

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

INTERIM APPLICATION No. 1 OF 2019  
IN  
COMM. IP SUIT (Lodging) No. 1068 OF 2019

Brand David Communications

Pvt. Ltd. & Anr

..Applicants/Plaintiffs.

Vs

Vivo Mobile India Pvt. Ltd. & Anr

..Defendants.

Dr. Veerendra Tulzapurkar, Sr. Advocate a/w Mr Hiren Kamod, Ms Meena Shah, Mr. Rahul Dhote and Mr. Prem Khullar i/b M/s Pandya and Co. for the Applicants/ Plaintiffs.

Mr. Venkatesh Dhond, Sr. Advocate a/w Mr. Prateek Sakseria, Mr Kunal Kanungo and Mr Himanshu Deora, Mr Rahul Punjabi and Ms Rhea Garg i/b S. Venkateshwar for Defendant No.1.

Mr. Nimay Dave a/w M.S. Bodhanwalla and Mr. Shenoy Bodhanwalla, Mr. Rushabh Sheth a/w Ms Sakshi Sharma i/b M.S. Bodhanwalla and Co., for Defendant No.2.

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CORAM: B.P. COLABAWALLA, J.

DATE : 15<sup>th</sup> OCTOBER, 2019.

**P.C.:-**

1. This Interim Application has been moved for urgent ad-interim reliefs inter alia seeking to restrain the defendants from using, broadcasting, exhibiting, telecasting, disseminating or communicating to the public in any manner whatsoever, the impugned Television Commercial (TVC)/Advertisement/Film of **"VIVO V17 Pro" Mobile** titled **"Light up the Night"** being **Exhibit-I** to the plaint or any other TVC/Advertisement/Film on television, digital and on any other platform and/or form of media and/or adaptation whatsoever, so as to infringe the plaintiffs' copyright in its said work "Amusement Park".
2. The suit filed by the plaintiffs is inter alia seeking relief of permanent injunction to restrain the defendants from infringing the plaintiff's copyright in the literary work/script, more particularly mentioned in the plaint as well as for a decree in the sum of Rs.11,00,00,000/- towards compensation and damages for infringement of the plaintiffs' copyright, loss of business opportunity and legal costs.
3. To the above Notice of Motion, defendant Nos. 1 and 2 have filed their independent affidavits in reply. Dr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the plaintiffs has stated that



these replies have been served on them only on 12<sup>th</sup> October, 2019 and hence he would be proceeding to argue this application for ad-interim reliefs on the basis of denial. It is on this basis that I have heard the Interim Application for ad-interim reliefs.

4. It is the case of the plaintiffs that they are a part of a well-known advertising and marketing empire/group viz., Ogilvy and Mather (O&M Group) and are inter alia carrying on business of advertising and marketing communications. It has been carrying on its business activities since 1948 and due to their iconic and culture-changing advertisements have a presence in over 83 countries with 131 offices worldwide. The plaintiffs have been carrying on its said business in India since more than five decades and have established themselves as one of the oldest agencies in advertising and marketing services catering to fortune 500 Companies.

5. Defendant No.1 is a Company, who, according to the plaintiffs, was its client for an advertising and marketing pitch for one of its product viz., **"VIVO V15 Mobile"** (for short the **"Pitch"**). It is the case of the plaintiffs that upon sharing with defendant No.1 its literary, artistic and other creative works pertaining to the said pitch in confidence, the defendants, in collusion with each other,

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unauthorizedly and illegally reproduced and/or used and/or exploited the plaintiffs' said works so as to infringe plaintiffs' copyright. It is in these circumstances that the plaintiffs have sued both the defendants, as according to the plaintiffs, they are jointly and severally liable.

6. Dr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the plaintiffs stated that from 9<sup>th</sup> October, 2018 to 22<sup>nd</sup> October, 2018 several Emails were exchanged between defendant No.1 and the plaintiffs. Prior to its 1<sup>st</sup> pitch on 22<sup>nd</sup> October, 2018, once that marketing pitch was placed before defendant No.1, defendant No.1 provided feedback on the creatives shown to defendant No.1 by the plaintiffs on 22<sup>nd</sup> October, 2018. On 19<sup>th</sup> November, 2018 defendant No.1 requested the plaintiffs to share a detailed storyboard also. Accordingly, on the same day the plaintiffs emailed to defendant No.1 re-edited version of the creative "Amusement Park". Thereafter, there was correspondence between the parties and on 22<sup>nd</sup> November, 2018 the plaintiffs raised the estimate of the same date for an amount of Rs. 10 lakhs towards the pitch fees for the creative presentation related to "Amusement Park" which was duly approved by defendant No.1's representative i.e. Ms. Nidhiki Kohli on 12<sup>th</sup> December, 2018.

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7. Dr. Tulzapurkar, then pointed out that despite all this work, after an extensive discussion on the creative deck, defendant No.1 expressed their desire not to engage the services of the plaintiffs in relation to its **VIVO V15** project/campaign and executed a letter dated 27<sup>th</sup> May, 2019, wherein defendant No.1 agreed to pay Rs. 10,00,000/- towards professional fees of the plaintiffs for pitching the said creative deck pertaining to the said product to defendant No.1. Dr. Tulzapurkar brought to my attention the said letter and pointed out that the said letter categorically states that it was agreed between the plaintiffs and defendant No.1 that the materials, including but not limited to, any scripts, presentation materials, documents or other creative materials in relation to the said creative presentation is the intellectual property and proprietary materials of the plaintiffs.

8. Dr. Tulzapurkar then pointed out that despite the aforesaid letter of dated 27<sup>th</sup> May, 2019, defendant No.1, on 26<sup>th</sup> June, 2019, once again called upon the plaintiffs to make a presentation on the said literary work/script "Amusement Park". After the said presentation, the plaintiffs addressed an email on the same day to defendant No.1 wherein the plaintiffs forwarded a copy of the script

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and/or literary work pertaining to "Amusement Park" which was presented and discussed in detail with the team of defendant No.1. Dr. Tulzapurkar submitted that this detail presentation introduced the magic component for the first time and was shared with defendant No.1 vide their email dated 15<sup>th</sup> July, 2019 at 1:14 PM. The relevant contents of the said literary work and/or script of the plaintiffs is set at paragraphs 15 & 16 of the plaint and read thus :-

"15. On October 23, 2018, Defendant No.1, submitted their feedback. In relation to the first creative, Defendant No. 1 expressed their reservations for use of young couple entering into the amusement park sneakily but loved the idea of all the rides lighting up upon use camera of their said product and asked the Plaintiffs to further work on the creative. With reference to second creative, Defendant No.1 liked the idea of exaggerating use of pop-up camera of their said product. Hereto annexed and marked as **Exhibit-D** is a copy of the said email dated October 23, 2018, wherein, Defendant No.1 submitted their feedback pertaining to the pitch and/or creative deck presented by the plaintiffs on October 22, 2018 at Defendant No.1's office.

16. Plaintiffs, vide an email dated November 18, 2018 forwarded the said creative deck dated October 22, 2018 to Defendant No.1. Hereto annexed and marked as **Exhibit-E** is of the said email dated November 18, 2018, wherein, Plaintiffs shared the creative deck pertaining to the said product to Defendants via We Transfer since the size of the file was too large to be attached via email."

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9. In these circumstances, Dr. Tulzapurkar submitted that the said work "Amusement Park" was created by the employees of the plaintiffs, during the course of their employment under a contract of



service with the plaintiffs and all the rights in the said work vests in the plaintiffs alone. The said work is an original work and the plaintiffs are the owners of the copyright in the said work under the provisions of the Copyrights Act, 1957 and therefore have the right to restrain any one who, without their licence/permission/authority uses, reproduces and/or adopts their work directly and/or indirectly.

10. Dr. Tulzapurkar submitted that on 20<sup>th</sup> September, 2019 the plaintiffs were shocked and surprised to come across the TVC/advertisement/film in relation to defendant No.1's **"VIVO V17 PRO"** mobile product titled **"Light Up the Night"** claimed to be created by defendant No.2 on various platforms including YouTube and Television Channels. Upon viewing the said impugned advertisement, Dr. Tulzapurkar submitted that it was absolutely clear that the same is entirely based on the plaintiffs literary script, creative, and artistic work **"Amusement Park"** and the same is nothing but a slavish and flagrant imitation of the plaintiffs work. The entire execution of the impugned advertisement or at least the very essence of it is an infringement of the plaintiffs' copyright in its work **"Amusement Park"** and which was received, acknowledged and discussed in detail between the plaintiffs and defendant No.1. To highlight this point, Dr. Tulzapurkar brought to my attention a table reproduced at page Nos.

18 and 19 of the plaint which highlights the similarity between the plaintiffs' work and the impugned advertisement of defendant No.1.

The said table reads as under:-

Sr. No.	Plaintiffs' said work	Impugned TVC/ advertisement/film
1	Theme is set as "Amusement Park"	Theme is set as "Amusement Park"
2	There are two main characters who enter into an amusement park after it has closed.	The two main characters are in an amusement park when it's closing.
3	Creative device of lights switching on the moment selfie camera pops out.	Aamir Khan pops out the Selfie Camera and lights switch on.
4	Girl sits on a carousel horse and the boy pops out the camera.	The daughter is sitting on a carousel horse and Aamir Khan pops out the camera.
5	The moment boy pops out the camera the carousel lights switch on. The guy takes the selfie with the girl.	The moment Aamir Khan pops out the camera the carousel lights switch on. Aamir Khan takes a selfie with the girl.
6	The young couple is sitting on a lifeless giant wheel.	Aamir Khan (father) and the girl (daughter) are sitting on a lifeless giant wheel.
7.	The guy pops out the camera and the giant wheel switches on. The couple takes a selfie.	Aamir pops out the camera and the giant wheel switches on. They take a selfie.
8.	Every time the boy turns on his phone's camera and it pops out, the attraction/ride in front of the camera lights up.	Every time Aamir Khan turns on his phone's camera and it pops out, the part of the ride he is focusing on lights up.
9.	Creative device of lights switching on every time the selfie camera pops out to portray the low light feature of	Creative device of lights switching on every time the selfie camera pops out to portray the low light



	Defendant No.1's phone camera.	feature of Defendant No.1's phone camera.
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11. Dr. Tulzapurkar submitted that at Exhibit-J to the plaint is a comparative storyboard showing/displaying plaintiffs' said work and corresponding screenshots from the impugned TVC/advertisement/film to show the extent of infringement committed by the defendants. It is in these circumstances that Dr. Tulzapurkar submitted that the advertisement created by the defendants is a flagrant imitation and/or a copy of the plaintiffs' copyright in the said work "Amusement Park" and therefore the plaintiffs right ought to be protected by granting an ad-interim injunction restraining the defendants from using the said advertisement.

12. On the other hand, Mr. Dhond, the learned Senior Counsel, appearing on behalf of defendant No.1, submitted that the defendants are not in any way guilty of infringing the copyright of the plaintiffs. He submitted that in the facts of the present case, no confidential information is involved and the law is quite clear that no copyright exists in an idea. Mr. Dhond submitted that the theme is set on an "Amusement Park" and that there are two main characters of similar

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age, who sneak into an amusement park after it has closed and the creative device of lights switching on the moment selfie camera pops out. These features are not unique or novel but are mere vehicles for highlighting the features of defendant No.1's product. The amusement park, carousal and ferris wheel and lights switching on are not protectable expressions, but rather merely an advertising theme. He submitted that the copyright laws are not to be construed in a fashion whereby a theme cannot be used in future television commercials. Thereafter, Mr. Dhond submitted that the plaintiffs are not the first to use "Amusement Park" as a background in an advertisement/commercial/TVC and therefore the claim of the plaintiffs that their work is original and novel is blatantly incorrect. A reference of this has been made in paragraphs 11, 12 and 13 of its affidavit-in-reply. Mr. Dhond pointed out that there were very many dis-similarities between the pitch of the plaintiffs and the TV commercial of defendant No.1. In this regard, he brought to my attention the differences more particularly set out in paragraph 14 of the affidavit in reply.

13. Mr. Dhond submitted that the present suit is filed against defendant No.1 only to harass it and to extort monies. Mr. Dhond submitted that defendant No.1 had approached and hired the services



of the plaintiffs on multiple occasions so much so that defendant No.1 had stopped inviting other agencies for a pitch for promotional activities of defendant No.1. However, recently, defendant No.1 felt a decline in the quality of the work done by the plaintiffs as some of the projects for the plaintiffs were not successful. This caused defendant No.1 to go back to its old model of inviting pitches from multiple agencies. Mr. Dhond submitted that the present suit has been filed with the sole intention to cause harassment to defendant No.1 and in order to coerce it into hiring the services of the plaintiffs and also as a counter blast to defendant No.1 not accepting the pitch of the plaintiffs.

14. Even otherwise, Mr. Dhond submitted that apart from no prima facie case being made out, the balance of convenience also is not in favour of the plaintiffs. Mr. Dhond submitted that apart from the fact that the TVC/advertisement of defendant No.1 is not a copy of the literary work of the plaintiffs, even the balance of convenience and irreparable injury also strongly tilts in favour of refusing the injunction, rather than granting it. The advertisements which the plaintiffs are seeking to judicially restrain was telecast on 20th September, 2019 and admittedly they were aware of the same since then. This advertisement/TVC was created after expending extensive man hours of effort which spread across several months from

inception till release of the TVC and at a cost of more than Rs.50 crores. To ensure that this advertisement/commercial is prominently disseminated, defendant No.1 has booked time slots on various channels throughout the festival season ending with Diwali. These commitments involve a commercial cost of crores of rupees. If the plaintiffs are restrained from using the present commercial / advertisement, defendant No.1 will be required to shoot a fresh commercial/advertisement which will take several months. During this period, defendant No.1 will be deprived of promoting its product and this loss would be irreparable. He therefore submitted that the balance of convenience is therefore strongly in favour of the defendant rather than in favour of the plaintiffs. Mr. Dhond further submitted that the previous assignments given by defendant No.1 to the plaintiffs for making similar advertisement/commercials resulted in the plaintiffs being paid around Rs.50 lakhs and Rs.65 lakhs. He therefore submitted that strictly speaking, the plaintiffs are agitating a claim which can be compensated in terms of money and which would be another factor which this Court would take into consideration before it grants any injunction in favour of the plaintiffs. This is more so when one takes into consideration that defendant No.1 is a Million/Billion Rupee Company and therefore there is no apprehension whatsoever that the plaintiffs' claim in monetary terms will not be satisfied. For all



these reasons, Mr. Dhond submitted that no case was made out for grant of any ad-interim relief.

15. Mr. Dave, the learned Counsel appearing on behalf of defendant No.2, in addition to adopting the submissions of defendant No.1, submitted that even defendant No.2 was called upon to present their pitch to defendant No.1. He submitted that pursuant thereto several pitches were submitted by defendant No.2 to defendant No.1 over a period of time. He submitted all this is set out in the affidavit in reply of defendant No.2 in paragraph 6 (b) to 6(t) thereof. He too submitted that if any one looks at the script of defendant No.2 and that of the plaintiffs, it would be clear that the advertisement of defendant No.1's product was not a copy of the plaintiffs work but, was, in fact, based on the script given by defendant No.2 to defendant No.1. Mr. Dave brought to my attention page No.43 of his affidavit-in-reply where the script has been set out. The same reads thus :-

"You see this little girl looking out at the Parisian/European Street. She sees the lights, the glitz and celebration and is eager to get out.

She shoots a glance to Amir who's wearing his shoes and tugs to him impatiently. As they step out, unfortunately the dusk sets in. It is now dark. Her smile fades. Her face falls.

That's when Aamir from his pocket, takes out the Vivo V17 phone. Pops up the selfie camera..the moment he does that a glowing star pops out. She looks at this star and her face lights up with the glow of the star and her own excitement.

She's suddenly the glow of the street with her very own glowing star on her phone. You now see her running around, flocking on the street, chasing the star, following it,

She poses with the phone in her hand and admires the dancing star that follows her hand/phone.

Every time she finds something fascinating, she clicks a selfie and the glowing star throws light at her as she poses. On a merry go round, with cotton candy stuffed face, with a group of live performers, with all her admirers fawning over her. (multiple situations around the street)

Now tired, she slides her hand into Amir's. He picks her up, she hugs him and falls asleep. He gently takes out the phone and Clicks one selfie with her on him, the star glows on them. He smiles at the star as he swipes to see all the pictures that have been clicked. You notice that all the pictures look nice and brighter than the street otherwise. He turns off the front camera and glowing star goes down with it. Puts it back in his pocket and walks away."

16. He therefore submitted that looking at the script of defendant No.2 and comparing it with that of the plaintiffs, it was clear that it could hardly be contended that the same is a copy of the plaintiffs' literary work. In these circumstances, it was the case of Mr. Dave also that no case for any ad-interim relief was made out by the plaintiffs.

17. I have heard the learned Advocates for the parties at length and have also perused the papers and proceedings in the present suit. Since this is only an application for ad-interim reliefs, I am going to refrain from giving any detail reasons. However, I must



enunciate the principles laid down by the Supreme Court in the case of **R.G. Anand vs. M/s Delux Films & Ors** reported in (1978) 4 Supreme Court Cases 118 and more particularly paragraph 46 thereof which reads thus :-

“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 defendants' 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 test to determine whether or not there has been a violation of copyright is to see 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 prospective, a 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."



18. It is on the touchstone of these propositions and principles that I have to decide whether a case for ad-interim relief has been made out. I have seen the presentation that was made by the plaintiffs to defendant No.1 and also perused the storyboard and the script of the plaintiffs (page No.122 of the plaint, **Exh.H2**). Seeking the advertisement of defendant No.1 in juxtaposition with the script "Amusement Park", at least prima facie, barring some minor changes, the same appear to be similar. Some of the similarities are that the theme is set as an "Amusement Park". The two main characters, though different in age, enter into an "Amusement Park" after it had closed / when it was closing. In the plaintiffs work, the creative device of lights switches on the moment the selfie camera pops out. Similar is the case in the advertisement of defendant No.1 when Aamir Khan pops out the selfie camera and the lights go on. In the plaintiffs work the girl sits on a carousel horse and the boy pops out the camera. In the defendants' advertisement, the the daughter is sitting on a carousel horse and Aamir Khan pops out the camera. The moment boy pops out the camera, the carousel lights switch on and the boy takes a selfie with the girl. Similarly, when Aamir Khan pops out the camera the carousel lights switch on and Aamir Khan takes a selfie with his daughter. Similar is also the case when they are sitting on a lifeless giant wheel. The boy pops out the camera and

the giant wheel switches on and the couple takes a selfie. In the defendants' advertisement Aamir Khan pops out the camera and the giant wheel switches on and thereafter Aamir Khan takes a selfie with his daughter. In the plaintiffs' work every time the boy turns on his phone's camera and it pops out, the attraction/ride in front of the camera lights up. Similar is the case in the defendants' advertisement.

19. Looking to all these similarities, I am, at least, at this stage, prima facie satisfied that the plaintiffs would be entitled to an injunction. However, the matter does not stop here. I find considerable force in the arguments canvassed by Mr. Dhond on the issue of balance of convenience. As stated in the affidavit in reply, the advertisement of defendant No.1 was aired for the first time on 20<sup>th</sup> September, 2019. The plaintiffs were aware of this advertisement. This advertisement has been created after expending extensive man hours of effort which spread across several months from inception till its release and at a cost of more than Rs.50 crores. To ensure that this advertisement/commercial is prominently disseminated, defendant No.1 has booked time slots on various channels throughout the festival season ending with Diwali. These commitments involve a commercial cost of crores of rupees. If an unconditional injunction is granted, the same would not be in the



interest of justice. A sustainable loss would be caused to the defendants in such a scenario.

20. It is in these circumstances that I enquired from Dr. Tulzapurkar as to what would have been the price paid to the plaintiffs if the pitch of the plaintiffs was accepted by defendant No.1. Dr. Tulzapurkar, on taking instructions, stated that the plaintiffs would have been paid an amount of Rs.1.5 crores. Refuting this statement, Mr. Dhond, the learned Senior Counsel appearing on behalf of defendant No.1 submitted that the record clearly shows that for the advertisements done in the past by the plaintiffs for defendant No.1 they have been paid a remuneration ranging from Rs.50 lakhs to Rs.65 lakhs respectively. The claim of Rs.1.5 crores is highly exaggerated, was the submission of Mr. Dhond.

21. After hearing the learned Counsels on this aspect, considering the circumstances and balancing the equities, I think it would be in the fitness of things if defendant No.1 is directed either to deposit in this Court a sum of Rs. 1,00,00,000/- (Rupees One Crore) and/or secure the same by giving a bank guarantee of any reputed bank till the hearing and final disposal of the Interim Application. This deposit and/or furnishing a bank guarantee shall

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be done within a period of two weeks from today. Needless to state that if the aforesaid deposit is not made or the bank guarantee is not furnished as required by the Prothonotary and Senior Master of this Court, there shall be an ad-interim injunction in terms of prayer clauses (a) and (b) which read thus :-

“(a) That pending the hearing and final disposal of the present suit, this Hon’ble Court be pleased to pass an order restraining the Defendants by themselves, their agents, servants, representatives, assigns and/or any persons claiming through and under the Defendants from using, broadcasting, exhibiting, telecasting, disseminating or communicating to the public in any manner whatsoever, the impugned Television Commercial (TVC)/Advertisement/Film of “Vivo V 17 Pro” mobile titled “Light up the night” being Exhibit-I hereto or any other TVC/Advertisement/film on television, digital and on any other platform and/or form of media and/or adaptation whatsoever, which is a reproduction and/or adaption of Plaintiffs’ said work “Amusement Park” being Exhibit-H 2 hereto, so as to infringe Plaintiffs’ copyright in its said work; and

(b) That pending the hearing and final disposal of the present suit, this Hon’ble Court be pleased to pass an order restraining the Defendants by themselves, their agents, servants, representatives, assigns and/or any persons claiming through and under the Defendants from using, broadcasting, telecasting, disseminating or communicating to the public in any manner whatsoever, the impugned Television Commercial (TVC)/Advertisement/Film of “Vivo V17 Pro” mobile titled “Light up the night” being Exhibit-I hereto or any other TVC/Advertisement/film, which is a reproduction and/or adaption of Plaintiffs’ said work being Exhibit-H 2 hereto in relation to any event and/or award function or award entry, so as to infringe Plaintiffs’ copyright in the said work;”

22. Place the above Interim Application for hearing and final disposal on 22<sup>nd</sup> November, 2019 as per its turn.

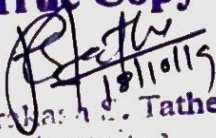
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23. It is made clear that the observations in this order are only prima facie and tentative and shall not influence the Court at the hearing and final disposal of the Interim Application.

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(B. P. COLABAWALLA, J.)

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by Roshakishan  
S. Ladda  
Date:  
2019.10.19  
13:04:18 +0530

**True Copy**  
  
Prakash S. Tathe  
Associate  
High Court Bombay