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ILR 2004 KAR 4530 : (2004) 24 AIC 689

BEFORE K. SREEDHAR RAO, J.

NRI Film Production Associates (P) Ltd.

Versus

Twentieth Century Fox Film Corporation and Another*

RFA No. 67/2004

Decided on August 18, 2004

(A) COPY RIGHT ACT, 1957 — SECTION 2(a)(V) — AMENDMENT OF SECTION 2(a)(v) — INCORPORATION OF CLAUSE (v) — Effect of — HELD — The true effect of amendment of Clause 2(a)(v) in the case of literary and dramatic works would apply only when there is marginal peripheral alterations and rearrangements — The amendment does not bring out any drastic change in the existing law, therefore the test of dissimilarities propounded by Supreme Court in *R.G. Anand's case* still holds the field.

(B) COPY RIGHT ACT, 1957 — INFRINGEMENT OF COPY RIGHT — SUIT FOR DECLARATION OF — QUESTION OF ACCESS — Whether it is a matter of inference or by direct proof — **HELD —** The question of access could be a matter of inference or by direct proof — When there is no similarity, the question of access to the work is inconsequential in law — On facts, further held — The question of access or otherwise has a little bearing in the present case, in view of the glaring dissimilarities which make "Independence Day" totally distinct and different from "Extra Terrestrial Mission".

(C) COPY RIGHT ACT, 1957 — SECTION 55 — REMEDIES FOR INFRINGEMENT OF A RIGHT — INJUNCTION, DAMAGES, ACCOUNTS ETC., — ON FACTS HELD — It is open to the plaintiff to seek damages. But in law the plaintiff is also entitled to the relief of accounts — But plaintiff cannot claim the relief of damages and accounts together.

Dismissing the Appeal, the Court



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Held :

The Indian Law as laid down in R.G. Anand's case, the English Law and the American Law on the subject of copyright in literary and dramatic works is unanimous in the view. There cannot be copy right over the ideas, theme, and the plot, lest it would stultify the growth and development of literary genius. But any idea, theme or a plot expressed with more vivid descriptive details of any subject by the author gives a copyright over such unique way of expression.

(Para 17)

The true effect of amendment of clause 2(a)(v) in the case of literary and dramatic works would apply only when there is marginal peripheral alterations and rearrangements. The amendment does not bring out any drastic change in the existing law, therefore the test of dissimilarities propounded by Supreme Court in R.G. Anand's case still holds the field. In that view I find the story and the film script in I.D. is totally distinct and different from E.T.M. The so called unique features of E.T.M. like President's involvement in war, the picturisation of effects of war, the presentation of concept of spaceship, energy shield could at the best be called an idea, but not a precise defined expression to confer copyright.

(Para 21)

In fact E.T.M. is only at the stage of film script, a reading material. Whereas I.D. is a visual material. The presentation and picturisation of ideas into events in a visual form involves technical skills and expertise of photography. The depiction of the events of nuclear missile attacks, the traffic jams, disruption of communications, devastating effects of the nuclear bombardment could get altogether a different photographic treatment varying from person to person. The photographic expression of the work in the film would itself constitute a copy right. Therefore, it cannot be said that the script of E.T.M.

if made a film will bear the similar presentation and effects.

(Para 23)

ASES REFERRED:

T PARAS

1. (1978) 4 SCC 118 : AIR 1978 SC 1613 -

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R.G. Anand v. Delux Films



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2. GA No. 2310/03 APO T No. 394/2003 with OS 145/2003 T No. 2/2003 -

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Barbara Taylor Bradford v. Sahara India Entertainment Ltd.

3. *Barsha Henry v. M.G.M.*

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4. AIR 1981 A.P. 224 -

(Relie

Pillamarri Lakshmikantham v. Ramakrishna Pictures

ooks Referred:

The tritise 'Nimmer on Copy right' Vol. III, 1993

Sri A.Y.N. Gupta, Advocate for Appellant

Sri Udaya Holla & Terxes D. Ramina, Advocates for Respondents

JUDGMENT

SREEDHAR RAO, J.:—

The case is at the stage of admission. At the request and with the consent of both the parties, the appeal heard on merits for final disposal.

The appellant/plaintiff filed a suit for a declaration that the Movie Independence Day (I.D.) produced by the defendants is the infringement of the copyright of the film script Extra Terrestrial Mission (E.T.M.). Further seek an injunction against display of the film in any theatre or through a videocassette etc. both in India and world over. Further seek an enquiry into accounts of the film I.D. for assessing the compensation payable to the plaintiff for the tort of infringement.

2. The Managing Director of the Plaintiff Company claims to be the author of the film script E.T.M., acquired registered copyright in the year 1986. The plaintiff in the year 1993 had engaged Ms. Susan Schaefer, an Entertainment Attorney at U.S. for getting a financial investor as a co-producer for the film ETM. One Mr. Richard Garzilli a professional companion of Ms. Susan Schaefer was in the full time employment of the first defendant for some time. Mr. Richard Garzilli was also representing Mr. Roland Emmerich and Mr. Dean Devlin the authors of the film



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script I.D. in some other project as such there was a close professional and social relationship amongst the first defendant, Ms. Susan Schaefer, Mr. Richard Garzilli, Mr. Roland Emmerich and Mr. Dean Devlin. In that view the plaintiff contends that the authors of the script I.D. and the first defendant had access to the film script E.T.M. The film I.D.

produced by defendants is the plagiarised version of the E.T.M. amounting to infringement of the plaintiffs copyright. Hence the suit filed for the above reliefs.

3. Per contra the defendants stoutly denied the allegations of infringement of copyright and maintain that the film I.D. is totally distinct and different from the script E.T.M. hence seek dismissal of the suit.

4. The Trial Court comes to the conclusion that the film I.D. is totally different from the film script E.T.M. and that there is no infringement. Accordingly dismissed the suit.

5. The following points arise for consideration in this appeal.

(1) Whether the plaintiff proves that the film I.D. infringes the copy right in film script E.T.M. the findings of the trial court that there is no infringement is contrary to law and evidence on record?

(2) Whether the suit of the plaintiff for accounts to enable him to seek the relief of damages is in accordance with law?

6. The story line of the film script E.T.M. and I.D. in nutshell is narrated below for convenient reference and analysis.

E.T.M.

7. The script starts with the scene at a war ravaged Vietnam. One Diana a Vietnam citizen when subjected to sexual assault by an American soldier, Phil Talon the Army Captain of US rescues Diana for which act Diana feels beholden. In the later part of the story, love blossoms and they get married. Henceforth the scenes of the film shift to U.S. and Middle East. Diana and Phil Talon at U.S. will be working together for the rehabilitation of the Vietnam War affected children at US by a body called Vietnam Center.



Phil Talon is also tipped for Noble Peace Prize for his philanthropic acts.

8. Aliens descend an earth by a spaceship on a rescue goodwill mission. Phil Talon is a familiar personality to aliens. One Pilgrim the leader of the aliens informs Phil Talon of the impending nuclear blast conspired by Dr. Cain, a Christian Priest at the site of mosque at Jerusalem. If not prevented Pilgrim apprehends that the whole earth would be devastated, therefore requests Phil Talon to negotiate with the President of US for a preventive action. The President of US takes egoistic stand at the instance of Dr. Cain refuses to allow the alien interference in the affairs of the earth, directs them to leave at once. On refusal by the aliens directs a war against them. In the first round of the war the nuclear arsenal is substantially exhausted in vain. The aliens appear to be invincible. The President makes a tactical retreat, confer with the President of USSR, France etc. for a strategy to combat the aliens. The aliens however successfully prevent the nuclear holocaust at Jerusalem and successfully resist the US attack. In the second round of attack also the aliens prove invincible to US forces. The President becomes desperate and calls for a truce. The aliens having established their triumph would voluntarily get back.

I.D.

9. The film starts with a scene in the Central Control Room in the mid night hours. One of the junior scientists receives strange signals from the space indicating evil arrivals. The chief of the Control Room is informed. The situation gets warmed up in the control room. In the early morning, the President is informed about the dangerous signals received from the space. The President will have meeting with the military authorities and scientists to chalk out a strategy to resist alien invasion.

10. The people curiously congregate look upto the sky hopefully to receive friendly aliens but the aliens descend belligerently bombarding the buildings including Whitehouse and nuclear installations killing several innocent people. The space ships of a diameter of 15 miles descend on several important cities. A huge mother spaceship stationed in the

space quite at a distance



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controlling the small spaceships. The US Air force in vain attacks the aliens spaceships exhausting substantial nuclear arsenal. The President becomes desperate, recalls the forces for evolving a successful strategy.

11. The President and advisors hold secret meeting in Area 51. One of the pilots who had captured an alien brings it to Area 51. The President feels distressed and helpless in the matter. A Scientist accidentally hits an idea of implanting virus in the spaceship to make it vulnerable. The Scientist and the expert war pilot take the journey by an old captured spaceship, reach the mother spaceship, after some tense anxious movements successfully implant the virus. The President gets directly involved in the Arial war as a pilot to attack the spaceship. The first round the attack would go in vain. The President without loosing hope tries to take a second chance much against the advice of his Officers. The virus in the round of attack would become active making spaceship fragile to attacks. Thus the mother spaceship and the small ones start crumbling by the attacks. The aliens get away from the earth. The entire episode takes place in two days. The last battle of the episode is made to coincide with the Independence Day of US to signify literally the triumph as yet another Independence Day from the aliens.

12. The appellant personally argued his case and listed out the following unique style of expressions in his script, which are adopted in I.D. amounting to infringement.

1. The President's direct involvement in the war and the President's presence in the last scene at the time of departure of the aliens are the unique aspects of the script ETM. The defendants witness also corroborates the contention that the Presidents direct involvement in the war is the specialty of the story.
2. The concept of energy shield, the picturesque vivid description of the impregnable capacity of the eneigy shield, the capacity to suck and let out the objects and persons intact, the capacity to diffuse the nuclear attacks preventing nuclear radiation are the unique features of the spaceships with energy shield in E.T.M. are adopted in I.D.



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3. The vivid and detailed expression of nuclear missiles fizzling out like broken balloons in E.T.M. are adopted in I.D.
4. The descriptive concept of spaceship, its movement from outer space prominently passing through moon with cloud covers is a novel expression in ETM. The descriptive effects of spaceship with dazzling lights descending on the earth focussing the beaming light from the bottom on the Whitehouse is again a special expression first of its kind in E.T.M., adopted in I.D.
5. The people of US in cheerfully welcoming the aliens with placards, the crowd going hanky-panky, the descriptive details of disruption of communications and transport are the novelty aspects of E.T.M. adopted in I.D.

13. The Counsel for the respondent pointed out the following dissimilarities to refute the contention of infringement of the copyright.

- (1) In E.T.M. the aliens visit is a goodwill mission to save the earth. The US President unlike a noble Samaritan refuse to see the good purpose. But on egoistic considerations directs a war to drive out the aliens. Whereas in I.D. the aliens visit is to conquer the earth. The US President boldly with good intention successfully

repulse the attack with his dedicated band of men.

- (2) The aliens in E.T.M. are portrayed as human beings, in I.D. they are grotesque with magnified insect face and overlapping features of octopus.
- (3) In E.T.M. the aliens would talk in human language but in I.D. they function only on telepathy.
- (4) The energy shields in I.D. have no capacity to suck and let out objects intact like in E.T.M.
- (5) In I.D. the aliens descend on earth with a war mood destroying the cities, bombarding the buildings, killing large number of people. But in E.T.M. it is totally other way.
- (6) The energy shields through out the story in E.T.M. are impregnable and aliens are invincible but in I.D. it is not so in the end.



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- (7) The US President remains desperate and feels humiliated through out in E.T.M. on account of invincible capacity of aliens but in I.D. the President is tenacious and triumphant in the war against aliens.
- (8) The aliens are noble, righteous minded and people friendly in E.T.M. but in I.D. they are wicked and ambitious to conquer the earth.

14. The Counsel for the respondent argued that the idea and portrayal of sequences like traffic jams, disruption of communication, dazzling effects of the nuclear missiles are hackneyed subjects of every scientific fiction and matters of common grasp. There is no novelty or uniqueness either in the idea or in expression. Invariably every author of a scientific fiction would conjure them as consequential concomitant effects as a matter of common grasp and "Scenes a Faire" which carry no copyright.

15. In the tritise "Nimmer on Copyright" in Vol. III, 1993 while dealing with the topic — Action — Substantive aspects at page 13-75 elucidates the doctrine of "Scenes a Faire" in the following words:

"(4) 'Scenes a Faire'. Bearing in mind the hoary wisdom of Ecclesiastes that there is nothing new under the sun, certain patterns and situations are bound to recur. The claim (and variations thereon) is often advanced that "the entire dramatic literature of the world can be reduced to some three dozen situations" *Schwartz v. Universal Pictures Co.* 85 F. Supp. 270 (S.D. Cal. 1949) So, for example, if two scenarios wish to treat the unprotected idea of police life in the South Bronx, for each it will be only natural to depict "drinks, prostitutes, vermin and derelict cars", juxtaposed against hard drinking Irish cops chasing fleeing criminals Judge Leon Yankwich has called such incidents "scenes a faire" i.e., "scenes which 'must' be done." That language is often invoked to immunize from liability similarity of incidents or plot which necessarily follow from a common theme or setting."

16. The Supreme Court in *R.G. Anand v. Delux Films*¹ has laid down the following testing



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guidelines to determine the infringement in paras 46 and 58 as follows:

"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 limitation 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 test 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.



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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 copy right may be said to be proved.

58. The effect of the dissimilarities pointed out above clearly go to show that they far outweigh the effect of the similarities mentioned in para 9 of the plaint set out above. Moreover, even if we examine the similarities mentioned by the plaintiff they are trifling and trivial and touch insignificant points and do not appear to be of a substantial nature. The mere fact that the name of the Madras father was subramaniam in both the film and the play is hardly of any significance because the name of a particular person cannot be the subject — matter of copy right because these are common names."

17. The Indian law as laid down in *R.G. Anand's case*, the English Law and the American Law on the subject of copyright in literary and dramatic works is unanimous in the view. There cannot be copy right over the ideas, theme, and the plot, lest it would stultify the growth and development of literary genius. But any idea, theme or a plot

expressed with more vivid description details of any subject by the author gives a copyright over such unique way of expression.

18. Hon'ble Pathak J. in *R.G. Anand's case* his concurrent but separate Judgment in the lastlines of paragraph 66 makes the following observations.:



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"This court is extremely reluctant to interfere with concurrent findings of fact reached by the Courts below and for that reason I would allow the Judgment under appeal to stand. In another, and perhaps a clearer case, it may be necessary for this Court to interfere and remove the impression which may have gained ground that the copyright belonging to an author can be readily infringed by making immaterial changes, introducing insubstantial differences and enlarging the scope of the original theme so that a veil of apparent dissimilarity is thrown around the work now produced. The Court will look strictly at not only blatant examples of copying but also at reprehensible attempts at colourable imitation."

19. Perhaps as a sequel to the observations of Hon'ble Pathak J. an amendment to Section 2 of the Copy right Act, 1957 is effected by incorporating Clause (V) w.e.f. 10.5.1995 which reads thus:

(a) "adoption" means,-

- (i) in relation to a dramatic work, the conversion of the work into a non-dramatic work.
- (ii) in relation to a literary work or an artistic work, the conversion of the work into a dramatic work by way of performance in public or otherwise;
- (iii) in relation to a literary or dramatic work, any abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in newspaper, magazine or similar periodical;
- (iv) in relation to a musical work, any arrangement or transcription of the work; and
- (v) in relation to any work, any use of such work involving its rearrangement or alteration;

20. The Division Bench of the Calcutta High Court in *Barbara Taylor Bradford v. Sahara India Entertainment Limited*² makes the



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following observations on the effect of amendment of Section 2(a)(v) of Copyright Act.

"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."

In our opinion, the large change meaning cannot be ascribed to the word "alter" in Section 2(a)(v) of the Copy right 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 programs 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 sub-section 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 52%. 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."

21. The true effect of amendment of clause 2(a)(v) in the case of literary and dramatic works would apply only when there is marginal peripheral alterations and rearrangements. The amendment does not bring out any drastic change in the existing law, therefore the test of dissimilarities propounded by Supreme Court in still holds the field. In that view I find the story and the film script in I.D. is totally distinct and different from E.T.M. The so called unique features of E.T.M. like President's involvement in war, the picturisation of effects of war, the



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presentation of concept of spaceship, energy shield could at the best be called an idea, but not a precise defined expression to confer copyright.

22. There is no comparative basis between E.T.M. and I.D. Except the fact in both the plots the President is involved in the war, but the manner of involvement and the nature of the President's role conceived in E.T.M. is totally different from I.D. The spaceship, energy shield, people welcoming aliens are again ideas. The treatment and presentation of the concept in the film I.D. is totally different from the script E.T.M. The picturisation of blasting of nuclear missiles, disruption of communications, traffic jams are nothing but "scene a faire" commonly found in scientific fictions. Indeed in the several English earlier movies which have been marked and presented visually for the Court's benefit disclose that the confrontation of aliens with the men on the earth, the spaceship energy shields are the ideas evolved several decades ago and there is nothing special of the idea.

23. In fact E.T.M. is only at the stage of film script, a reading material. Whereas I.D. is a visual material. The presentation and picturisation of ideas into events in a visual form involves technical skills and expertise of photography. The depiction of the events of nuclear missile attacks, the traffic jams, disruption of communications, devastating effects of the nuclear bombardment could get altogether a different photographic treatment varying from person to person. The photographic expression of the work in the film would itself constitute a copy right. Therefore, it cannot be said that the script of E.T.M. if made a film will bear the similar presentation and effects.

24. The question of access could be a matter of inference or by direct proof. When there is no similarity, the question of access to the work is inconsequential in law. The appellant relied on the decision of Court of Appeal California, the Second District Division II, in *Barsha Henry v. M.G.M.*³ to contend that the access to script could also be a matter of inference. In the cited decision one Irwin Telbargh associated with production of film "High Fever"



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had an occasion to read the film script "A Dog at Risk" earlier to production of "High Fever". Therefore the possible access was held to be matter of inference. In this case the plaintiff has placed material to show a close professional relationship between Ms. Susan Schaefer on the one part, Richard Garzilli, Roland Emmerich, Dean Devlin and the

defendants on the other part which by inference may support the plaintiff's contention of possible access. But the question of access or otherwise has a little bearing in this case, in view of the glaring dissimilarities which make I.D. totally distinct and different from E.T.M.

25. Section 55 provides the remedy of "injunction, damages, accounts and otherwise as are or may be conferred by the law for the infringement of a right." The Division Bench Andhra Pradesh High Court in *Pillamarri Lakshmikantham v. Ramakrishna Pictures*⁴. Placing reliance on the English decisions held that a party cannot claim the relief of damages and accounts together, they are the remedies in alternative and both the reliefs are incompatible. The judgments of the American Courts' are cited by the appellant to show that a certain percentage of net profits could be granted as damages. It was open to the plaintiff to seek damages. But in law the plaintiff is also entitled to the relief of accounts. It is the case of the plaintiff that after an enquiry into the net profit on percentage basis the relief of damages could be granted. Therefore the plaintiff makes only a tentative valuation for the purpose of Court fee and jurisdiction and it is in accordance with law. Point No. 1 is answer in affirmative and point No. 2 is answered in negative.

For the reasons stated above, the appeal is dismissed with costs.

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* RFA No. 67/2004.

¹. (1978) 4 SCC 118 : AIR 1978 SC 1613.

². GA No. 2310/03 APO T No. 394/2003 with OS 145/2003 T No. 2/2003 148.

³. Court of Appeal California, the Second District Division II.

⁴. AIR 1981 A.P. 224.