

**Court No. - 1**

**Reserved**

**A.F.R.**

**Case :- FIRST APPEAL FROM ORDER DEFECTIVE No. - 432 of 2021**

**Appellant :- Uday Prakash**

**Respondent :- Anand Pandit And Another**

**Counsel for Appellant :- Shantanu**

**Counsel for Respondent :- Ankur Tandon, Anubhav Shukla,  
Rahul Agarwal, Rahul Rathi, Ram Shiromani Shukla**

**Hon'ble J.J. Munir, J.**

1. This is a plaintiff's appeal from an order of Mr. Jitendra Kumar Sinha, the learned District Judge, Ghaziabad, rejecting his application for temporary injunction in a suit for infringement of copyright.

2. The suit was instituted, complaining infringement of a copyright owned by the plaintiff relating to a story-screenplay-dialogues for a feature film, registered with the Copyright Office at New Delhi under Registration No. L-28822/2007 dated 16.07.2007. The literary work aforesaid was registered under the name of 'Highway-39'. The aforesaid literary work shall hereinafter be referred to as the 'copyrighted work'. The suit, wherein the temporary injunction application was made, was instituted some time in the month of December, 2019 and registered on the file of the learned District Judge, Ghaziabad as Suit no.2 of 2019. The following reliefs have been claimed in the suit against the two defendants, who are the respondents here:

"A. pass a decree of Perpetual/Permanent injunction:

i. by restraining the defendants, jointly and severally, by themselves or acting through any agent or any other such person from infringing the registered copyright of the plaintiff in respect of his story and screenplay work titled as 'Highway-39' from converting and adopting the same into a motion picture/feature film in any name whatsoever;

ii. by restraining the Defendants, jointly or severally, by themselves or acting through their agents or any such person from producing, making, promoting, publicizing, releasing, communicating to public about the infringed feature film.

B. pass a decree of Mandatory injunction directing the defendants to jointly or severally:

i. to deliver all versions of the story/ script/ screenplay (literary work), reels and / or the produced work based on the registered copyright work of the plaintiff pertaining to the infringed feature film;

ii. to remove from internet and other similar platforms, including social media pertaining to the defendants and/or of social media account of any of the actors or any other such person involved with the production and making of the infringed feature film, including the removal of any and all promotional material (including posters, trailers and teaser) of the infringed feature film;

C. pass a decree for the rendition of accounts of the advance amount received by the Defendants from the Distribution Companies/ Television Channels/ Internet Television Network by selling the distribution rights/ satellite rights / streaming rights respectively of the feature film made by the defendants by infringing the copyright of the plaintiff in the process of producing the infringed feature film;"

3. It would be apposite to give a more detailed account of the facts giving rise to this appeal. The plaintiff-appellant, Uday Prakash, who shall hereinafter be referred to as the 'plaintiff', is claimed to be a Hindi Poet, Scholar, Filmmaker, Journalist and one who has worked as a Professor with Central Universities. The plaintiff also claims to have worked as an Administrator with the Government of India, but which department, is not explicit in the plaint. He also says that he has been an Editor, Researcher and Television Director with the National and Private TV Channels. He writes for major national dailies and periodicals on issues of social and cultural significance. There is an elaborate pleading by the plaintiff, showing his established scholarly status, besides an impressive list of accolades that stand to his credit in the form of prestigious literary awards and literary works of repute.

4. It is the plaintiff's case that he conceived, conceptualized and set about a venture to write a screenplay (film script), that is to say, the copyrighted work, already introduced hereinbefore. The plaintiff says that he completed the copyrighted work and got the same registered with the Film Writers Association, Mumbai. The aforesaid literary work was submitted to the Copyright Office, New Delhi, where it was

registered on 16.07.2007 under Registration No. L-28822/2007. The plaintiff says that he discussed the copyrighted work with one of his acquaintances, Mazhar Kamran, who was, at the relevant time, working with the plaintiff as a Cameraman on several audio visual projects that the plaintiff had in hand during the years 2000-2005. Mazhar Kamran is said to have assured the latter that he would show the copyrighted work to a few prominent producers, of whom Anand Pandit was one. Anand Pandit is defendant no.1 to the suit and respondent no.1 to this appeal, who shall hereinafter be referred to as 'defendant no.1'. Defendant no.1 is said to be a well-known producer and proprietor of a certain Anand Pandit Motion Pictures, whereas Rumi Jaffery is a well-known Director. Rumi Jaffery of Saraswati Entertainment Pvt. Ltd., Mumbai is the second defendant to the suit and the second respondent to this appeal. He shall hereinafter be referred to as 'defendant no.2'. Wherever a joint reference to defendant nos.1 and 2 is necessitated by the context, they shall be called the 'defendants'.

5. It is the plaintiff's case that in or about the month of June, 2019, he came to know, from reliable sources in the Film Industry, that defendant no.1 is making a movie under the direction of defendant no.2, which is very similar to the copyrighted work. The plaintiff claims that he was given information that defendant no.1 has scheduled a release of the movie under the name and title of '*Chehre*'. The plaintiff also asserts that he read news and collected information available in the public domain that the movie, last mentioned, went into production somewhere around the month of May, 2019. The movie '*Chehre*' shall hereinafter be called the feature film. The plaintiff asserts that he received reliable information from the

Film Industry that the feature film is based exactly on the same 'plot and premise' as the plaintiff's copyrighted work. The plaintiff took legal advice and caused a 'cease and desist' notice to be issued to the defendants on 14.06.2019. The notice, last mentioned, called upon the defendants to cease and desist from using any portion of the copyrighted work, including his professional, intellectual and creative ideas that have gone into the story and presentation. The defendants were asked to forthwith cease their production of the feature film based on the copyrighted work as it would infringe the plaintiff's registered copyright.

6. The notice is said to have been answered through a reply of June the 29<sup>th</sup>, 2019, denying infringement of the copyrighted work. It is said by the plaintiff that the defendants are knowingly indulging in infringement of the plaintiff's copyright. They have signed high profile artists to work in the feature film without taking the plaintiff's permission for the use of the copyrighted work, converting his literary work into a motion picture. It is also said that the plaintiff has not so far assigned or transferred or sold his copyright in the copyrighted work to any third party; he holds it in his name alone. The violation of the plaintiff's copyright has been claimed to cause loss of name and reputation to the plaintiff. It is said the infringement, that would come about in consequence of production and release of the feature film, would cause the plaintiff severe harassment, loss of reputation and a cascading effect on the plaintiff's professional prospects, *vis-a-vis* his reputation as an author in general and the copyrighted work in particular.

7. It is claimed that the wrong done by the defendants not only constitutes infringement of the plaintiff's registered copyright but an act of breach of confidence, besides unlawful

trade. It has the effect of depriving the plaintiff of the fruits of his intellectual labour created by investment of colossal time, intellect and effort.

8. Alongside the suit, an application for interim injunction under Order XXXIX Rules 1 and 2 read with Section 151 CPC was also made with a rather curiously worded prayer. The prayer in the temporary injunction application reads:

“In the above mentioned circumstances and in the interest of justice this Hon'ble Court may be pleased grant ad-interim ex-parte injunction in favour of the applicant/ plaintiff and against the defendants, his associates, musclemen, agent, legal heirs, representatives etc, till the pendency of the suit.”

9. One would expect the prayer in the application for interim injunction to be somewhat similar in terms of the relief claimed in the plaint, but that is not so. However, it does not appear that the Trial Court has gone much by that technicality. Instead, the Trial Court has substantially read the prayer in the temporary injunction application to be one in aid of the main relief, directed to forbid the defendants, pending suit, from producing and/ or releasing the feature film. Again, the Trial Judge has not expressly said so, but the tenor of his order leaves this Court in no manner of doubt that, that is how he has construed the prayer for interim injunction and decided it by the order impugned.

10. A written statement was filed in opposition to the suit on behalf of defendant no.1. It raises preliminary objections going to the root of the action for infringement of copyright, besides those saying in much detail that no cause of action was disclosed. It was also pleaded that the copyrighted work was devoid of ingenuity and originality as it is an adoption of a banal theme in the public domain. The copyrighted work is said to have been borrowed from a novel titled “A Dangerous Game” written by a Swiss author, Friedrich Durrenmatt. It was pleaded

that the theme and plot of the copyrighted work is drawn substantially from the last mentioned novel and, therefore, lacks originality. It is also said that this work is known by different titles in different parts of the world. It is published under the title 'Traps' in the United States and 'Die Panne' in Germany. The work of the Swiss author is said to form the basis not only of stage plays, but also films and TV shows. It is said to have been adopted into Hindi and Marathi stage plays, that have been professionally performed in India. It has also been pleaded by defendant no.1 that the feature film is in no manner similar, or connected with the copyrighted work nor does it infringe it in any manner.

11. It was also said by the defendants in the written statement and in opposition to the application for temporary injunction that the film was not scheduled to be released in the month of February, 2020 and the suit was, therefore, no more than a *quia timet* action, that was founded on unreliable sources and erroneous apprehension.

12. Heard Mr. Gaurav Bhardwaj, Mr. Shantanu, Ms. Poonam Meena, Mr. Mahir Malhotra, Mr. Raj Kumar Dhama, learned Counsel for the plaintiff and Mr. Shashi Nandan, learned Senior Advocate assisted by Mr. Ankur Tandon, learned Counsel for respondent no.1 and Mr. Rahul Agarwal, learned Counsel along with Mr. Anubhav Shukla, Mr. Prafull Shukla, Mr. Nishchal Anand, learned Counsel appearing on behalf of respondent no.2.

13. Before this Court, the matter was very elaborately argued on behalf of the plaintiff by Mr. Gaurav Bhardwaj, learned Counsel, very ably assisted by Mr. Shantanu, Ms. Poonam Meena, Mr. Mahir Malhotra, Mr. Raj Kumar Dhama, Advocates. Mr. Bhardwaj was particularly critical of the learned District

Judge's order refusing the temporary injunction on parameters completely irrelevant to judge a case for a temporary injunction in a suit for infringement of copyright. He has particularly submitted that the remarks in the impugned order that say that the copyrighted work though registered is an unpublished document are absolutely extraneous to the consideration of a case for grant of a temporary injunction. He has also criticized the learned District Judge's remark to the effect that once the plaintiff pleaded that he had discussed the contents of the copyrighted work with Mazhar Kamran, the plaintiff ought to have impleaded him as a party to the suit.

14. This Court must say that both these remarks in the learned District Judge's order are indeed not relevant to judge a plea for the grant of a temporary injunction in an action for copyright violation. An unpublished copyright, unregistered or registered, is protected intellectual property. It cannot be plagiarized merely because the owner of the copyright has not published it until the time of infringement. The other remark about the failure to implead Kamran as a party to the suit by the plaintiff, is also besides the point. Merely because the plaintiff claims that he had discussed the copyrighted work with Kamran, does not oblige him to implead Kamran as a defendant to the suit. This is so because on the cause of action disclosed in the plaint, the plaintiff does not claim any relief against Kamran. The relief has been claimed against the defendants. The plaintiff's case may require Kamran to be examined as a witness, but there is absolutely no necessity to implead him as a defendant to the suit. On both these premises, Mr. Bhardwaj is right that the learned District Judge has gone wrong. But, these infirmities are not all that the refusal of temporary injunction is about. There is much more to it.

15. It has next been submitted by Mr. Bhardwaj that there is an error apparent on the face of the record committed by the learned District Judge while writing the impugned order. He submits that this is so because the learned Judge has dealt with the matter as if he were holding a summary trial. The learned Counsel says that this is further so because the learned Judge sought evidence to be led at the stage of consideration of the temporary injunction matter, which is manifestly illegal. This could be urged as a case of manifest illegality, but certainly not an error apparent. This is not to say that this Court accepts the submission of the learned Counsel for the plaintiff that the learned District Judge indeed required evidence to be led like a summary trial, or that his order is illegal on that count. The submission would be considered a little later in this judgment. Learned Counsel for the plaintiff, in support of this submission, has placed reliance upon a decision of the Rajasthan High Court in **Fateh Singh Mehta v. O.P. Singhal & Ors.**<sup>1</sup>. He has also depended upon a decision of the Supreme Court in **Wander Ltd. & Anr. v. Antox India P. Ltd., 1990**<sup>2</sup>. These decisions too would be alluded to later.

16. It is next submitted by Mr. Bhargav that the sole substantial defence of the defendants is that there is no comparison pleaded by the plaintiff about the similarity between the feature film and the copyrighted work, which, according the learned Counsel for the plaintiff, is fallacious. He submits that this plea does not lie in the defendants' mouth, inasmuch as the plaintiff had moved an application for discovery of documents under Order IX Rule 12 CPC (along with a notice for production of document under Order XII Rule 8 CPC) seeking a direction from the Court to the defendants to discover the story/ script of

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1 1989 SCC OnLine Raj 9

2 1990 (SUPP) SCC 727



his screenplay that was the edifice of the feature film before the Trial Judge; but in answer to the said application, the defendants filed a reply, refusing to discover. He submits that defendant no.1 refused to submit the script before the learned District Judge for his perusal and comparison as it was said that it would jeopardize the commercial viability of the project. It is urged that once the defendants' script, that is the foundation of the feature film, was not accessible to the plaintiff, he could not be expected to plead details of the comparison between the feature film and the copyrighted work. In support of his submission, learned Counsel for the plaintiff has depended on a decision of the Supreme Court in **Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors.**<sup>3</sup>.

17. It is next submitted that there is a vague plea urged on behalf of the defendants that belated approach to this Court against the impugned order dated 08.04.2021, on the eve of release of the movie, disentitles the plaintiff to relief. Mr. Bhardwaj submits that this plea is misplaced because the whole nation had plunged into a deep and devastating crisis about time when the impugned order was delivered, on account of second wave of the Covid-19 pandemic that raged during the months of April, May and June, 2021. It is pointed out that the pandemic is still going on. It is in those circumstances that the plaintiff's timely pursuit of his appeal has to be viewed. The plaintiff, upon coming to know on 14<sup>th</sup> August that the defendants had declared that the movie would be released in the theaters on August the 27<sup>th</sup>, 2021, moved this Court on 19.08.2021, and then urgently mentioned the matter to be taken up.

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<sup>3</sup> AIR 1968 SC 1413

18. Learned Counsel for the plaintiff next submits that the defendants' case that the suit is a *quia timet* action based on a mere apprehension is now no longer open, nor was it ever open. It is something that has to be seen in the plaintiff's favour. In this connection, reliance has been placed on a decision of the Madras High Court in **P.G. Narayanan v. The Union of India, rep. by the Secretary, Ministry of Information & Broadcasting, Sastri Bhavan, New Delhi-110 001 and others**<sup>4</sup>.

19. It is also urged by Mr. Bhardwaj that the conduct of the defendants is *mala fide*, unscrupulous and fraudulent, inasmuch as the defendants' project seeks to financially capitalize on the plaintiff's creativity, labour and scholarship. This they seek to do in violation of a registered copyright. In support of this part of his submission, learned Counsel for the plaintiff has placed reliance upon a decision of the Telangana High Court in **Super Cassettes Industries Private Limited & Another v. Nandi Chinni Kumar & Others**<sup>5</sup>. It is also urged that the learned District Judge has also erred in not securing a copy of the script that is the basis of the feature film and comparing it with the copyrighted work; in the absence of doing this, the learned Judge could not have disposed of the temporary injunction matter. It is in the last submitted that the plea of the defendants not to interdict release of the movie on ground that investment worth hundreds of crores of rupees have gone into its production is abominable. Mr. Bhardwaj says that a submission of this kind leaves an impression that is not seemly in a Court of justice.

20. Mr. Shashi Nandan, learned Senior Advocate assisted by Mr. Ankur Tandon, learned Counsel for respondent no. 1 and

4 2005 SCC OnLine Mad 379

5 2020 SCC OnLine TS 1282

Mr. Rahul Agarwal, along with Mr. Anubhav Shukla, Mr. Prafull Shukla and Mr. Nischal Anand, learned Counsel appearing on behalf of respondent no. 2 have submitted in one voice that the plaintiff's claim to have shared the copyrighted work with Mazhar Kamran, whom the plaintiff believes may have passed on the script to the defendants, is founded on sheer conjecture. There is not the slightest proof offered that the plaintiff, in fact, shared this script of the copyrighted work with Mazhar Kamran or the further proof that Mazhar Kamran, in turn, passed on that intellectual property to the defendants. Mr. Shashi Nandan has drawn the Court's attention to the plaint, where it is said that the plaintiff, in the month of June, 2019, had learnt from reliable sources that defendant no. 1 is producing the feature film under the direction of defendant no. 2 and that the story/ plot of the feature film is similar to the copyrighted work. It is emphasized that no detail of "the reliable sources" have been pleaded. The suit, therefore, in Mr. Shashi Nandan's submission, is based on hearsay, conjectures and surmises.

21. It is next submitted by the learned Counsel for the defendants that the plaint reveals that it is bereft of a cause of action, let alone a *prima facie* case. Attention of the Court is drawn to Paragraph no.5 of the plaint, that purports to plead the cause of action. It is submitted by the learned Senior Counsel and Mr. Agarwal that the plaintiff has failed to disclose facts and documents in support of the cause of action. It is particularly urged that the plaint fails to disclose that :

- (a) The copyrighted work is an original literary work;
- (b) Defendant no. 1 had access to the copyrighted work;  
and
- (c) The script of the feature film is substantially similar to the copyrighted work.

22. It is next urged on behalf of the defendants that plaintiff has not revealed any material to indicate the defendants' access to the copyrighted work. Reliance has been placed on the decision of the Bombay High Court in **Mansoob Haider v. Yashraj Films Private Ltd.**<sup>6</sup>. It is also urged that the plaintiff merely rests his case on speculation that is far from one that meets the minimal standard of proof.

23. Learned Senior Counsel for the defendants says that at best, it can be construed as a *quia timet* action, where the burden of proof is much greater on the plaintiff in comparison to an action for injunction, where an actual injury is sustained by the plaintiff contra-distinguished from an apprehended injury. In support of this submission, reliance has been placed on the decisions of the Bombay High Court in **Graigola Merthyr Company Limited v. Mayor Alderman and Burjesses of Swansea**<sup>7</sup> and **Zee Entertainment Enterprises Ltd. v. Sony Pictures Network Pvt. Ltd.**<sup>8</sup>. It is further argued that the reasonable apprehension about an apprehended injury must arise from credible information, the particulars whereof are duly pleaded; that is utterly wanting.

24. It is next submitted that a civil suit cannot be a fishing or roving inquiry, but must be based on established principles of law and accurate pleadings. It is urged that the plaintiff's application for discovery was objected to by the defendants on facts and grounds recognized in law. The Trial Judge never directed the defendants to submit the script for the Court's perusal. It is also said that the application for discovery was never allowed or the defendants permitted to serve the notice that they enclosed with the application. It has been particularly

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6 2014 SCC OnLine Bom 652

7 [1928] Ch. 235

8 2017 SCC OnLine Bom 409

urged before this Court that the defendants' script that is the basis of the feature film and the copyrighted work, both are inspired from a theme of the mock trial contained in the novel titled "A Dangerous Game". About this novel, allusion has already been made earlier in this judgment.

25. It has next been urged that a comparison of the two scripts may show a similarity between the common theme, but the treatment of the subject by each party is completely different. It is urged, therefore, that it cannot be dubbed as an infringement of the plaintiff's copyright. It is urged that the plaintiff's claim does not at all make out a *prima facie* case, as it is founded on utter conjecture. It is an action that is designed to prevent the defendants from commercially exploiting the feature film, which is an upcoming project nearing fruition. There is no unimpeachable evidence of the kind and degree required to make out a *prima facie* case in an action that is essentially *quia timet*. About the balance of convenience here, it is said on behalf of the defendants that the plaintiff has chosen to approach this Court in appeal at the eleventh hour, whereas the order impugned was passed on 8<sup>th</sup> April, 2021. It is said that this Court is functioning normally since the month of July, 2021 and physical hearing has been going on for quite some time now. The defendants also say that they are at the threshold of release of the feature film in India, which has already been released in some foreign jurisdictions. The defendants have entered into onerous contracts with Over The Top (OTT) Platforms and film distributors. Any embargo on the release of the film would have a devastating effect on the rights of the third parties. It would lead to irreparable injury to the defendants and many others, who have entered into engagement with them. It is submitted that on the other hand, in the off-chance, if the

plaintiff were to succeed in the action at the trial, he can be easily compensated in monetary value as well as by provision of the intellectual credit for the movie. In support of this part of the defendants' submissions and the counts of irreparable loss and balance of convenience, reliance has been placed on a decision of the Bombay High Court in **Akashaditya Harishchandra Lama v. Ashutosh Gowariker**<sup>9</sup> and the decision of the Delhi High Court in **John Hart Jr. and Another v. Mukul Deora and Others**<sup>10</sup>.

26. This Court has keenly considered the rival submissions advanced on behalf of both sides and perused the record. The submission of the plaintiff that the Trial Judge has manifestly erred in expecting evidence to be produced at the hearing of the temporary injunction application, as if it were a mini trial, is not one of much substance. The reason is not far to seek. The fundamental principles of law governing a motion for temporary injunction pending suit requires the plaintiff to establish his *prima facie* case, the irreparable loss that he would sustain from a refusal of the injunction and the balance of convenience. No doubt that this tripod that holds a plea for a temporary injunction firm is not required to be established by evidence of the kind that is expected to be led at the trial. But, it does require a *prima facie* case to be established and the two other ingredients by some evidence that can be led on affidavits. Temporary injunction matters are reputed to be decided on affidavits, with copies of documents annexed. The first requirement about a *prima facie* case postulates that the case pleaded in the plaint, on the foot of which alone, the case for a temporary injunction stands, should disclose *prima facie* and not after a searching inquiry that must await trial, that a triable

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9 2016 SCC OnLine Bom

10 2021 SCC OnLine Del 3499

case is made out. The decision on this point urged on behalf of the plaintiff is the one in **Wander Ltd. (supra)**. In **Wander Ltd.**, it has been held :

"9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

"...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies."

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

27. The other decision relied upon by the plaintiff on this point is **Fateh Singh Mehta (supra)**, which is not of much relevance on the issue in hand, though it is quite relevant on another point that would soon be dealt with.

28. Now, the question whether a *prima facie* case is made out, is intrinsically connected to the cause of action regarding infringement of the copyright alleged. It is true that in order to establish a *prima facie* case, in an action for infringement of copyright, there have to be pleadings to establish that the literary work, of which the plaintiff claims infringement by the defendants should be shown to be the plaintiff's original literary work, in the sense that the work is at least original rendition of a known theme with the plaintiff producing it, employing his knowledge, labour and skill. In addition, it has also to be established that the defendant had access to the plaintiff's

work, and that the offending script is substantially similar to the plaintiff's script. Here, there is no doubt about one fact that the plaintiff holds a copyrighted work. But beyond that, the pleadings are utterly vague. There is an assertion to the effect that the plaintiff discussed the copyrighted work with Mazhar Kamran, but it does not say that he showed the copyrighted work to Kamran or handed it over to him. Therefore, there is a very vague case pleaded about the intermediary who could have possibly palmed off the copyrighted work to the defendants, on coming to know of its contents. A mere discussion of a work involving intellectual intricacies with another is not a case enough to impute that other with knowledge of its contents; and knowledge good enough to share it with a third party. The pleadings, therefore, are woefully vague about the access of the defendants to the copyrighted work.

29. The next assertion in the plaint that the plaintiff was given information about defendant no. 1 producing the feature film, that is essentially similar to the copyrighted work, is also utterly vague. It is set out in Paragraph no.5 of the plaint. The plaintiff does not name the source through which he came to know that the feature film is based on a script that is a plagiarized version of the copyrighted work. The terms employed in the relevant pleadings are "reliable source/sources from the film industry" which can hardly go to make for a *prima facie* case or a triable case for the grant of a temporary injunction in an action for infringement of copyright.

30. There is another issue which is required to be addressed. It is connected to the fundamental issue about whether the plaintiff at all had a cause of action to proceed for infringement with the kind of allegations that find place in the plaint. *Prima*



*facie*, the plaintiff never had occasion to see what the contents of the script leading to the feature film were, the movie having not been released as yet and certainly not until time the suit was filed. The plaintiff has inferred that it is a copy of his work on the basis of some hearsay, that he has expressed through vague allegations in the plaint, describing them as reliable sources from the film industry. The entire action is, therefore, based on the plaintiff's conjecture. This cannot be the basis of an action for infringement of copyright.

31. In this connection, reference may be made to the decision of the Bombay High Court in **Zee Entertainment Enterprises** (*supra*). The aforesaid principle is well-established that unless there is the infringing copy in the hands of the plaintiff, an action in the nature of *quia timet* would not lie, and even if it does, a temporary injunction on the basis of mere speculation would not be granted. In **Zee Entertainment Enterprises**, it was held:

"20. Mr. Kadam then relies on the decision of a learned Single Judge of this Court (A.M. Khanwilkar, J as he then was) in *Urmi Juvekar Chiang v. Global Broadcast News Ltd* to say that what is required is not a hypercritical or meticulous scrutiny but an assessment from the perspective of the average viewer. I understand this to mean that having seen Sony's show, would the average viewer believe that this is in fact a copy of Zee's show. We cannot today adopt that standard, and this of Zee's making, because it chose to make this as a *quia timet* application. This is not without consequences. Sony's show is scheduled to release only on 8<sup>th</sup> April 2016. Nobody has seen it yet. What Zee proceeds on is something of speculation or conjecture. Effectively Zee asks me to conclude that Sony's show releasing this Saturday, 8<sup>th</sup> April 2016 must necessarily be an infringing copy of the Zee's show; and this I am supposed to conclude or am invited to conclude on the basis of paragraphs 8, 9 and 10 of the plaint; although, as we have seen, in those paragraphs the distinct elements (in paragraph 10) have been disclaimed, and the other paragraphs only contain non-specific generalities without any explanation as to the original labour or effort put in by Zee. During the rejoinder, I did ask Mr. Khandekar to consider whether he would prefer to wait till after the show is released on Saturday, on my closing the hearings today, so that the Plaintiffs would have had the opportunity to see the show's first episodes. Mr. Khandekar did take instructions and these were to proceed with the matter today rather than wait for the release. That is certainly something the Plaintiffs are entitled to do and it cannot prejudice the final results. But inevitably what it does mean is that Zee's case is then limited to a matter of speculation without even meeting a minimal standard of proof. This creates enough difficulties in the context of the claim in infringement but it creates even more difficulties in the context of the claim in passing off and to which I will next turn."

32. On general principles governing an action that is in the nature of *quia timet*, it has since long been held that for an injunction to be granted on a threat of injury, the evidence about threat should be through some tangible evidence laid before the Court. An injunction of this kind cannot be sought by a plaintiff on bald assertions based on hypothetical facts. Burden of proof in a *quia timet* action is also much heavier than in a case where the defendant has acted and wronged the plaintiff to his detriment. The principle is classically stated in the decision of the Court of Appeal in **Graigola Merthyr Company Limited** (*supra*), where Lord Hanworth M.R. said thus:

"A quia timet action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court-it will act at once, and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle."

33. In **Graigola Merthyr Company Limited** in his separate but concurring opinion, it was held by Lawrence L.J.:

"..... The only difference between the two cases is that in a purely quia timet action the burden of proof resting on the plaintiff is far heavier than in an action where an act has already been done and has already caused actual damage. In both cases, however, the issue is the same-namely, where the act (completed or intended) is an act causing substantial damage to the plaintiff....."

34. Here, the submission of the learned Counsel for the plaintiff that the defendants' plea that the suit is a *quia timet* action based on a mere apprehension, is now no longer open, nor was it ever open, must be dealt with. Learned Counsel for the plaintiff has also said that it is no longer a mere apprehension and is something that ought to be viewed in the plaintiff's favour. Learned Counsel for the plaintiff, in urging this part of his submission, has drawn inspiration from the decision of the Madras High Court in **P.G. Narayanan** (*supra*), where it has been held:

"26. Learned counsel for the petitioner also submitted that the petitioner is entitled to invoke the jurisdiction of this Court for a *quia timet* action. *Quia timet* is an extraordinary relief granted by Courts to

prevent irreparable harm. It gives relief to parties who face imminent threat or danger of a tortious harm for which there is no adequate legal relief available later. They are actually writs of prevention which require three conditions — (a) no actual present injury, (b) reasonable fear of future harm, and (c) irreparable harm, if relief is not granted. According to the learned counsel for the petitioner, “the violation has already occurred”. If so, condition (a) is not satisfied. The petitioner has not made out a case of reasonable future harm. It is not clear how if the license is granted to the sixth respondent, public interest will be injured and hence, condition (b) is not satisfied. Further, it is not as if even if the sixth respondent is granted the license, the harm is irreparable, since it is seen from the guidelines that the license is not a permanent one; it is for a period of ten years and it is terminable at the instance of the licensing authority, which is the Union Government. *Quia timet* action is defined as “One a claimant may bring to obtain an injunction to prevent or restrain some threatened act which, if it is done, would or may cause substantial damage and for which money would not be a sufficient or appropriate remedy”. None of these ingredients are satisfied in the present action.”

35. From what the Court has been able to make out of this part of the submission by the plaintiff’s learned Counsel, is that with the impending release of the feature film, the apprehension has turned into a potent threat staring the plaintiff in his face. It is true that it can now no longer be said that the defendants are not about releasing the feature film and that part of the cause of action is based on a mere apprehension, that would not support a *quia timet*. The feature film has done its full gestation and would be released by the defendants in the morning hours tomorrow, but it is not the mere release of the feature film, that would afford the plaintiff a cause of action *prima facie* to maintain a *quia timet*. He would have to demonstrate from a case duly pleaded and evidence good enough to support an entitlement to a temporary injunction on basis that the copyrighted work and the script leading to the feature film are *prima facie* so similar in the treatment, may be of a common theme, that it is no more than an offending copy of the plaintiff’s copyright. About this part, *prima facie* the plaintiff has not pleaded sufficiently and proved up to the threshold by a comparison of the two scripts a positive case of violation of his copyright. As already said, the allegations about violations of the plaintiff’s copyright in the plaint, are based on mere hearsay

and no more. The decision in **P.G. Narayanan** is hardly attracted on the facts here.

36. The next submission advanced on behalf of the plaintiff is based on that objection of the defendants that the plaintiff ought to have pleaded accurately the similarities between the copyrighted work and the script underlying the feature film, which was not done. In this regard, learned Counsel for the plaintiff has largely said that considering the vantage at which the parties stand, the plaintiff did not have access to the script leading to the feature film. Therefore, it is impossible to expect of him to have pleaded the similarities with full particulars thereof in the plaint. It has also been said that the application for discovery, though made, was opposed with the result that neither the plaintiff nor the learned Judge, before whom that application was made, could ever have the advantage of comparing the two works. But the question is that whatever be the reason of the failure to plead in the plaint, the offending similarity between the copyrighted work and the script said to be the foundation of the feature film, would it entitle the plaintiff to maintain the action *prima facie*. Learned Counsel for the plaintiff says that where there are no means for the plaintiff to know the contents of the infringing script and despite demand, the defendant does not discover its contents in answer to an application made for the purpose, the burden must be placed on the shoulders of the one who withholds the best evidence which is in his possession, not only from the plaintiff, but also the Court. In support of this contention, learned Counsel for the plaintiff has drawn this Court's attention to the following observations of the Supreme Court in **Gopal Krishnaji Ketkar** (*supra*) :

"5. .... Lastly, reference should be made to the important circumstance that the appellant has not produced the account of the

Dargah income. In the course of his evidence the appellant admitted that he was enjoying the income of Plot No. 134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately". But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from Plot No. 134 was dealt with. Mr Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of Plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manickavasaka Pandara* [44 IA 98, at p 103] Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough — they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in Their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision— *Biltu Ram v. Jainandan Prasad* [ Civil Appeal No. 941 of 1965 decided on April 15, 1968\*\*\*\$\$\$] . In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjit Singh* [42 IA 202, at p. 206] :

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

But Shah, J., speaking for the Court, stated:

"The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with Illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority."

**37. The question in *Gopal Krishnaji Ketkar* arose in the context of an issue, whether the land in dispute in the said case was the property of Peer Haji Malang Dargah or the appellant. It was in the context of the accounts relating to Plot No. 134, which the appellant admitted he was maintaining and did not**

produce that it was held that even if the burden of proof does not lie on a party, the Court may draw an adverse inference, if that party were to withhold important documents that can throw light on the facts in issue. The proposition involved here is not at all about the burden of proof, but the cause of action itself. What is required to be examined is, as already said, what would be essential to make out a triable cause in an action for infringement of copyright. Those principles are well enunciated in **Mansoob Haider**. It was a temporary injunction application made in a suit for infringement of copyright. The plaintiff was a professional film script writer. The short facts, giving rise to the action and the temporary injunction matter there, as these figure in the report of the decision in **Mansoob Haider**, are extracted below :

"1. The Plaintiff, a professional film script writer, and whose father wrote scripts and dialogue for notable films, is the author of the film script entitled "ONCE". The entirety of this script is annexed to the plaint at Exhibit "B". The Plaintiff claims that a recently released film, Dhoom 3, infringes the Plaintiff's copyright in his script "ONCE". In the suit, the Plaintiff seeks an order that he be given credit in the titles of the film.

2. The Plaintiff claims that he had delivered this script to 1st Defendant's office. Three years later, the film Dhoom 3 was released....."

38. In the aforesaid context, the principles relating to what would be essential for the plaintiff to succeed in an action for infringement and *a fortiori*, on a motion for temporary injunction pending suit, were laid down in **Mansoob Haider** thus :

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

(a) Has the plaintiff proved that the defendant had access to his work?

(b) On considering the two works, would an ordinary person inevitably conclude that the defendant had copied the plaintiff's work? (the subjective or intrinsic test); and

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

39. Even if a plaintiff fails on the first question, he may yet succeed on the second and third questions. But if he fails on the second question also, then I do not see how he can possibly succeed on the third alone. But that may arise in another matter. In this case, in my view, the present Plaintiff fails on all three counts. Indeed, his case is

not even based on the second question, but only on the first and his own variation of the third: that Defendants Nos. 1 to 3 had access and that there are common elements, even if these are not shown to be entirely unique and some of which are later given up as being original (the magic trick) or demonstrated to be untrue (being set in a foreign locale). The Plaintiff's variation on the third question is a sort of *reductio ad absurdum*: a vivisection of individual elements, a false and misleading juxtaposition of these, and, on that basis, to 'round up the usual suspects' and invite a finding of infringement. If these elements, however and wherever placed, are in support of an entirely different premise and story line, there can be no copying, no piracy and no infringement.

#### G. Conclusions

40. In my view, there is no case whatsoever made out for the grant of interim relief. The Plaintiff has not made out a *prima-facie* case. I am not convinced that the Plaintiff has even been able to demonstrate that his work was given to, let alone seen, by the 1st Defendant or any of its employees, officers or principal personnel. The two works are entirely different, each original in its own way. The film *Dhoom 3* is not and cannot possibly be said to be a copy of the Plaintiff's work *Once*. The material propositions and premise of the two works are entirely dissimilar. The mere use in both of certain well established and commonly used motifs, themes or elements or even the perhaps co-incidental placing of these in a certain juxtaposition gives the Plaintiff no rights against the rival work."

39. Therefore, the question that is required to be addressed is not about the burden of proof, or so to speak, the defendants' burden as the plaintiff claims, once they (the defendants) opposed the application for discovery to disclose the contents of the script that is the basis of the feature film, but whether the plaintiff has a triable case pleaded on the parameters of an action for infringement. It has already been held that there is absolutely vague pleading to show that the defendant could have had access to the copyrighted work. The Court in **Mansoob Haider** no doubt, has said that failing on the point of access, the plaintiff can still succeed, upon showing that on a comparison of the two works, an ordinary person would inevitably conclude that defendants had copied the plaintiff's work. There is some doubt whether access has to be necessarily proved, but assuming that it is required to be proved, it would still be necessary for the plaintiff to plead and show that an ordinary person, in comparing the copyrighted work and the feature film, would inevitably come to the conclusion that the latter is a copy of the former.

40. It must be remarked here that before this Court, during the hearing, the Court asked the defendants if they would produce the script, on the foundation of which, the feature film was produced. On instructions sought, the defendants said that they were willing and would produce it. They did so during the hearing on 26.08.2021. At the instance of the plaintiff, the defendants also filed an affidavit to the effect that the final script, on the foot whereof the feature film has been developed and produced, authored by one Ranjeet Kapoor, is the one that is being passed on to the Court. However, the defendants declined to share the script with the plaintiff. The Court, therefore, compared the copyrighted script that was provided by the plaintiff and the script on which the feature film is founded, without sharing it with parties or the advantage of hearing learned Counsel. The Court has nevertheless very carefully compared the two scripts. There is no doubt that they share a common theme. But, it is equally true that the two are distinct and individual treatments of the same subject and theme developed by different individuals in their own way, as a result of their individual intellectual exertions. The two scripts *prima facie* are distinctly different treatments of the same theme. The similarity of the theme consists in the protagonist of the story, wandering off onto a mysterious road – a highway, and landing in distress amidst mysterious characters, who are retired members of the legal profession: a Judge, a prosecutor, a defence counsel and a hangman. The protagonist in both the scripts has some kind of a wrongdoing, a crime to hide, which, in a game, these four men play about a mock court, he reveals when put on trial for the game's fun. In both the themes, ultimately, he dies. This is the theme to be found in the novel "A Dangerous Game", authored by Friedrich Durrenmatt. But, that



is not what is relevant. What is to be seen is whether the plaintiff's treatment of the theme in his original way has been plagiarized. The law appears to be that infringement of a copyright is not about the novelty of the work, but about its originality. A very old theme may receive a different and distinctive creative development at the hands of different individuals. Both would be entitled to the copyrights of their originality. The commonality of the theme would not offer any cause of action for infringement.

41. In this connection, reference may be made to the decision of the Bombay High Court in **XYZ Films v. UTV Motion Pictures/ UTV Software Communications Ltd.**<sup>11</sup>. In the said decision, the test about what would constitute violation of a copyright was laid down thus :

"32. In my view, these quoted portions do not actually assist Dr. Saraf at all. To the contrary, they seem to be against him. The Plaintiffs' copyright does not subsist in any so-called 'central' theme or concept. It subsists only in a particular realization of it; and if that is not copied, and the rival work is wholly different, there is no infringement. I must agree with this view that there is, generally speaking, no copyright in the central idea or theme of a story or a play. It subsists in a combination of situations, events and scenes which, working together, form the realization or expression of that idea or theme. If this combination is totally different and yields a completely different result, the taking of the idea or the theme is not copyright infringement. To my mind this would seem to apply almost exactly to the case at hand. As the Australian Court said another author who materially varies the incidents and character and materially changes the story is not an infringer of copyright."

42. This question about what originality of the impugned work would mean in the context of a copyright violation was considered by the Rajasthan High Court in **Fateh Singh Mehta (supra)**, where the principle was laid down:

"7. .... The originality which is required relates to the expression of the thought but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work that it should originate from the author (See *University of London Press Limited v. University Tutorial Press Limited* (2). Thus it is well settled that the originality in work relates to the expression of thought. Much depends on the skill, labour knowledge and the capacity to digest and utilizes the new materials contributed by the others in imparting to the product the quality and the

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character which those materials did not possess and which differentiate the product from the materials used. It was stated in the decision reported in AIR 1973 MP 261 that the law of copy right do not protect ideas but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceeding work upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revisial and correction as to produce an original result. The question whether there has been an infringement of copy right depends on whether a colourable limitation has been made."

43. Assuming that the plaintiff has a copyright in the copyrighted work, the law about what would possibly constitute a violation of that copyright has to be further examined for the purpose of this appeal, which after all asserts a right to temporary injunction forbearing release of the feature film pending suit. In the opinion of this Court, it would be apposite to look to guidance in authority also where the point was, whether the plaintiff acquired copyright in a literary work, that he was entitled to protect. This is so because the criteria for the acquisition of copyright in a literary work would be the same as that in claiming a violation of it. The difference would be only about the vantage of the parties claiming. The substance of the right is originality. In one case, it is about the copyright to be ascertained in the literary work that is claimed, and in the other, assuming that the right exists in the person claiming, whether the infringing work is also original enough so as not to be a violation of the claimed copyright. **Macmillan and Company, Limited v. K. and J. Cooper**<sup>12</sup> was a case that arose under the Copyright Act, 1911, where the issue before their Lordships of the Privy Council was whether the plaintiff's work had sufficient originality to entitle it to a copyright. It has been held thus:

"The only other authority on the point of the acquisition of copyright to which it is necessary to refer is the case of *UNIVERSITY OF LONDON PRESS, LTD., v. UNIVERSITY TUTORIAL PRESS, LTD.*, (9) in which Mr. Justice Peterson, dealing with the meaning of the words "original literary work used in Section 1, sub-section 1," of the Act of 1911, at page 608 says:

<sup>12</sup> AIR 1924 Privy Council 75

"The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas but with the expression of thought; and in the case of literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work that it should originate from the author."

In their Lordships' view this is the correct construction of the words of S. 1, sub-section 1, and they adopt it.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree. ...."

44. This issue has engaged the attention of the Supreme Court of Canada in a relatively recent decision in **Law Society of Upper Canada v. CCH Canadian Limited**<sup>13</sup>. The issue before the Supreme Court of Canada relating to violation of copyright arose in the context of provision of custom photocopying services by the Law Society of Upper Canada, a statutory non-profit corporation of some standing. The law society maintained and operated a library equipped with reference and research material said to be the largest collection of legal material in Canada. The library provided a request – based photocopy service for the law society members, judicial and other authorized researchers. Under its custom photocopy service, the desired photocopies of material were delivered in person or by mail to persons eligible to avail this facility of the library. The law society also maintained self-service photocopiers for use by its patrons. Some publishers of law reports, photocopies whereof were permitted by the library to be taken by its patrons, commenced action for infringement of their copyright. This was broadly the contours of the action that ultimately travelled to the Supreme Court of Canada, where, amongst the several issues decided, one was the contemporary

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views of Court about 'originality' in the copyright law, albeit in the context of the Canadian Statute. The learned Chief Justice speaking for a unanimous Court held:

"(iii) *Recent Jurisprudence*

21. Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct*, supra, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.), at para. 8, adopting this passage.

22. The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist*, supra. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement — the compiler's original contributions — to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information." ... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law — that no one may copyright facts or ideas.

As this Court recognized in *Compo*, supra, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor J.'s concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist*, supra, at pp. 345 and 358.

(iv) *Purpose of the Copyright Act*

23. As mentioned, in *Théberge*, supra, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, "The Public Domain" (1990), 39 *Emory L.J.* 965, at p. 969, and C.J. Craig, "Locke, Labour and Limiting the Author's Right: A

Warning against a Lockean Approach to Copyright Law" (2002), 28 Queen's L.J. 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) *Workable, Yet Fair Standard*

24. Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) *Conclusion*

25. For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

**45. The Canadian decision shows that the standard of originality, where the impugned work would not be regarded as infringement, ought to be an exercise of skill and judgment by the author, where the changes that he affects are not so trivial as may be regarded as purely mechanical. This standard would seem to give leeway to an author to write about a theme, that is the subject matter of the work of which infringement is claimed without risk, provided he puts in his intellectual skill, learning and judgment, in his own way, and not merely doing a cosmetic change over. Reference in this context must be made to a very old decision by the Circuit Court, D. Massachusetts in **Greene v. Bishop**<sup>14</sup>, where the Court, faced with the same issue, held:**

"Copying is not confined to literal repetition, but includes, also, the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable

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14 **10 Fed Cas 1128**

alterations to disguise the piracy. In all such cases, says Mr. Curtis (Curtis, Copyr. 253), the main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all waiters, or whether he has adopted and used the plan of the work which it is alleged he has infringed, without resorting to the other sources from which he had a right to borrow. Within these principles, both the report of the master, and the evidence on which it is founded, show that the respondent has copied what in judgment of law was exclusively secured to the complainant, under and by virtue of his respective copyrights."

46. In India the law relating to copyright in its historical perspective finds reference in the decision of the Madhya Pradesh High Court in **M/s. Mishra Bandhu Karyalaya and others v. Shivratn Lal Koshal**<sup>15</sup>. The brief history of this legislation finds mention in paragraph 11 of the report, which reads:

"11. We are, however, concerned with the state of things prevalent prior to 21st January, 1958, when the Copyright Act, 1957 (Act. No. 14 of 1957), was brought into force. The law then in force was the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) which, with slight modification, was made applicable to this Country by the Indian Copyright Act (Act No. 3 of 1914). The Imperial Copyright Act, 1911, either as operating proprio vigore or as applied by the Indian Copyright Act, 1914, was "a law in force in the territory of India immediately before the commencement of the Constitution", and it, therefore, continued to be in force as the law of the land by virtue of Article 372(1) of the Constitution. We consider the following passage in *Copinger and Skone James on Copyright*, 9th Edn., pp. 428-9, as describing the position correctly.

"The United Kingdom Copyright Act, 1911, extended to India as part of His Majesty's dominions, but certain modifications were introduced by the Indian Copyright Act, 1914 (No. 3 of 1914). The effect of Section 18 of the Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) appeared to be that copyright protection both in India and with respect to works originating there remained unchanged."

47. The point under consideration was dealt with by their Lordships of the Division in **M/s. Mishra Bandhu Karyalaya**, thus:

"40. It would thus appear that a 'copy' is that which comes so near the original as to suggest the original to the mind of the reader. The dictum of Kekewich, J., in 1908-1 Ch 519 (supra) has throughout been followed and applied in India. See *Sitanath Basak v. Mohini Mohan Singh*, 34 Cal WN 540 : (AIR 1931 Cal 233), *Mohendra Chandra Nath Ghosh v. Emperor*, AIR 1928 Cal 359, *Kartar Singh v. Ladha Singh*, AIR 1934 Lah 777 and *Gopal Das v. Jagannath Prasad*, ILR (1938) All 370 : (AIR 1938 All 266).

41. Applying these principles to the present case, we are unable to find any material showing that the "Purva Madhyamik Ank Ganeet" published by the defendants, was a copy or a colourful imitation of the 'Saral Middle School Ank Ganit' written by the author. Suffice to

say, the laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The rule appears to be settled that the compiler of a work. In which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. See, *Spiers v. Brown*, 1858-6 WR 352, *Reade v. Lacy*, (1861) 128 RR 508 and *Hotten v. Arthur*, (1863) 136 RR 249, cited by Bamet and Ganga Nath, JJ., in ILR (1938) All 370 : (AIR 1938 All 266) (supra)."

48. The decision of the Division Bench of the Madhya Pradesh High Court in **M/s. Mishra Bandhu Karyalaya** was overruled by a Full Bench of that Court in **K.C. Bokadia and another v. Dinesh Chandra Dubey**<sup>16</sup> on a different point without disturbing the exposition of the law, that is under consideration here.

49. The distinction between what would constitute infringement of copyright on account of the statutory changes in the Copyright Act, 1957, varying the earlier provisions of the Imperial Copyright Act, 1911 or the Indian Copyright Act, 1914 fell for consideration of a Division Bench of the Madras High Court in **The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern**<sup>17</sup>. There, it was held:

"15. .... Learned Counsel Sri Sankara Ayyar, appearing for the appellant, drew our attention to a difference between the earlier Copyright Act and the Act of 1957. In section 35(1)(c) of the former Act infringing when applied to a copy of a work, in which copyright subsists, has been defined as any copy including any colourable imitation, made, or imported in contravention of the provisions of this Act. It was urged before us that the new Act did not refer to colourable imitation as constituting an infringement. It was contended that any person could now make a colourable imitation of a painting or other artistic work without being held guilty of infringement of the copyright. The earlier Act had already defined what infringement of a copyright meant in section 2(1) but in another place of the same Act in section 35(1) the meaning of the word infringement was again explained. What Act XIV of 1957, did apparently was to bring together the definition of infringement in one place in section 14(1). The English Act of 1956 appears to have also left out the term colourable imitation of an artistic work as constituting an element of infringement. Adverting to this, Copinger observes in his *Law of Copyright* ninth edition at page 147:—

"Section 35(1) of the Act of 1911 in defining 'infringing copy' employed the expression 'colourable imitation' but this expression does not appear in the Act of 1956 The question therefore appears

16 1995 SCC OnLine MP 191

17 1964 SCC OnLine Mad 29

to turn solely upon the interpretation of the expression 'reproduction' and the definition of that word in section 48(1) of the Act of 1956 does not assist, as this definition merely includes certain special forms of reproduction. It is apprehended, however, that the word 'reproduction' in the Act of 1956 has the same sense as the word 'copy' has acquired in copyright law."

16. After the deletion of the words colourable imitation in the Act of 1957, to find out the meaning of infringement one has therefore, necessarily to interpret the words 'reproduce the work in any material form' Section 14(2) of the Act includes also the reproduction of a substantial part of the work, for the purposes of infringement of copyright. The word 'reproduce' is a word of ordinary-popular usage. However, the Shorter Oxford English Dictionary refers to the progressive evolution of its meaning

'The action or process of bringing again before the mind in the same form. The action or process of repeating in a copy A copy or counterpart. A copy of a picture or other work of art by means of engraving or some other process and finally a representation in some form or by some means of the essential features of a thing.'

17. It therefore appears quite likely that when Act XIV of 1957, repealed the earlier enactments and consolidated the law of copyright in India, it adopted the procedure followed in the English Act XIX of 1956, of using the word 'reproduction' both of the work itself or a substantial part of it, as a sufficient indication of the scope of infringement and dropped the term 'colourable imitation', as superfluous or redundant."

**50. There was a wholesome consideration of the issue by the Supreme Court in *R.G. Anand v. Delux Films and others*<sup>18</sup>, where, what would constitute infringement of a copyright, led to elaborate guidance about it. In *R.G. Anand*, it was held:**

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

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest 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 negate 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, 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."

51. Here, the comparison between the two scripts which the Court has undertaken albeit *prima facie*, shows that after the principle theme that is common to both scripts, are a host of differences in the script leading to the feature film. The protagonist, Mehra, in the script relating to the feature film, suddenly takes a diversion while proceeding to Delhi, when he comes across a road sign, where the diversion that leads to the shortcut indicates a distance to destination of 210 kms., instead of 285 kms. on the main highway. The scene is in a hilly terrain and the car is caught on a road full of snow. It is held up on account of a tree being uprooted and falling onto the road, causing the car to suddenly stop and bump against the snow.

52. By contrast, in the copyrighted version, the theme stands with a welcome to the protagonist in a club along with his newly-wedded wife (his second wife). There is a long course of events involving the protagonist Rohit and his newly-wedded wife Tanya, until time that he leaves to inspect a work site in between a holiday, with his wife. As he reaches the outskirts of the city, he comes across a petrol pump which is mysterious. There, he meets a very scary pump attendant. The highway

that he then takes to his work site is mysterious and has no traffic. His car suddenly goes out of order, with steam rushing from somewhere under the bonnet. It does not restart. He walks on foot and finds himself in the midst of a forest. He returns back to the car. After some time, he gets out again, moves into the forest and meets another mysterious man, who ultimately takes him to a mysterious-looking dwarf, who has an equally mysterious-looking wife. The dwarf takes him to the house of a retired High Court Chief Justice, where he comes across four men from the legal profession in similar roles as in the script, giving rise to the feature film. The four men involved behave far more mysteriously than those in the feature film/ script. They act and behave in a much different manner. The manner in which they accuse Rohit of a crime and mock-trial him is quite different and distinctive *prima facie*. Rohit dies ultimately in a car accident at the same place, where his first wife had died.

53. Noticeably, in the script giving rise to the feature film, the four men of the legal profession and Mehra's introduction to them is in a much different fashion. The story leading to the mock trial is developed in its own individual way, much different from the copyrighted version. In the script that is the foundation of the feature film, there is a completely different end, where Mehra is sentenced to death by the Judge in the mock-trial. He was made to believe that he would indeed be hanged. During the course of trial, he goes into great distress and turns violent. During the trial and at the end of it, he utters many things, about which the men from the legal profession tell him that the camera connected to a recorder has captured crimes, to which Mehra has confessed during the mock trial and the incriminating facts that he had uttered. He is threatened with being put on his trial upon charges before a real court. He then

tries to break away using his revolver. Mehra ultimately dies while running away falling into a chasm, and cannot be saved despite efforts by the four men who mocked his trial.

54. There is, thus, *prima facie* a materially different and distinctive development and treatment of the same theme in both the scripts. In the *prima facie* opinion of this Court, there is, apart from the fundamentals of the basic theme that appear to have come from a common source, no such distinctive feature in the copyrighted version that have been *prima facie* plagiarized. It must be remarked here that whatever comparison has been done, is not, in any manner, a final expression of opinion on merits about the distinctive similarities or the dissimilarities. That is something that has to await trial, where wholesome evidence would now be led. All the remarks here are limited to the decision of the temporary injunction matter and nothing more.

55. Now, a still further issue that is required to be examined is what would happen if at the hearing, the plaintiff were to ultimately succeed. Would damages alone be recompense enough? There is relief sought by way of a decree for rendition of accounts of the advance amount received by the defendants from the distribution companies, television channels, OTT platforms, television networks by selling distribution rights/streaming rights of the feature film, infringing the plaintiff's copyright. The said decree would entitle the plaintiff, if he succeeds, to proportionate proceeds on account, as may be determined that the film earns. But, apart from that, if the copyright is ultimately held to be infringed at the trial, monetary compensation may not be recompense enough. It is, therefore, to be ordered that if the plaintiff succeeds, all further displays of the feature film shall have to carry an acknowledgment, suitably

to be displayed that the movie is based on the copyrighted work, which is the plaintiff's authorship. Also, the trial of the suit is to be expedited. Since the learned District Judge is hearing the suit himself, he will proceed with the suit, fixing one date every week and endeavour to conclude the trial within four months.

56. Subject to the above directions, the impugned order does not deserve to be disturbed.

57. The appeal is **disposed of** in terms of the aforesaid orders. Costs in this appeal shall abide the event in the suit.

58. Let this order be communicated to the District Judge, Ghaziabad by the Registrar (Compliance).

**Order Date** :- 27.8.2021  
Anoop/ I. Batabyal