

SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 1940 OF 2016

IN

SUIT (L) NO. 694 OF 2016

Balaji Motion Pictures Ltd. & Anr.

...Plaintiffs

Versus

Bharat Sanchar Nigam Ltd. & Ors.

...Defendants

**Mr. V. R. Dhond, Senior Advocate, with Mr. Shailesh Mandon, a/w
Mr. N. Rodriguse, i/b R. M. Partners, for the Plaintiffs.**

**Mr. Sushant Mohendru, Technical Director of Aiplex Software
Private Limited, present.**

CORAM: G.S. PATEL, J

DATED: 4th July 2016

PC:-

1. Not on board. Mentioned. Taken on board.

2. This matter was moved in urgency on Friday, 1st July 2016. On that day I passed an order setting out why I was unprepared to grant the injunction in the terms that were then placed before me. I found the reliefs to be overbroad. They were directed against to entire websites. I left it open to the Plaintiffs to renew that application after placing on an Affidavit additional and more precise information and data about offending links that point to illicit downloads of the film in question, *Great Grand Masti*. This film's scheduled release is 22nd July 2016.

3. Mr. Dhond renews the application today. He does so on the basis of an Additional Affidavit dated 4th July 2016 affirmed by one Mr. Ayan Roy Chowdhury, the Plaintiffs' general counsel. This Affidavit sets out considerably more detail. I propose to consider some of the material of this Affidavit. To begin with, the Affidavit points out that someone named of Wasim Akram Ansari posted a message to Twitter on 29th July 2016 reporting the leak of *Great Grand Masti*. A copy of this Twitter post is at page 6 to this Affidavit (it is also annexed to the Plaint). The post appears to have a screen shot of a scene from the film. In the bottom right hand corner of that screenshot is a clearly imprinted legend: "censor copy". On that very day, the Plaintiffs were also notified by the film's actors about a possible, and entirely illegal, leak of this film. As the present Affidavit itself says, there are two possibilities: either the entire film was leaked or someone obtained an image of that solitary scene. But even the second scenario posits that any person who took such a screen shot would, at a minimum, have had to have access to the film. That access is clearly unauthorised. But this was all previously available material, and it did not, on its own, form a sufficient basis for the injunction.

4. Mr. Dhond then points out that there are now other screenshots at pages 60 to 62, Exhibit "C", to the present Affidavit of messages from other Twitter users. These Twitterati seem to have obtained multiple screenshots of the film. The second and third messages report a leak of the film. What is curious is the first message at page 60. This says that the second half of this film is "Supebb". Even allowing for the linguistic damage caused by this medium, there can be no mistake about what the message conveys.

It extols the films, and it extols a specific portion of it. That would be impossible without a viewing. Any such viewing outside the certification board is illicit.

5. It is in this context, and following my previous order, that the Plaintiffs have now over the weekend engaged the services of two professional anti-piracy agencies, viz., Aiplex Software Private Limited and Markscan, with a mandate to analyse potentially infringing web-based links to illicit downloads of the films. Both agencies deployed some software and web-based technology, including web crawlers. They identified a list of potential URLs on different web pages that, *prima facie*, point to specific illicit downloads of the film.

6. Paragraph 14 of the Affidavit makes an assertion on oath that the period between 29th June and 2nd July saw a sharp surge in number of infringing links and URLs. The Affidavit also says that clips of the film were uploaded to YouTube on 3rd July 2016. The Plaintiffs' complained and sent out take down notices through Markscan and Aiplex. Those clips have now been removed.

7. The Plaintiffs say that they have not been able to locate the culprits, but they have approached the Cyber Police Station, Bandra Kurla Complex, Mumbai. Paragraph 17 and 18 of this Affidavit set out the potential loss and damage likely to be caused to the Plaintiffs.

8. In fairness, when I pointed out that the cast of the prayers in the Motion is much too wide and relates to entire websites, Mr. Dhond agreed to amend these. He now places a draft amendment to the Motion. This is taken on record and marked “X” for identification. Leave to amend forthwith, without need of reverification. The amendment introduces prayer a(iv). The cast of this prayer is more accurate. It is directed to individual infringing URLs or weblinks. I will set out the wording of the prayer shortly.

9. At this stage, I must briefly note the reason for making these additional demands on the Plaintiffs, especially given that there is a long history of broad-based John Doe orders in the past. I myself have passed some of those orders. But this in itself is no reason to continue with a trend that seems to me if not downright dangerous, at least one that requires the introduction of some caution and circumspection. I have noticed some criticism of such orders on various legal sites and journals particularly as to their width, ambit and tendency to last for a long time without sufficient judicial oversight in the interregnum.¹ Criticism should always be welcome; studied and measured criticism set out with rancour or invective, even more so. This, after all, is the discourse of law, and I see no reason why orders and judgments should stand outside this discourse. The source of the criticism is surely immaterial, and the fact that the criticism is on a website or portal is not itself reason to view it with either suspicion or disdain. There is a vast body of sound academic writing online. If the law is to progress, an

1 *Udta Punjab*: Of Courts, Cuts, Copyrights and Conflicted Counsels; - by Prof. Shamnad Basheer, LiveLaw.in; <http://bit.ly/29kRyrj>; *Udta Punjab*: An IP Controversy [Part I], by Vasundhara Majithia, Spicy IP.com; <http://bit.ly/28NwcVJ>

engagement with such criticism is essential. I do not suggest, of course, that any court or decision-making authority or body should be over-sensitive; the nature of the task demands a thick hide. Nor do I suggest that every barb and jibe deserves a response or the indulgence of scarce time and resources. However, where there is a point well-taken, it surely at least merits some thought. We should, I believe, be remiss in the performance of our public duty if we were to ignore a valid critique. Every system must have a process of self-correction where one is needed; nothing is written in stone. In the present case, the point being made is that the entrenched format of the John Doe orders was far too broad and admitted of little or no scrutiny. They had the potential of shutting down entire websites and blocking all content, even legitimate content. As I said last Friday, such orders proceeded on the implicit assumption that the entirety of the content of all these cited websites was illicit; that no verification was necessary; that the illicit content had been established to the satisfaction of the Court; and possibly that the entirety of the content of these sites related only to the immediate complaint at hand. It is, on reflection, impossible to justify any of these. There are, I think, at play here far larger issues, including of an unattended and unsupervised and judicially mandated policing of the Internet.

10. These are among the reasons I asked the Plaintiffs in this case to give me more specifics on Affidavit, and to supply me with more cogent material as the basis of the order. The fact that this information has been obtained with such apparent ease leads me to believe that the criticism is in fact well-founded. We just never sought it earlier. I do so now.

11. Having read the new Affidavit, I am satisfied that the Plaintiffs have met the threshold criteria. I must also commend Mr. Dhond for so readily accepting that the frame of the prayers was much too wide and for suggesting a perfectly acceptable alternative by way of the present amendment.

12. Finally, I turn to Exhibit "D" to this Affidavit. This is a tabulation on a larger fold-out sheet of some 482 individual links. This analysis has been carried out by the two agencies mentioned earlier. The links are not to websites but point to individual download links of the film in question. Some of these links have the name of the film and the year (2016) as part of the URL. The statement on Affidavit is that these are suspected or potentially infringing links. Some of these have been checked. The last column of this chart has a column called 'status'. Some of the links have the status "approved". I am informed by Mr. Sushant on behalf of the Plaintiffs, who is present in Court, that this means that the Plaintiffs approached Google, which in turn has, after verification, removed all search results that display these links. Not all these links have been "approved". Many are yet pending review. The Affidavit itself in paragraph 13 references this chart and the fact that this has been prepared by these two agencies commissioned by the Plaintiffs.

13. As to the *prima facie* case, I believe Mr. Dhond has made this out sufficiently with references to the posts to which I have referred.

14. I am satisfied that this is sufficient material for the grant of the narrowed relief that Mr. Dhond now seeks. There will,

therefore, be an ad-interim injunction in terms of prayer clause a(iv), which reads as follows:

“(a)iv. Grant an order of temporary injunction directing the Defendants to take measures to block access to the 482 urls/web links at page 63 of the Additional Affidavit dated 4th July 2016 and/or other active urls/weblinks which contain or purport to contain, an infringing or illicit copy of the said Film “**Great Grand Masti**” or part thereof, upon the Plaintiffs or their authorised representatives, providing details of such infringing urls/ web links to the Defendants or upon the Senior Inspector of the Cyber Police Station, Bandra Kurla Complex notifying the Defendants about the same;”

15. I am making it clear that the Plaintiffs will be at liberty to move against all or any of those 482 URLs if they are found to be active. In other words, it is not expected that these links should be active today at the time when this order is passed.

16. In addition, the Plaintiffs will be at liberty, without further reference to Court, but only during the time when this order is operative, to approach the Cyber Crime Cell with any other weblink or URL pointing to an individual download. Before the Cyber Crime Cell the Plaintiffs will place such material as it has obtained verifying that download. Of course, the Cyber Crime Cell is also expected to carry out an independent assessment before acting further in the matter.

17. As regards intermediaries and cable/DTH operators, there will be an injunction restraining them from making any broadcast or making available any form of download of this film without a specific written authorisation from the Plaintiffs.

18. The Plaintiffs will comply with the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 in respect of the named Defendants within a period of one week from today. The Plaintiffs will also be at liberty to issue a public notice setting out the substance of this order. This will be a sufficient service on the John Doe Defendants.

19. Liberty to any of the named Defendants to apply for a variation, modification or recall of this order after four clear working days' notice to the Advocates for the Plaintiffs.

20. This injunction will operate till 4th October 2016.

21. List the Notice of Motion on the supplementary board for further ad-interim reliefs on 3rd October 2016.

22. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)