

agk

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**NOTICE OF MOTION (L) NO. 502 OF 2014**  
**IN**  
**SUIT NO. 219 OF 2014**

**MANSOOB HAIDER,**

Aged 44 years, of Mumbai, Indian  
inhabitant, having address at 301-A  
Block, Benston, Behind Rizvi College,  
Off Carter Road, Bandra (West),  
Mumbai 400 050

...

Plaintiff

*versus*

**1. YASHRAJ FILMS PVT LTD**

A company duly incorporated  
under the Companies Act, 1956  
having its address at 5, Shah  
Industrial Estate, Veera Desai  
Road, Andheri (West), Mumbai  
400 053

**2. ADITYA CHOPRA,**

Of Mumbai, Indian inhabitant  
having address at 5, Shah Industrial  
Estate, Veera Desai Road, Andheri  
(West), Mumbai 400 053

**3. VIJAY KRISHNA ACHARYA,**

Of Mumbai, Indian inhabitant  
having office at 5, Shah Industrial  
Estate, Veera Desai Road, Andheri  
(West), Mumbai 400 053

4. **MULTI SCREEN MEDIA PVT LTD,**  
(Popularly known as “Sony TV”)  
address at Interface Building No.7,  
4th Floor, Off Malad Link Road,  
Malad (West), Mumbai 400 064
5. **MSM SATELLITE  
(SINGAPORE) PTE LTD,**  
Having address at 5, Tampines  
Central 6, #02-19, Telepark  
Building, Singapore 529482 ... Defendants

---

**APPEARANCES**

**FOR THE PLAINTIFF**

**Mr. Chirag Modi**, with Mr. Ashok Purohit,  
Ms. Shalaka Mali, i/b Ashok Purohit  
& Co.,

**FOR DEFENDANTS NOS.  
1-3**

**Mr. V. R. Dhond**, Senior Advocate, with  
Mr. Rashmin Khandekar, i/b  
Keystone Partners,

**FOR DEFENDANTS NOS. 4  
& 5**

**Mr. R.M. Kadam**, Senior Advocate, with  
Mr. Prakash Shah, Mr. Durgaprasad  
Poojari, i/b PDS Legal, for defendants  
No. 4 and 5.

---

**CORAM : G.S.PATEL, J.**

**DATED : 20th June 2014**

**P.C.:**

**A. SUMMARY**

1. The Plaintiff, a professional film script writer, and whose father wrote scripts and dialogue for notable films, is the author of

the film script entitled “ONCE”. The entirety of this script is annexed to the plaint at Exhibit “B”. The Plaintiff claims that a recently released film, *Dhoom 3*, infringes the Plaintiff’s copyright in his script “ONCE”. In the suit, the Plaintiff seeks an order that he be given credit in the titles of the film.

2. The Plaintiff claims that he had delivered this script to 1st Defendant’s office. Three years later, the film *Dhoom 3* was released. The Plaintiff saw the film. He says he then realised that the film and his original script were so similar that the only possibility was that the 1st Defendant and, in particular, Defendant Nos. 2 and 3, credited as co-authors of the film script for *Dhoom 3* (the 3rd Defendant being the director of the film) had infringed the Plaintiff’s copyright in his original work. The Plaintiff then filed the suit. I will deal with the rival contentions presently. The Notice of Motion at this stage is for a limited purpose. It seeks a restraint on Defendant Nos. 1 to 3 from releasing the film on 28th June 2014 via satellite broadcast on television channel. This is proposed to be done by the 4th and 5th Defendants, who run several television channels under the name Sony TV.

3. I must note that at this stage there is one significant hurdle in the Plaintiff’s way: this film has already enjoyed a general public release in December 2013. It has then been released in various other media and forums, including most recently on DVD and CD. No injunction has been obtained by the Plaintiff in respect of those releases. The Plaintiff, therefore, has an additional burden to show how the release of the film on television channels via satellite broadcast will so prejudice him that an injunction must be granted. I

must also note that only relief sought in this suit is for the credit in the film; there is no claim for damages.

4. I have heard Mr. Modi, learned counsel for the Plaintiff, Mr. Dhond, learned senior counsel for Defendants No. 1 to 3 and Mr. Kadam, learned Senior Counsel for Defendant No.4 at some considerable length. I have considered the very large volume of affidavits and pleadings filed, the many authorities cited and the oral arguments. I must straightaway state that, in my view, albeit at a *prima-facie* stage, the Plaintiff has not made out a sufficient case for the grant of injunctive reliefs in the terms sought in the Notice of Motion. He has not been able to demonstrate, even *prima-facie*, any infringement. He has not shown irretrievable injury or prejudice. He has not been able to show how the balance of convenience is in his favour especially given the wide general release and the fact that a restraint is bound to result in significant financial loss to the Defendants.

## B. FACTUAL BACKGROUND

5. These are the facts: On 17th December 2009 the Plaintiff registered his script with the Copyright Board. This is not in dispute. Sometime in early 2010, the Plaintiff claims, he submitted his literary work, i.e., the film script, to the 1st Defendant. There is very great deal of controversy about this, and a legal submission will turn on it as well. I will turn to those submissions presently. On 20th December 2013, the film, *Dhoom 3* was released. The Plaintiff claims to have seen the film very the next day after its general public release. At this, the Plaintiff says, he was shocked to see the

similarities between his four year old script and the new movie. He attempted to visit the offices of the 1st Defendant to place his case that his original script had been used in making of this film and that his copyright had been infringed. The Plaintiff, by all counts, seems to have been rebuffed in his attempts at a meeting, at least at this stage. There then followed some correspondence between the Plaintiff and representatives of Defendants No. 1 to 3. Again, this correspondence has a bearing on a legal issue and I will consider it in slightly more detail when deciding that issue. This correspondence continued from December 2013 till early February 2014. On 7th February 2014, the Plaintiff through his Advocates sent a notice to the Defendants reiterating his claim. In this legal notice, the Plaintiff demanded that the Defendants No. 1 to 3 cease further distribution of film and give credit to the Plaintiff as a script writer of the film. The Plaintiff also reserved to himself the right to claim damages. A reply followed on 10th February 2014 refuting the Plaintiff's contentions but offering a settlement. Although at some point in the arguments, Mr. Modi attempted to gain some mileage from this offer, I am inclined to believe that this was merely a good faith offer to avoid the costs of litigation; something that seems, unfortunately, not to have come to pass. The correspondence between the Plaintiff's advocates and 1st to 3rd Defendants' continued through the middle of February 2014. On 3rd March 2014, the Plaintiff filed the present Suit. The Notice of Motion, filed on or about the same day, contains a prayer broadly worded injunction in prayers (a) and (b). All that survives today is an injunction from release on television by satellite broadcast. I must note, once again, that there is no claim for damages. No leave under

Order II Rule 2 appears to have been obtained by the Plaintiff till date.

### C. THE CLAIM IN BRIEF

6. *Dhoom 3* is part of a franchise, the third in the series. All three films deal with a certain somewhat genial class of criminals and generally delightful expert thieves. The films tell of the attempts being made by a police officer and his assistant (played by Mr. Abhishek Bachchan and Mr. Uday Chopra, the latter providing some comic elements) to capture these thieves. The police are not successful in ways they intend, and there is a certain admiration and empathy for the thieves and their inventive and often spectacular heists.

7. What precisely is the Plaintiff's claim? He says that if one dissects the film and his script and chalks out component elements side by side, there is far too much of a coincidence to be inadvertence. In Exhibit "C" to the plaint, the Plaintiff presents a comparative chart. This chart purports to analyse the similarities between the Plaintiff's script and the film. This chart, in fact, is the bedrock of the Plaintiff's case. Mr. Modi points out that from this tabulation there are very many elements that are common to both the film and the Plaintiff's script. Take these common elements out of the film, Mr. Modi submits, and there is no film at all. Therefore, the submission is not only that there is a similarity but that there is so much in the film that is copied from the script that this cannot be mere coincidence or happenstance. It is a deliberate attempt to copy the Plaintiff's work and constitutes an infringement.

Moreover, Mr. Modi submits, there is no doubt that the Defendant No. 1 had access to the Plaintiff's script. This only further fortifies the Plaintiff's case that having got the script in hand, the Defendants No. 1 to 3 then proceeded to copy large portions of the script.

#### **D. THE QUESTION OF 'ACCESS' TO THE SCRIPT**

8. Mr. Modi points to certain public statements made by various persons in the press from or connected with the 1st Defendant regarding the film. According to Mr. Modi, it is not possible to accept the version of Defendants No. 1 to 3 that their script, annexed as Exhibit "C" to the affidavit in reply of the 1st Defendant, was of 15th May 2012 because there are newspaper reports of February 2011 and perhaps even earlier where persons on behalf of Defendants No. 1 to 3 are quoted as referring to the script of this movie. Clearly, Mr. Modi says, the Defendants have deliberately tried to create confusion, when, in fact, all that they have done is use the Plaintiff's original work, one that was with them from early 2010.

9. Mr. Dhond, learned senior counsel for Defendants No. 1 to 3, not only disputes this factual formulation, but points out that there is a very serious dispute about whether or not the 1st Defendant ever had the Plaintiff's script at all. The question of access plays a material, though not determinative, part in the assessment of any action of copyright of infringement. Simply put, if the Plaintiff is able to show that the contesting Defendants had access to his work and is also able to show substantial similarity between the two

works, sufficient to meet legal requirements, then the Plaintiff must succeed. It is, however, also possible for the Plaintiff to urge that irrespective of whether the 1st Defendant can be proved to have had access, if the similarities shown are so extensive as to eliminate any possibility of the rival work being original, then, too the Plaintiff's claim for injunction must be granted.

**10.** The issue of access is perhaps best dealt with at the beginning. This is what the Plaintiff says in paragraph 3.4 of the plaint.

“3.4 The Plaintiff had submitted the said literary work to the Defendant No.1 (It is a normal practice followed by Defendant No.1 that if anybody wants to share the script written by them with Defendant No. 1, then they can drop the script with Defendant No.1 for their evaluation, along with their contact details at Defendant No.1's office and if Defendant No.1 likes the script then Defendant No.1 would call the concerned writer/author of the script. In view of this practice followed by the Defendant No.1, the Plaintiff dropped the literary work with the Defendant No.1 at its office somewhere around early 2010. Thereafter, the Plaintiff was waiting for response from the Defendant No.1, however, no response was received from the Defendant No.1.”

**11.** Now this paragraph indicates that the Plaintiff merely left the script at the door of the 1st Defendant's office. The paragraph contains no particulars. It also does not, as Mr. Dhond points out, tell us what is that the Plaintiff's then did for the next three years or more. He does not seem to have made any enquiries with the 1st Defendant (or with any of the others to whom he says he delivered



his script) as to whether anyone from the 1st Defendant's organization had looked at the script, whether they were interested in developing the script further and using it for a motion picture, or even whether the Plaintiff could possibly have a meeting to further discuss the script with the 1st Defendant's staff and team. In the affidavit in reply, there is a categorical denial by the 1st Defendant of ever having had access to the script. In particular, and given the Plaintiff's assertion that there is a "normal practice of leaving scripts at the door", the 1st Defendant has asserted that there is no such practice at all. Faced with this categorical denial in paragraphs 3(ii) and paragraph 8(u) of the affidavit in reply, the Plaintiff filed a rejoinder in which, for the first time, he set out in some startling details the circumstances in which he supposedly left his script with the 1st Defendant. Paragraph 11 of the affidavit in rejoinder reads:

"11. I say that in or around March 2010 Plaintiff visited the Defendant No.1's office. At the main gate through the intercom Plaintiff was connected to the reception. When Plaintiff explained the purpose of his visit, the intercom was then connected to one Mr. Jaideep Sahani. However his intercom went unanswered. I then informed the reception about Mr. Jaideep Sahani's intercom not being answered. The receptionist then connected Plaintiff to another person who said he was Mr. Sahadev and Plaintiff should come another day since Mr. Jaideep Sahani would have been busy. Since I was at the relevant time working in an export company and was not a full time writer and I could not come repeatedly so I requested Mr. Sahadev if I could hand over the script to Mr. Jaideep Sahani's assistant. Mr. Sahadev agreed and said he would send someone from the writing team. I then wrote my details i.e. phone number, my background, including details on my father's

works to create a good impression. I put that note along with the script which was already in an envelope. I say that two people came at the entrance and asked for Plaintiff. One of them then identified himself as Mr. Parag. I asked him if he was Mr. Jaideep's assistant. He said no and that the other man along with him was from the writing department and that he himself was an assistant from the casting department. I handed over the script to the assistant writer and left. I say that in the all the correspondences which have been exchanged between the Plaintiff and the Defendant No. 1 and 2, Defendant No. 1 & 2 never questioned about the access of the script."

12. Here the Plaintiff now for the first time gives us the names of the individuals, who, accordingly to him, in early 2010 were present at the relevant time. The 1st Defendant filed a sur-rejoinder. In paragraph 6, it dealt with the relevant portions of the affidavit in rejoinder on this aspect. That paragraph is reproduced in full for completeness.

"6. Now, in the Rejoinder filed 6 months after engaging in correspondence with the Defendants and/or their representatives, the Plaintiff has for the first time set out certain details and has named certain individuals in the manner set out in paragraph 11. Even this assertion is false to the knowledge of the Plaintiff. In so far as Mr. Jaideep Sahani is concerned, he is a freelance writer and has never been on the rolls of Defendant No.1. The allegation that the receptionist connected the Plaintiff to Mr. Sahadev appears to be completely false. Mr. Sahadev is Vice President – Theatrical Distribution and a very senior executive of Defendant No.1. It is impossible that the receptionist would connect the Plaintiff's call to Mr. Sahadev *"because Mr. Jaideep Sahani was busy"*. In

any event, Mr. Sahadev was never associated with the script department. On instructions, I deny that Mr. Sahadev agreed that he would send someone from the writing team to collect the script from the Plaintiff. The Plaintiff has further mentioned having met one Mr. Parag. I say that no person with the said name works with the Defendants. The Plaintiff also alleges to have met another man along with Mr. Parag from the writing department who identified himself as an assistant from the casting department. The said assertion appears to be completely false as the casting team of Defendant No.1 is not based out of the Andheri Office, where the Plaintiff allegedly dropped off his script. The Plaintiff seems to be trying to develop on its concocted story and has only managed to dig a deeper hole for himself.”

13. *Prima facie*, it does seem that the Plaintiff’s version about the 1st Defendant having had access to his script is not one that can be readily accepted. Of course, one cannot expect the Plaintiff to prove what happened behind the closed doors of the 1st Defendant’s organization, but equally, this attempted improvement in the affidavit in rejoinder, effectively demolished by the affidavit in sur-rejoinder, is fatal. If the Plaintiff had all this information at hand, there is no explanation why it was kept out of the plaint. There is also no explanation as to why the Plaintiff kept silent for the next four years if he says he delivered his script. This does not seem to be in the normal or ordinary course of reasonable conduct in such matters.

14. Mr. Modi attempted to read the correspondence after December 2013 to suggest that the 1st Defendant had not once denied receipt of the script. That puts the cart before the horse. I

do not find in any of the letters or emails addressed by the Plaintiff to the 1st Defendant any reference to the script having been delivered or left at the office of the 1st Defendant. It is not possible to read the correspondence in the manner Mr. Modi suggests. If anything, matters seem to be to the contrary and the converse seem to be the case. For, in more than one letter/e-mail the Plaintiff has implored persons from the 1st Defendant to “read my script”. Even making allowance for the fact that is in generalized correspondence, not based on legal advice at that stage and that all that the Plaintiff sought to do was to specifically draw the attention of the 2nd Defendant, a person highly placed in the 1st Defendant organization, the fact remains that there is absolutely no assertion of the delivery of the script till the commencement of advocates’ correspondence on 7th February 2014. It is only in the Plaintiff’s advocates’ first notice of that date that there is a reference, and that too extremely guardedly placed, of the script being delivered to the 1st Defendant:

“1. .... Our client after completion of the said script and on being completely confident that if a cinematographic film is made based on the said script the said film will surely do a profitable business and will definitely be a box office success, he started to share the said full-bound script with the industry since it was already a protected script he had nothing to worry the said script was distributed and shared with a few production houses one of it being your production house.”

15. Here, too, we see none of the detailing that comes late in the affidavit in rejoinder. It ought to have been placed here or, at the very least, in the plaint. What is now stated in the rejoinder only

adds to the incongruity, for it still does not explain the Plaintiff's silence and lack of follow-up for all that time.

16. The arguments relating to the press release issued by or on behalf of the 1st Defendants cannot and do not advance the Plaintiff's cause. To my mind, these are merely prejudicial assertions. Indeed, the Plaintiff's assertion in this regard is not even logical. It amounts to saying that two years before the film's release, in late 2011, the 1st Defendant hatched a conspiracy and started making public pronouncements and issuing false public releases, including in public interviews, so as to defeat the Plaintiff's rights. There is no such claim made out in the plaint. It is not necessary to deal with this any further. It is much too far-fetched. If the Plaintiff thought his script might be the beginning of a beautiful friendship, this is a decidedly odd way to start.

**E. 'ALIEN vs PREDATOR': THE RIVAL NARRATIVES**

17. I will proceed now to the question of similarity and copying of the Plaintiff's script by the 1st Defendant. Both scripts are on record. I have carefully read the Plaintiff's script as also the script of the film annexed to the affidavit in reply. Independently I have had an opportunity to see the movie myself. Here are the rival narratives.

- (a) First, the script "ONCE". The premise of the story is this. There are two sons, one of whom is adopted. One son suffers from a slight disability in that he has only three fingers. Their father (the putative father of one

of the two sons) was a magician. The natural son resents his parents doting on the adopted son. One son is a successful crime novelist. The father is killed. The natural son attempts to “frame” the adopted successful son by contriving a series of murders that follow almost exactly those described in his crime novels. A police detective and his assistant attempt to track down the real killer. The identities of the two brothers are confused. A telling wound on one is not seen on the other. The script culminates in a climatic sequence and exchange between two brothers.

- (b) The trajectory of the film, *Dhoom 3*, is entirely different. Here a magician in America (Chicago) has twin sons. We do not see the second twin till much later. Their father is also a magician. He commits suicide because a bank refuses to defer repayment of his dues. The film moves ahead by several years (also said by the Plaintiff to be a feature common to his script). Several decades later the bank is repeatedly robbed. An inspector and his assistant from India attempt to capture the thieves. It is then later revealed that the thief has a twin, and that the two twins together have been robbing the bank, and using the money to revive “the Great Indian Circus” that was once their father’s dream. In this film too, a wound on one brother is not seen on the other. Despite an attempt to drive a wedge between them, the two brothers remain united to the end.

18. There is no manner of doubt at all that the manner in which the two rival narratives unfold is completely different. To be sure, there are certain undeniable commonalities. There is a magician who has two sons who resemble each other or are twins. There is the magician's trick of placing a young child in a sealed box and having him disappear. There is the general motif of vendetta and revenge, of distinguishing marks or wounds. But none of these, in my view, are in themselves entirely original conceptualizations or expressions. Each of these is a well known, recurrent and common theme in literature and cinema, both here and overseas.

19. What Mr. Modi contends is, however, that there are many more similarities than this. In his tabulations annexed to the plaint and the rejoinder, the Plaintiff attempts a dissection of the rival narratives and on that basis claims that there has been plagiarism. Now in assessing this contention, I do not believe it would be correct to look at every single small item as set out. For example, the Plaintiff contends that one of the similarities is "the cop and his assistant go to the place and wait at the place where the robbery is going to happen to catch the magician's son (bank thief)". This is in the movie. The corresponding portion of the script, according to the plaint, is exactly the same except that bank thief is replaced by murderer. There are several such examples. Even on first principles, it is not possible to accept this formulation. Any person can draw such parallels and then say that the rival work is an infringement. But it needs to be shown that these various ingredients are in themselves original. The example I gave is one of several. It is of the species known as *scène à faire*, logical

consequences of common actions or sequence of events that must necessarily follow from a common theme.<sup>1</sup>

20. A strikingly discordant note is struck between the claim first made in the correspondence prior to the suit and in the averments made later in the affidavit in rejoinder. In his email of 10th January 2014 to one Ashish Singh of the 1st Defendant, the Plaintiff claims that the main plot of both scripts was based on the same magic trick or vanishing act without which both the scripts could not proceed further. This is, unambiguously, the frame of his case prior to bringing suit. After this is denied in the affidavit in rejoinder at paragraph 15(p), the Plaintiff completely retreats from this position. He now says that the magic act is just a passing reference, a *scène à faire* in his script. It is not the vanishing act performed by the magician but, the Plaintiff now claims, “the uniqueness of the plot / theme / storyline / premise that has not been in the public domain”. Let me accept that for the moment. Once it is demonstrated that the plot / theme / storyline / premise is different, then two things occur automatically. The first is that the basis on which the Plaintiff first came to Court, i.e., the documents on which he made his representations to the 1st Defendant, now seem to be at a distant remove from the stand taken, and the second is that it is now beyond controversy that the Plaintiff claims his rights only in the plot / theme / storyline / premise and not in any individualized element of it. It, therefore, matters little whether there is or is not a chase sequence at a particular point or whether there is a police officer with an assistant. What has to be looked at is

---

<sup>1</sup> Literally, from French, “scene to be made” or “scene that must be done”), connoting a scene in a book or film customary to the genre. A robbery with a chase sequence following would be an example.



the overall premise or subject matter of the story. These, as I have noted, are entirely different.

21. As I have noted, although both works feature a magician and a vanishing act, the stories could not be more different. The magic act itself is also not unique. Indeed, Mr. Dhond is at some pains to point out that it occurs in a very close temporal proximity to the Plaintiff's supposedly original creation in a Hollywood film by Mr. Christopher Nolan, *The Prestige*, a 2006 release. In that film too, as in the Plaintiff's script, there is a character missing two fingers, in addition to the vanishing act. It is difficult to discern which, therefore, of the many elements listed in the charts produced by the Plaintiff are entirely original. There are undoubted similarities between the Plaintiff's work and other, specifically identified, works. These are not denied by the Plaintiff. Indeed, it would not be out of place that 2006 was a year that saw a slew of 'magic'-based movies: *The Prestige*, *The Illusionist* and *The Scoop*.

22. There is also the unfortunate misstatement made in the charts in which Plaintiff claims that his script is set in Australia. The commonality claimed is that both works are set on foreign locations. On reading the script, I find that no part of it is set in Australia at all. There is a reference to one of the characters having been imprisoned in Australia and of some officers at an Australian Consulate, but certainly no part of the entire script, unlike the film *Dhoom 3*, is set in a foreign locale.

23. As far as I am able to tell even the concept of a murderer replicating or carrying out in real life the fictionalized murders of a

prominent novelist is not new. This has been the subject of several films and even television serials. Episode 4 of Season 5 of the US television show *Castle* has an almost identical plot line. That episode is entitled *Murder, He Wrote*. It is itself similar to another celebrated television series, *Murder, She Wrote*, in which Dame Angela Lansbury plays Jessica Fletcher, a retired teacher who writes a series of popular crime novels and then solves murders that closely resemble those in her fiction.

24. 'Revenge is a dish best served cold': vendetta underlies both narratives. But the Plaintiff's tale is centred on murder, not robbery. It is one brother pitted against the other. The animosity stems from a resentment that their parents loved the one more and the other less. One brother blames the other for the death of their father. He seeks to avenge that death by contriving matters so that the innocent brother is suspected of these heinous and grisly crimes. It is a dark, brooding, edgy and menacing work. It is also about as far from *Dhoom 3* as it is possible to be. In the film, the two brothers are united. Together they seek to avenge what they perceive to be the avoidable and needless suicide of their father who, they believe, was driven to it by the acts of a rapacious banker. Their vendetta is directed against the bank. There is no internecine battle between the siblings. In fact, they care deeply for each other. One masterminds the robberies, the other executes them. One brother is autistic and needs the other's assistance. The tension between them occurs later in the movie when one brother says (and this too the Plaintiff complains is a commonality) has been forced to live in the shadow of the other. An attempt to separate them with emotional pressure fails. Throughout, the tone of the movie is light;

the implausible and the athletic interplay; and there is some moralizing about the practices of the banking world. There is sympathy for both brothers and, at the end, an ungrudging admiration for their solidarity. Again, the concept of a wronged magician and others taking on the mantle in vengeance is not original; neither is the concept of ‘illusion and deception’, a matter central to all prestidigitation. In a very different mode of expression, the recent 2013 film *Now You See Me* also had many of these elements.

25. Now if it is possible for anyone to legitimately see these two works in this light, then, I do not see how any question of copyright infringement could possibly arise. For the Plaintiff to succeed, he must be able to show that there is no material distinction on reading his script and seeing the film and that any differences are but the most minor embellishments of no consequence. This also directly rebuts the Plaintiff’s assertion in correspondence that the copyright claimed is in “the uniqueness of the plot / theme / storyline / premise that has not been in the public domain”. The Plaintiff’s plot/theme/story line/premise may be unique. It is just not the same as the movie. *Dhoom 3* is, the Plaintiff says, a predatory work, one that has fed on and dismembered *Once*. On an overall reading, this is incorrect. *Dhoom 3* is wholly alien to *Once* from its starting premise (brother *vs* brother) to the arc of its narrative. The former has as its premise “we rob banks”;<sup>2</sup> the latter uses *Murder, He Wrote*.

---

<sup>2</sup>Warren Beatty as Clyde Barrow in *Bonnie & Clyde*.

26. Mr. Dhond's attorney, Ms. Kapadia, has put together five-volume compilation of all the 66 revisions to *Dhoom 3* script from 8th August 2008 to late 2011. In an astonishing and assiduously constructed tabulation, she has taken two of the key elements that the Plaintiff claims to be his, i.e., the magic scene (a matter that the Plaintiff later disclaimed) and the question of one of the two brothers having a telltale wound. This chart shows that both scenes were taken out, inserted, taken out again, reinserted, repositioned and finally accepted in a given position only very late in the development of the *Dhoom 3* script.

27. It does not seem to me in the least clear what it is precisely that the Plaintiff claims to have a monopoly on. Is it the fact of there being a vanishing trick as a magic act? Of a magician with twins? Of one of the twins having an identifying mark? None of these are original conceptualizations. Mr. Dhond is correct, therefore, when he asks what is it in which the Plaintiff claims such 'originality'? It cannot be the theme of twins, one with a distinguishing mark. This is as old as the hills, even in Bollywood. By the Plaintiff's own admission, it is not in the magician or his vanishing trick. It is not in the concept of murders replicating fiction. There can be no copyright in elements that constitute *scène à faire*. Remove all these elements, Mr. Dhond says, and nothing 'original' remains as the source from which the film could be said to have been copied. This, I believe, is a compelling argument. The burden on the Plaintiff was rather more. He had to show commonality not in dissected and disparate elements but in what lies at the heart and core of the competing works. He had to show that an average person reading the two scripts or reading his script and seeing the

movie would inevitably conclude that the film was a copy, lifted from the Plaintiff's work. That is simply not possible.

#### F. PIRACY IN LAW: THE LEGAL TESTS

28. Mr. Mody relies on the decision of the Supreme Court in *R.G. Anand vs M/s. Delux Films & Ors.*<sup>3</sup> In particular, he relies on paragraphs 45 and 46 to suggest that matters that are in the public domain cannot be made a subject matter of a copyright infringement action and what falls for determination is not whether or not the Defendant had adopted the idea. For there is no copyright in an idea but whether he has adopted "the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishments here and there". He also refers to the separate but concurring decision of Pathak, J. to suggest that if these embellishments and differences are trivial or dishonestly made and the rival product is a colourable imitation, then an injunction must follow.

29. This argument is founded on the premise that one must accept that there is, as a matter of established fact, such an overwhelming commonality between the two narratives to works that there can be no other view. Indeed, what Mr. Modi invites me to do is to break down both the film and the Plaintiff's script and to compare isolated pieces from each one against the other; to then find that because an element, or a set of elements, in one is to be found in the other, that there has, therefore, been an infringement. But the very judgment on which Mr. Modi relies says, as Mr.

---

<sup>3</sup> AIR 1978 SC 1613

Dhond points out, also relying on *R.G. Anand*, that the surest and safest test to determine whether or not there is a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original. That passage is to be found in paragraph 46 of *R.G. Anand*:

“46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

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.
2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the Defendant's work is *nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to 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.

3. One of the surest and the safest tests to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the 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.
4. 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.
5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.
6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.
7. Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the Plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader perspective, wider field and a bigger background where the

Defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved."

(emphasis supplied)

30. Applying all the tests in sub-paragraphs 2 to 7, the Plaintiff must be held to have failed. I have, as I have said, seen the film and read both scripts. They are entirely different works. It is impossible to say that the film is a copy of the Plaintiff's original work. Again, following the same judgment of the Supreme Court, even if the treatment be different, no question of violation of copyright would arise. So too where there are material and broad dissimilarities that negate the intention to copy. Minor or co-incidental commonalities do not equate to infringement. What the Plaintiff must do is establish his case by clear and cogent evidence. There have been cases before our Court and before the Supreme Court where such commonality was demonstrated. That is not the case here. The key elements that I have summarized above in the Plaintiff's work are certainly not original in themselves. Mr. Modi's contention that the sequencing is entirely original is somewhat like his client's protagonist's magic trick, smoke and mirrors, illusion and deception; for the story lines and premises of the two works are entirely dissimilar.

31. The Supreme Court's decision in *R.G. Anand* contains a comprehensive review of the law both in India and in England. It



has been accepted as a matter of law that the identity between the two works must be substantial. The appropriation must be of a substantial or material part of the protected work. Infringement exists when a study of the two works plainly shows that the answering defendant's work is a transparent reproduction (or translation into another medium) of the plaintiff's protected work. Coincidence or similarity may be due to one or more of several factors. Mere chance is only one of them. They may both have a common inspiration or source. To claim copyright in the expression of an idea, one must be careful not to attribute copyright protection to the narration or use of what I will call standard or stock incidents such as those that abound in everyday life, history and traditional fiction. For instance, in order to establish that a particular scene from a particular film is set in Bombay, a film-maker may choose to show a view of the CST Railway Station. The fact that he has done so does not mean that no other film-maker can do so. That level of protection would be absurd and would result only in stifling creativity. That is not the intention of copyright protection law. What the law protects is originality. It may be originality in the expression of one particular idea or in the juxtaposition of a series of ideas, but these must be shown to be not only original but also to have been copied in order for an action to succeed. Where, on the other hand, it is demonstrable that the two works are materially different in what they intend to portray and the manner in which they do it, the coincidence of certain elements, especially if they be of the *scène à faire* variety, will not constitute copyright infringement. Here, the very *idea* of the two works is different; so is their premise, their story line, their plot line. On the *R. G. Anand* tests, the Plaintiff must fail.

32. Mr. Dhond relies on the decision of the United States Court of Appeals, Ninth Circuit in *Cavalier vs Random House, Inc.*<sup>4</sup> As the court pointed out there are two tests: the extrinsic test, an objective comparison of specific expressive elements and one that focuses on similarities between plot / themes / dialogue / mood etc., and an intrinsic test, i.e., a subjective comparison that assesses whether an ordinary, reasonable audience would find the works substantially similar in the total concept and feel of their works. General or common themes are not protected. It cannot have been the intention of copyright protection law to prevent the use of the common place, the everyday, the quotidian, the many daily trials, tribulations and travails that are so often the inspiration behind so much of our literature and art. *Scène à faire* situations and incidents that necessarily flow from a fundamental premise cannot sustain a finding of infringement. There is nothing unique about the concept of a magician with two sons, the vanishing act trick, and identifying birth mark or, indeed, any of the other elements to which the Plaintiff lays claim. His work and claim fail both tests.

33. Mr. Dhond then relies on the Eleventh Circuit US Court of Appeals decision in *Herzog vs Castle Rock Entertainment*.<sup>5</sup> This decision, too, is significant for it clearly enunciates the principle that in a situation where the Plaintiff cannot show access, he may still succeed by demonstrating a striking similarity. These similarities must be substantial when viewed by an ordinary reader. The decision quotes Judge Learned Hand in *Nichols vs Universal Pictures Corp.*<sup>6</sup>

---

<sup>4</sup> 297 F.3d 815

<sup>5</sup> 193 F.3d 1241

<sup>6</sup> 45 F.2d 119

“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 general statement of what the play is about, and at times consist of only 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.”

(emphasis supplied)

34. Mr. Dhond next cites the decision of a learned Single Judge of the Karnataka High Court in *NIR Film Production Associates (P) Limited vs Twentieth Century Fox Film Corporation & Anr.*<sup>7</sup> to submit that portrayal of everyday matters, and matters of common grasp, are neither novel nor unique and carry no copyright.

35. Mr. Kadam, learned senior counsel for the 4th and 5th Defendants, though his clients have no role, strictly speaking, in this matter, made his submissions on law. The test, Mr. Kadam submits, for the grant of an interim injunction in a matter like this is the same as would govern all such applications. The Plaintiff must be shown to have made out a strong *prima-facie* case and the likelihood of irretrievable harm and prejudice. It is not sufficient for the Plaintiff to show the probability of a good case. I have already noticed that it is not possible for the Plaintiff to show, in light of the film having been released widely already, how its present proposed distribution via satellite will in any way prejudice the Plaintiff any

<sup>7</sup> 2005 (1) KCC 126

further. There is also no evidence whatever from the Plaintiff on a *prima-facie* valuation to show that his script was sent to the 1st Defendant. Indeed, all that we have is the Plaintiff's bare word unsupported by any evidence of access. Consider the manner in which the Plaintiff made his claim. He began by asserting in the most general terms that there was a normal practice of leaving scripts at the 1st Defendant's office door; and then, presumably, for the next several years, only hoping for the best. In his own correspondence prior to the suit, the Plaintiff did not himself once make this assertion. It crept in only under legal advice in the Plaintiff's advocates' first notice. In the affidavit in reply, the allegations in the plaint are denied in terms and with great emphasis. In the affidavit in rejoinder, the Plaintiff then vastly improves on this case and is shown to be incorrect. It would not be correct to suggest that because he is wrong on one aspect of his claim, therefore the Plaintiff must be disbelieved in every other (the *falsus in uno, falsus in omnibus* principle having no application here). But there is a second mistake the Plaintiff makes when he asserts (repeatedly) that his script is set in a foreign country. It is not, as I have previously noted. It is in the context of such assertions and such conduct also that I must assess whether the Plaintiff is entitled to the grant of ad-interim relief.

36. Mr. Kadam refers to the decision of the Chancery Division in *Francis Day & Hunter Limited & Anr. vs Bron & Anr.*<sup>8</sup> in which the Court said that the question of fact of whether or not there is an infringement of copyright must be taken in two stages, the first objective and the second subjective. The objective question of fact,

---

<sup>8</sup> 1963 (1) Chancery 587

one that depends to a very great extent on the perception of the Court and on the evidence before it, is an assessment of whether there is a substantial similarity between the two works. The subjective test is blunter. It assesses whether any ordinary person on considering the two works would inevitably come to one, and only one conclusion, viz., that the allegedly offending work is a copy of the plaintiff's.

37. The test Mr. Kadam and Mr. Dhond suggest is one that is singularly appealing. It is a test that is drawn from the law as settled in *R.G. Anand's* case and reflected too in the two decisions of the United States Court cited by Mr. Dhond. The test is this: if we remove all scenes to which no originality attaches, such as all *scènes à faire*, then are the two works still substantially similar, and has the subsequent work copied substantial part of the earlier work? Indeed, if this is applied to the elements carved out by Mr. Modi in his submissions, very likely the entire suit would fail.

38. There are, therefore, three crucial questions or legal tests in cases like this:

- (a) Has the plaintiff proved that the defendant had access to his work?
- (b) On considering the two works, would an ordinary person inevitably conclude that the defendant had copied the plaintiff's work? (*the subjective or intrinsic test*); and

- (c) Is there a substantial and material overlapping or commonality of the original elements in the plaintiff's work?

39. Even if a plaintiff fails on the first question, he may yet succeed on the second and third questions. But if he fails on the second question also, then I do not see how he can possibly succeed on the third alone. But that may arise in another matter. In this case, in my view, the present Plaintiff fails on all three counts. Indeed, his case is not even based on the second question, but only on the first and his own variation of the third: that Defendants Nos. 1 to 3 had access and that there are common elements, even if these are not shown to be entirely unique and some of which are later given up as being original (the magic trick) or demonstrated to be untrue (being set in a foreign locale). The Plaintiff's variation on the third question is a sort of *reductio ad absurdum*: a vivisection of individual elements, a false and misleading juxtaposition of these, and, on that basis, to 'round up the usual suspects' and invite a finding of infringement. If these elements, however and wherever placed, are in support of an entirely different premise and story line, there can be no copying, no piracy and no infringement.

## G. CONCLUSIONS

40. In my view, there is no case whatsoever made out for the grant of interim relief. The Plaintiff has not made out a *prima-facie* case. I am not convinced that the Plaintiff has even been able to demonstrate that his work was given to, let alone seen, by the 1st Defendant or any of its employees, officers or principal personnel.

The two works are entirely different, each original in its own way. The film *Dhoom 3* is not and cannot possibly be said to be a copy of the Plaintiff's work *Once*. The material propositions and premise of the two works are entirely dissimilar. The mere use in both of certain well established and commonly used motifs, themes or elements or even the perhaps co-incidental placing of these in a certain juxtaposition gives the Plaintiff no rights against the rival work.

41. The notice of motion is dismissed. At this stage, Mr. Khandekar, learned advocate for the 1st to 3rd Defendants, submits that in view of these findings, the Court should award costs even if this be only token costs so as to discourage persons from "taking their chances" in making frivolous claims of this kind. It is true that I have found this particular claim to be entirely without substance. I am inclined to accept the submission made on behalf of the Defendants. Costs are awarded against the Plaintiff in the token amount of Re. 1/-. Learned advocate for Defendants No. 1 to 3 immediately waives payment of costs.

#### H. DIRECTIONS IN THE SUIT

42. Defendants to file their written statement on or before 14th July 2014. List the suit for framing issues on 21st July 2014.

(G. S. PATEL, J.)