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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 2071 OF 2015
IN
SUIT (L) NO. 778 OF 2015

1. **Mr. Narendra Mohan Singh alias Mr. Sanjay Singh**, Sole Proprietor of M/s. Sanjay Singh Films having its office at Tarang Bungalow, 13, Golf Ling Estate, Union Park, Bandra (W), Mumbai 400 050.
2. **Mr. Manish Jha**
Residing at B/1106, Andalucia, Raheja Exotica, Near Madh Church, Malad, Mumbai 400 061.

...Plaintiffs

Versus

1. **Mr. Ketan Mehta**
71/81 Harmony, Madh, Malad (W), Mumbai 400 095.
2. **Maya Movies Private Limited**
71/81 Harmony, Aksa Village Road, Madh, Malad (W), Mumbai 400 095.
3. **Maya Mahendra Jakhar**
residing at D205/206/Tulip Gundecha, Valley of Flowers, Thakur Village, Kandivali (East), Mumbai
4. **Viacom 18 Motion Pictures,**

a division of Viacom 18 Media Private Limited a company incorporated under the Companies Act, 1956, having its registered office at Zion Bizworld, Subhash Road - 'A' Vile Parle (East), Mumbai 400 057

5. **National Film Development Corporation of India** having its office at 6th Floor, Discovery of India Building, Dr. A. B. Road, Worli, Mumbai 400 018 ...Defendants

APPEARANCES

FOR THE PLAINTIFFS

Mr. D. D. Madon, Senior Advocate,
a/w Mr. Ashish Kamat, Mr. M. Behl & Ms. Viloma Shah, i/b Hariani & Co.

FOR DEFENDANTS NOS. 1
AND 2

Mr. V. Tulzapurkar, Senior Advocate,
a/w Mr. Rohaan Cama, Mr. Rahul Jain & Ms. Mamta Kadam, i/b RES Legal.

FOR DEFENDANT NO.3

Mr. Sharan Jagtiani, a/w Mr. Anuj Menon, i/b Desai & Diwanji.

FOR DEFENDANTS NOS. 4
AND 5

Mr. V. R. Dhond, Senior Advocate,
a/w Mr. Amit Naik & Mr. Vaibhav Bhure, i/b Naik Naik & Co.

CORAM : G.S.Patel, J.

DATE : 20th August 2015

JUDGMENT : (Per G.S. Patel, J.)

1. This is an application for an injunction against the release on Friday, 21st August 2015 of a film “**Manjhi - The Mountain Man**” directed by the 1st Defendant, Ketan Mehta. The Plaintiffs’ claim infringement of a copyright in the 2nd Plaintiff’s script and a breach of confidence. They say they shared an early “basic” screenplay of the film with the 3rd Defendant, Mahendra Jakhar, who is today credited with having written the script on which the film is based. At this stage I am required to consider whether there is a *prima facie* case made out on these grounds as between the film and the Plaintiffs’ script, not between the two rival scripts of the Plaintiffs and the 3rd Defendant.

2. The Suit was filed on 1st August 2015. An application for ad-interim relief was moved on 6th August 2015. Mr. Justice Kathawalla, to whom the matter was then assigned, directed the filing of Affidavits in Reply and Rejoinder and posted the matter for hearing and final disposal on 19th August 2015. The sitting assignments changed with effect from that day. By consent, therefore, on the matter being mentioned on 17th August 2015, I took up the Notice of Motion on 19th August 2015. Having regard to the imminent release of the film, the Motion was heard finally. By this time, several Affidavits in Reply and Rejoinder had been filed. Although the Defendants claim that new material had been introduced in the Affidavits in Rejoinder, time did not permit an adjournment for further returns to deal with these. The Defendants agreed to proceed on denials.

3. In the meantime, late in the evening on 17th August 2015, after the matter was mentioned for 19th August 2015 (the Court

being closed on the intervening day), I requested the Advocates for the Plaintiffs and the Advocates for Defendants Nos. 4 and 5 (the producers of the film) to make available to me a copy of each of the two scripts/screenplays as also a copy of the film itself. These were readily provided. I saw the film privately. I also went through both scripts/screenplays.

4. The film is based on and inspired by the life of Dashrath Manjhi, a poor labourer from Gehlor Village near Gaya in Bihar, a man of undoubtedly modest means and circumstances, very much of the 'poorest of the poor', but one who single-handedly achieved a Herculean feat. He is widely acknowledged to have spent 22 years in single-handedly carving a road between the Atri and Vazirganj blocks of Gaya town. In the process, a distance of about 40 to 70 kilometres going around the mountain range was considerably shortened. Ultimately, the road that Dashrath Manjhi hewed from the rock was 360 feet long, 25 feet deep and in places about 30 feet wide. One of the acknowledged facts about Dashrath Manjhi's life was that his wife suffered an accident on this mountain. Medical care was not immediately available: the nearest health care facility lay on the other side of the mountain. This is said to have spurred or moved Manjhi to his self-appointed task: to remove the obstacle the mountain presented. Dashrath Manjhi came to be known in popular media and even in Government issued publications as "the Mountain Man". He died on 17th August 2007. The film and the scripts all claimed to be inspired by his life and his labours.

5. The 2nd Plaintiff, Manish Jha, is a writer-director. He has to his credit some award-winning films, including one called

Matrubhumi, *A Nation Without Women* (2003), about female infanticide. That work was well received in several international film festivals. He is also the director of a short film entitled “*A Very Very Silent Film*”. This won the Jury Price for the best short film at the 2002 Cannes Film Festival. The 1st Plaintiff is a Proprietor of a firm engaged in the production and distribution of feature films.

6. The 1st Defendant, Ketan Mehta is a well-known figure in the Indian film industry. He has made several feature films, documentaries and television serials. His very first film, *Bhavni Bhavai*, a Gujarati film, won him considerable fame as did his subsequent films *Holi*, *Mirch Masala*, *Mangal Pandey - The Uprising* and others. He has, by all accounts, directed two previous films based on historical figures: *Sardar*, a biopic on the life of Sardar Vallabhbhai Patel and *Mangal Pandey*, about the eponymous figure who played a key role in the events immediately preceding the 1857 uprising. The 2nd Defendant is a production company owned and managed by Ketan Mehta and his spouse, Deepa Sahi. The 3rd Defendant, Mahendra Jakhar, is a script writer and novelist. The 4th Defendant, Viacom 18 Motion Pictures, is a producer and distributor. The 5th Defendant is the National Film Development Corporation, a government-run enterprise engaged in film production and distribution.

7. The Plaintiffs’ case is that some time in 2007, the 2nd Plaintiff learned of the life and work of Dashrath Manjhi. He took up on himself the task of writing a script inspired by his life. The 2nd Plaintiff claims that the amount of information then available was limited. He fictionalized large parts of the story based on the

little he had gleaned. About two years later, the 2nd Plaintiff approached the 1st Plaintiff and asked him to produce a film based on his script, with the 2nd Plaintiff as its writer and director. The Plaintiffs' claim that the 1st Plaintiff agreed to do so and made some payment to the 2nd Plaintiff in that behalf. The 2nd Plaintiff completed the writing of his script/screenplay in January 2010. On 11th January 2010, he applied for registration of copyright of his script. The registration ultimately followed later that year on 27th August 2010.

8. The 2nd Plaintiff claims that he and the 3rd Defendant, Mahendra Jakhar, were acquaintances for a few years. According to the 2nd Plaintiff, on 1st July 2010, the 2nd Plaintiff shared his script or screenplay with the 3rd Defendant. There is a great deal of controversy about this email exchange. I will return to this presently, for one of the defences is that there was in fact no communication in confidence of the nature suggested by the Plaintiffs at all.

9. Nothing significant seems to have happened for the next couple of years. On 18th June 2012, the 2nd Plaintiff assigned his rights in the script and screenplay to the 1st Plaintiff. According to the 1st Plaintiff, he has since then been investing time, effort and money in developing the script into a cinematographic film. Of this, there is next to no material at all.

10. The events from August 2012 are of some consequence. It is the Plaintiffs' case that in August 2012 they learned that the 1st Defendant was about to start shooting a film inspired by Dashrath

Manjhi's life and based on a script by the 3rd Defendant. Apprehending an infringement of their copyright, the 1st Plaintiff sent an email to the 1st Defendant on 31st August 2012. This was followed by a legal notice by the Plaintiffs' Advocate to the 1st Defendant on 15th October 2012. To this too the Plaintiffs claim to have got no response. Pacified by this silence, the Plaintiffs say, they did not move further. There is between 2012 and July 2015, according to the narrative set out in the plaint, another quietus. It was only on 14th July 2015, i.e., about three years after the legal notices of August and October 2012, that the Plaintiffs saw the trailer of the 1st Defendant's film. This is when, according to the Plaintiffs, they realized that there was indeed an infringement of copyright and breach of confidence. Correspondence between the Advocates followed in July 2015 and this suit was ultimately filed on 1st August 2015.

11. I heard Mr. Madon, learned Senior Counsel for the Plaintiffs, Dr. Tulzapurkar, learned Senior Counsel for the 1st and 2nd Defendants, Mr. Jagtiani, learned Counsel for the 3rd Defendant and Mr. Amit Naik, learned Advocate for the 4th Defendant at some length yesterday, 19th August 2015. For the reasons that follow, I am not persuaded that the injunction sought by the Plaintiffs should be granted. I do not believe that the Plaintiffs have made out a sufficient *prima facie* case for the grant of these reliefs or that the legal tests to establish a breach of confidence or infringement of copyright are satisfied at all.

12. Before I turn to the rival arguments, I must set out my impressions — and these are only impressions for want of any

qualifications in such matters — on the two rival screeplays and the film itself. The Plaintiffs' screenplay seems to me extremely rudimentary. In one of the controversial emails, the one dated 1st July 2010, this document is described as a basic screenplay. It is indeed that. It is a skeletal outline of the beginning of a narrative. Such little dialogue as there is in Jha's script is sporadic. The visualizations in the screenplay are not yet fully realized. There are however certain key elements in this screenplay and Mr. Madon emphasizes these as being crucial. I will return to these shortly. The 3rd Defendant's screenplay is, in contrast, a much more substantial work. There is a considerable amount of detail in regard to shot selection, *mis-en-scène*, camera work, visuals and dialogue. The structure is more complex and there is considerably more detail than one finds in the Plaintiffs' script. The film itself is by no means a shot-by-shot adaptation of the 3rd Defendant's script. It seems to have been based on that script but differs from it markedly. The entire opening sequence, for instance, is not to be found in either of the two scripts. I will towards the end of this judgment return to a broad assessment of the Plaintiffs' script and the film and I will, too, address the question of the key elements on which the Plaintiffs lay much emphasis. For the present, it is perhaps sufficient to note that although all three works have their genesis in the same factual public-domain material, each seems to follow a distinct trajectory.

13. Mr. Madon's submissions are essentially these. First, that the narrative structure in terms of a repeated and constant movement back and forth in time is one that was first put out by the Plaintiffs in their script. Second, the characterization of the principal players, i.e., Dashrath Manjhi and his wife and the treatment given to each of

these characters in the Plaintiffs' script is unique. Third, Mr. Madon submits that it is the Plaintiffs' script that introduces an entirely fictional incident that serves as a pivotal plot point, and this is of Dashrath Manjhi's wife falling while on the mountain and later dying for want of quick medical care. It is this, Mr. Madon says, that provides the fictional impetus in the Plaintiffs' work for what Dashrath Manjhi then proceeded to do for the next 22 years. Finally, Mr. Madon submits that there are various fictional aspects that have been tabulated and these show a uncanny overlap or parallel between the Plaintiffs' script and the final film.

14. Mr. Madon says that the 3rd Defendant's case that he had never read the Plaintiffs' script, or at least had not read it till much later, is completely incorrect and cannot be believed for more than one reason. He draws attention to the 3rd Defendant's reply email of 24th January 2013¹ from the 3rd Defendant to the 2nd Plaintiff, in which the 3rd Defendant says that there is not a single scene in the 3rd Defendant's script that is even remotely close to the Plaintiffs' script. This, Mr. Madon says, is a clear admission that the 3rd Defendant had in fact read the script. In the Affidavit in Reply,² the 3rd Defendant says that he did not read the draft sent "at that time". Mr. Madon says that this as a denial is worthless because the normal course of human conduct would suggest that if the 3rd Defendant received a research script covering material that he himself was working on at that time, it is most unlikely that he would not have immediately read it; the more so if, as he claims, the 3rd Defendant was then suffering from writer's block for many years. In fact,

¹ Motion, *p.* 28

² Motion, *p.* 197

according to Mr. Madon, there is no material at all to indicate that the 3rd Defendant was at that time independently researching the subject matter at all. There is a very great deal of controversy raised between the parties about the alleged “fabrication” of extracts or hard-copy printouts from Wikipedia, as if to suggest that these entries are in themselves in some way authoritative. As Wikipedia’s own disclaimers show this is not correct. Wikipedia entries are made by volunteer editors and contributors and are always subject to corrections and revisions. They have no single authoritative source. In formal technical literature citing Wikipedia is not just frowned on; it is wholly unacceptable, precisely because of its lack of disclosed authorship and constant revisioning at the hands of persons unknown. These entries may be useful for an overview or as a first guide to further enquiry but that is all. I do not think that it is possible on the basis of the Plaintiffs’ foray into previous revisions of Wikipedia to conclude at this interim stage that the 3rd Defendant had done no research at all on the subject. At best, all that can be said is that even in 2010 there was some material available in the public domain about Dashrath Manjhi. For the Defendants’ purposes, and at this stage, that is enough.

15. There is one significant factor that comes in Mr. Madon’s way. This takes the form of a brace of newspaper items reported on bollywoodhungama.com and then in the web edition of the Indian Express on 12th July 2013. The Indian Express article seems to have been drawn from the bollywoodhungama.com report. That report is said to have been authored by one Mr. Subhash K. Jha. The report quotes the 2nd Plaintiff as accepting the fact that the 1st Defendant was making this very film. He is said to have blamed himself for the

alleged leak of the story. He is also quoted as saying that the 1st Defendant had in all likelihood done a fine job. This material is disclosed in the Affidavit in Reply of the 1st and 2nd Defendants.³ The Rejoinder⁴ is very peculiar. The 2nd Plaintiff says that these newspaper articles are “false and fabricated documents”. I do not know what this is supposed to mean. The 2nd Plaintiff claims that he had never seen these before till their disclosure in these proceedings. I find that very hard to believe even going by that very normal course of human conduct that Mr. Madon himself invokes. Mr. Madon relies on the decision of the Supreme Court in *Dr. B. Singh v Union of India & Ors.*⁵ to say that mere publication in a newspaper or journal or magazine is not *per se* legally acceptable evidence. That is of course the law. The material will need to be proved at the time of the trial. But at this *prima facie* stage, this does not mean that material in the public domain can be wholly ignored merely because a party says, many years later, that the document is ‘false and fabricated’. I notice that the 2nd Plaintiff does not elaborate on this. He does not say, for instance, that the named correspondent, Mr. Subhash Jha never spoke to him. He does not show that even after he learned of this newspaper article from the 1st Defendant’s Affidavit in Reply dated 13th August 2015, he wrote to either of these publications, even by email, protesting. It is one thing to suggest that a statement attributed to the 2nd Plaintiff is inaccurate or even misleading. It is quite another thing to say that the entire report is “false and fabricated”. That is altogether more serious and I do not think it is unreasonable to expect the 2nd

³ Motion, *pp.* 144-145

⁴ Motion, *p.* 219, paragraph 11

⁵ (2004) 3 SCC 363

Plaintiff to have shown a little more assertiveness in that regard if that was indeed his case.

16. Mr. Madon also draws attention to Exhibit “B”⁶ to one of the Plaintiffs’ Affidavits in Rejoinder. This is a tabulation that compares various elements in the 2nd Plaintiff’s script with those to be found in the film itself. An earlier tabulation in the plaint makes a similar comparison with the film’s trailer, but that is no longer relevant. Mr. Madon says that except for Items 2 and 28 of the 34 elements in this tabulation everything else is fictionalized. On the face of it, this appears not to be correct. This list of 34 items contains very many items that might reasonably be described in a film of this kind as *scènes-à-faire*, i.e., a consequence that might be logically expected in a film or work of this genre. It would not, therefore, be entirely fictional to show disapproval by Dashrath Manjhi’s father, village scenes, government offices, a drought, villagers discouraging Manjhi, a celebration of a local festival or a village market or fair, and so on. At least one of these items to which the 2nd Plaintiff lays claim as being entirely fictionalized is demonstrably incorrect. Item 30 of this list is a caption ‘polythene bag’ and the Plaintiffs claim that in their script Manjhi is shown wearing a polythene bag on his head and that this is repeated in the film. Indeed it is. It is just not fictionalized. Almost every photograph of Dashrath Manjhi in the public domain shows him wearing just this type of headgear. Given this, it is not immediately obvious which of the various parts in this list are truly fictionalized, or at least sufficiently fictionalized for the purposes of the law and for the grant of an injunction. One item in particular, though, stands out and that is Serial No. 4 in the

⁶ Motion, p. 225

tabulation about Manjhi's wife being pregnant, slipping while on the mountain, Manjhi carrying her over the mountain to the nearest hospital on the other side, only to be told of her death. Mr. Jagtiani, learned Advocate for the 3rd Defendant does address the question of whether this is sufficiently fictionalized and original to afford the Plaintiffs relief. I will return to this aspect of the matter shortly.

17. Not unexpectedly, Mr. Madon relies on the decision of a Division Bench of this Court (A. P. Shah & D. K. Deshmukh JJ.) in *Zee Telefilms Ltd. v Sundial Communications Pvt. Ltd. & Ors.*⁷ on the question of the doctrine of confidence and for a statement of the law on breach of confidentiality. I will take it that this branch of the law is well settled and admits of no debate. Confidentiality lies in the twilight zone before copyright: it may in a given case extend to oral communications and is usually restricted to the recipient (and to those recipients further downstream aware of the confidentiality) not the world at large; it does not have a statutorily mandated life, though in practice it usually ends when it passes into public knowledge. The *Zee Telefilms* court reiterated the principles set out in *CMI Centers for Medical Innovation GMBH and Anr. v Phytopharm PLC*⁸ as to what a plaintiff in a breach of confidence action must address, viz.: (i) to identify clearly the information relied on; (ii) to show that it was handed over in circumstances of confidence; (iii) to show that it was information that could be treated as confidential; and (iv) to show that it was used, or threatened to be used, without his licence. At the stage at which we find ourselves today, i.e., an interlocutory stage, a plaintiff in this kind of action does not need to

⁷ 2003 Vol. 105 (3) Bom. L.R. 678

⁸ (1999) Fleet Street Reports 235

prove the second and fourth of these as he would at the trial of the suit. But they must still be satisfactorily addressed. The plaintiff must demonstrate, at a minimum, a seriously arguable case in relation to each of these four aspects. I read the words 'seriously arguable' as meaning 'eminently plausible', and it is this measure that must be applied. We are not in this case, and perhaps fortuitously, concerned with the somewhat different aspect of novelty or originality in a rearrangement of established or well-known facts that lie in the public domain. There, the argument might be that those basic building blocks are public knowledge, and their re-ordering in a given sequence is unique. This aspect was recently considered by another Division Bench of this Court.⁹ But that is another matter altogether and forms no part of Mr. Madon's case. He places his case in a far more straightforward fashion when he says that based on what little material the 2nd Plaintiff found in the public domain, the 2nd Plaintiff fictionalized an entire story; that this fictionalization was given in confidence to the 3rd Defendant; and that the 3rd Defendant and, through him, the 1st and 2nd Defendants made illicit and unlicensed use of it.

18. The other decisions cited by Mr. Madon seem to me to turn on their own facts. In *Kapil Chopra v Kunal Deshmukh & Ors.*,¹⁰ reversing the refusal of relief by the trial court, a Division Bench in appeal found the similarities between the plaintiff's script and the film (which it viewed) too close. It also found an inexplicable ('shocking' was the word used) discrepancy in the defendants'

⁹ *The Bombay Film Company & Anr. v Ms. Jyoti Kapoor & Ors.*, Order dated 2nd July 2015 in Appeal (L) No. 490 of 2015.

¹⁰ 2012 (6) All M.R. 599

assertion that the work on their script had started two years earlier, though the agreement with the scriptwriter was of a much later date. In *Urmi Juvekar Chian v Global Broadcast News Limited*¹¹ a learned single Judge of this Court (A. M. Khanwilkar J. as he then was) found on facts that the plaintiff had passed on in confidence information regarding her concept for a television programme and that this was used without a license by the defendants. The principles in *Zee Telefilms* were applied. This Court in *Beyond Dreams Entertainment Pvt. Ltd. & Ors. v Zee Entertainment Enterprises Ltd. & Ors.*¹² took a very similar view, but went a step further in its finding that there was a stateable case of breach or infringement of copyright.

19. But there are two key sets of observations in *Beyond Dreams* that we might profitably use in this case. The first is what the learned single Judge (S. C. Gupte J.) succinctly summarized as the sub-elements or sub-branches of confidentiality itself. Gupte J. held that the confidential information, properly so-called, must be identified. I understand this to demand a degree of precision in isolating what is or is not covered by the confidentiality sought. In the context of material that straddles the public domain and original works, I should imagine this to be of primary importance. Next, the confidential information so identified must be original and not in the public domain. As I have noted, in the Plaintiffs' tabulation this is not done accurately. All manner of things are claimed to be original and fictionalized. Many are demonstrably not. Finally, in Gupte J.'s formulation, the material must be sufficiently developed to the

¹¹ 2007 Vol. 109 (2) Bom.L.R. 0981

¹² 2015 (62) PTC 241 (Bom) : MIPR 2015 (2) 0028

extent that it lends itself to realisation. All these elements must exist and must be shown for the plaintiff to succeed. It is not enough to claim one or the other, nor is it possible for a plaintiff to lay claim to very many things as being original and then hope that some of them may, in the estimation of the Court, be found to be original (or, in this case, fictionalized). In three words: precision, originality, and fullness. All three must be seated at the heart of the plaintiff's cause in a breach of confidence action.

20. The second aspect that finds place in *Beyond Dreams* and is of relevance here is the matter of the test to be applied to two completed works. I note this because in very many cases of breach of confidence what is said to have been shared in confidence is a 'concept' or a 'concept note'. Gupte J held that comparing two artistic or literary works presents little difficulty. What is to be ascertained is if the two completed works display so sufficiently substantial a similarity as to lead to the ineluctable conclusion that the offending work is an illicit copy of the original. The following passage merits reproduction:

13. ... The difficulty arises when it is not two completed works of art or literary works that we need to compare. If we were to compare, let us say, a story and a play or movie which is said to use or plagiarise the story disclosed in confidence, these difficulties would ordinarily be presented. For in that case, there will be several distinguishing features which set apart a completed work of art, namely, a play or a movie, from the story used to create it, which would be dissimilar or which would be different from the story *per se*. There will be different scenes, different characters or elements

introduced, different dialogues, and yet the play or the film may be a complete rip off or a close adaptation of the story. The Courts have grappled with such cases in various ways. One of the well known doctrines used for the purpose is the “spring board” doctrine. It may well be that the defendant uses the plaintiff’s idea as a spring board and then devises some additional material to produce a work. If the original idea was conveyed by the plaintiff to the defendant as a matter of confidence and the defendant uses it as a spring board to develop his own work, in an appropriate case, the defendant may still be liable for breach of confidence.

(Emphasis supplied)

21. This reasoning was based on a close reading of *Zee Telefilms*, where the Division Bench accepted the English statement of ‘the germ of an idea’ principle. Later in *Beyond Dreams* Gupte J. declined (‘steadfastly’) the (‘vehement’) invitation to view ten episodes of the television serial in question, once again reiterating that the concern was with a concept note, the broad story, the pitch, and so forth on the one hand and the completed work of the defendant on the other. Mr. Madon bases at least part of his argument on the ‘springboard doctrine’ when he says that at least one key element in the Plaintiffs’ script is indubitably the mother lode for the Defendants’ film.

22. It merits stating at this stage that this key or central element is the incident of Dashrath Manjhi’s wife, pregnant at the time with a female child, losing her footing on the mountain. She falls and is seriously injured. Manjhi takes her to the nearest hospital. That lies on the other side of the mountain. She dies; the infant survives.

This, says Mr. Madon, is the kernel to the entire story. Everything else is irrelevant embellishment. This is entirely fictional. Nothing of the kind happened. Manjhi's wife did fall and was seriously injured and did not receive health care in good time. But she did not die then as a result of that accident. She died years later. She was also not pregnant then. These are all original dramatic elements of the 2nd Plaintiff's own invention, Mr. Madon says, and they are used in that very manner, but without a license, in the Defendants' film.

23. Before turning to the Defendants' argument, one final judgment cited by Mr. Madon must be noticed, and that is the *locus classicus* on copyright infringement in India, *R. G. Anand v M/s. Delux Films & Ors.*¹³ As is well known, that decision sets out seven propositions and also deals with the question of inevitable similarities when two creative persons approach the same public domain material:¹⁴

45. Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences

¹³ (1978) 4 SCC 118

¹⁴ Para numbers follow the SCC report

by themselves cannot lead to an irresistible inference of plagiarism or piracy. ...

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 copyright 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.

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.

24. I have taken the liberty of setting out this extract at length for two reasons. First, it defines precisely the contours of the action in copyright infringement. Second, it is Dr. Tulzapurkar's submission

that to succeed the present Plaintiff must show *prima facie* that his case falls within these boundaries. While on this, I must also reference the separate but concurring decision of R. S. Pathak J. from paragraph 66 of the SCC report. Can there be an infringement of copyright even though the essentials of one work correspond only to part of the other? We must, Pathak J. said, disabuse ourselves of the notion that copyright can be readily infringed by making—

“immaterial changes, introducing insubstantial apparent 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.”

25. The vigorously mounted defence to this action is on three separate counts. The first, canvassed by Dr. Tulzapurkar almost to the exclusion of all else, and later supplemented by Mr. Jagtiani, is the question of delay, coupled with what they describe as a deliberate attempt at misdirection. The second, which is closer to the bone, is Mr. Jagtiani’s case that there was no sharing in confidence and that there is in fact no similarity between the two works, that none of the items that the Plaintiffs describe as original are in fact so, and that there is no springboard or germ of an idea of the kind Mr. Madon suggests. The third aspect, on which Mr. Naik lays emphasis, is in my understanding of it an argument on the question of balance of convenience.

26. First, on the question of delay and conduct. Although Mr. Madon attempts to answer this by saying that ‘mere’ delay cannot

defeat an injunction where copyright infringement is shown,¹⁵ I believe Dr. Tulzapurkar's charge is far more serious than that. He says that not only is the delay gross and unexplained, but such explanation as exists is false and an attempt to mislead the Court. Had the Plaintiffs been permitted to move *ex-parte*, on the now demonstrably incorrect slant in the Complaint, the Court might have been of a mind to grant the injunction. In paragraph 4.14 of the Complaint, the Plaintiffs say they learned through newspaper articles that the 1st Defendant was about to start directing and shooting a film allegedly based on the 3rd Defendant's script. Since, according to the Plaintiffs, they had already shared in confidence the 2nd Plaintiff's script with the 3rd Defendant, on 31st August 2012 the 1st Plaintiff sent an email to Ketan Mehta, the 1st Defendant, claiming that Mahendra Jakhar, the 3rd Defendant, had the 2nd Plaintiff, Manish Jha's, script and that Jakhar was misusing it. The Plaintiffs claim to have got no reply. In paragraph 4.16, the Plaintiffs say that they sent a legal notice on 15th October 2012, but to this too there was no reply. It was that want of a reply, they say, that persuaded them to believe that all was well and that Mehta would do the decent thing and not use Jha's script in an illicit manner.

27. This entire narrative, Dr. Tulzapurkar says, is deliberately misleading. There was, in fact, correspondence, and it has been suppressed. Mehta and his production company, the 2nd Defendant, replied to the legal notice by their Advocates' letter dated 19th October 2012.¹⁶ That reply contains complete denials. It

¹⁵ *Midas Hygiene Industries (P) Ltd & Anr. v Sudhir Bhatia & Ors.*, (2004) 3 SCC 90; *Schering Corporation & Ors. v Kilitch Co (Pharma) Pvt. Ltd.*, PTC (Supp) (2) 22 (Bom)(DB)

¹⁶ Motion, p. 123

also says that caveats were being filed in the High Court and the City Civil Court. A copy of this Advocates' reply was sent to the 1st Plaintiff. It was returned unclaimed.¹⁷ On 29th November 2012, the 1st and 2nd Defendants' Advocates sent a detailed response to the Plaintiffs' Advocate.¹⁸ This, too, is suppressed. The answer that now comes in from the Plaintiffs, in paragraph 4 of the Additional Affidavit in Support,¹⁹ is that the 1st Plaintiff searched his records but found no trace of the 1st and 2nd Defendants' Advocates' letter or the caveats. That is perhaps understandable since he left their delivery unclaimed. But how could he not have known that his own Advocate had in fact received a response from the 1st and 2nd Defendants' Advocates? asks Dr. Tulzapurkar, and with some considerable justification. That very course of human conduct of which Mr. Madon speaks itself demands recognition of the fact that in the ordinary course a man who has chosen to instruct an Advocate would enquire with that Advocate whether any reply was received; and it might reasonably be supposed that on receiving a reply, an Advocate would put that to his client for further instructions.

28. An even more intriguing response in Rejoinder follows from the 2nd Plaintiff.²⁰ He says this:

“In any event, I have now perused the contents thereof and it can be seen from the letters that the Advocates for Defendants Nos. 1 & 2 have clearly stated that the film

¹⁷ Motion, *p.* 125

¹⁸ Motion, *p.* 131

¹⁹ Motion, *p.* 9

²⁰ Motions, *pp.* 215-216

being produced by these Defendants was based not on my script but rather only on information available in the public domain.”

This is a statement that raises more questions than it answers. Does it mean only that the response was inconsequential? Indeed it was not. If this correspondence was to the Plaintiffs’ knowledge then it surely merited disclosure. Its elision is clearly an attempt at misdirection, and that is something that no Court will allow.²¹ This is, therefore, not a question of ‘mere’ delay through ignorance or oversight. It is deliberate. It is studied. The Plaintiffs knew since 2012 that Mehta and his team were shooting a film on this very subject. They gave notice to Mehta, not once but twice. In the plaint, they held back the response they received. They averred specifically that there was no response when clearly there was. The replies did not just disclaim infringement and breach of confidence: the replies told the Plaintiffs in no uncertain terms that just such a film was being made even then. Yet the Plaintiffs waited till the very last minute, moving the Court just a fortnight or so before its scheduled release, well after it had received much publicity, claiming that they had only recently learned that the film being made was an infringement or in breach.

29. If it is the Plaintiffs’ case now that they were led to believe in 2012 from the Defendants’ lawyers’ letters that although a film was being made it was not one that would infringe or breach the confidence claimed, that is what ought to have been explained and set out in the plaint. To aver instead that there was *no reply* to the

²¹ *S. P. Chengalvaraya Naidu v Jagannath*, (1994) 1 SCC 1

legal notice is a very different thing. As Mr. Jagtiani points out, the Plaintiffs' Advocate's notice of 15th October 2012²² is on behalf of the 1st Plaintiff. It makes no mention at all of any so-called breach of confidence but only claims exclusivity on account of the copyright to the "story writing/screenplay and film making on the life of Dashrath Manjhi 'the Mountain Man' in all languages". The detailed response of 29th November 2012²³ clearly says the 1st and 2nd Defendants were making a film based on Manjhi's life and that they had been engaged in this enterprise since 2009. They point out that Jakhar's script was registered with the Film Writers' Association on 24th November 2011. There were public announcements in the media in August 2012. A trade notice was issued on 15th September 2012. The 1st and 2nd Defendants denied that the Plaintiffs had a monopoly on the life and times of Dashrath Manjhi. That reply runs into five printed pages. Despite this, the Plaintiffs say in paragraph 4.16 of the Plaint:

In view of there being no response to the aforementioned email, Plaintiff No.1 also issued a legal notice dated 15 October 2012 to Defendant No.1. **However the Plaintiffs did not receive any response to the legal notice.** The Plaintiffs **submit that they did not proceed against the Defendants since the Plaintiffs were under the erroneous impression that Defendant No.1 being a well known creative person in the film industry would have honoured the notice** and would not use the the said Script in any unauthorised manner, especially after having been put to reasonable notice by the Plaintiffs. Hereto annexed and

²² Plaintiff, p. 45

²³ Motion, p. 131

marked as **Exhibit “F”** is a copy of the legal notice dated 15 October 2012.

(Emphasis supplied)

The omission of mention of the 1st and 2nd Defendants’ reply is neither inconsequential nor immaterial. It is no answer at all to say that the Plaintiffs believed that there would be no breach. That so-called belief is pegged to a single, solitary alleged non-event: the lack of a reply. In other words, but for the absence of a reply the Plaintiffs could not and would not have formed the belief that they did. Therefore, the disclosure of the reply was imperative. It was material. Its non-disclosure is possibly fatal at this stage. In similar situations, on the very ground of such unexplained delay, courts have declined relief,²⁴ submits Dr. Tulzapurkar, and in my view correctly.

30. Mr. Jagtiani for the 3rd Defendant, Mahendra Jakhar, adopts these arguments. In addition, he points out that the Plaintiffs’ email of 31st August 2012²⁵ was not even addressed to the 3rd Defendant with whom the confidential material is said to have been shared, although it threatens dire consequences to him. The fact of the Plaintiffs’ legal notice was the subject of at least one newspaper report at about the same time in 2012. This report, from the

²⁴ *Sai Paranjpaye v PLA Entertainment Pvt Ltd & Ors.*, order dated 4th April 2013 in Notice of Motion (L) No. 764 of 2013 in Suit (L) No. 280 of 2013; *Sushila Sharma v Madhur Bhandarkar & Ors.*, order dated 4th November 2009 in Notice of Motion No. 3391 of 2009 in Suit No. 2417 of 2009; *Nariman Films & Ors. v Baba Arts Ltd & Ors.*, order dated 19th December 2011 in Notice of Motion in Suit (L) No. 3404 of 2011, where ad-interim relief was refused only on the ground of delay.

²⁵ *Plaint, p. 44*

Mumbai Mirror, is on record, and it quotes a response from Jakhar.²⁶ This is not in any way disclaimed. The Plaintiffs' Advocate's notice of 15th October 2012²⁷ is on behalf of the 1st Plaintiff. It makes no mention at all of any so-called breach of confidence but only claims exclusivity on account of the copyright. Then there is Jakhar's email of 24th January 2013 to Jha²⁸ and this clearly says that the 1st Defendant, Mehta, is making a film based on Jakhar's script. This, too, is suppressed from the plaint though it directly contradicts the assertion in paragraph 4.16 of the plaint that the Plaintiffs were put into some state of sated somnolence by the lack of *any* response. Jakhar's stand appears to be that even if he did receive the script, he did not read it then; he was already at work on his own script. At this stage, it is difficult to hold that Jakhar had done no work at all, or had nothing in hand.

31. But what was it exactly that was 'shared in confidence'? The Plaintiffs say that what the 2nd Plaintiff, Jha, sent to Jakhar is the email reproduced at Exhibit "B" to the Plaint.²⁹ This supposedly has a soft copy of Jha's script, "Mountain Man", attached to it. The body of the email says:

"Hi Bhai, sending you my new script "Mountain Man".
Looking forward to your feedback.

Regards,

Manish Jha."

²⁶ Motion, *p.* 206

²⁷ Plaint, *p.* 45

²⁸ Motion, *p.* 28

²⁹ Plaint, *p.* 34

Jakhar says that he never received *this* email. He says it is forged. What he did receive is another email of the same date but of quite different tone, tenor and intent. This email reads:³⁰

Attached is one of the basic screenplay of the play. Bhai, c if v can incorporate 'Hinsa' in it ... or maybe some other twist to the film itself ...

32. Now *Hinsa* is a script that Jakhar was working on. Faced with this, the 2nd Plaintiff attempts an explanation in his Affidavits.³¹ He says that the first mail, the one annexed to the Plaintiff, did not seem to have been reflected in the sent items of his email account. Therefore he sent the second mail, the one shown in the Notice of Motion. This paragraph in the Rejoinder³² makes for the most interesting reading. Jha does not seem to deny the second mail, the one referencing *Hinsa*. Indeed, he points out that Jakhar replied on 5th July 2015 with two attachments, a synopsis of *Hinsa* and 'pointers'.³³ That explanation will not wash. As Mr. Jagtiani points out, both mails supposedly sent by the 2nd Plaintiff bear exactly the same time-stamp of 10:13 pm. In itself, not to have even a minute's differentiation is hardly credible. Second, and perhaps more pertinently, if this is indeed so, then both mails ought to have been disclosed and explained in the Plaintiff itself. Third, if the first mail was not, as the 2nd Plaintiff now claims, 'reflected in the sent items', it could not and ought not to have been annexed to the plaintiff at all; and certainly not with the accompanying averment in

³⁰ Motion, p. 143

³¹ Motion, p. 217

³² Motion, Rejoinder, Para 9, pp. 216-217

³³ Motion, p. 224

paragraph 4.8³⁴ that it was by *this* mail (the one that did not ‘reflect’ in the sent items) that the confidential information was shared.

33. There is in all this far too much I find to be wanting from the Plaintiffs. Perhaps they will be able to explain some, if not all, of this at the trial. Their explanations today however are unconvincing and unpersuasive. There is clearly the most egregious set of elisions in the plaint: of advocates’ correspondence, of the two conflicting emails, of material that is in the public domain about the making of this film. That is not all. There are statements made in the plaint that are designed to suggest that there were in fact no replies; that the email annexed to the plaint communicating Jha’s script was the only one ever sent; that there was an all-round silence from 2012 to this day. Each of these is one more step in a series of steps of studied misdirection.

34. And then there is the matter of the two newspaper reports in bollywoodhungama.com³⁵ and the Indian Express³⁶ to which I referred earlier. I will accept that the latter is only a reproduction of the former for the online or web edition of the Indian Express. But the bollywoodhungama.com article has a byline. It credits one Subhash K. Jha as the author or reporter of the piece. In the body, the 2nd Plaintiff, Manish Jha, is quoted at length:

“Says Jha, “I think it’s important that Dashrath Manjhi’s story be told. It doesn’t matter who tells it. I guess somewhere I was being egoistic by insisting on making

³⁴ Plaint, *p.* 6

³⁵ Motion, *p.* 144

³⁶ Motion, *p.* 145

my own film on the subject even when I heard Ketan was doing it. I did feel cheated because I had started work on the subject many years ago. However, now I see that every story has its own destiny. If Ketan was destined to tell Dashrath's story, so be it.

...

If in my enthusiasm over the subject I shared the idea with a writer who passed it on to another filmmaker, it is my fault. After all these years, I am still a stranger to the ways of show business. In spite of being a filmmaker for 12 years, I still don't know how the system works," says Manish, who in a career of 12 years has directed only two films Matrabhoomi and Anwar.

Manish says he spent his time travelling across India and preparing for the film on Dashrath Manjhi. "But now I will direct something else. I am sure Ketan has done a fine job."

35. This is not the kind of report that can be wished away, nor is it, in my view, sufficient at the *prima facie* stage to disclaim it as 'not being evidence' as if to suggest that newspaper reports are never used in courts in any circumstances. Whether or not the material is admissible in evidence is for a later stage. What is of concern to me now is how the Plaintiffs chose to deal with this material when it was placed on affidavit. That response comes in paragraph 11 of one of the Affidavits in Rejoinder.³⁷ The 2nd Plaintiff only says that the article is a false and fabricated document and that he had never read it before its disclosure in these proceedings. The second statement strains credulity, and Mr. Madon's assertion that not everyone reads everything seems to me to be stretching it more than a bit. I do not

³⁷ Motion, p. 219

pretend to understand what on earth it is the 2nd Plaintiff means by the first assertion. How is it fabricated? *What* exactly is fabricated? The print out annexed to these papers? The contents? The actual digital version available online even now? That would need some doing, very likely beyond the reach of all the Defendants put together. What is important, though, is what the 2nd Plaintiff has *not* done. He does not claim to have written to the author of the piece or the editor of either publication protesting the alleged inaccuracy, forgery or fabrication. The disclosure of the articles was made on 13th August 2015. The articles are dated 12th July 2013 (curiously about one year after the legal correspondence I have noted above). Till the hearing yesterday, 19th August 2015, the 2nd Plaintiff seemed to have done nothing at all *vis-à-vis* either publication. Alleging forgery and fabrication of newsreports is not something to be done lightly or idly; it is serious business and is to be dealt with seriously. The 2nd Plaintiff, apart from making this bland assertion, seems to have done nothing. Most importantly, I do not find in the entirety of paragraph 11 a single assertion that the 2nd Plaintiff had at no point spoken with the writer, Mr. Subhash K. Jha.

36. This is no mere acquiescence. This is not mere delay. This is a wholesale abandonment of a cause once invoked and then forgotten. Absent a cogent and compelling explanation, I do not see how I can simply let this pass or how, in the face of this, the Plaintiffs can contend that they are nonetheless entitled to an injunction. This is not a case of a copyright license, one that needs to be in writing. That argument muddles the two causes of action pleaded by the Plaintiffs. This is an abandonment in its entirety of the cause of

action in breach of confidence and, given the springboard formulation that seems to be the mainstay of the Plaintiffs' case, this abandonment is fatal to their cause at this stage. Perhaps an explanation still awaits at the trial; but that is a matter for another day.

37. What of the various comparisons that the Plaintiffs draw in their tabulation?³⁸ I have already noted that there are 34 items in this tabulation and that Mr. Madon claimed on instructions that but for items 2 (a barren, drought-struck village in the opening) and 28 (people discouraging Manjhi), the rest were all fictionalized. Indeed this is not so. Item 30, for instance, which I have mentioned earlier, is about Manjhi's headgear of a polythene bag, something that as Mr. Jagtiani put it, came to be some sort of badge for the man. There are innumerable images of this flooding the public media; the simplest Google image search shows so. Even the current Wikipedia entry, if one must reference it, has such an image. How could the 2nd Plaintiff claim this to be original, an invention, a piece of fiction? If he is so utterly wrong in this, what else is not right? There is no principle of *falsus in uno, falsus in omnibus* at play here, but the Plaintiffs fail *Zee Telefilms* standard of a 'seriously arguable' case when they place material willy-nilly like this. There are other elements in this tabulation too that when described as fictional or original beggar belief: the celebration of Holi, a wicked Mukhiya, drought, political rallies and so forth. Placed like this, this scattering of inaccurate claims fails the *Beyond Dreams* precision test.

³⁸ Motion, p. 225

38. There are, however, two distinct items to which attention must be paid, in fairness to the Plaintiffs. One of these is the use of a miniature model of the Taj Mahal as a motif. In the film, Manjhi gifts this miniature to his wife, explaining that a man built the real monument for his wife as a symbol of undying love. The Plaintiffs might have had a point here but for the fact that material already in the public domain draws precisely this comparison: the time it took (22 years), and that the work itself is a ‘monument to love’. There are, I imagine, limited ways to depict this visually, and this is no germ of any idea, nor any springboard.

39. The second aspect is the matter of Manjhi’s wife’s accident. This is, in the film, the tipping point. So too in Jha’s script. In both, she dies. In both, she is pregnant at the time. In both, he cannot get her to the hospital across the mountain in time to save her. But the fact of the accident itself, in 1959, and the lack of prompt and close medical care is well documented in the public domain.³⁹ That incident was demonstrably the cause for Manjhi’s 22-year solitary, and somewhat manic, endeavour. Is this a ‘springboard’ as *Zee Telefilms* intended? I have the gravest doubt. It rather appears to me that the true ‘springboard’ is the real-life accident that Manjhi’s wife, Phaguni Devi, suffered while on the mountain. It is not the 2nd Plaintiff’s imagination of it as an eventual fatality during her pregnancy that can be said to have inspired the film. It is entirely possible that a creative mind in cinema would view a simpler injury such as a fracture or a twisted ankle as entirely too pedestrian, and lacking the necessary emotive punch. But deaths, even horrific deaths, in pregnancy are not in and of themselves unique to the art

³⁹ Motions, pp. 146, 149

form: they are used because of what they are and what they do: to shock, to disturb, to overwhelm and to provide drive and direction.

40. I must, in any case, view even this from another perspective: the coherence and consistency of the Defendants' case throughout is in marked contrast to that of the Plaintiffs. If there is nothing clear and cohesive to show that the 3rd Defendant knew and read the 2nd Plaintiff's script at the time when the 2nd Plaintiff alleges it was sent to him, and I am asked to proceed on an assumption of normal conduct, then it seems to me to put this case at a perilously distant remove from the 'seriously arguable' requirement of *Zee Telefilms*.

41. Finally, there are Mr. Naik's submissions on the question of balance of convenience. He points out that 500 prints are already out. Advance bookings have opened. The 4th Defendant has put out over Rs.4 crores already toward print promotion, advertising, marketing, radio and television promotion and publicity. All of this, he says, and I think quite correctly, cannot be held to ransom by a last-minute foray by the Plaintiffs on a case so insubstantial. There is no question of the balance of convenience being with the Plaintiffs.

42. A final word on the film itself. I address this with the words of Pathak J. in *R. S. Anand* in mind. The film is a very different work from Jha's script. It does not even hew faithfully to Jakhar's work. Jha's screenplay seems to me to be exactly as it was described: basic. It is still very preliminary, even abbreviated. The film on the other hand has layers of complexity that are well beyond Jha's script or anything hinted at in it. At one level, the film functions as a love

story and of a unswerving dedication to a loved one lost too soon. But it also deals with the politics of caste, zamindari, shifting political realignments, Kafkaesque bureaucracies and even rape used to assert power and dominance. There are many cinematic metaphors used here. Some are obvious (a collapsing stage at a politician's rally held up by the downtrodden), others less so. The mountain itself might serve as a metaphor for something more subtle: taking on the impossible, daring to dream, doing the same thing day after day, a little better each day, a chase that is at first merely Quixotic and then triumphs in fulfilment. Manjhi's monomaniacal fixation with the mountain, one that survives ridicule, obloquy, bureaucratic obduracy, shame, loss, his capacity to care for his children, the vicissitudes of time, and just about everything else in between is itself something of a metaphor — an irresistible force flung again and again an immovable object. The David-and-Goliath parallel is obvious in this telling of a story of the triumph of one man's will in subjugating an implacable, immutable, daunting and seemingly insurmountable force of nature. But, as depicted on screen, it is a story as much about enduring love as it is about an overwhelming obsession. It is at once one man's story and every man's story: we all have our mountains to conquer. There are subtleties and nuances in the film that are, I think, wholly missing in Jha's script, one that is considerably 'flatter' and one-dimensional. Whether or not Mehta and his team have succeeded in what they set out to do is best left to an analysis by film critics and cinéastes. But what it most emphatically is not is merely a series of 'immaterial changes', 'insubstantial differences' or a 'veil of dissimilarity thrown around' Jha's script. It is an entirely different and independent work in its own right.

43. The Notice of Motion is dismissed. There will be no order as to costs.

(G. S. PATEL, J.)

