

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**NOTICE OF MOTION (L) NO. 1049 OF 2016**  
**IN**  
**SUIT (L) NO. 301 OF 2016**

**Arbaaz Khan Production Private Limited** ...Plaintiffs  
1-2, Coral Reef CHS Limited, 55, Chmibai Road,  
Bandra (West), Mumbai - 400 050

*Versus*

1. **Northstar Entertainment Private Limited** ...Defendants  
Limited, 8-2-415/1 to 8-2-415/5, Flat No.  
1A, The Address Apartment, Road No. 4,  
Banjara Hills, Hyderabad 500 034
2. **Eros International Media Limited**,  
901/902, Supreme Chambers, Off Ceera  
Desai Road, Andheri (West), Mumbai -  
400 053
3. **Pawan Kalyan Creative Works Private Limited**, Plot No. 32, Nandagiri Hills,  
Jubilee Hills Hyderabad, Andhra Pradesh  
- 500 033
4. **Pawan Kalyan**,  
Plot No. 32, Nandagiri Hills, Jubilee Hills  
Hyderabad Andhra Pradesh 500 033
5. **Mr. Ganesh Babu**,  
Proprietor of Parmeshwara Arts, having its  
Office at H. No. 304, K1, Road No. 78,  
Besides Padmalaya Studio, Film Nagar,  
Jubilee Hills, Hyderabad 500 045

**Dr. Birendra Saraf**, with Ms. Pooja Kshirsagar, Mr. Ajay Vazirani, Mr. Nirav Jani, Ms. Ritu Shetty, i/b Hariani & Co., for the Plaintiffs.

**Mr. Ravi Kadam**, Senior Advocate, with Mr. Rohan Kadam, Mr. Anupam Dighe, MR. Kiran Padalkar, i/b India Law Alliance for Defendant No. 1.

**Mr. V. R. Dhond**, Senior Advocate, with Mr. Akshay Patil, i/b R. M. Azim, for the Defendant No. 2.

**Mr. Janak Dwarkadas**, Senior Advocate, with Mr. Vishal Kanade, i/b India Law Alliance, for Defendants Nos. 3, 4, and 5.

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

**DATED: 5th April 2016**

**ORAL JUDGMENT:-**

1. This is an application moved on the eve of the public theatrical release on 8th April 2016 of a widely publicized Telugu film entitled 'Sardar Gabbar Singh'. This is a film that stars Defendant No. 4, Mr. Pawan Kalyan, an actor of some considerable renowned in the Telugu film industry (apparently known as 'Tollywood').

2. The action before me is not the usual case of copyright infringement. Even at the ad-interim stage, it raises unusual questions. What precisely is a 'remake' of a film? When that 'remake' is authorised, does it carry with it any intellectual property rights or privileges independent of those in the original film from which it was remade? Does the law in India recognize copyright in a fictional character *simpliciter*? Where an original film has a unique character, and is allowed to be remade under an assignment, is the resultant fictional persona in the remake, even if

that character has quite distinct characteristics, wholly bereft of all independent copyright? These are some of the bolder questions before me today. There are others, too, and these lie in the interstices between these questions.

3. The infringement alleged is in respect of two aspects of the popular Hindi film franchise '*Dabangg*'. This is, at least for the moment, a brace of films produced by the Plaintiffs. The franchise features Mr. Salman Khan as a more than somewhat colourful police officer known as 'Chulbul Pandey'. This character is the subject matter of much description and debate both in the pleadings and in the arguments before me.

4. Briefly stated, Dr. Saraf for the Plaintiffs places his case in copyright infringement and passing off on two footings. The first of these is that the Chulbul Pandey character from the *Dabangg* films has been infringed by the Defendants in their forthcoming film '*Sardar Gabbar Singh*'. This is a sequel to the 4th and 5th Defendants' hugely successful '*Gabbar Singh*', a remake authorised under a written and undisputed assignment, of the first '*Dabangg*' film. The second aspect or limb to Dr. Saraf's case is that by making this sequel, '*Sardar Gabbar Singh*', there is an infringement of copyright and passing off in relation to what Dr. Saraf describes as 'the *Dabangg* franchise'. To begin with, I must explain my understanding of this phraseology, one that is commonly used in cinema when describing a series of films. The franchise, as I understand it, is a reference to thematically consistent film or set of films. It relates to the entire collection of those films including prequels and sequels, and even stand-alone films that share a set of

common characters. There are several well-known film franchises: *James Bond*, *Star Wars*; the *Bourne* series; the *Batman* movies; *Rocky*, the *Die Hard* films; *Star Trek*; *Shrek*; *Kung Fu Panda*; and many others. There are domestic examples too: perhaps the *Munnabhai* films and the *Singham* films.

5. The Plaintiffs' case is that taken together, the two *Dabangg* films constitute just such a franchise. They have several unique aspects and features including various characters. The Plaintiffs claim to have rights in each of these films and in both of them together that are all capable of statutory and common law protection or enforcement.

6. It is not in dispute that in 2009/2010, the Plaintiff produced and released the first *Dabangg* film. The film script, story, screenplay and dialogue were written by one Abhinav Singh, hired by the Plaintiff on a commission basis for that purposes. The Plaintiffs claim that what was created was the unique character of Chulbul Pandey, portrayed by Mr. Salman Khan. This character is described as "a corrupt but fearless police officer". In paragraph 3.1 of the plaint, the various features that make this character supposedly unique are set out at some length. For instance, apart from saying that he is corrupt but fearless, he is said to have a troubled relationship with his stepfather and half-brother; he calls himself "Robin Hood" Pandey; he has what is described as a unique, funny and bizarre way of dealing with rough elements. Indeed I think it is necessary for the purposes of this order to set out the manner in which this description of the Chulbul Pandey character has been placed at the forefront of the Plaint.

"3.1(a) Chulbul Pandey (portrayed by Mr. Salman Khan) plays a corrupt but fearless police officer. He lives with his family and has a troubled relationship with his stepfather and half-brother. He calls himself "Robin Hood" Pandey.

(b) Chulbul Pandey has his unique, funny and bizarre way of dealing with rogue elements. The character has developed a unique dance style. The entire character of Chulbul Pandey was that of an endearing, loving and funny police officer, a spontaneous and peculiar laugh adds charm to his steps. Chulbul Pandey rides a bike in the movie.

(c) Chulbul Pandey wears aviators and has a unique style of tucking the aviators on the back of his collar in the Film.

(d) Chulbul Pandey has a well-built body type, neat close-cut hairdo and handlebar pencil-thin moustache. Though a police officer, he wears a uniform with the top buttons open.

(e) Chulbul Pandey is a very light hearted police officer who dances with the other police officials at the police station. Even his fighting style has comic elements."

7. The *Dabangg* film was extremely successful. This is at least partly attributed in paragraph 3.2 of the plaint to the uniquely etched character of Chulbul Pandey, and it is suggested that this is no ordinary, generic or 'stock' police hero. There is originality and

novelty in his every characteristic. Indeed, it is his character that serves as a vehicle for the story.

8. Some two years later on 21st January 2011, the Plaintiff entered into an agreement with Parmeswara Arts, a proprietary concern of the 5th Defendant, for the remake rights of the first *Dabangg* film.

9. This agreement is extensively referred to by both sides. It is perhaps best to set out some of its salient features. The fact that this assignment relates to *Dabangg* and its proposed remake in Telugu is not in dispute. Clause 1 contains several definitions, some of which are important. Clause 2 has the operative portion of the grant, transfer and assignment and Clause 4 speaks of the rights of the Assignee.

"1. **DEFINITIONS**

(a) . . .

(b) . . .

(c) "New Film" means the cinematograph film proposed to be made by the Assignee to be titled as may be decided by the Assignee (including the original name) by virtue of acquisition of the Remake Rights and other incident rights assigned by the Assignor to the Assignee under this Agreement.

(d) "Remake Rights" shall mean and included the rights to make a New

Film based on the Film and/or Script but not limited to the following:

i) The right to remake the Film in Telugu Language and for the Territory based on and using the story line, script, scenes, screenplay, dialogues, characters, picturisation, designs, dramatic work, artistic works and names of the characters, passages, title of the Film or any part thereof etc. of the Film in any manners as Assignee may deem fit the Film or the story line of the Film in any manner Assignee so chooses.

ii) The exclusive right in the intellectual Property of the New Film including but not limited to the Copyright and all other ancillary rights and exclusive rights in the New Film and its underlying works.

iii) Any and all other rights that are incidental to and are necessary for appropriate utilization of the above mentioned rights i.e. (i) and (ii) of this clause.

(e) "Script" means and includes jointly and severally the story, each script outline treatment, draft, re-write

and polish and screenplay of the Film in Hindi with dialogues.

2. GRANT, TRANSFER AND ASSIGNMENT

The Assignor hereby grants, assigns and transfers to Assignee exclusively, entirely, absolutely, unequivocally, in perpetuity and free from any encumbrances whatsoever and without any limitation the Remake Rights of the Film for the Entire World in Telugu Language only with any and all right including the right and license to convert or cause to convert or authorize to convert the Film and/or Script or its contents into the New Film, with sound, dialogues, etc. based on the Film and/or Script or any part thereof in its original form or in modified or altered form the New Film in Telugu language only. The Assignor shall give a) Script of the film translated in English, b) Photo Copy of Censor Certificate & c) DVD of the film.

4. RIGHTS OF ASSIGNEE

The Assignee shall have the absolute rights for remaking the film in Telugu language only. The Assignee will be having absolute rights to exploit the remade version of the film in Telugu Language Only all over the world in all dimensions commercially and non-commercially."

10. Dr. Saraf is at some pains to point out that although styled as an assignment and despite the fact that Clause 2 speaks of absolute



rights, what was assigned was a very restricted and limited right. This, he submits, is evident from the phraseology of Clauses 1(c) and 1(d)(ii). Both of these speak of, and only of 'the New Film', itself defined. This phrase is repeated in Clause 2. Consequently, Dr. Saraf submits that what Defendant No. 5 was entitled to do was to produce a remake of *Dabangg 1*. Defendant No.5 could at best have copyright in the new film but not in any underlying literary work. For, indeed, the new 'remake' film *Gabbar Singh* had no independent underlying work at all. The only underlying work was the script, story line and characters that went into and made up *Dabangg 1*. This, in Dr. Saraf's submission, exhausts the universe of the 'remake rights' under this agreement. There was emphatically no assignment of the Plaintiffs' copyright in the character of Chulbul Pandey. It is this character Dr. Saraf submits that is entirely unique and it is this character that was found attractive for the 5th Defendant to even want to produce a remake.

11. In order to establish the unique features of this character, Dr. Saraf invites my attention to a tabulation below paragraph 3.14 of the Plaint. This sets out some twelve points said to be unique and to comprise, read with paragraphs 3.1(a) to (e) of the Plaint, the features, characteristics or aspects that render the Chulbul Pandey character so utterly unique that in any remake of it, there would, of necessity, be at the very least an infringement of the Plaintiffs' copyright in that character; and also, therefore, a sustainable action in passing off.

12. Defendant No. 5 is admittedly the producer of '*Gabbar Singh*' (the first 'remake' film). Defendants Nos. 1 to 3 are the

producers of its sequel, '*Sardar Gabbar Singh*'. There is nothing, Dr. Saraf submits, to show who "etched out" the character of Gabbar Singh. If it is suggested that the Gabbar Singh character was created or brought into existence by Defendant No. 4, Mr. Pawan Kalyan, then it is noteworthy that at no point has anybody produced any literary work that could be said to underlie the first Gabbar Singh film. In the Affidavit in Reply it is now claimed that the Gabbar Singh character was in fact created by Defendant No. 4. Dr. Saraf's submission is that in the absence of proof of any underlying literary work for the *Gabbar Singh* film, it is reasonable to presume, and I must hold, that there is no originality in the Gabbar Singh character. The Gabbar Singh character is nothing but the Chulbul Pandey with another name and portrayed by a different actor. It is equally reasonable to presume that the Chulbul Pandey character, over which the Plaintiffs have exclusivity, has been entirely copied. In essence, the submission is that the 4th Defendant's portrayal of Gabbar Singh is nothing but his portrayal of the Chulbul Pandey character first enacted by Mr. Salman Khan: Gabbar Singh is a licensed avatar of Chulbul Pandey. Indeed, this is how everybody understood it, Dr. Saraf says, when he refers me to several documents annexed to the plaint from pages 125 of 129. Now pages 125 and 126 are the rival posters of the two films. I do not think that this takes the Plaintiffs' case much further. Page 127 is a screen shot from a dance sequence which is also entirely distinct in the two films. Page 128 shows an action sequence, one that will merit some mention later. Page 129 shows the principal characters astride a motor cycle. All this is used by Dr. Saraf to point out that there are similarities. He then turns to page 134 of the plaint, a news report relating to the first *Gabbar Singh* film. The report says that

Defendant No. 4 will “essay the cop’s role Gabbar Singh (Chulbul Pandey)”. This is also repeated at pages 136, 139 and 141. Dr. Saraf therefore submits that the public and the world at large understood the remake in Telugu to be of a film with a particularly well-defined character and that the public associated Gabbar Singh not with the eponymous film but instead with *Dabangg 1*. Given that *Dabangg 1* was successful, it evidently had acquired the necessary reputation and goodwill. The Defendants now attempt to capitalize on and encash this goodwill by making an unauthorised sequel, *Sardar Gabbar Singh*.

13. Dr. Saraf points me to a very great deal of learning in this aspect, almost all of it from the US. Principally he relies upon a decision of a District Judge in *Metro-Goldwyn-Mayer v. American Honda Motor Co.*<sup>1</sup> relating to the James Bond franchise. I do not think that this reference was actually necessary, or, for that matter, even appropriate. Just because a different convention is followed in the United States for reporting opinions and decisions does not mean that every one of this can appropriately be cited in the High Court. I can understand the citing of a decision of the Supreme Court of the United States; we often refer to those opinions, and our own jurisprudence often draws from them. I can even understand the citing of decisions of the US Courts of Appeals for the numbered Circuits and the Federal Circuit, and of opinions of the State Supreme Courts; we sometimes refer to those, too. But I simply cannot understand why a District Judge’s opinion on anything should be cited in this Court. It is no different from citing

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<sup>1</sup> 900 F. Supp. 1287 (C.D. Cal. 1995)

the decision of one of our District Judges, had we a system of reporting those.<sup>2</sup>

14. In any case, as I said, the reference is unnecessary. The thrust of the argument is that it is possible to hold copyright not just in a literary work, but in a character. I understand this to mean the realization of a persona with iconic characteristics and traits that make him or her unique. Where such a character is developed and realized by a person entitled in law to hold copyright, there should be no difficulty in accepting that such copyright does subsist in that character and that a person or entity is entitled to it. The on-screen persona of Rocky from the *Rocky* franchise, James Bond from the film franchise (distinct from the literary character), certain characters from the *Star Wars* series (Darth Vader, Obi Wan Kenobi, Han Solo, Chewbacca, and others), John McClane from the *Die Hard* franchise, and the many characters in *Star Trek* (most especially Kirk, Spock and McCoy) are all possible examples. I seriously doubt, too, that anyone can make a film of a dumpling-gobbling martial arts panda bear without authorisation or complaint.

15. Dr. Saraf gives me copies of two other decisions of the US District Courts. I decline to refer to those. He does refer, too, to the 1942 decision of the US Fourth Circuit Court of Appeals in *Lone Ranger, Inc v Cox*,<sup>3</sup> for much the same proposition.

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<sup>2</sup> The tests for an ad-interim or an interim injunction applied in the jurisdiction of the Ninth Circuit in the United State are quite different from the tests that we apply here. The first test of seeing whether the plaintiff has a chance of success at a trial is a standard we long ago abandoned.

<sup>3</sup> 124 F.2d 650.

16. In the context of the agreement to which I have referred, Dr. Saraf cites *Samuel D. Goodis et al v United Artists Television*, of the US Second Circuit Court of Appeals.<sup>4</sup> This pertained to the television series 'The Fugitive' based on copyright-protected material in work called 'Dark Passage'. The question was whether a contractual right to make 'unlimited' additions and alterations in the *Dark Passage* writings, characters and plot necessarily allowed unbridled license to create a wholly different work with no resemblance to the original, or whether those contractual clauses could be read more restrictively. The question was one of interpretation of a particular contract. The Court was required to discern the contractual intent of the parties. I have no difficulty in accepting that in a given case a contractual clause may be read in a restrictive or limited manner; the question before me is whether in this particular assignment agreement any such restriction can or should be accepted.

17. Dr. Saraf then cites *Warner Bros Pictures Inc v Columbia Broadcasting System Inc* of the US Ninth Circuit Court of Appeals. This related to the literary work *The Maltese Falcon* by Dashiell Hammet, and the John Huston film from this work with the same name starring Humphrey Bogart, Mary Astor and Peter Lorre. This is actually the second film adaptation, though certainly the better known one. There was another adaptation, made ten years earlier in 1931, directed by Roy del Ruth. Hammet's work is said to have 'crystallized' the development of the 'hard-boiled' detective genre: his lead character, Sam Spade, is tough, cold, determined, much given to snappy one-liners. Raymond Chandler's character, Philip

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<sup>4</sup> 425 F.2d 397.

Marlowe, falls in this category too. The issue before the *Warner Bros* court was whether, following a written document permitting the 1941 film, Hammet and the other defendants retained any rights in the characters he had developed or whether these had all been conveyed and granted under the instruments in question, even though the characters were not specifically referenced. Did the conveying and granting instruments, silent as to characters, confer exclusivity in relation to the character on the transferee, Warner Bros, which complained of infringement? The trial court denied Warner Bros relief, and declared Hammet's rights. Warner Bros appealed. On an interpretation of the contract, the Appeal Court concluded that the parties never intended by their contract to buy and sell all future use of the personalities. The question then was whether the statute operated to limit (or, depending on one's perspective, restrict) such further use by the transferor. The Court concluded that even if the owners assigned their 'complete' rights in the copyright, this did not prevent the author (Hammet) from using the character he had developed in other stories. The characters were vehicles for the story told. The vehicles did not go with the sale of the story.

18. I must admit to being more than somewhat puzzled by Dr. Saraf's use of this decision. It seems to me to be wholly against him, though in reverse. If *Gabbar Singh* brought into existence a wholly different persona, then surely its creators and owners have the right to further use that character and persona, no matter what any document said. Dr. Saraf's argument seems to proceed on an *a priori* assumption that the *Gabbar Singh character* is otherwise featureless; i.e., he is inhabited by those, and only those,

characteristics, features and idiosyncrasies that make up the persona of Chulbul Pandey; other than the name, there is no difference, and anyone seeing Gabbar Singh on-screen, played by Mr. Pawan Kalyan, will believe that he is seeing Chulbul Pandey albeit with a different visage. I find no basis for this supposition. It is an aspect central to the construct of this Complaint, and I will return to it shortly.

19. It might also be something of an exaggeration to put Chulbul Pandey today on the same platform as James Bond. I suspect Chulbul Pandey has some distance to travel yet before he can quite get to the shaken-not-stirred gold standard. But as to the general principal that the character is unique and the portrayal of that character, as also the “writing up” of that character in an underlying literary work is capable of protection is something that I think I can safely accept. It would be, I think, stretching it too far to say that such a fully developed and uniquely depicted character, because it is ‘merely a character’, falls wholly outside the realm of all protection.

20. A reference is also made by Dr. Saraf to the decision of the learned Single Judge of this Court in *Star India Private Limited v. Leo Burnett India Private Limited*,<sup>5</sup> where the issue was of alleged copyright infringement by a commercial said to have infringed a popular television soap opera. The question before the Court was whether by so closely depicting characters drawn from the TV serial, the commercial violated the plaintiffs’ copyright, artistic work and whether the defendants were guilty of passing off. I

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<sup>5</sup> 2003 (2) Bom CR 655

accept, as do Mr. Kadam, Mr. Dwarkadas and Mr. Dhond for Defendants Nos. 1, 3 to 5 and 2 respectively that there is no quarrel with these general propositions of law.

21. For Defendant No. 1, Mr. Kadam argues that by virtue of the assignment of 21st January 2011 what was brought into existence was a distinct work. I asked Mr. Kadam that if it was his case that Pawan Kalyan's *Gabbar Singh* is not in fact Pawan Kalyan's renamed version of Salman Khan's *Chulbul Pandey*, why such an agreement was at all necessary. The answer that Mr. Kadam provided, and which I find compelling, is that the first *Gabbar Singh* film used as its base the same story line as the *Dabangg 1*. This does not, however, Mr. Kadam says, that the former was an exact copy of the latter. The agreement was required because the story line was being used and any unauthorized use of that story line would have infringed the underlying literary work in the first *Dabangg* film. It would not, however, constitute an infringement of the copyright in the cinematographic film. What was brought into existence in the so-called 'remake', Mr. Kadam says, was an entirely different character. The name was different. The portrayal was different. The stylization was different. The locales were different. So too were his mannerisms, qualities and, most of all, his core value system, his moral compass: where *Chulbul Pandey* is fearless but corrupt, *Gabbar Singh* is fearless and honest. This was an adaptation developed distinctively. The script or story line underlying *Gabbar Singh*, one that is said to have been developed by Mr. Pawan Kalyan himself, has an independent copyright. Mr. Kadam says it is irrelevant that no literary work has been placed on record. He says it is safe from the nature and aspect of the finished



product, i.e., the *Gabbar Singh* film, to assume that its underlying work, although an adaptation and although with some overlap from the literary work that underlies *Dabangg*, is distinctive enough to enjoy its own protection; and that, in any case, the character developed in that adaptation is wholly unique and belongs to the *Gabbar Singh* franchise-in-the-making, not to the *Dabangg* franchise.

22. I believe this is generally correct and it is probably what the parties intended by the agreement itself. Mr. Kadam correctly points out that the agreement of 21st January 2011 relates not to a licence but to an assignment, a very different thing. That assignment vests rights in the 5th Defendant. Clauses 1(d)(ii) and 1(d)(iii) (set out above) are critical. They say in terms that what was given to the 5th Defendant under that agreement was exclusive right in the intellectual property in the 'New Film' (i.e. *Gabbar Singh*). This is an expansive and inclusive definition. It extends to all copyright, all ancillary rights and all exclusive rights not only in *Gabbar Singh* but also in all its underlying works. Clause 1(d)(iii) amplifies this further by saying that these rights extend to any and all other rights incidental to and necessary for the appropriate utilization of the foregoing rights and clauses (i) and (ii).

23. In addition, there is Clause (4) which grants the Assignee absolute rights to remaking the film in Telugu language only. There is, therefore, a very wide assignment of rights, though these may be language-restricted. I do not think that under this agreement, the 5th Defendant had rights to remake the film in any language other than Telugu, and that is indeed nobody's case. But within the

framework of that limitation, certainly it seems that the 5th Defendant had the full panoply of rights without the kind of restrictions that Dr. Saraf suggests. What seems to have, therefore, been brought forth, and I think Mr. Kadam is correct in saying this, is a wholly new work based on a wholly new underlying literary work with a quite distinctive character portrayed by another actor adapted from a pre-existing literary work.

24. What is important at this stage is Mr. Kadam's submission that it cannot be in doubt that the Gabbar Singh character for the first Telugu film, though a derivative character, was one that was unique to that particular film. This is reflected by the fact that there is an assignment in perpetuity and with exclusivity. The vesting of copyright in the Defendants within the meaning of Section 14(a) and (d) respectively of a literary work and a cinematographic film cannot be disputed. Consequently, the rights in the Gabbar Singh character are wholly distinct from the rights in the Chulbul Pandey character. The rights in the Gabbar Singh character vest in and only in the Defendants. They are entitled to use those as they please. Mr. Kadam points and I think he is again correct, that there is otherwise a fundamental and fatal flaw in the Plaintiffs' arguments. If it is assumed, as the Plaintiffs ask me to assume, that the Gabbar Singh character has no independent copyright because it is a remake and "a copy" of the Chulbul Pandey character, then it must necessarily follow that just as there is copyright in the Chulbul Pandey character, any corresponding copyright in the Gabbar Singh character must also vest in the Plaintiffs. This is in fact nobody's case, even though this would be the necessary the logical consequence of what is being suggested by the Plaintiffs. Mr.

Kadam finally submits that once it is conceded in the agreement that there is a distinctive work being brought into existence, no question of passing off then arises.

25. Mr. Dwarkadas for Defendants Nos. 3, 4 and 5 supports Mr. Kadam's case and points out that in paragraph 3.1 of the plaint the claim was not only that the producers had copyright in the cinematograph film but that they also owned the rights in the script, and that it was the entirety of all of this material that was assigned.

26. At this stage, I think it is necessary to have a look at the various characteristics that are said to be common. Some of these are set out, as I have noted earlier, in a tabulation below paragraph 3.14 of the Plaint. I am not particularly impressed by any of these as being aspects that taken individually or even collectively are so unique that none could take one or the other or even all of them without infringement. If the Plaintiff is to be believed, for example, that none could portray a character whose life is inspired by music or dance, or is highly influenced by Hindi cinema (are not we all in this country?) or who delivers his dialogue in a particular manner (this could be said of the original Gabbar Singh in *Sholay* or Mr. Amrish Puri in his Mogambo role), it would be very difficult to make any movie at all. Item 12 in this tabulation, for example, says that both characters share a loving and protective relationship with the female lead. I imagine this is generally true of most on-screen romances. To say that both Chulbul Pandey and Gabbar Singh wear their uniforms in a casual manner is hardly unique. As far as I can recollect, so does Mr. Ajay Devgn, and in the past so did Mr. Shashi Kapoor and Mr. Amitabh Bachchan. There is then a particularly

alarming claim of a signature dance move with a pelvic thrust. I hardly think this is the kind of stuff that is unique to any one character in Indian cinema, or otherwise. Many others have done it before (perhaps most famously Mr. Bachchan in quite spectacular fashion in the film “*Hum*”) and I have little doubt that they will do it again; and it is a ‘signature’ move of Michael Jackson and his army of followers.

27. At this stage, nobody has seen *Sardar Gabbar Singh*, the sequel, though some of us have had the somewhat questionable distinction of having seen *Dabangg 2*. The cause of action in the Plaintiff is not (yet) that *Sardar Gabbar Singh* is an infringement of *Dabangg 2*. Dr. Saraf has been insisting for some time that I should spend what little time is available to me in watching these two films, presumably back-to-back. I have resolutely declined to do anything of the kind. Mr. Kadam has not been particularly cooperative in refusing to allow Dr. Saraf to spend his own time in this ostensibly forensic enterprise. I do not think that it is possible in law for a plaintiff to improve his case by demanding that either it should be allowed to see a defendant’s copyright-protected work or even that the Court should examine the two works to determine whether the plaintiff has made out a case. In the present case for the grant of interim relief, I do not think that in the guise of copyright protection, courts should act as censors, no matter under what umbrella. I do not believe that a Court is required to engage in fact-gathering to supply deficiencies and lacunae in a plaintiff’s case. In the present situation, I see no reason why the Plaintiffs should not, on the basis of material that is already available, have been able to more accurately place their case. After all, both *Dabangg* films and

the first *Gabbar Singh* film are already available. If it is the Plaintiffs' case that the Gabbar Singh character portrayed by Mr. Pawan Kalyan is nothing but an avatar of the Chulbul Pandey character portrayed by Mr. Salman Khan, then the Plaintiffs should have been able to demonstrate that on the basis of existing material much more comprehensively than has been done in this Plaint. What is stated is only in generalities. If it is argued that it is only the Chulbul Pandey character that has all these elements combined, then that too needs to be shown; and in any case it needs to be shown that these qualities and characteristics so completely define the Chulbul Pandey character that any other character who has all these qualities is necessarily an infringement. This is not done at all.

28. There is also an argument in passing off that any person watching the *Gabbar Singh* film is bound to recognise in the Gabbar Singh's character as portrayed by Defendant No. 4, the Chulbul Pandey character portrayed by Mr. Salman Khan. There is nothing to show this. It is one thing to say that the character first portrayed by Mr. Salman Khan is now being portrayed as an adaptation by Mr. Pawan Kalyan. It is quite another thing to say that the two are exact and that anyone seeing Mr. Pawan Kalyan's performance would think and only think of Mr. Salman Khan's portrayal of a particular and character and none other. Again of this conflation of the two personas, and of the Gabbar Singh character having no persona of his own, there is no evidence.

29. What the Defendant No. 1 has, however, put together in a quite remarkably accomplished Affidavit in Reply drafted by Mr.

Rohan Kadam is to take both the tabulations presented by the Plaintiff and demonstrate the obvious differences in the two works. I refer first to the tabulation below paragraph 10(d) of the Affidavit in Reply which is a comparison of *Sardar Gabbar Singh* with the Plaintiff's *Dabangg* franchise. This is important, because it does not compare the second *Gabbar Singh* film to either the first or the second *Dabangg* films but to the entire franchise, i.e., to that which makes the franchise unique and in which the Plaintiffs claim exclusivity and copyright.

30. There are 17 distinct points of distinction that are shown. I do not propose to set out all of these. They are at pages 17 to 21 of the Motion paperbook. But what has been produced is important because it addresses the fundamentals that make the two sets of films and their respective lead characters unique. To begin with, for example, the *Gabbar Singh* character features a police officer who is both fearless and honest. The Chulbul Pandey in the *Dabangg* franchise is just as fearless, on the footing that we all want our heroes to be fearless, but he is at the same time corrupt, a nod to reality but hardly an aspiration. This is to my mind and important distinction because it directly affects the trajectory of the film that follows. The setting of the two films is different: the *Dabangg* films are set in North India while the *Gabbar Singh* films are in the Andhra/Telangana region. There are many other points of distinction too.

31. There is a second tabulation that starts at page 21 of the Affidavit in Reply. It is in direct response to the Plaintiffs' own second tabulation below paragraph 3.27 of the plaint in which there

is a comparison between *Dabangg 2* and the trailer of *Sardar Gabbar Singh*. There are several problems with the Plaintiffs' tabulation, as the 1st Defendant points out in its Affidavit in Reply: the concept of a fearless police officer is hardly unique, for instance. The Defendants refer to some recent films, such as the two *Singham* films, but I imagine that there is a very long line of such films going back to *Zanjeer*, if not earlier, and moving forward through *Deewar* and other films. Then there is a claim that in one of the *Dabangg* films there is a scene of a perfectly villainous character being shot in the stomach (helpful comparative screenshots are at page 128 of the Plat), and being airborne across the room in a quite exaggerated manner by the force of the bullet. The Defendants point out that this has been done before at least since 1981. I agree. It also seems to have been in almost every single film made by Mr. Quentin Tarantino: in *Django Unchained*, a female character is similarly transported, and not just across a room, but out of the frame altogether. Then there is a claim that a protagonist using two pistols at the same time is unique. That is also incorrect. Examples abound: the Defendants point to *Day of the Jackal* and *LA Confidential*. Others leap to mind: almost everything by John Woo, from his early Hong Kong *The Killer* movie starring Chow Yun Fat, to *Face Off*; the *Boondock Saints* films. In the 'auteur' theory of film making, every director has certain 'signature' elements. These stamp the works as those of that director alone, and make the film instantly recognizable. This is true of the works of many established directors. Some are subtle in their use of these telltales; others less so. It is difficult to say that each of these elements, used independently, is wholly protected from use or adaptation by another. Could anyone stop the use of, say, white doves taking wing

in slow motion? Or impossible somersaulting leaps and landings shown in a particular fashion? Hero and villain each with two guns back to back against a wall, both guns empty? It is impossible from an idle listing of individualized elements to conclude that there is copyright infringement or passing off in the manner claimed.

32. What is it precisely that the Plaintiffs claim? They say that their character Chulbul Pandey has been exactly copied and is represented by the Gabbar Singh character. What do they have to show this? Next to nothing. There are certain generic elements that are described. What the Defendant No. 4 has portrayed is a completely unique character meant for a totally different audience, conceived differently but based on a story line developed for the first *Dabangg* film. I find it very difficult to accept the proposition advanced by Dr. Saraf, at least at this ad-interim stage, that because the first *Gabbar Singh* film was a 'remake', therefore, the Gabbar Singh character must be assumed to be an exact reproduction of the Chulbul Pandey character, and that it is not necessary for the Plaintiffs to show this, though both *Dabangg* films and the first *Gabbar Singh* film are available. It is also not possible to accept his submission that the Defendants have no independent rights in the portrayal or the depiction of the Gabbar Singh character at all. As I have noted, that stir's up a hornet's nest of ownership of the Gabbar Singh character well beyond what is imagined in this Plaint.

33. For the purposes of the ad-interim application, there is also, as Mr. Kadam points out, the question of delay. I am not prepared to accept, as Dr. Saraf would have had me to do, that having once given notice to the Defendants on 14th January 2015, everything



after that is at the Defendants' peril. In fact, the Plaintiffs knowledge of *Dabangg 2* dates back to 2014. Notice was given by the Plaintiffs' Advocates to the Defendants on 14th January 2015. The Defendants responded on 3rd February 2015. By this Reply, they actually put the Plaintiffs to counter-notice. They said that they intended to proceed with the making of *Sardar Gabbar Singh*. They resisted the Plaintiffs threats of legal action. The Plaintiffs did nothing.<sup>6</sup> From August 2015 *Sardar Gabbar Singh* was widely advertised. The Plaintiffs themselves admit to having seen posters in January 2016, but waited till March 2016 for the trailer. *Sardar Gabbar Singh* is scheduled for release on 8th April 2016, a mere three days from now. The Suit was filed on 24th March 2016, at the very last minute. In this context, Mr. Dhond for the 2nd Defendant is also correct in inviting attention to paragraph 14 of the Affidavit in Reply at page 25 of the Notice of Motion. In this the 1st Defendant says that *Sardar Gabbar Singh* has been produced with a Rs. 65 Crore budget. It is scheduled for theatrical release in 2000 screens worldwide and over 600 screens in Hindi. Back-to-back distribution and commercial agreements have been executed with several large cinema chains in India, U.S.A. and across the world. Even this might not matter if the Plaintiffs were able to demonstrate and clear and unequivocal case of copyright infringement and of them having acted with reasonable promptitude and despatch.

34. This issue of delay has another aspect, and that is the question of the process of this Court. By waiting till the last minute,

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<sup>6</sup> There is also the question of the effect, if any, and which I am not addressing, of a apparent assignment by the Plaintiffs of the remake rights in *Dabangg 2* to yet another Company. That is perhaps another complication.

something that seems to have become a fashion, parties who come to court to seek an 'urgent' injunction do themselves a disservice and the Court a very great discourtesy. I have spent the entire morning hearing this matter and dictating this order. The transcription will have to be corrected overnight to make the order available tomorrow. No doubt an appeal court will then be put under further strain. Apart from the additional and entirely avoidable pressure on this or that Court, what matters is the hijacking of judicial time that could have been made available to other litigants, some of them needy, all of them patiently awaiting their turn. These last-minute luxury applications arrogated by plaintiffs should not be tolerated; they come at very considerable cost, not just in terms of judicial time spent, but in time stolen from other litigants waiting in queue. I will let this pass one last time. I will not do so again. Where I find a plaintiff has known well in advance of a possible threat to his or her rights and has chosen not to act till the last minute, that will most certainly be a factor to be weighed in the balance. This has been done before.<sup>7</sup> There may also be a question of costs; but that, too, I will defer for now to another day and another case since I have not yet sent out so unequivocal a warning. These litigants should not take courts for granted. They should not take other litigants for granted. If they do, it will be at their peril, one that is likely to be very considerable indeed.

35. Unable to find for the Plaintiffs on either a *prima facie* or balance of convenience, I decline ad-interim reliefs. For what it is worth, I clarify that this is a *prima facie* view for the purposes of the ad-interim application.

<sup>7</sup> *Nariman Films & Ors. v Baba Arts Ltd & Ors.*, order dated 19th December 2011, per SJ Vazifdar J, as he then was.

36. Affidavits in Reply to be filed and served on or before 6th May 2016. Affidavit in Rejoinder, if any, to be filed and served on or before 17th June 2016. List the Notice of Motion for hearing and final disposal in the week of 20th June 2016.

(G. S. PATEL, J.)

Bombay High Court