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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 2147 OF 2016
IN
SUIT (L) NO. 755 OF 2016**

Eros International Media Limited & Another ...Plaintiffs
Versus
Bharat Sanchar Nigam Limited & 49 others ...Defendants

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

**CORAM: G.S. PATEL, J
DATED: 26th July 2016**

PC:-

1. Not on board. Mentioned. Taken on board.
2. Mr. Dhond renews his application for an *ex parte* ad-interim reliefs in this *John Doe* action. This follows the previous order dated 22nd July 2016, in which, on the information then available, I did not grant immediate relief but left it open to the Plaintiffs to apply again.
3. Given the nature of these applications and their frequency, it is perhaps time to consider what it is we really mean when we say

this is a 'hybrid' action. The hybridity is not only because a '*John Doe*' (or '*Ashok Kumar*') action combines principles of a representative action with an invocation of inherent powers of the Court to gain orders against a person or persons unknown; the hybridity is actually now a combination of several distinct jurisprudential innovations: a form of an *Anton Piller* order of compelled compliance; an asset-blocking variant of the *Mareva* injunctions; the provisions of Order 1, Rule of the Code of Civil Procedure, 1908 ("CPC"); parts of Order 38 and 39 of the CPC and, of course, CPC Section 151.

4. The *John Doe* element lingers in a vestigial form. Increasingly, there are many named defendants, all services providers of one stripe or another. The small clutch of Ashok Kumars at the end of the cause title are supposed to represent, usually, those unidentified persons responsible for actual copyright infringement — for illegally uploading illicit content for Internet downloads and streaming; making bootleg CDs and DVDs, etc. More and more plaintiffs name and target service providers: blocking access is very like cutting off the oxygen or blood supply. I have yet to come across a reported case where an actual John Doe was ever finally traced and prosecuted.

5. Unfortunately, the trend of judicial orders has not, in my view, consistently instituted sufficient safeguards while granting these orders. Indeed, we may have been altogether too lax and too unmindful of the impact such orders possibly have even on legitimate business. The trouble stems, I believe, from the constantly shape-shifting nature of Internet and digital technology,

the swiftness of which is no match for the glacial pace of legislative and jurisprudential change; and perhaps, too, from a real fear that the Internet represents something both unknown and unknowable. Since we see ourselves as incapable or at least ill-equipped to forge a narrowly tailored definitions of those we propose to subject to judicially evolved restraints, the chosen course has often been to broaden the parameters on the footing that, once sufficiently broadened, the restraint net will almost certainly stop any miscreants who might otherwise slip through. When we do this, however, we sometimes impinge on the rights of innocents, those who are blameless and free from wrongdoing. We afford primacy — perhaps even *supremacy* — to those who hold statutory and common law rights in our Intellectual Property protection laws, and, by necessary implication, we hold that *all* other rights are subordinated to these. This has often resulted in an one-sided, and even lopsided, frame for these orders.

6. There is a very real contest between competing rights or competing equities in cases such as these, and we should be astute enough, I now think, to acknowledge that some balancing is essential. A Court is bound to recognize, and indeed it has no choice in the matter, that parties such as the present Plaintiffs do have valuable statutory rights in their films. This copyright is an asset. It represents a tangible monetary value, not only in terms of what can be gained by transacting with it, but perhaps, and more importantly, by what is lost when the value of that copyright is diminished on account of piracy and illicit copying. Sometimes, it even boils down to a simple arithmetical equation: if those who would ordinarily buy tickets to see a film in a theatre have already seen an illegal copy on

their cell phones or computers, the revenue loss to the holder of copyright is direct, immediate and obvious.

7. This does not, however, mean that in the protection of that copyright one should make orders that are in terms so wide that there is no concern about innocents who might be adversely affected. There is no concept of 'acceptable collateral damage' in law. It simply will not do to obtain an order which is in the nature of a carpet-bombing or scatter-shot salvo, where several persons are struck at the same time, many guilty but some (perhaps very few) perfectly innocent. I believe a much more granular approach is necessary, one that balances the right and interests of the Plaintiff while safeguarding the legitimate rights, protected by the Constitution in terms of business, free speech and all the other essential freedoms of individuals.

8. I have already noted that the film in question *Dishoom* is scheduled for release on 29th July 2016, a few days from now. Hence the urgency. Defendants Nos. 1 to 42 are internet service providers, cable operators and the like.

9. Mr. Dhond has now placed before me an Additional Affidavit in Support dated 26th July 2016 of Mr. Aamod Gupte, the Group General Counsel of the 1st Plaintiff and the authorized signatory of the 2nd Plaintiff. I propose now to consider this Affidavit in some detail.

10. In paragraphs 4 and 5 of this Affidavit, Mr. Gupte sets out that following my previous order of 22nd July 2016, the Plaintiffs instructed Aiplex Software Private Limited (“**Aiplex**”) to carry out a detailed verification of a list of URLs or weblinks that showed or indicated the potential availability of illegal or illicit copies of the Plaintiffs’ film *Dishoom*. Pausing here, I note that there is, in this case, no source of information that the film has already been leaked; the anxiety is that the threat of this leak grow more imminent as the theatrical release date approaches. This is important, for it marks the present action clearly as a *quia timet* action, one instituted in anticipation of possible injury.

11. The Plaintiffs also asked Aiplex to provide supporting documents and evidence in support of each such URL or weblink. Aiplex sent on a list of 134 web links. A categorical statement is made in paragraph 4 in these terms:

“As stated above, these links are currently dormant. They will, however, spring to life and become active as soon as an offending copy of the film becomes available on the internet.”

12. The Affidavit goes on to say that Aiplex forwarded to the Plaintiffs detailed supporting documents and evidence. This evidence takes the form of screenshots evidencing the specific page contents of each URL. In other words, Aiplex troubled itself to visit each link and then obtained a screenshot of the resultant webpage. This is used by the Plaintiffs to establish and demonstrate that these URLs and web links do in fact claim to offer illicit copies of the film (not just trailers and promos). By its letter of 25th July 2016, a copy

of which is at Exhibit "C" to this Affidavit, Aiplex in writing confirmed that it had verified every single one of these URLs.

13. In paragraph 5, Mr. Gupte then says that he and the Plaintiffs' Advocates further personally cross-checked all the web links and URLs mentioned at Exhibit "B" with the supporting documents, and he confirms that they found each of these web links or URLs do indeed purport to potentially offer free downloads or streaming of illegal copies of the film. This is verified and confirmed on Affidavit.

14. Thus, what I have before me now is a three-step verification. First, a verification and an assessment by Aiplex. This is accompanied by their letter in writing. There is then a second level of verification that is said to have been done by the deponent of the Affidavit along with the Plaintiffs' Advocates; and finally all of this material is placed on Affidavit and is now on oath. I think this is sufficient material on which to base an order.

15. The rest of the Affidavit deals with past instances. In paragraph 6 there is an expression of a serious apprehension that these links will be activated very quickly. Paragraph 10 also sets out the potential loss to the Plaintiffs. These elements are also essential in an action of this type.

16. I turn now to Exhibit "B" which is, first, a two-page listing of these 134 links. This is at pages 8 and 9 of the Affidavit. Thereafter, from page 10 to page 143 are screenshots of the respective web pages. I do not claim myself to have examined all 134 of these links. I

do not think it would be reasonable to expect Courts with overcrowded dockets to do this. What we need, perhaps, is a neutral, third-party agency to verify these claims; but till such an entity comes into being, we will have to make do as best we can. What I have done, however, is to quickly scan the list for any discrepancies. I notice none. I see that this list shown to me today is very different from the list that was shown to me on 22nd July 2016. This is a much more carefully curated list. I do not find in this any reference to links to trailers of the film or to shopping portals. The supporting documents from pages 10 to 143, and these too I have quickly scanned, going through each page, do support what the Plaintiffs state. All of these speak of free downloads of the “full movie”. For instance, at page 11 the caption is “Dishoom (2016) full movie download” and below this we find details of the film quality, file size and file format. Much the same material is on all the subsequent pages. I have not in fact been able to find a single screenshot in this list that points to either a trailer or any permissible display of these contents. There is no material on these pages that is kosher: the entire page (and we are not here speaking of an entire site) is specific to a download of the movie in question.

17. Mr. Dhond also points out, and I think he is perfectly correct in this, that the Plaintiffs have not given any contract to any party for the exploitation of right in this film. This may be viewed as an important contractual safeguard against online piracy, for what it is worth.

18. I am satisfied that there is a case made out for the grant of some measured relief in terms of the list now shown to me.

19. The Plaintiffs are permitted to replace or substitute the list at Exhibit "C" to the plaint (the much longer, original list, without sufficient verification) with the list of 134 verified and cross-checked URLs and web links annexed as Exhibit "B" to the present Affidavit.

20. Mr. Dhond also tenders a draft amendment to prayer clause (a)(v) to the Notice of Motion and prayer clause (f)(v) in the Plaint. This is allowed. The draft amendment is taken on record and marked "X" for identification. Both amendments are to be carried by the end of the day tomorrow, without need of reverification of the Plaint.

21. There will be an order in terms of amended prayer a (v), which reads as follows (I have added the portions that are underlined and deleted the portions shown as struck through):

"(a)(v) Grant an order of temporary injunction directing the Defendants to take measures to block access to the 134 URLs/weblinks at the amended Exhibit "C" of the Plaint ~~and/or other active URLs/weblinks~~ which contain or purport to contain, an infringing or illicit copy of the said Film "**Dhishoom**" or part thereof, upon the Plaintiffs or their authorised representatives, providing details of such infringing URLs/weblinks to the Defendants or upon the Senior Inspector of the Cyber Police Station, Bandra Kurla Complex notifying the Defendants about the same;"

22. It is once again clarified that the reference to Exhibit "C" is a reference to exhibit as amended, i.e., the substituted exhibit which now includes the 134 verified weblinks and URLs.

23. This order will operate against Defendants Nos. 1 to 42 with immediate effect.

24. In addition, the previous order as regards Section 52(1)(c) of the Copyright Act, 1957 will also apply. In other words, upon the Plaintiffs drawing the attention of any of the Defendants Nos. 1 to 42 to any specific verified URL, i.e., one verified in, at a minimum, the same manner as the 134 links discussed earlier, and which is shown to be a link to a page containing links for illicit downloads, display or streaming of the film in question, these Defendants will first restrict access to that URL or web link (not to an entire website) as required by Section 52(1)(c) and for the 21 day period mentioned in that section. For any continuance of the page-specific URL-block, the Plaintiffs must apply to Court, and liberty is expressly reserved to them to do so.

25. In addition, when the Plaintiffs call upon Defendants Nos. 1 to 42 to block access to the 134 URLs mentioned in Exhibit "C" to the Plaint as amended (or future specific, verified URLs as mentioned earlier), the Defendants will also display certain special default error pages when any attempt is made to access those blocked links. Those error pages are to contain suitably worded text prepared by the Plaintiffs' attorney and approved by Mr. Dhond:

- (a) Referencing the relevant provisions of the Copyright Act, 1957 that prescribe penalties for offences of copyright violations (mentioning specific sections, prison term and amounts); and
- (b) Referencing this order by its date, the suit number and the details of the present Suit. It is not necessary to reproduce the entire order. It is sufficient to state that the block of that particular link is authorised by this order. The suit number must be correctly mentioned.
- (c) A statement that any person aggrieved (i.e., not merely Defendants Nos. 1 to 42) by any such block may directly approach this Court with at least 48 hours' notice to the Advocates for the Plaintiffs (whose address is also to be given) for a variation or modification of this order in relation to that particular URL or web link.

I do not suggest that this information should be exhaustive or copious (as in setting out the entire Plaint or affidavit). It is sufficient to set out the essentials.

26. The second and third parts of the 'error page' notice are particularly important to ensure that even if some innocent person is inadvertently affected by a blocking action, he has the remedy of being immediately approaching the Court for relief. Returning to the original frame of the suit, and the array of parties, such an affected

party may well be described as the non-John Doe John Doe, i.e., a person though unknown at the time of filing the suit, yet not a person intended to be subjected to a restraint, but one found later to be affected by it. I believe this provision is important and a necessary safeguard. Without it, innocent third parties are left without a remedy except perhaps to venture an intervention application, never an easy thing in a civil suit. At the broadest level, the principle I advocate is this: if you seek a broad-based order, flinging a restraint net wide, then justice and equity demand that you make provision to save those you never intended to harm. It is, to my mind and in my judgment, unthinkable that a judicial order should so operate as to cover a multitude of unnamed entities and yet leave the innocent or blameless among them without a remedy.

27. In addition, I clarify that the Plaintiffs will still be at liberty to apply to Court (and not move directly under Section 52(1)(c) of the Copyright Act, 1977) for a block against the entirety of a particular website if they are able to demonstrate on the most comprehensive audit or review reasonably possible that they have found the entirety of that website to contain *only* illicit and infringing material (not necessarily their own) with no legitimate content whatsoever. In such cases, the Court may consider an order blocking an entire site. Any such application would necessarily needs sufficient supporting documents and evidence. There is no prohibition against ordering such a block, but the standard of care required is proportionately higher.

28. The present injunction will need to be time-limited and will continue till 3rd October 2016.

29. Liberty to the Plaintiffs to apply should the need arise.

(G. S. PATEL, J.)

Bombay High Court