, has not read the book "A Woman of Substance". He says to the effect that Emma had an illegitimate son but she actually had an illegitimate daughter. She called her Edwina, after Edwin Fairlie who had got her pregnant in a

cold cave. The other daughter Daisy, born to her of the Australian lover, even when she was married to arid living with the lawyer's son, also was a daughter and not a son.

50. When Sabir says somewhat vaguely electrician Neill Blackie, he does not give the correct name which is Blackie O'Neill. He was not much of an electrician, in the book and there was not much of electricity in the times which are portrayed in that part of the book, being the time before the First World War. Blackie O'Neill was more of an odd job man.

51. Joe, the shopowner, was not an army officer but was conscripted. He was no more an army officer than Blackie O'Neill himself who was conscripted with him and fought with him and was in the same jungle where he was killed. All these would, in our opinion, be quite novel and new to Sabir.

52. Sabir was quite wrong when he said that the grand-daughter inherits everything. Even the four children of Emma (leaving Daisy out, who was always true to her like her true love), who had plotted to kill her, each of even those four got a million pounds (may be a million dollars, we are not very sure) and four million pounds is not nothing, not even to Sabir. The other grand children of Emma than Paula also got substantial bequests as per her expressed intentions. It is only a person who knows nothing of the details who can say, in the end it is again the grand daughter who gets everything and who is also Karishma.

53. Pammi and Sabir had known each other for several years. Pammi got no response from her attempts at getting "a lovely interview" from Talat Jani; she hit, with her no doubt keen journalistic sense, the weakest spot in the armour, which she found in Sabir, and efficiently inflicted a wound, from which she drew as much blood of information, as could possibly be obtained in the circumstances.

54. The respondents are at pains to submit, that the circumstances are such, that even with Pammi's interview, one could only make out a specious case, but a real case of infringement never had any hopes of being made out; because "A Woman of Substance" was not known, not read, not copied and not ordered to be copied by Sahara. When Sabir said to Pammi that they had Indianised it and revised it, Sabir was talking about something, of which he was not aware, and even if aware, was not talking with full responsibility and accuracy. The whole thing, according to the respondents, is new, and not according to the book.

55. However, the first Court has found that there is infringement. It is not lightly that the Court of Appeal can interfere with a finding of this nature entered by the first Court. The principles in these matters of findings by the first Court are clear. Unless some misapplication of legal principle can be demonstrated, or unless some extremely material fact or facts can be shown to have been misappreciated by the first Court, the Court of Appeal should not interfere. We have already held, with respect, that his Lordship was not quite right in writing and thinking that it appeared that Sabir had read the book; but this single misappreciation would be took little to permit us to upset the entire finding of prima facie similarity by the first Court altogether. This is the stage where we have to discuss the copyright law for assessing the strength of the prima facie case.

The sections in the Copyright Act, 1957

56. This is a good place to start a short review of the relevant copyright law. Our country is singularly devoid of reported decisions in copyright actions, at least up to the present day. We have had the case of R.G. Anand (decided by the Supreme Court some time in the late seventies) shown to us; but from that time until now there appears to have been no Indian authority which either side found worth citing before us. The statutory sections are therefore the first things to see.

57. When we set out the purport of certain sections and sub-sections below, although we use inverted commas, the extracts are to be understood as materially substantial for all practical purposes, and not exactly identical.

58. Under Section 14 copyright is explained as meaning the exclusive right to "(i) reproduce the work (ii) to issue the copies of the work (iii) to perform the work in public or (iv) to make any adaptation of the work".

Under Section 2 of the Act, an adaptation is explained to mean "(ii) in relation to a literary work, the conversion of the work into a dramatic work; and (v) in relation to any work, any use of such work involving its rearrangement or alteration".

Under Section 51 copyright in a work shall be deemed to be infringed when any person "does anything, the exclusive right to do which is conferred upon the owner of the copyright".

59. Since the authoress is the owner of the copyright, a joint reading of Sections 51, 14 and 2 would show that the TV serial would be an infringement if it is an adaptation of the book or any substantial part thereof. Section 14 mentions that the copyright owner's rights extend "in respect of a work or any substantial part thereof".

60. Mr. Sen submitted that if the intended adaptation of a substantial part of the book has been made out prima facie by his clients, then and in that event, they would be entitled to the protections given by Section 55 of the Act. The said section states that the protection could be by way of "all such remedies by way of injunction, damages, accounts and otherwise as are of may be conferred by law for the infringement of a right".

61. On the above basis, Mr. Sen supported the finding of the first Court on the prima facie case of infringement. He said that the basic theme and the existence of numerous common characters showed that the book had been used for adaptation by the respondents and the result was that they were threatening to convert the book, or at least a substantial portion thereof, into a dramatic work, although such conversion could be made by or under the licence of the authoress, and the authoress only.

The case of R.G. Anand

62. Since this is a solitary Indian decision and that, too, of the Supreme Court this has to be read with as much care as the sections themselves for understanding the copyright law. That understanding is a must, before the strength of the prima facie case of Mr. Sen's clients can be assessed. The case is R.G. Anand v. Delux Films . Mr. Sen pointed out from paragraph 12 of the judgment that their Lordships were dealing with the copyright Act of 1911 which did not even contain a definition of adaptation which is central to Mr. Sen's arguments and which is given in Section 2. Sub-section (1) to (d) of Copyright Act, 1911 mentions that copyright means the right to produce or re-produce the substantial part of a work in any material form whatsoever in public; it is also mentioned that in case of a literary work the making of a cinematographic film is also prohibited.

63. No doubt, we have a much more extended definition of adaptation in the present Act. But in our opinion the substance of the protection remains the same; the substance is, that a literary work cannot be dramatised in breach of copyright by copying it or a substantial portion of it.

64. Their Lordships of the Supreme Court went on to explain certain principles which have to be borne in mind in copyright actions. The central problem in copyright cases is to determine whether one is a copy of the other or not.

65. Neither the Act of 1911, nor the Act, 1957 defines, whether inclusively or otherwise, what a copy is. Thus, what the right of a copyright is, is not defined or explained or enumerated by instances in the Act. Their Lordships gave the following guidances in paragraphs 45 and 46 of the said judgment. Several other most helpful (with respect) guidances are also mentioned. But we extract only those which are the most useful to us.

"Thus, the position appears to be 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. It is always open to any person to choose an idea as a subject-matter and develop it in his own manner and give expression to the idea by treating it differently from others....

...Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there....

Care, however, must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.

...In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

One of the surest and safest tests to determine whether or not there has been a violation of copyright is to see if the reader, spectator or viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence...." (pp. 139-140)

66. In the manner we venture to read the above dicta, it appears to us that the English Copyright Law and the Copyright Law in India (and as laid down by their Lordships) is not much different. There is no copyright in an idea but only in the expression of it. The principles generally governing copyright actions are set out above in a manner most unexceptionable (with respect) and now let us see how an application of these principles will take shape in different factual situations. One factual situation is our own. The first learned Judge has relied on these principles and extracted those in his Lordship's judgment, just as we have; after applying those his Lordships has found the existence of the basic theme and several common characters make the case of prima facie infringement arguable and capable of sustaining orders of relief. We give below a second instance, for exercise of one's own judgment, about what is or is not a legal breach of copyright.

67. Let us take the following illustration.

Plaintiffs' play Hero has inherited a fortune from his uncle subject to the condition that if he dies unmarried the money will go to his cousin, the villain. The Villain shoots him but makes it look like an accident. The hero defeats the machination of the Villain by bribing a beggar girl out of the streets to marry him before his death can ensue.

The defendant's play The hero has inherited a fortune from his father subject to the condition that he must marry before the age of 25, or else the money will go to his cousin, the villain. The villain induces him to pass his time drinking and gambling so as to forget the condition. The family lawyer finds the hero on the eve of his 25th birthday and persuades him to go home. On his way home, the hero meets a beggar girl and out of compassion gives her shelter for night. The next day the lawyer turns up with a special marriage licence and insists on immediate marriage. The hero marries the beggar girl.

68. If one were asked to decide whether the defendant's play infringes the copyright in the plaintiff's play, quite a natural reaction would be, to place emphasis on the basic theme of both the plays, that is, if a marriage does not take place within a specific time the good person loses everything and the bad person takes everything. This is the common theme of both the plays.

69. The existence of common characters cannot also be denied. Both the plays show a cousin as the Villain. In both the plays the beggar girl happens to take the morsel out of the Villain's mouth at the

very last moment. In both the plays the subject-matter is inherited fortune.

70. One would thus conclude, that the substance of the play of the plaintiff has been reproduced by the defendant and he is therefore copying it. A substantial part of the plaintiff's work has been adopted, not merely adapted, by the defendant. One would assume that the conclusions hereby made are quite in line with the dicta in R.G. Anand's case (supra). The defendant's action is no more than an act of piracy where the basic artistry of the plaintiff has been copied.

71. One would feel secure in this conclusion. One would happily pass appropriate orders of relief by way of injunction. One would feel confident.

But one would go thereby utterly wrong in copyright law.

72. We hope, we have been able to deceive the reader into falling into a trap by reference to the above illustration, as Pammi succeeded in deceiving Sabir into falling into her hidden trap. We have done so with a view to demonstrating that, because of the absence of copyright actions on the Indian legal scene, most people, Judges and lawyers not excepted (ourselves certainly included), usually do not know, until they have a chance to learn (like ourselves in this case), the basic and elementary ideas of copyright law.

73. The above illustration is taken from a book most helpfully and fairly cited by Mr. Sen being an anthropology of Modern Law of Copyright and Designs, It is a Butterworths publication. The learned authors of the Second Edition were Hume Laddie, Peter Prescott and Mary Vitoria. The first of the illustrious authors has since been elevated to the Bench and we give his Lordship's name above as his Lordships was when the Second Edition was published. The book has gone into third edition now. We have given the illustration from the second edition of the book as set out in paragraph 2.86. After giving the illustration the learned authors made the following remarks:--

"The idea of a man marrying a beggar girl to save a fortune had been used before (Cf. W.S. Gilbert's Yeoman of the Guard) and the details of the respective plays were either completely different or consisted of stock characters and incidents common to the genre (lurid melodrama). Held, the defendants had not taken a substantial part of the plaintiff's play - Rees v. Melville [1911-16] MCC 168, CA."

74. We now explain what we understand of the rationale behind the basic copyright law which is, that you can borrow the idea of another author, but not the expression.

The understanding of the basics of copyright law

75. Why is it that the theme of a play, like the marriage of an heir contingent to a beggar girl does not create a copyright ?

Why is it that the plot by itself is usually not the subject-matter of a copyright ?

Why is it that identical characters, like a Villain cousin and the devising ancestor wishing his legatee to marry a young, these do not create copyright ?

76. The answer is two-fold. The first answer is that these characters are common, no doubt, but too common. Therefore, there is no protection given by the law to the first writer who is not really the first writer at all. The above idea of the risk of a fortune being lost to others, the other idea, of, say, two persons looking alike, are not the subject of the author's original literary work. The second reason for not giving protection in this regard is even more important. If plots and ordinary prototype characters were to be protected by the copyright law, then soon would come a time in the literary world, when no author would be able to write anything at all without infringing copyright. Fathers, mothers, revenge, lust, sudden coming into fortune. Count of Monte cristo themes, beggar girl marrying rich boy, rich girl marrying poor boy, and one thousand such themes, characters and plots would become the subject-matter of copyright and an intending author, instead of concentrating upon the literary merit of his expression, would be spending his life first determining whether he is infringing the copyright of the other authors who have written on this topic or that. The law of copyright was intended at granting protection and not intended for stopping all literary works altogether by its application.

77. So far so good. We understand fairly that the plot being common, perhaps too common, and being the possible field for operation of future and different literary works and plays, should not be blocked of by the law of copyright. Once we understand this, the other side of the problem raises itself. In its extreme form, the next question would be, that since no literary work is ever exactly copied, except for naked piracies by unauthorized printing law at all ? Should not a particular author be free to devise his own story, characters and plots, just as he pleases provided he does not actually copy an earlier work, exactly or almost exactly ?

78. Again the law cannot become this lax. It would pave the way to plagiarism and the labours of the authors would be freely picked up by unscrupulous persons. They would utilise the fruits or originality, not the authors themselves. Therefore, even if the plot is copied, the person who copies it, be it consciously or unconsciously, must also weave into the plot sufficient creations of his own imagination and literary skill, to make the work his own and not a copy of the work which might have inspired him in the first place.

79. The third and last point is, how does one distinguish between a copy of an idea or a plot, which is permitted, and the copy of an expression of the author, which is protected and which is his or her own ? Where does idea end and expression begin ? These are the questions which are the most difficult to answer or even to explain. The best answer is that there are no final answers yet, and there is no hope that there will be any final answers ever. These are situations of legal assessment. Just as there is no mathematical formula for finding out when it is just and convenient to appoint a receiver, similarly, although at a more refined level of intellectual operation, there is no final and exact way of determining what is a copy, or what is a copy of the expression, or what is a copy of the idea, or what is a copy of the idea only. This is why copy has never been attempted to be defined in any of the copyright Acts either here or in England, or to the best of our knowledge (which is not much), anywhere else in the world. It is an exercise doomed to failure from the very beginning. It

will either become too long for an Act, seeking to encompass in it all the judicial pronouncements of value of all the civilized countries in the world in all the different cases, or it would be short, simple and wrong.

80. But the situation is not totally hopeless. It is not that because copy cannot be defined, there cannot be guidances and helpful suggestions which might be usefully considered by Judges when determining whether one work is a copy of another or not. The best way of finding these guidances is in the reported decisions. Several of these decisions were cited before us and we propose to deal with each and every one of those hereafter. With the reading of every new case of copyright, one becomes more confused, more uncertain of oneself, and in our opinion, certainly more equipped to decide according to copyright law in copyright actions. Before we deal with the cases one by one, we wish to sound one note of warning. In copyright cases especially, the judgments should be read as a whole. It is possible to find apparently contradictory statements within the very same copyright judgment in almost all cases. The subject is such that exact dealing is impossible. The judgments, therefore, have to be read in full and the dicta have to be understood in their context, hardly anywhere is the dictum more important than judgments are not to be read or construed like acts of Parliament but as expressions of opinion on cases before the court which are circumstanced by special events and special features.

Cases and Materials on the Law of Copyright

81. It would be wrong, by placing too much emphasis on the heading of this section of the judgment, to skip it over under the impression that it contains only a summary of the cases and materials, but none of our findings.

82. While we shall deal with the legal matter, we shall indicate, in some parts and in relation to some of the authorities, their intimate connection with the facts of our present case and relate such connection to our findings in regard to those parts of the cases.

83. We would first like to start with a case found by the industry of Mr. Pal who appeared for Sachin Bhowmick but which case was cited by Mr. Ray during his arguments. We shall thereafter go on to Mr. Sen's materials on copyright and thereafter maintain order.

84. This case had this remarkable similarity with ours that the alleged offending material had, until the judgment, not seen the light of the day. In our case the situation is almost the same, there having been only one telecast so far. In that case a certain gentleman engaged by the Government of South Africa had prepared several reports which were communicated by him to the said Government. A journalist from the "Times" interviewed him and after according the interview he became apprehensive that the report thereof in the papers might put him in difficulties and prejudice.

He sued to obtain a restraint order alleging as one of the points that the publication of the information obtained on interview would infringe his copyright in the reports. There were points about confidentiality of information which do not concern us.

85. The case is that of *Fraser v. Evans* 1969 (1) Queen's Bench, 349. To the point of possible defamation by publication, the "Times" replied that the materials were going to be defamatory, but if action were taken, they would plead truth. In regard to copyright, the newspaper took up the point of protection given by fair dealing of extracts of copyright material in a newspaper, which provisions would be found in the long Section 52 of our Act.

86. Later on his Lordship again said as follows :

"I think the injunction which has been granted should be removed. "The Sunday Times" should be allowed to publish the Article as their risk. If they are guilty of libel or breach of confidence, or breach of copyright, that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain."

87. The principle of this case applies strongly to ours. We do not know what the serials are going to be like. We do not know the situations which will be shown. We do not know that scenes which will be displayed. We do not know how the characters will be portrayed. We do not even know the details of the storyline. All that we know is that one of the team of persons engaged in production, which is quite a large team, has said to a certain fishing journalist that there are some characters which are as per the book of the plaintiff No. 1 and that the serials have been based on the book and Indianised and adapted.

88. This is simply not enough. Even if all things said by Sabir are accepted, the result, which we have not yet seen, might well be such as to expose all claims of infringement of copyright as practically frivolous and quite unsupported by the copyright law. This is a strong prima facie ground against accepting, that as on date, the plaintiffs have any case to go to trial at all. It should be appreciated that if everything stops today and nothing is shown and the plaintiff's case is tried here and now, and the defendants do not wish to rely upon any of the contents of the serials, the Court would be unable to enter a finding of infringement without first compelling the defendants to exhibit the serials to the Court, and thereafter examining and finding out whether copyright has been infringed. In a situation like this, in our opinion, grant of injunction is more an interference with free trade than a protection granted to protectible rights.

89. We now go on to the other materials given by Mr. Ray. He cited the case of *Francis Day & Hunder* 1963 (1) Chancery, 587. That was with regard to copyright in a music sheet. Mr. Ray cited the case for the dictum that it is important for the plaintiff so as to succeed, to prove a casual connection between his work and the defendants' work. If this cannot be proved, the plaintiff cannot hope for success.

90. Mr. Pratap Chatterjee, who was assisting Mr. Sen, who presented the case of the appellants, dealt with this case on one day when Mr. Sen was busy elsewhere. Most fairly and properly he made submissions on this case for the purpose of fully assisting the Court; and that those submissions tend to help the respondents rather than the appellants, is a matter of no importance. We shall explain this.

91. In regard to casual connection a point had been raised by the defendant that he had not copied the music consciously. It was not said that he had not ever heard the copyright work but conscious copying was denied.

92. Counsel for the plaintiff argued before the Court of appeal that if access to the work is admitted, and if copying is established by demonstration of substantial similarity between the two works, then and in that event, the defence of not actually copying is not available to the defendant. It was said that this is the rule in America and that England should follow suit.

93. Mr. Chatterjee was right in submitting that whatever be the language employed by the Lords Justices, their Lordships did accept that rule as good law.

94. We are of the opinion that the said law is good law in India also- There is good reason for accepting this as good law. If a person has seen something and if his work is a substantial copy of that, then it is impossible for anybody to prove that that person had actually sat down and copied the work in his own private room or by his own private efforts. If he strictly maintains that he did, however, strong might be the similarity between the two. This is why the law does not allow this defence. It is for the same reason that the law does not allow the defence of ignorance of law, as it is impossible to prove that somebody knew some item of law, if he insists upon denying it, even in the fact of the weirdest improbabilities and impossibilities.

95. This explanation given by Mr. Chatterjee is quite of some importance in our case. Sabir said that the serial was based upon the book. Sabir said that they had Indianised it, adopted it and revised it. If there is substantial similarity between the serial and the book, there would be breach of copyright even if Sabir and the whole team went on flatly denying their ever copying anything from the book. Thus, for an identical reason, if there is no substantial similarity between the book and the serial, it is a matter of no importance whatsoever, whether Sabir or anybody else says that they based the serial on the book or adapted it.

96. This is a matter of quite some importance. Adaptation of a book in copyright law has a special meaning. Basing the work on another's copyright work, so as to cause an infringement must relate to a certain type of 'basing', which comes sufficiently within the prohibitions of the copyright law. What is 'basing' something in ordinary parlance, what is adaptation in ordinary parlance, is not 'basing' something according to copyright law understanding, and is not necessarily adaptation within the meaning of Section 2 of the Copyright Act of 1957. Nobody claims, or submits, that Sabir was or is an expert in copyright law and his conversation, if it contains technical copyright law words, should be read as giving those words the copyright law meaning, and not the meaning of ordinary people (extraordinary if you like) engaged in the film trade. Accordingly, the statements of Sabir that the serial was based on the book and that they Indianised it or revised it, are matters of absolutely no importance. The assessment whether there has or has not been an adaptation is an assessment for the Court to make and it is a mixed question of law and fact. It has to be done on a comparison of the materials and the Court can be relieved of this task if and only if some defendant should on some occasion walk into Court and say that he will happily suffer a decree involving infringement; short of such an admission of liability itself, nobody's statement about adaptation or even copying, can be

accepted at face value, because a copy of a copyright work is a technical thing, and quite difficult to determine.

97. The next was the case of the University of London Press, which dealt with copyright in question papers. It is 1916(2) Chancery 601. Mr. Justice Peterson said, "Literary work includes maps, charts, plans, tables and compilations. It may be difficult to define literary work... but it is not confined to literary work in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson... the papers set by examiners are, in my opinion "literary work" within the meaning of present Act." (p. 608) His Lordship also said :--

"Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and, in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of thought. But the Act does not require that the expression must be in an original or novel form but that the work must not be copied from another work - that it should originate from the author."

98. Therefore, if and when the serials are exhibited and seen, it appears to the Viewers that those have originated from people like Talat Jani and Sachin Bhowmick who allegedly brain-stormed for the dialogues, etc., then in that event, it would not matter really at all, if the viewer also thought that the basic idea or the basic theme was obtained by way of an inspiration from the book "A Woman of Substance", the said basic theme being the victory of a single woman over the adversities life. Copyright does not protect the theme; the theme does not sell; it is only when the theme is dressed up after a lot of artistic effort and after a lot of expenditure of money that it starts selling. If, even in the process of such dressing up, the process of mental copying continues, then copyright is infringed but not otherwise.

99. In the above case, his Lordship Peterson, J., also succeeded in producing one of these pithy statements, which makes a Judge famous because it is so true as to get quoted and requoted by future advocates and Judges again and again. The statement of his Lordship was:--

"...after all, there remains the rough practical test that what is worth copying is prima facie worth protecting." Mr. Sen relied on this statement on more occasions than one but in our opinion, this statement is not of much value in our case. It was made by his Lordship for emphasizing that copyright did exist in examination papers. The statement was not made by his Lordship with reference to protection of even ideas; we have already quoted portions of the judgment where his Lordship explained that ideas as such are not protected by copyright. His Lordship did not intend to say by the above aphorism that if a good idea is worth copying then even a good idea is worth protecting under the Copyright Act. All that was meant was that original examination papers should be protected by copyright and protection should not be denied merely because of some notion that this was not literary or artistic work according to the ordinary meanings of these terms; if originality in examination papers is worth copying, then such originality is worth protecting, not any the less than the originality of a poet or a dramatist. When we deal with the football betting bills case, it will be found that this statement is again and again used by their Lordships, because a point arose that football betting bills, which only give the possibility or chance of betting, cannot be a subject-matter

of copyright.

100. Mr. Ray gave the University of London case to emphasize before us the basic quality of copyright problems i.e. the copying of ideas and the copying of artistic expressions. The football betting case is that of Ladbroke Ltd. 1964(1) All England Reports 465 and it is a decision of the House of Lords.

101. The point of existence of a copyright in football betting coupons arose when the appellants decided to send out coupons which closely resembled the respondents' coupons. The appellants maintained that only certain parts of the respondents' coupons are copyright.

102. The point of what can be copyright, therefore, squarely arose. Mr. Justice Peterson's above statement that what is worth copying is worth protecting is quoted by Lord Reid at page 471, by Lord Hodson at page 478 (top) and by Lord Pearce at page 481, at the very end of the judgment.

103. The above is only a matter of interest to us. What concerns us is statements on the idea - expression theme. Lord Reid extracted one of the passages quoted by us above from the judgment of Mr. Justice Peterson, where his Lordship explained that Copyright Acts are not concerned with the originality of ideas, but only with the expression of thought. Lord Evershed said as follows :--

"It is not in doubt that what amounts in any case to substantial reproduction within the meaning of Section 2(5)(a) and Section 49 of the Copyright Act, 1956, again cannot be defined in precise terms but must be a matter of fact and degree. It will, therefore, depend not merely on the physical amount of the reproduction but on the substantial significance of that which is taken." (p. 473)

104. Lord Hodson said :--

"... the undoubted truth that copyright is concerned not with originality of ideas but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing." (p. 477)

105. Lord Reid also had said at the beginning of the judgment as follows :--

"Broadly reproduction means copying and does not include cases where an author or compiler produces a substantially similar result by independent work without copying. If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether that part he has taken is novel or striking, or merely a common place arrangement or ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to inquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could Section A be the subject of copyright if it stood by itself, could Section B be protected if it stood by itself and so on.... Indeed, it has often recognised

that if sufficient skill and judgment and have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright." (p. 469)

106. Before we leave this case we, make this remark with regard to the very last portion of Lord Reid's dictum that, in our country that would have to be read along with the 1995 amendment introduced to Section 2(a) of the Act, by which, adaptation in relation to any work has been defined to include "any use of such work involving its rearrangement or alteration". But here we are not concerned with a case of rearrangement, we are concerned with conflicting claims of making a substantial copy and of not making any copy at all whatsoever.

107. The case of *Hollinrake v. Truswell* 1894 Ch. 420 was also cited to show that in mere ideas there is no copyright. This dealt with a work which enabled the cutting of the hand of a lady's dress. Lord Justice Lindley said that it was unnecessary to consider the question of infringement but still went on to say as follows :--

"The defendant may have got her own idea from the plaintiff's chart, but the Defendant has not copied more than the plaintiff's method of measuring. Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed. The case of *Baker V. Selden*, already referred to, illustrates this very well. It was there held that the author of a system of book-keeping was not entitled to any monopoly in the system, but was only entitled to prevent the other persons from copying his description of it...." (p. 426) If this dictum is applied to our case it can be said, and we say so, the plaintiff No. 1 has no monopoly in the idea of a poor woman making good in life, being burdened early in life with an illegitimate child, having a life long friend who is an ordinary worker, marrying an army officer, and then making a devise of her fortunes, required through a chain of stores, to her successors. It might, be the theme of "A Woman of Substance", but if only this is copied, then nothing is copied. It is common to both the works, but it is too common. There can be no monopoly in something which is too common, because it would prevent free exercise of artistic skill.

108. The case of *Mccrum v. Eisner* 1918 L.J. Ch. 99 was also cited to show that a copying of idea is not prohibited. It was again a judgment of Mr. Justice Peterson where his Lordship quoted Lindley, L.J.'s above dictum of there being no copyright in ideas or schemes.

109. His Lordship said as follows in the body of the Judgment :--

"The only copyright that can exist is in the expression of such an idea, and the question in all such cases must be whether the expression of the idea has been imitated. Now there is no doubt that drawing or other subject of copyright can be copied indirectly as well as directly. As Mr. Justice Blackburn said in *Beal, Ex parte*(37 L.J. Q.B. at page 164), when the subject of a picture is copied it is of no consequence whether it is done directly from picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate subjects...." Lord Watson said this:--

'The Language of Bayley, J. in West V. Francies (5B, and Aid. 737) comes nearer to a definition of what constitutes copying than anything which is to be found in the books'. It runs thus :--

'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original'. Then Lord Watson made this comment upon that definition :--

The same idea which is suggested by the copyright may be expressed by another painting or drawing which is in no sense a copy, and does not borrow its design' - thus indicating that the definition is defective insofar as it states that a copy is that which comes so near to the original as to give to every person seeing it the idea created by the original'."

110. So, if a viewer of the serials gets the same idea which is created by the original, it is simply not enough. The above statement was made with reference to pictures, but it is equally applicable, if properly understood to a book and its serialised versions in T.V. serials.

111. Mr. Sen, appearing for the appellant, relied for exposition of the copyright law, mainly on passages from text books. He cited the well known and celebrated work of Copinger & Skone James and gave us passages from the current edition. In paragraph 7 - 143, the following passage occurs:--

"Dramatisation of non-dramatic works. Infringement of this kind may occur when a novel is turned into a play or a screen play for a film. In such cases, there may, of course, be sufficient copying of the language for the defendant's dramatic work to be a reproduction of the plaintiff's work, so that the defendant will have infringed simply by copying the literary work. However, when there is no language copying, but, for example, the defendant has, to a substantial extent, taken the incidents and plot from the plaintiff's novel and turned them into a dramatic work, this will amount to an infringement by the making of an adaptation."

112. The learned Owrk mentions in the footnote referred to after the above passage as follows:--

"Again, arguably, it will also amount to copying of the work, where part of the merit of the literary work was its plot, characterisation, etc."

113. He also cited the Butterworth's Text Book on the Modern Law of Copyright and Designs from which we have already extracted the beggar girl illustration, from paragraph 2.86 of the works. Mr. Sen gave us the Second Edition and copies therefrom. The Third Edition is already out but we were assured that there are no substantial changes in this regard in the new edition. He also relied on the following parts of the said work.

114. In paragraph 2.107, which is headed "Is altered copying allowed ?", the following passage occurs:--

"It is a remarkable fact that there are still some who are under the impression that it is always legitimate to change in altered copying of literary works provided the language is changed sufficiently. This is most certainly a mistaken proposition. It is a fallacy derived from a

misunderstanding of the catch phrase that there is no copyright in ideas, only in the form of their expression.

'Although no copyright exists in ideas', said Astbury, J., 'there can be copyright in a combination of ideas, methods and devices, used and expressed in and going to form part of a new and original work based though it may be, on old matter'."

Then, at paragraph 2.75 there is this passage :--

"Thus, it is an infringement of the copyright to make a version of a novel in which the story of action is conveyed wholly by means of pictures; or to turn it into a play, although not a line of dialogue is similar to any sentence in the book. Again, a translation of a work into another language can be an infringement".

At paragraph 2.76 it is said :--

"Further, on consideration it will be perceived that any literary or dramatic work contains a combination of details ideas, thoughts or information expressed in a particular language or notation; and once it is conceded that the protection is not confined to the actual language or notation used, it must follow that what remains and is protected, consists of that collection of ideas, thoughts or information. ...However, lip service continues to be paid to what has been called the ideas/expression dichotomy. Sometimes, courts content themselves with stating the proposition and then proceeding to ignore it if inconvenient. At other times, while they say it is 'trite' law that there is no copyright in ideas, they proceed to express that this refers to mere general ideas and treat the ideas-pattern as part of the expression. ...It is of course the law that something can be too abstract or too vague to be capable of copyright protection and a line must be drawn somewhere, but references to a supposed principle that copyright is confined to expression, do not assist in drawing that line."

115. In the illustrations given in paragraph 2.77, the 4th illustration mentions a case and then says :--

"...the Court of Appeal held that there was no infringement in taking the plot of a play. This is not necessarily so today."

Just after this illustration a footnote refers the reader to paragraph 2.86 of the said book. In paragraph 2.86 occurs the beggar girls illustration, which is no doubt an illustration of the plot being taken with impunity and there being no copyright in the mere idea of the plot.

116. In our opinion, though the text books cited by Mr. Sen appropriately warn the reader of the difficulty in applying the test, that there is no copyright in an idea but only in an expression, yet these text books cannot, and do not, do away with that basic proposition of copyright law. It has to be understood and applied in cases of copyright infringement and that law is good law.

117. The text books no doubt indicate that to some extent everything is an idea and, therefore, if no idea is ever protected, in the final logical extreme, no copyright can ever exist, and no literary work would then ever be protected. That is quite true, but the difficulty in applying the idea/expression test is no ground for discarding the test altogether. It is a real test and canvass the real task is, that it is to be understood in the context of decided authorities and different factual instances.

118. Mr. Sen heavily relied upon the 1995 Amendment to the meaning of adaptation introduced in our Copyright Act of 1957. Section 2(a)(v) states that adaptation means - "in relation to any work, any use of such work involving its rearrangement or alteration;"

119. Mr. Ray argued by referring us to the English Act of 1988 that this sub-section must relate to computer programmes and databases. He shows us from the parallel English sections, which are Sections 21(3)(ab) and (ac), of the English Act of 1988, that in the English Act, these words referring to arrangement and alteration are made applicable only to computers.

120. Sub-section 21(3)(ab) referred to above is somewhat as follows:--

"Adaptation means in relation to a computer program, an arrangement or altered version of a program or a translation of it;" and Sub-section (ac) is roughly as follows:--

"In relation to a database, adaptation means an arrangement or altered version of a database or a translation of it."

121. Mr. Ray submitted that from this it is clear that we have followed the English Act of 1988 in our amendment of 1995 by introducing Section 2(a)(v), since the words used are 'rearrangement' and 'alteration', and, therefore, such following should be given full weight by judicial interpretation, and we should read the Indian amendment as an exact or almost exact replica of the English amendment, not merely in form, but also as regards content and meaning.

122. We are unable to agree. This type of statutory construction is not permissible. One is not permitted to impute to our parliament both the fact of copying and the charge of copying badly. If Parliament has said something, may be following some Act somewhere else, may be unwisely, yet it is law made by Parliament and the plain words have to be given a plain, fair and reasonable meaning.

123. In the above sub-section it is mentioned that the added definition applies in relation to any work and work is defined in Section 2(i) as including a literary work. It is impossible nonetheless to accede to Mr. Ray's submission and say that the definitions given by the Indian Parliament notwithstanding, we shall assume that they have in fact copied the English Act only. We unhesitatingly reject this submission.

124. In passing, we mention, that Courts might have to interpret on a purposive approach, if the words and definitions employed by Parliament lead, on giving of a plain meaning to those words, to conclusions of ridiculousness or absurdity. In the very same Section 2, Sub-section (d)(ii) states that

adaptation means in relation to a literary work also the conversion of the work into a dramatic work by way of performance in public. Now, Sub-section 2(o) states that literary work includes computer programmes and computer databases. If one were to argue that computer works and computer databases cannot be converted into dramatic work by way of performance in public, one might have been compelled to interpret Section 2(a)(ii) in a restrictive way. But no such problem arises here, because a literary work like a book is certainly subject to rearrangement or alteration.

125. This argument of Mr. Sen deserves full attention. Rearrangement not being very much in issue in our case, we put to Mr. Sen the question what the meaning of the word "alteration" in this sub-section was. Did it mean mutation or transformation, and did it include such extreme changes also ?

126. Mr. Sen could not maintain any argument of this extreme form, that by introduction of this amendment, the Copyright Law has been so altered in India, that if a literary work is taken by somebody other than the author, and it is so changed and muted as to make it transformed, and a different work altogether, even then copyright would be infringed. Such an interpretation of this sub-section would make nonsense of the Indian Copyright Law. A totally changed thing can never be termed a copy of the original thing. How can copyright affect the right in something, which is not related to the protected work's copying or re-production at all ? Pursuant to our queries, Mr. Sen referred us to several Dictionaries. Dictionaries are the last resort of Judges who either find it difficult to give a meaning to a particular word, or, having deal with all the other principles and authorities, and just for the sake of completeness, refer to these voluminous and useful works.

127. On the basis of what we saw from the Dictionaries, and on the basis of common knowledge of the English language, it appears to us that the word "altered" is capable both of meaning slight changes and of meaning extreme changes.

128. Although it might be utterly unfamiliar to the modern reader who only buys designer suits off the shop hanger, there used to be a time when people slightly had their suits altered to match with a slight change and necessities occasioned by the inevitable progress of life. This would be used of the word "alteration" in the sense of a slight change, or a change at the fringes. The expression "alter ego" is a Latin expression but by constant use it has almost become English. It means the other I, and alter ego would not be much different from ego, who is I myself. It would be like me and my image in the mirror, or may be like two brothers who look very much alike. This again is a meaning of slight change.

129. When, however, a ship's captain goes on an altered course of journey or voyage, he might be taking both a slightly different course, or a totally different course. A slight alteration of the course might land him at Madras instead of Bombay but an altered chartered party might take him to Tilbury instead of Haldia. This would be alteration in the sense of violent change.

130. Any reader having the time or wish to do so can think of numerous instances where the word "alter" will fit both the slight change meaning and the large change meaning.

131. In our opinion, the large change meaning cannot be ascribed to the word "alter" in Section 2(a)(v) of the Copyright Act, 1957, because it renders the interpretation absurd. Minor change, slight change, not making the original something beyond recognizable possibilities, changes in some of the details, this would be the meaning that would fit the word alter in Sub-section (v). In our opinion this sub-section might have a very good bearing when applied to copyrights of computer programmes and databases, but in relation to literary works, the sub-section does not bring in any very great changes in the law; one can at best say that the subsection would make it slightly, we repeat only slightly, easier for an author or an authoress to establish infringement, after its introduction, than it would have been before the introduction. It is often misleading to speak of percentages in legal matter, but the difference made by introduction of this sub-section for literary works is the sort of difference that exists between two mathematics answer papers, one of which gets, say, 46% and the other 5296. There is no reason why we have mentioned these two figures but if this clears the understanding even a little bit, then the illustration would have well served its purpose. In our opinion, the view that we take of the strength of the prima facie case of the plaintiffs, cannot be altered (meaning radically changed) by the introduction of this sub-section only, and by reason merely of the presence of this single new sub-section.

132. Mr. Pal gave us, the case of *Musto v. Meyer* 1977; 434 F. Suppl. 32 which is a decision of the United States District Court, S.D. New York. The report will be found more easily by Indian readers in a text book being *Nimmer's Copyright Materials and Cases*, an American publication but available in India like "A Woman of Substance". The case again illustrates the importance of understanding the difference between protecting an idea and protecting an expression of the idea. The following passages occur in the judgment delivered by the learned District Judge, Bonsal :--

"Plaintiff, David F. Musto, author of an article entitled "A Study in Cocaine, Sherlock Holmes and Sigmund Freud" which appeared in the April 1, 1968 edition of the journal of the American Medical Association is suing the defendants for damages alleging that the defendants infringed upon his copyright by publishing, distributing and selling in 1974 a hard cover and paper back edition of a book entitled. *The Seven Per cent Solution*, and by making and producing a feature length film of the book known by the same time. ...Here the similarity between the article and the book is limited to the idea that Sir Arthur Conan Doyle misled the reading public in the *Final Problem* as to the real activities of Sherlock Holmes in Central Europe, that Holmes was really addicted to cocaine at the time, and that Holmes' friend, Watson, tricked Holmes into following Professor Moriarty to Vienna so that he could be cured of his habit by Sigmund Freud. Even assuming the "idea" of Holme's cocaine addiction was copied by Meyer from Nusto's article without any reference to Sir Arthur Conan Doyle's earlier works, the Court finds as a matter of law that the copying involved only an "idea" and not "an expression of an idea" and therefore, is not actionable under the copyright laws." In our opinion, the case provides a good example where a similarity, of what might be thought to be an important central idea, does not tilt the balance at all in favour of the plaintiff suing for infringement.

133. He gave us the case of the Circuit Court of Appeals in *Nichols v. Universal Pictures Corporation* Second Circuit, 1930; 45 F. 2d 119. This will also be found in *Nimmer*. The decision is of the celebrated American Judge Learned Hand when on Circuit. The illustrious Judge said as follows in

different parts of the judgment.

"As we think the defendant's play to unlike the plaintiff's to be an infringement, we may assume, *arguendo*, that in some details the defendant used the plaintiff's play, as will subsequently appear, though we do not so decide. It, therefore, becomes necessary to give an outline of the two plays. ...Upon any work, and especially upon a play, a great number of patterns, of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statements of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas" to which, apart from their expression, his property is never extended. ...Nobody has ever been able to fix that boundary and nobody ever can... though the Skeleton is a part of the body it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed. As respects plays, the controversy chiefly centres upon the characters and sequence of incident. ...If the defendant took so much from the plaintiff it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff's play was wholly original and assuming that novelty is not essential to a copyright, there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalised an abstraction from what she wrote. It was only a part of her "ideas"."

134. The above dicta are very helpful to our case; the plaintiff cannot have a monopoly to the idea of a woman making it from rags to riches. Bhowmick in his affidavit has mentioned no fewer than five works where the same theme of poverty to wealth is dealt with successfully. It is quite clear that even if Sabir actually based the serial on the book, this would simply not be enough to prove a case of infringement, not even a *prima facie* case of infringements, let alone the main trial.

135. The details are everything in copyright actions. It is the easiest thing in the world to take a fat book running to hundreds of pages, and to take a serial which will go into about 300 episodes, and to say in the three or four lines that these are common to both. If what is common to both, both of which are large, can be said in so few words, then the similarity so described, must be so central and so essential and so extraordinary, that like the magic quality of a very small looking nuclear bomb, it can more than match the power of masses of details, i.e., masses of mundane or ordinary weapons of destruction. We are of the opinion that the admissions obtained by Pammi from Sabir are nowhere near this type of extraordinariness. They do not make out even a *prima facie* case that the actions, the scenes, the events, the details and the portrayed conceptions, serial by serial, would match either substantially or at all, the situations and incidents in the book.

136. This is the appropriate place to mention a very remarkable thing. Although copyright action is about the details, although copyright action is about similarities of expression, similarities of story, scene, situations, character and the entirety of the progress of the literary work, yet neither Mr. Sen who argued out the appeal nor Mr. Ray, who appeared for the respondent No. 1 nor Mr. Anindya Mitra nor Mr. Samaraditya Pal appear to have read the book "A Woman of Substance" at all. The only person who seemed to have read the book was Mr. Mitra's son Abhrajit Mitra who is, comparatively speaking, a raw junior.

137. I was at least venturesome enough to take the book home everyday and get it read by my wife; I was also sufficiently polite to ask her what she had read and sufficiently patient, (could I be otherwise) to listen to her every morning at least at the breakfast table; the result was that I knew something of the plots and situations. I knew that Blackie the friend, had gone war with Joe the husband. It was a surprise, like a very small bomb, at least to Mr. Pal, learned counsel appearing for Sachin Bhowmick. The others will know or say for themselves.

138. I shall mention another incident here which is quite an interesting one. Incidents of this sort characterise a book and protect it from being copied.

139. Emma Harte, after she had got pregnant, went away from the village. She suffered her agony but was constantly writing letters to her father. An appreciable time later, she returned. The Fairlie who had got her pregnant, was Edwin Fairlie. Emma called the illegitimate daughter Edwina. She left her to be brought up by her cousin, as she had to feud for herself at a very young age. She found that just after she had left the village, there had been a fire. Edwin Fairlie was in great risk of being burnt and killed. Emma's father, to whom she had been writing, protected Edwin and the burning smoulders fell on his back. He suffered third degree burns. He died, protecting Edwin who had given Emma Edwina. All the time Emma was writing letter to her father, he was dead. This finally embittered Emma against the Fairlies, and gave her the hard determination she needed to face life.

140. An incident like this, no doubt, creates an impression upon the reader. It is by creation of such impressions that pop literature sells. These specially imagined incidents are copyright. No attempt was made by anybody to pick out any of these incidents or any of these special features to make out a prima facie case for infringement. May be, the exercise is fruitless now because the serial has not yet been exhibited. Be that as it may, we say confidently that even eminent and highly prized counsel did not bother to read the book, the copyright of which was the subject-matter of this appeal, because and simply because, there are hardly any copyright actions in India, and the copyright law is very imperfectly understood, if at all, and because it is not realized commonly that infringement of copyright can be demonstrated by, and only by, the attention to details, and analysis of the similarities of the details, which are the expression, and the only copyright.

141. At the time of giving reply, Mr. Sen gave us a very interesting judgment, delivered by Mr. Justice Pritchard in the High Court of New Zealand. It is reported at [1986] Fleet Street Reports, 63. Large parts of the judgment were placed before us and we propose to extract some portions of it. The Copyright infringement was claimed in regard to pocket packs of a fruit called Kiwi fruit, which is common like the bird in New Zealand. It is now available in many parts of India although it was practically unheard of even two years ago.

142. Pritchard, J., said as follows in the judgment :--

"This proposition touches on the question of the idea/expression dichotomy, which is probably the most difficult concept in the law of copyright. It is no longer universally accepted that there is no copyright in ideas. ...The concept that copyright does not protect ideas is found unacceptable by the authors of several reasoned text books - e.g., Laddie, Prescott and Viotria at pages 31-33 and Lahore

on Intellectual Property in Australia (Paragraphs 1121, 1151).

I think the conflict between these two philosophies is more apparent than real, and if there is any conflict it can be resolved by an analysis of the concept of ideas.

There are, in fact, two kinds of ideas involved in the making of any work which is susceptible of being the subject of copyright. In the first place, there is a general idea or basic concept of the work.... Then there is a second phase - a second kind of idea. The author of the work will scarcely be able to transform the basic concept into a concrete form, i.e., express the idea - without furnishing it with details of form and shape. The novelist will think of characters, dialogue, details of plot and so forth. The artist will think of a certain tilt to the dog's head, to the effect of perspective, colour, light and shade. The pocket pack maker will likewise design the shapes, forms and patterns whereby he believes he can most effectively express the basic idea of pocket packs. Each author will draw on his skill, his knowledge of the subject, result of his own researches, his own imagination in forming his idea of how he will express his basic concept. All these modes of expression have their genesis in author's mind - these too are "ideas". When these ideas (which are essentially constructive in character) are reduced to concrete form, the forms they take are where the copyright resides. ...The basic idea (or concept) is not necessarily simple - it may be complex. It may be something innovative or it may be common place, utilitarian or banal. The way the author treats the subject.... It is in this area that the author expends the skill and industry which (even though they may be slight) give the work its originality and entitle him to copyright. Anyone is free to use the basic idea - unless of course it is a novel invention which is protected by the grant of a patent."

143. One notes with interest that although the learned Judge quotes authors who advocate the modern and fashionable view, that the idea/ expression dichotomy is no longer acceptable to modern lawyers, yet his Lordship goes on to expound this very dichotomy of idea/expression. The manner in which his Lordship proceeds to expound this idea, is, with respect, quite striking and helpful. It is but another block of stone or brick to the edifice which is being built and which will never be finally built, which is the law of copyright relating to idea/expression. The concept of idea/expression is a time-tested, solid and good concept of copyright law. We accept it as holding fully in India, as the Hon'ble Supreme Court has itself said in R.G. Anand's case (supra). We proceed now to apply this law to judge the prima facie strength of the plaintiff's case on alleged infringement of copyright.

Prima facie case of infringement of copyright

144. In our opinion, the plaintiffs have, as yet no arguable case to go to trial. If Pammi's interview is taken at full value, it can only mean that the basic theme of 'A Woman of Substance' has been borrowed and there are some common characters. The Hon'ble Judge of the Interlocutory Court has also held no more than this. In our opinion, this is just an idea, the idea of rags to riches, the idea of introducing certain characters which ideas are in no way uncommon or copyright. One single incident of the heroine getting an illegitimate child is an incident so common, and therefore, of such insignificant importance, that no one would dream of stopping a project of Rs. 100 crores and much more on the allegation of copyright that the heroine of the plaintiffs' book also bore an illegitimate

child. The same thing applies about an army officer even after the army officer dies as allegedly he dies in the first serial (which is not admitted, and is explained as we have stated before) even then anybody who reads the law on the subject which we have extracted above, would have no difficulty in realising that these are simply not enough even to found one paragraph of a good plaint in a copyright action which is likely to succeed.

145. Had there been, on the 28th of April or the 7th of May, a threat of action of infringement of copyright, should the serials start resembling the book in an impressible way, and to an impressible degree or extent, one could have understood such threat to be quite a legitimate effort at protecting the rights of the authoress. But to come to Court with a plaint on the sketchy, basic and sparse similarities like the above is wholly wrongful on the part of the plaintiffs. It is even more wrongful to obtain an injunction on such scanty and hopelessly insufficient material and put a spoke in the wheel of the Sahara channel for nearly three months now. The plaintiffs should suffer for the consequences of filing a case without any prima facie strength of merit and for obtaining wrongfully an injunction thereupon, causing the defendants to suffer fully thereby. We are of the opinion, and we say this with the greatest of respect, that though the Hon'ble Single Judge extracted the copyright law with absolute perfection and accuracy, his Lordship did not apply the law correctly to the facts found by his Lordship, which are again quite in order. Had the standard law been applied to the facts one and only one conclusion was possible, which is, that the plaintiffs have as yet no prima facie strength of case on merits. Injunction should have been refused fully on this ground and this ground alone. We are to note that his Lordship has, with his Lordship's considerable wisdom expertise, (we say this again with the greatest of respect) passed an order with which we shall ultimately find ourselves in substantial agreement; but we shall only vacate the direction for furnishing of bank guarantee. Before we can do that, we have to traverse a lot of other ground.

146. We could have come to the above conclusion here and now on the above single ground also, which is also the central point of the controversy between the parties. But there are other points of considerable importance on which a lot of emphasis has been laid and a lot of argument has been made. It would be just to the litigants only if we dealt with all these arguments to a reasonable extent and gave our conclusions thereon. It is also necessary to do so for the additional but important aspect of assessing costs and damages for obtaining injunction wrongfully. These are also important matters in a litigation of this magnitude involving financial stakes of Rs. 100 crores and more.

Two Further Illustrations

147. Before we pass on to the other topics, we would like to add two more illustrations to explain the idea/expression dichotomy a little further. The purpose of giving these illustrations is this. The law protects originally of expression but not originality of the central idea, not merely because of the balancing of two conflicting policies. Those policies are as follows. The first is that the law must protect originality of artistic work, thereby allowing artists to reap the fruits of their labour and stopping unscrupulous pirates from enjoying those fruits. The second policy is that the protection must not become an over protection, thus, curbing down future artistic activity. If mere plots and character were to be protected by copyright, on original artist could not write anything "original" at

all, on a similar plot or on similar characters.

148. The law recognizes these policies; but the law is also in accordance with, what could be called the idea of fair protection, even if that idea of fairness were to be formed by an artist or a writer, who does not know even a single thing about copyright law. The two illustrations that we given below show this. It will also show at least in this one instance, that the law is not, as some and laymen and even some lawyers sometimes jocularly say, an ass; but the law regards, sometimes, as in this case, the layman's concepts of copying as the concepts of an ass, because copying of ideas is not copying the artist. Both lawyers and artists would follow it, and also people of understanding, but not those who make only a superficial assessment.

149. The first illustration concerns a play by Henrik Ibsen called "An enemy of the people". Inspired by this book late Satyajit Ray, made a Bengali film called 'Ganashatru'. That word means in Bengali exactly the same thing as an enemy of the people.

150. The central story of the Ibsen play is that there were two brothers. The elder brother was a city father of a watering place which owed its prosperity wholly to the tourists' visits who came to use the renowned waters of the place.

151. The younger brother was a scientist. He discovered that the waters were in fact foul, and not at all healthy. He wanted to disclose this to the public. There arose a conflict between the two brothers. It was also a conflict between two policies. The policy of the elder brother was to protect the economy of the place, if necessary at the cost of the health of the tourists. According to him, many people of the watering place would be ruined if the truth were made open. The younger brother's policy was, that the truth must be told, whatever the consequences. It was morally impermissible to permit or invite tourists to use the foul waters and allow them to ruin their health, when the fact of the waters being foul, had been found out finally. The end of the play does not find victory for the younger brother. He makes two nice statements which read roughly as follows in the Modern Library English translation, which is all that I have read. One is, that the majority is always wrong; and the second is, that one is never stronger than when fighting alone.

152. In the film 'Ganashatru', the prosperity of the place is owed to a temple which is very popular and constantly visited. Its 'Charanamrita' meaning the waters which are obtained by washing the feet of the Deity, were found by the scientist to be foul and likely to cause disease of the Stomach.

153. A similar conflict as in The enemy of the people arose. The film ends on the note that the people, especially some students, prepare to support the scientist, who had quite given up hopes of obtaining any public support.

154. A superficial examiner would say from a comparison of the play and the movie, that the film has been copied. That might be the reaction of the layman, no doubt. But it is not a copy, according to the copyright lawyer. Although the central theme is the same, it is but an idea. The idea is novel and no doubt the idea is central to the creation of a dramatic conflict. Once the idea of this conflict is conceived by a dramatist, it becomes much easier for a future dramatist to write a play on the same

theme.

155. But the point is, that this is permitted by the copyright law. The theme can be borrowed. The originality in the theme is not protected. Had it been otherwise, and Ibsen's play had continued to have a life of copyright at the time the film was conceived, the film would never get made; people who appreciate these things, would be the poorer, if the film could not be made because of an over protecting copyright law.

156. The second illustration is from Othello. To the best of my knowledge, the story of Othello was originally a sordid Seaman's tale. There was this strong man returned from many wars, who fell in love with a prized and beautiful lady. They fell in love and got married but the man was made jealous... by insinuations and falsity. The jealousy rose, and he killed her. Thereafter he rued his deed, but it was too late.

157. Nobody would say, that even if the seaman's tale hypothetically was protected by copyright, Othello would be an infringement of it. The idea and the story are totally borrowed. The character of the Moor is lifted from the story. The fair and frail lady is also in the story. But there is in Othello much more than the story. It has become a classic and is read by students of drama and English literature, not because of the story, nor because of the characters, but because the story was unfolded and fold in the manner done by the great dramatist. Even people like me, who never read literature seriously, know of such 'ordinary' lines as, she loved him for the dangers he had passed, and he loved her because she did pity them; or, put out the light, then put out the light. I do object however, to the great bard describing the killing of Daesdemona as the casting away of a pearl by a "base" Indian, the pearl being richer than all his tribe;

Indians do not cast away pearls and the intuition had, just this once failed Shakespeare because, no fault of his, he had never visited India in his time.

158. That the central idea, the story, the central theme is not at all everything to the art, is sufficiently explained by these two illustrations. So, even if what Sabir says is true, and the serial is based on A Woman of Substance, and even there is a certain "commonality of characters" as the Hon'ble First Judge records in his Lordship's judgment, the prima facie case of the plaintiffs still does not even begin to take off. The copyright lawyer would simply say, a common theme, common characters, all these there might be, but so what? That simple and single question would finish of all prima facie case of the plaintiffs and cause them to fail on this primary ground alone. We go on to the other topics now.

Injunction now, or damages in the suit, later on

159. The learned Judge found that even if there is a prima facie case made out by the plaintiffs they should fail because the balance of convenience, and the likely prejudice to be caused to the two sides on the two possibilities of grant or refusal of injunction, indicated that way.

160. His Lordship placed emphasis on the fact that Rs. 100 crores had been invested and Rs. 11 crores already taken from advertisers who relied on the serials being broadcast. The names of the advertisers are given. Mr. Sen made very pointed remarks about the break up of the 100 crores being simply Rs. 60 crore for production and Rs. 40 crores for publicity. He also said that no contracts with any of the advertisers are annexed. He argued that the first plaintiff might well be a bubble company, which would never have any means of meeting a decree for damages even if damages should follow in the end after the trial of the suit. He also said that computation of damages in such cases as these presents enormous difficulties. The true measure of damages would be the loss of value of the plaintiff's works, and since all the facts and figures of profits made by the respondents would be in their possession, short of ordering and enforcing large scale discoveries, and constant supervision over the profits, which are being made during the telecast of the serials, no damages could ever be proved.

161. His Lordship, in our respectful opinion considered all these submissions and placed full weight upon each one of these. Upon an exercise of his Lordship's judicial discretion the conclusion was that too great an amount of prejudice would be caused to Sahara by stopping the telecasting of the serials altogether at this stage. Mr. Ray submitted that if the serials are stopped now, and those have to wait until determination of the suit, the serials and the whole project would be killed. The gap in time would rob it of its life. Karishma herself would grow older. The project, if shelved for the time that is likely to be taken for the final disposal of the suit, in all the forums, will be killed simply by running out of the shelf life.

162. His Lordship balanced the inconvenience and prejudice of the plaintiffs against this. His Lordship found that the book has been exploited and it is not that the authoress has stopped all exhibition of the book, treating it as something which has to be read, and read alone. It is not that his Lordship has used all these exact words, but the exploitation of the book by the authoress has been mentioned and emphasized. We were told that the authoress had been approached for assignment of her copyright for the purposes of transmission to the Hindi speaking public. Balancing these factors his Lordship refused to grant injunction, only directing the furnishing the bank guarantee of Rs. 25 lakhs by the respondents for protecting the plaintiff's suit.

163. We are aware that if the suit should succeed (we have already held that it has no prima facie chance of success as yet), then and in that event, Rs. 25 lakhs would perhaps not be an adequate or realistic measure of damages, in case, of course, the serial is a success.

164. Though Mr. Sen made pointed remarks about the break up of Rs. 100 crores being only Rs. 60 crores plus Rs. 40 crores, the Court cannot lose sight of the realities of the situation.

165. When a serial with circulating Bombay actors and actresses is made with a view to turning it into 280 episodes, the project costs money. Advertisements in between the serials also cost money and the marketing wings of wealthy commercial establishments spend a lot of money in this. It is not un-reasonable or fanciful to estimate, even without details of fact or figures, the rough cost of a project of the nature of Karishma to be of the order of rupees hundred crores.

166. We do not dispute the propositions of law made out by Mr. Sen or the authorities cited in that regard. It is true that if there is a good or reasonable prima facie case of infringement, injunction should be granted, because a person cannot be allowed (in breach of the 8th commandment, as his Lordship quotes and says) to steal another's property, even if it is only intellectual property, and enrich oneself by such theft. But if there is no such prima facie case, no question of grant of such injunction arises.

167. On the point of balance of convenience, we are in respectful agreement with the Hon'ble Single Judge that much the greater prejudice would be caused to Sahara by killing their whole project altogether, than by allowing exhibitions to proceed against the objections of the copyright holders.

168. We agree with Mr. Sen that proof of damages in this regard is a matter of great difficulty; if Mr. Sen's clients had a strong reasonable prima facie case to go to trial, we would not have had much hesitation in granting an order of injunction as one should not be allowed to earn profits by using or pilfering another's property, and then putting that deprived owner to great and grave problems of proof of loss, at the time the suit is heard. But on the basis of Sabir's interview alone, these considerations do not really arise.

169. We are of the opinion that such is the weakness of the plaintiff's prima facie case, such is this scantiness of materials upon which the plaint has been filled, that even the requirement of furnishing of bank guarantee by the respondents should be removed. As such, we propose to allow the cross-objections to this extent, and we relieve of the respondents of the said obligation. We have not dealt with any of the authorities cited by Mr. Sen in regard to these matters, because we have accepted all the propositions canvassed by him, but we have moulded those propositions in the light of the extreme weakness, or non-existence, of a prima facie case of the plaintiffs.

Suppression

170. In our opinion this topic is as important as the topic relating to copyright law. It was argued by Mr. Ray on the basis of the Russian Princess' case (we shall have something to say about why that case is called that way, when we give the reference and deal with it). He submitted that the motion should be dismissed even on this ground alone. Before we come to the law, let us relate once again the details of the alleged suppression.

171. It is said that the first interim order of 7th May, 2003 was obtained wrongfully from the Court by the plaintiffs by suppressing important and vital material which should have been told to the Court and which was very likely to affect the Court's discretion, had it been brought to the Court's notice.

172. The material facts are these. On 28th April, 2003 the plaintiffs had filed an earlier suit in Bombay, of which we have spoken in the beginning. They withdrew it, with liberty to file afresh, on the 2nd of May, 2003, stating through counsel that fresh material had come to light and it would be inconvenient and cumbersome to amend the plaint. No fresh material had come to light then. The fresh material and the only material of the plaintiffs is Pammi's interview, in which she sneaked out

the plaintiffs' material, from the creative director-cum-producer, Akashdeep Sabir, in the evening of 2nd May, 2003. After obtaining of the interview, the plaintiff No. 1 did not go back to the Bombay High Court from which leave was obtained to file afresh. They came to Calcutta instead. It is mentioned clearly in paragraph 31 of the Bombay plaint that the whole of the cause of action has arisen in Bombay. Pammi's interview also had taken place in Bombay. Contrary to these allegations, parts of the cause of action are alleged in the Calcutta plaint to have arisen within the territorial limits of the Ordinary Original Civil Jurisdiction of this Court. Counsel had made no attempt on the 2nd May, 2003 to ask for any interim order from the Bombay High Court, although a petition had been filed for obtaining of interlocutory orders from the Bombay High Court; with the withdrawal of the suit, the petition had no further ground to stand upon.

173. It was pointedly submitted that if these facts were brought to the notice of the Court in the above sequence, it would be most natural for any Court to ask why the plaintiffs have hopped from Bombay to Calcutta ? It would be quite natural for the Court to ask of the new thing, that had happened between the 28th of April, 2003 and the 7th of May, 2003, by which, the whole of the cause of action, which was in Bombay until the 28th of the last month, should spread its wings within a few days, and find several perching places within the local limits of the Calcutta High Court Jurisdiction, by and within the 7th of May, 2003. The Court could naturally ask, that if there were no sufficient materials to press for an interim order up to the 2nd of May, 2003 (before fall of evening), but that a suit (to the same effect as before the Calcutta High Court), could only be withdrawn until that time, how and what great importance could be attached by a Court, to a single journalist's interview, obtained from her friend for several years, even if that should be passed on to the side of the enemies of that friend, for reasons best known to Ms. Pammi Somal ? It would be quite natural for the Court to ask, that the next day i.e. 8th of May, being a working day, why should there be an interim order stopping the projected telecast of the 12th of May, 2003 which is a Monday, and why the matter should not be made returnable on 8-5-2003 with notice to the other side ?

174. Mr. Ray pointed out that the Court had remarked in the order of 7-5-2003 that an interim order is necessitated by reason of counsels' submissions that if notice of the application is given to the respondents they would destroy or conceal the materials upon which the infringement action is based. This statement or submission in the plaintiffs' petition is absolutely inconsistent with the prayer sought for. The prayer was for stopping the telecasting. The telecasting is the best material for demonstrating infringement of copyright. The reason why interim order was asked for, without giving notice, was a reason which had no legs to stand upon.

175. When the Hon'ble Judge was approached by Mr. Ray for vacating of the interim order in the morning of 12th of May, 2003 the only point pressed was the point of suppression. No finding is entered whether the suppressed facts, according to his Lordship are at all material or not. All that is said, as reason for continuance of the order is (to the best of our understanding and reading of his Lordship's order) as follows :--

"However, after hearing the parties it appears to me that it would be proper for me to continue with the order on the undertaking of Mr. Sen which is submitted on instruction of his Advocate on

Record. The interim order is modified to the extent that the Receiver shall only make inventory. Mr. Sen's client is directed to file an undertaking by way of an affidavit to the extent that if any damages or prejudice is being caused to the respondent, his client shall undertake to pay such damages and cost for the same to have this interim order in their favour, in the event the petitioner fails to succeed in this application. Such affidavit to be filed within one week from date."

The affidavit filed by the plaintiffs is not in accordance with the undertaking but that is a separate topic to be dealt with by us later.

176. What is important to note, at this stage, is that the only point urged by Mr. Ray was turned down by the Court only on the ground that acceding to the submission did not appear to his Lordship to be proper.

177. The finding of his Lordship is extremely important. As we have said before, if suppression is alleged before the same Hon'ble Judge who passed the ad interim ex parte order, and that same Hon'ble Judge rules that even if the matter had been brought in details before his Lordship on the ex parte day, his Lordship would not have considered it to be material for the use of his Lordship's discretion, then and in that event, it becomes exceedingly difficult, if not impossible, for any Court of Appeal or any other forum to rule otherwise, contrary to the Single Judge's decision.

178. After all, the suppression, if any, is before the Single Judge; the giving of incomplete facts, if any, is before the Single Judge. The deception practised, if any, is upon the First Court; the abuse of the process of law made by any of the parties is, in this regard, before the First Court. There is no more suppression once the other side comes; then, even if the plaintiffs do not give the whole facts, the defendants will. It is only when the plaintiffs have a chance to score a goal without the goalkeeper, that suppression can be practised, and ex parte orders can be obtained wrongfully by playing upon the belief and credulity of the First Court, not to mention misuse of the usual reliance placed by long practice on the Original Side (as well as other places) by Judges on learned Counsel moving ex parte.

179. Failing to get a vacating of the interim order and the dismissal of the motion before the Single Judge, the respondents went before the Court of Appeal on that very day.

180. The Court of Appeal entered a finding that there had been serious suppression disentitling the plaintiffs to any further relief. A judgment was delivered by the Appeal Court. The Court said inter alias as follows :--

"Instead of filing the plaint in Bombay High Court, unfortunately the Calcutta High Court was moved without a whisper of the Bombay High Court proceedings ...The very fact that leave was obtained from Bombay High Court shows that the subsequent Suit will be on the same subject-matter, and but for that leave, the subsequent suit is barred.... The learned Judge of the First court should have vacated the ex parte ad interim order dated 7-5-2003 after his Lordship was apprised of the Bombay High Court proceeding and the order and specially when those facts were withheld from his Lordship.... Apart from anything else the conduct of the appellant as stated above

disturbs conscience of this Court.... Suppression of these facts amounts to a gross suppression of a very material fact and we are of the prima facie view that a litigant who indulges in such a practice virtually acts in abuse of the process of the Court.... We make it clear that subject to this, the order Court should not be construed as staying the hearing of the injunction petition before the learned Judge of the First Court."

Their Lordships also noted paragraph 31 of the plaint in the Bombay suit (which mentions that the whole of the cause of action is there) and the said paragraph can be found at page 117 read with page 210 of the petition cum paper-book before us.

The order of the Court of Appeal dated 12-5-2003 has not survived.

On 22-5-2003 the said order was set aside practically by consent of the parties. The Supreme Court said:-- "...we make it clear that we have not expressed any opinion on the issues arising in these appeals because the appeals are being disposed of by consent."

181. Their Lordships also clarified that the matter was being remitted to the Single Judge to dispose of the interlocutory application after hearing the parties and considering all the arguments of the learned Counsel. It was also said that the interim stay granted by the learned Single Judge dated 12-5-2003 shall continue until the final disposal of the application before the learned Single Judge. The impugned order of the Division Bench dated 12th of May, 2003, from which we have quoted above, was set aside by the Supreme Court.

182. Had the Supreme Court passed an opinion that their Lordships thought that the Division Bench order was wrong, and the reasons given by their Lordships in the said Division Bench order were unsustainable, we would have had no jurisdiction once again to enter into that closed chapter in this judgment. But the Supreme Court did not say so. It expressly kept the points in the appeal before it open. The only point before it was the point of suppression. It is accordingly still open. We have to give our judgment on it.

183. In the order of 30-6-2003 suppression has been dealt with in details. His Lordship found as follows:--

"The nature of misconduct alleged and keeping in view the explanation offered by the plaintiffs I am of the view that the conduct has not been such as to warrant the denial of consideration of the motion on merits."

The explanation of the plaintiffs as given by Mr. Sen to the learned Single Judge and as recorded by his Lordship is as follows:--

"Mr. Sen, learned Counsel responded to the said contentions by submitting that there has been no misconduct on the part of the plaintiffs. As the Hon'ble High Court at Bombay had closed for Summer Vacation, the plaintiffs were advised to file the suit elsewhere as there was no possibility of having any application heard immediately as was incumbent. The order of the Court dated 7th May

of 2003, it was submitted, was received after 4 p.m. on May 8, 2003 and due steps were taken for service. The order and the pleadings were only despatched by courier on May 8, 2003 immediately after having the order."

184. We do not wish to place any reliance, in the interest of the plaintiffs themselves, on the submission made by learned Counsel to us, as to whether the closure of the Bombay High Court for Summer Vacation, is a matter of absolutely any consequence for obtaining an interim order from the Bombay High Court. Like all other premier and other High Courts, the Bombay High Court has a full and well geared system of appropriate and adequate number of Vacation Benches operating.

The explanation given by Mr. Sen before the Interlocutory Court is, therefore, thoroughly unacceptable to us.

185. No adequate explanation came before us why the whole of the cause of action from Bombay came, by reason of the events between 2-5-2003 and 7-5-2003, to Calcutta also. We have found no adequate reason whatsoever explaining the plaintiffs' choosing one High Court instead of another, although that other High Court had been first approached by the plaintiffs, on their own free choice.

186. There is no finding by any Court yet that the suppression made by the plaintiffs is not suppression of a material fact at all. On the other hand, one Division Bench has already held that these are material facts. We have no hesitation in re-entering the same finding. If I were sitting in the Interlocutory Court and if I were told that just the other way a Bombay suit had been filed, and withdrawn with liberty to file afresh, I would have surely felt myself put on inquiry, as to why the parties had travelled in such a brief space of time from Bombay to Calcutta. Interlocutory matters depend a lot on facts and common sense. Thus, inquiries by Court compel counsel to reveal materials which put the case on facts in its proper perspective. We have no doubt that important and relevant materials were deliberately suppressed before the Interlocutory Court, on behalf of the plaintiffs, when an ad interim order was obtained without giving any notice to the other side, and taking the responsibility of disclosure of full facts upon the plaintiffs themselves.

187. Mr. Sen argued before us, that if a suit was filed and withdrawn with liberty to file afresh, in the eye of law it is all as if no suit had been filed. We found that a similar submission had also been made before the first Court. Mr. Sen cited a judgment of the Division Bench of Calcutta High Court in *Sashi Bhusan Basuri v. Moti Bala Dassi*. That proposition of law is not disputed. There might or might not be a case in the eye of law at all, after it has been withdrawn. But the fact of filing of the case, and the reasons for its withdrawal, and the submissions made in the plaint about the arising of the cause of action, these are all facts which were, are and will always be all there before human eyes, and human eyes see facts more penetratingly than do mere eyes of the law.

188. We read the submission of Mr. Sen that because there is no suit in Bombay after its withdrawal in the eye of law, by that reason, any suppression made with regard to the ex-Bombay hopping onto the Calcutta Court is also rendered unnecessary for consideration by our Court, As such, there being material suppression, we have to consider what the effect of such suppression is, in law. The case, in point, is, as we have said, the case of the Russian Princes case.

The Russian Princess' case

189. Although decided more than 80 years ago, and in England, this is still the root case in regard to grievances of suppression made by the party who has suffered an ex parte ad interim order. The case is reported in 1917 King's Bench Division 486; it was a decision of the Divisional Court affirmed by the Court of Appeal. The facts were briefly these. An American lady, who had successively married two members of the French Gentry, was taxed in England and certain assessment orders were issued. She moved for the writ of prohibition alleging that the authorities had no jurisdiction to tax her in England as she had no property there.

The Divisional Court passed ad interim order of prohibition, upon the application being moved, in the absence of the revenue.

The matter being returnable before Court thereafter, the revenue argued that the Princess had suppressed serious material before the Court. She did have property in England, and her brother's flat in London was really hers and her brother was only her nominee. The source of purchases money of the flat and other details of the monies involved in that regard left no manner of doubt about her real ownership.

The Divisional Court, on this ground of obtaining of an interim order on suppressed material, dismissed the application of the Princess altogether. The appeal of the Princess to the Court of Appeal failed. The name of the case is King v. General Commissioners, ex pane Princess Edmond De Polignac; the case has been jocularly known in the Bar Library Club at Calcutta at the Russian Princess' case because there was nothing Russian in the case, and it was the territory of the only one of the allied powers, which was not to be found in the case. I am not aware whether it was called as the Russian Princess' case (supra) in Calcutta between the first war and the second, but from the time I came to know of the case for the first time (in or about 1970, from Mr. Amiya Nath Bose, elder brother's son of Netaji Subhas Chandra Bose), I have been aware of the case as the Russian Princess' case (supra) always. I enquired of counsel, why it was called so, as the point had not occurred to me earlier. No answer being forthcoming, I have ventured an opinion about the jocular name given above. If I am wrong, no doubt somebody will correct sometime.

190. Be that as it may, the case contains several important propositions. The first of those propositions is, that obtaining an ex parte interim order on suppression is a very serious matter. The second point is, that if the Court was deceived or misled by it, the litigant who obtained the interim order, must suffer a dismissal of the motion. The third point is, that if such dismissal entails a loss of remedy, that cannot be helped. The fourth point is, that the power of dismissal for suppression is an inherent power of the Court. Some of the statements made by the illustrious Judges are reproduced below,

191. Viscount Reading Chief Justice of the Divisional and the High Court said as follows :--

"Where an ex parte application has been made to this Court for a rule nisi of other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did

not fairly state the facts, but stated then in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived". (p. 495)

192. Mr. Justice Low, also of the Divisional Court said as follows :--

"The statements made in the affidavit on which the rule nisi was granted were very far from being honest and candid. That being so, it seems to me that this Court, having been exposed to an attempt to mislead and deceive it, has no alternative but to discharge the rule". (p. 498)

193. Lord Justice Cozens-Hardy, Master of the Rolls said as follows:--

"...the general proposition which I think has been established, that on an ex parte application unerrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say 'We will not listen to your application because of what you have done'." (p. 505)

194. Lord Justice Scrutton stated at page 513 in the beginning of the judgment that the Princess Edmond De Polignac was an American lady who had married a French subject. His Lordship went on to conclude as follows:--

"It may be that the result of our decision is that the applicant loses her remedy. If so, she has herself and her legal adviser to thank for it." (p. 519)

195. The effect of this case, in the light of Order 39 Rule 4, is material in this regard. It is not necessary to set out the provisions as the code is easily available.

196. Mr. Sen argued on the basis of the express words, that the code enjoins, that upon suppression being pointed out and established by the other side, the Court will merely vacate the interim order already obtained. Mr. Sen, submitted that the code does not go so far further as to say, that the application itself will be dismissed and no affidavits at all need be called for.

197. In our opinion, this point is very simply answered. As the case of the Princess demonstrates, the power to dismiss for deception or concealment practised upon the Court is an inherent power.

198. Section 151 of the Code expressly preserves the inherent powers of the Court. Such dicta in the case of the Russian Princess (supra) are in no manner affected by the words of Order 39 Rule 4, but if anything, further strengthened by the words of the Code.

199. We should not here be understood as laying down, that the Code does not enjoin a dismissal of the application altogether. It might well be so, on a true and complete construction of the Code. It is, however, not necessary for us to go so far, as the inherent power point is quite sufficient, for the

purpose of letting the suppression practised by the plaintiff applicants, have its full effect.

The Effect of Suppression

200. That hopping from Bombay to Calcutta was not mentioned, that withdrawal of the Bombay suit was not mentioned, that the complete arising of the cause of action in Bombay as per the Bombay plaint was not mentioned, these are matter of indubitable concealment before the trial Court. Had these not been concealed, the court would certainly have been put upon much greater scrutiny before granting an ad interim order stopping the T.V. serials altogether, especially because the first broadcast was no fewer than five days away from the date of the interim order. The urgency would appear considerably dismissed on full disclosure.

201. The ex parte order on concealment was obtained on 7-5-2003. It was not vacated on 12-5-2003 by the same Hon'ble single Judge, although suppression was heavily pressed. His Lordship did not enter a finding that there had been no concealment or no deception or no hiding of any relevant material. The Division Bench on 12-5-2003 opined that there was serious concealment and the interim order was vacated. On an SLP being admitted, the Supreme Court set aside the Division Bench's order by consent of parties on 22-5-2003. It, however, kept the point of suppression open for argument.

202. The argument has been made before us. We have no doubt that the plaintiff's suppressed the Bombay material before the Calcutta High Court deliberately with a view to obtaining a better chance of getting an ex parte ad interim order. Thereby they failed to take the Court into full confidence and misled it. It cannot be doubted that this type of suppression should not occur in future. It is not enough merely to say, the litigant should not have done it and the Court does not want the litigants to do it in future. People who suppress and conceal only understand adverse effect and punishment. The adverse effect according to law is a dismissal of the application. This is the appropriate result. In our opinion, even apart from the plaintiffs' having no case on merits whatsoever as on date, their application should be dismissed even without consideration of the merits for concealment practised upon the Court by deliberately suppressing relevant and important materials for the purpose of obtaining an ad interim order behind the back of the adversaries who were hereby seriously affected.

The Undertaking for Obtaining of the Interim Order :

203. On the 12th of May, 2003 when the Hon'ble Single Judge maintained the order of 7-5-2003 in the face of the point of suppression being pressed, his Lordship said as follows :-

"Mr. Sen's client is directed to file an undertaking by way of an affidavit to the extent that if damages or prejudice is being caused to the respondent, his client shall undertake to pay such damages and costs for the same to have this interim order in their favour, in the event the petitioner failed to succeed in this application. Such affidavit to be filed within one week from date."

204. An affidavit has been filed by the authoress, being the plaintiff No. 1 and she solemnly took oath before the Notary Public of New York, City of New York, U.S.A. on the 20th May, 2003. However, in the third paragraph of the said affidavit she said as follows :

"I am filing this affidavit giving an undertaking that in the event the applicant fails and the respondents show that they have been prejudiced as a result of the interim order passed by this Hon'ble Court on 7th May, 2003. I shall pay such damage by way of costs, as may be determined by this Hon'ble Court."

205. Thus the undertaking is not in the terms ordered by the Court. The Court ordered her to undertake to pay damages and costs. She has undertaken to pay only damages by way of costs. Thus, she has disobeyed the directions passed upon her by the Interlocutory Court on the 12-5-2003. What steps, if any, the parties will be advised to take in regard to her for this breach of obedience of direction of a Court of law, it is not necessary for us to consider at this moment. We, however, make it clear that no order that we pass shall in any manner prevent any of the parties from taking any such steps against the plaintiffs and any of them.

Undertaking or no, Inbuilt Meaning of an Injunction :--

206. There is always an inherent undertaking of the litigant taking the order that he will compensate the person suffering because of the passing of the order to a reasonable degree as assessed by the Court, if and when it finally turns out that the interim order was wrongfully obtained by the applicant.

207. We propose to impose upon the plaintiffs both costs for the Court below and before us as well as damages for every week of delay of telecast which the respondents have suffered because of the wrongful order of injunction obtained by the appellants. We shall make the assessment under a separate heading.

The Application Being Premature :-

208. Although this topic might overlap a little with grant of injunction, and balance of the prejudice to be suffered by the parties in case of different results of the application for injunction, yet the subject is so important that it deserves a separate mention by itself.

209. We have already said at quite some length, that the scanty materials of the plaintiffs brought to light so far, do not get the case of infringement of copyright off the ground even one millimetre. This is because the plaintiffs have no copyright over the central theme of a woman rising to power, or there being characters about her, like an old and sticking friend, Blackie O'Neill, a lover from the house where she was working, an Army husband and some other person whom she might have married or might have fallen in love with at sometime. These ideas and characters are too stock and too common to confer copyright. Events and incidents surrounding these characters which build up the story of the drama, these are the meat of copyright. Establishment of copyright infringement is an exercise in detail. No such exercise could be undertaken by any of the parties. How lacking in

details the case is, can be no better exposed, than by saying that neither leading Counsel engaged in the case of infringement of copyright of the authoress' book "A Woman of Substance", had read the book or a substantial part of it. How can anybody establish infringement in copyright of a book when he has not read the book at all ?

210. This brings us to the point of the application being hopelessly premature.

That somebody has not read the book until today does not mean, he cannot read it tomorrow or in the next week. That no infringement of copyright has been established one bit until today does not mean that tomorrow, or a month hence, when 15 or 20 telecasts have taken place, the plaintiffs cannot, then and thereafter, establish a prima facie case of infringement. They might, on a careful comparison of the parts of the book (which has to be read, we are sorry but compelled to emphasize), and the different characters, incidents and dialogues telecast during the month, thereafter be able to establish that there is such a close similarity, between the expression of ideas in the book, and the serials, that the respondents can justly be said to have stolen from her book. But until the plaintiffs are able to establish that, the respondents might justly say, that the authoress and her husband through their agents have unfairly stolen an interim order from the Interlocutory Court by practising concealment.

211. The application is, therefore, premature. A lot of time and money has been spent by all parties by prosecuting a premature and until now baseless application. This is a good ground by itself for dismissal of the application.

Assessment of Costs and Damages :

212. We are of the opinion that the several grounds for dismissal of the appellants' interlocutory application entitle the respondents to costs both in the lower Court and before us. We are of the opinion that the appellants should pay the respondents costs of Rs. 10,000 per day of hearing before the first Court and Rs. 15,000 per day of hearing before us, not counting any of the days partly or wholly occupied in delivery of judgment. As regards assessment of damages for injunction wrongfully obtained, we are of the opinion that the assessment should be made for every week of delay. We have to give certain broad outlines of how we have reached the figure, which we have calculated. It is easy to assess costs, since any realistic estimate will show that the costs which we have assessed above are, if anything, pitifully small compared to what parties have actually spent everyday for a full-fledged and contested hearing, as has taken place in this case. To assess damages, the first point to assess is the investment made by the respondents for the serial so far. They say, it is more than Rs. 100 crores.

213. Mr. Sen argues that their statements are sadly lacking in details, the break up of Rs, 100 crores is only Rs. 60 crores production and Rs. 40 crores publicity. The criticism is well-founded, but just as, if one buys a new ordinary car in India, the cost is somewhere near Rs. 3 to 8 lakhs, be it a little more or less, so also, if a party makes a T.V. Serial intended to run to some 300 episodes, and has already filmed 80 episodes starring at least one leading Bombay film actress, the cost can justly be claimed to be of the order of Rs. 100 crores, even if it is not proved exactly. We are not passing a

decree on this calculation. We are only assessing damages, on the basis of the undertaking to be given by the plaintiffs for payment to the respondents on account of wrongful obtaining of the order of injunction, and which damages are in any event at once payable.

For this purpose the above assessment is reasonable and just in our opinion.

214. Only a percentage of this will be earned as profit per week. Again, because the profit has not been earned for the last three months or so, does not mean that the profits will not be earned ever. Damages for wrongful injunction are, therefore, limited to the delay in obtaining profits. It is well-known that money or profits today is not the same thing as money or profits of the same very rupee value to be obtained three months hence. The difference is something like diminishing interest for three months on the profits which have been lost, the earlier loss being more costly.

215. On this basis, taking percentage on the lower side, in our opinion, the plaintiffs should pay damages to the defendant respondents at the rate of Rs. 1,50,000 per week, or part thereof commencing 13-5-2003 until issuance of the signed copy of the Dictated Order which we direct and mention hereafter.

Summary and Order

216. Although we have delivered a very long judgment, the long and short of it is as follows.

216.1 Facts: The appellant No. 1, with her husband, sues for infringement of copyright of her 1979 best seller "A Woman of Substance". She wants to stop a serial of the respondent No. 1 called "Karishma - a miracle of destiny", of some 300 planned episodes. Only one episode was broadcast on 12-5-2003. The only material of the plaintiffs is a sneaked out interview of one journalist, an Ms. Pammi Somal, from respondent No. 2, who is but one of a big team, producing the serial. The story writer, respondent No. 4 and other Directors deny having ever read, at the material times, "A Women of Substance". The interview shows, by its internal evidence, that even Sabir, respondent No. 2, has not read the book himself. Pammi herself called Sabir a brat, and arrogant, during the interview.

216.2 Copyright Law : The interview mentions that the serial has taken the rags to riches theme of the book. It mentions some four other characters common to the serial and the book. Sabir not having read the book, thinks that Emma of the book had an illegitimate son. She had one (or two) illegitimate daughters. The Copyright Law does not protect basic plots and stock characters. If it granted such protection, four or five writers writing 15 or 20 novels with stock characters and stock plots could stop all writers of pop literature from writing anything thenceforth. It is enough to refer in this regard to R.G. Anand's case (supra), paragraph 46, proposition No. 1 :- "There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work". (p. 140) 216.3 Prima facie case : Respondent No. 2, who granted to his woman friend journalist the interview, admitted to borrowing only the plot and some characters. Copyright infringement cannot be established on this alone. There is no prima facie case

at all yet. Infringement can be established only by comparing and showing similarity of details, events, situations, expressions of language and imagination. Learned leading counsel of both sides had not even read the book. How can infringement be established when even the book had not been read ?

216.4 Balance of Convenience : The respondents say they have spent over a hundred crore and taken eleven crore from advertisers. If the injunction continues, on this scanty material, their project will be finished. The interlocutory application is premature. If 15-20 episodes are shown, then details of similarity can be established; the plaintiffs might, we say might, have a prima facie case then ; they have none now. If 15 or 20 out of 300 episodes are shown, the plaintiffs will hardly suffer any loss of value of their book ; if an injunction is obtained after 15/20 episodes (assuming there is going to be an infringement), the plaintiffs will get practically their full relief, and the respondents will be in almost equal problems as not starting at all. The balance of convenience heavily favours the respondents.

216.5 Suppression : The plaintiffs obtained an interim order ex parte on 7-5-2003 from the Calcutta High Court by suppression. They had filed a suit in Bombay on 28-4-2003 which they withdrew on 2-5-2003, saying fresh material had come to light and amendment of the Bombay plaint was cumbersome and inconvenient. No fresh material had come to light at the time of withdrawal. The interview of Pammi Somal took place in the evening of 2-5-2003. The Bombay plaint alleged in paragraph 31 that the entire cause of action had arisen in Bombay. The Bombay episode was completely suppressed before the Calcutta interlocutory Court. The plaintiffs thus hopped from Bombay to Calcutta, without telling the Calcutta High Court that they had hopped so, and the reasons, if any, for their so hopping. We do not know of any such acceptable reasons yet. This is clear concealment from the Court. A litigant must be discouraged from engaging in such unwholesome practice. The result is a dismissal of the action. Suppression is alone a ground for dismissal of the interlocutory motion. If the Court had been told of Calcutta hopping, it would be on far keener scrutiny, before granting drastic orders without notice.

216.6 Damages and Costs : On 12-5-2003 the plaintiffs obtained continuance of the interim order upon direction of their filing an undertaking to pay damages and costs; damages to be assessed by Court if the injunction turns out to have been wrongfully obtained. As the project is a hundred crore project, we assess damages for wrongfully obtaining injunction at the rate of Rs. 1,50,000 per week from 13-5-2003 until issuance of this dictated order, as mentioned below. Costs, on the basis of a realistic estimate of a heavy hearing, are assessed by us at Rs. 10,000 per day of hearing in the Court below and Rs. 15,000 per day of hearing before us, not counting the days occupied partly or wholly in delivery of judgment.

217. This last portion of the judgment, headed summary and order, shall be typed/xeroxed out also as a dictated order passed by us, and such dictated order shall be given out in copies to the parties, for their immediate action, upon the usual undertakings.

218. The appeal of the appellants is thus dismissed with the above order as to costs and damages. The learned first Judge had also refused to continue injunction on the ground of inconvenience and

prejudice. His Lordship directed, however, furnishing of Rs. 25 lakhs Bank Guarantee by the respondents. We allow the respondents' cross-objections in this regard. The obligation to furnish Bank Guarantee is hereby lifted.

219. There will be no protective interim order in aid of the suit henceforth; the interlocutory application of the plaintiffs is dismissed as above. The telecast of the serials can start this evening, so far as orders of Court are concerned.

220. Stay of operation of our order is prayed for by Mr. Bachawat for the appellants. Since the materials of the plaintiffs are prima facie zero, as yet, since they suppressed relevant material and obtained an interim order, since the stopping of the serials at this stage can only be a result of TV Channel disputes and not a bona fide fear that the copyright in the book will be infringed (nobody having yet seen a substantial number of episodes), the prayer for stay is unhesitatingly and emphatically turned down.

Joytosh Banerjee, J.

I agree.