

Bombay High Court

Dashrath B. Rathod And 2 Ors vs Fox Star Studios India Private Ltd ... on 21 March, 2017

Bench: G.S. Patel

Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors
P2-NMSL693-17.DOC

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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 693 OF 2017
IN
SUIT (L) NO. 196 OF 2017

Dashrath B Rathod & Ors

...Plaintiffs

Versus

Fox Star Studios India Pvt Ltd & ors

...Defendants

Mr Aldrin D'Costa, with Manoj Kumar Saboo, for the Plaintiffs.
Dr VV Tulzapurkar, Senior Advocate, with Mr VV Tulzapurkar,
Senior Advocate, Mr Sharan Jagtiani, Mr S Kadam, Ms
Apeksha Sharma, Mr Sanjil Kadam, Mr Deepak Enakphale &
Ms Sayalee Rajpurkar, i/b Kadam & Co, for Defendant No. 1.
Mr Rohan Kadam, with Mr Darshan R Mehta, Mr Kiran Desai, Mr
Bhavik C Mehta & Ms Surekha Srinivasan, i/b M/s. Dhruve
Liladhar & Co, for Defendants Nos. 2 to 5.

CORAM: G.S. PATEL, J
DATED: 21st March 2017

PC:

1.

Not on board. Mentioned. Taken on board.

2. Mr Saboo for the Plaintiffs seeks urgent circulation of a Notice of Motion in this Suit. He says that there is urgency because the Defendants' film Phillauri, alleged to be in violation of the 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC Plaintiffs' copyright in their 2013 Gujarati, Bhojpuri and Nepali film Mangal Phera, is slated for public theatrical release just a few day hence -- this very Friday, 24th March 2017. He asks that the matter be taken up tomorrow or the day after.

3. At this stage when the matter is mentioned for circulation, I am not, of course, addressing the merits of the claim. I only address the question of urgency. The basis of the copyright infringement claim is the trailer of the Defendants' film. The plaint itself acknowledges that the trailer was released over six weeks ago, if not more, on 6th February 2017 with an even then confirmed theatrical release date of 24th March 2017. This is so stated in paragraph 16 of the plaint, which then claims that the 1st Plaintiff's attention was drawn to this trailer on 24th February 2017. That of course will be tested. It is not in dispute that on 28th February 2017 the Plaintiffs' Advocate sent a notice to the Defendants. The 1st Defendant replied as early as 2nd March 2017 and then provided a more detailed response on 10th March 2017.

4. None of this explains why the Plaintiffs have waited till 21st March 2017 to move the suit. In fact, this filing is not even complete. No Notice of Motion is lodged with the registry. Mr Jagtiani who appears on notice says copies of the plaint, the draft Notice of Motion and of an unaffirmed affidavit in support were served at 7 pm last evening.

5. The effect of granting such a circulation application would be that I would have to set aside all other work, including part-heard 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC and specially fixed matters, only to accommodate the Plaintiffs who have chosen to come this late, though they could well have moved earlier. This practice of parties claiming copyright infringement coming to Court at the eleventh hour and expecting Courts to drop all other work to listen to and decide their applications on a priority basis must be discouraged. In a given case, where the plaintiff had no prior knowledge an exception will of course always be made. But where it is shown, and especially where it is admitted, that the plaintiff knew several weeks in advance of the release of the film, I see no reason to grant priority. That would be an unconscionable indulgence.

6. Let me outline what granting such an application involves. If allowed, there will be an urgent hearing two days from now, on Thursday at the earliest, the day before the Defendants' film releases. That hearing will take the better part of the day; most certainly a couple of hours. Both sides will want to argue the matter fully. Then I must dictate a judgment in Court. This must be transcribed that very evening. My staff, which work long hours -- some commute two hours in one direction -- must work late into the night to complete the transcription to deliver it to me for correction. Assuming I carry out those corrections in soft copy myself, as is my usual practice, that will take another several hours. All this only so that these Plaintiffs, who chose to come late though they could have come earlier, can have in their hands by 11:00 am on Friday morning a judgment complete in all respects. As I said, in a given case, with demonstrated urgency, yes, we do this, and we do. But to allow this in a case where the Plaintiffs have deliberately waited till the last minute is grossly unfair not only to the Court's 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC infrastructure and hard-pressed staff but to other litigants waiting their turn. The attempt is, clearly, to pressure the Defendants into making a statement of some kind or, worse yet, to pressure the Court into passing some hurried pro tem order for want of time with little or no assessment on merits, a wholly unfair advantage. A plaintiff who waits till the last minute must face the consequences of a failed gambit of this kind.

7. I refuse to grant circulation between today and Friday. The earliest that the Plaintiffs can be accommodated is next Wednesday (next Tuesday being a public holiday) and no earlier.

8. Indeed there is nothing to list or circulate, for, on checking, my Court Associate confirms there is no Notice of Motion yet lodged. There is another problem too. Mr Jagtiani points out that there is in fact a reply in correspondence from the Advocates for Defendants Nos. 2 to 5. It is dated 14th March 2017. It is not even mentioned in the plaint. No copy is annexed. The plaint itself is defective at a minimum, and perhaps deliberately misleading.

9. No orders on this application for circulation. The Associate is not to accept any praecipe for urgent circulation before next Wednesday.

10. At this stage, Mr Saboo asks that I take the matter later today. He seems not to have understood a word I have dictated in open Court. So be it. I will take this matter at 5:00 pm and sit through the night if need be. I cannot take it any earlier, as there are part-heard 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC and specially fixed matters of other parties. I will hear parties, pronounce judgment and correct it in court itself, sitting for as long as this takes after 5:00 pm.

11. Now Mr Saboo wants me to take up the matter this afternoon. I cannot; there are other matters on board. Mr Saboo insists. He says the matter can be argued immediately. This is despite my pointing out there is no Motion lodged, and despite Mr Jagtiani's statement about the plaint being incomplete. Very well: I will take up this matter at 12:00 noon, but I will do so on the basis that should I find against the Plaintiffs (a) on lack of genuine urgency; or (b) on merits (or both), there may well be severe consequences. It cannot be any other way. Mr Saboo accepts the 12 noon time slot. I have asked Mr Jagtiani to take such instructions as he is able by that time. It is now 11:25 am. In the normal course, I should have been done with all mentioning and been at least half-way through my ad- interim list by now.

At 1.10 p.m.

12. The matter was finally called out about 12.15 p.m. Mr Saboo promptly asked for accommodation saying that Mr D'Costa was on his way; he suffered a mishap this morning. I asked Mr Saboo to commence, assuring him that I would allow Mr D'Costa to take over once he arrived. Mr Saboo began. Mr D'Costa arrived later. I have since heard both Mr D'Costa and Mr Saboo for the Plaintiffs and Dr Tulzapurkar, Mr Tulzapurkar, Mr Jagtiani and Mr Kadam for the Defendants.

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13. The sum total of the Plaintiffs' case is this. The 1st Plaintiff is a writer, actor and lyricist. The 2nd Plaintiff, a production house, is the proprietary concern of the 3rd Plaintiff. The 2nd and 3rd Plaintiffs have authorized the 1st Plaintiff to bring this Suit. The 1st Defendant is Fox Star Studios (India) Pvt Ltd, a production and distribution company. Defendant No. 2 is also a film distribution

or production company. It is wrongly described in the cause title of the suit, but I will let that pass. Defendants Nos. 3 and 4 are directors of the 2nd Defendant. Defendant No. 5 is apparently a screenwriter or scriptwriter of the Defendants' film, the one said to be an infringing work.

14. Before I begin, there is another initial problem with this filing, apart from the Motion even now not being lodged. The suit needs to be filed in the Commercial Division. It is only on account of the Plaintiffs pressing for such urgent orders in the circumstances that I have set out earlier that I have permitted the Plaintiffs to proceed. The suit will have to be registered as a Commercial Suit in view of the first proviso to Section 7 of the Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 ("the Commercial Courts Act"), read with Section 2(1)(c)(xvii) and Section 12 of that Act, and Section 62 of the Copyright Act, 1957.

15. The Plaintiffs claim to have copyright in the cinematographic film Mangal Phera and all underlying works. This was made in Gujarati and then in Bhojpuri and Nepali. There is a long history set out of the making of this film, but it does not seem to be in dispute 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC that the Gujarati version of Mangal Phera had its public theatrical release on 28th June 2013.

16. The Plaintiffs say that the Defendants have made a feature film, headed for theatrical release this Friday, named Phillauri. I will turn shortly to the precise nature of the claim, but before that a quick look at what the plaint says about the Plaintiffs' own film Mangal Phera. This is set out in paragraph 13 of the plaint. It tells the story of a young lady named Chanda who was said to be a 'manglik, an unfortunate expression and even more despicable thought process. She meets the film's male protagonist. He agrees to marry her. A priest then advises them that in order to get rid of her congenital 'ill-luck', Chanda must first marry a tree before marrying Suraj. Chanda marries a tree. She does not know there resides in it a male spirit, and does not realize she is thus bound in matrimony to this tree-dwelling male spirit. This, paragraph 13 of the plaint, says is a 'concept' conceived by the Plaintiffs as unique and novel, the main or central theme, story and screenplay. The relevant portion of paragraph 13 reads thus:

"13. The Suit Film is the original creation of the Plaintiffs and is based upon the life of the young girl named "Chanda", a Manglik, in the Suit Film. In Hindu astrology, Mangal Dosha is an astrological combination that occurs if Mars (Mangal) in the 1st, 2nd (Considered by South Indian Astrologers), 4th, 7th, 8th or 12th house of the ascendant chart. A person born in the presence of this condition is termed a Manglik. Manglik Dosha is considered to be a curse on a Female in the Indian Society. That Chanda meets the Hero of the Film i.e. Suraj, who agrees to marry Chanda. Based on the advice of a religious 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC Priest it is decided that Chanda should marry a Tree first in order to nullify the Manglik Dosha and thereafter marry Suraj. That Chanda follows the marriage rites without having any iota of knowledge about the existence of a Male Spirit having his abode in the Tree to which Chanda gets married. That the Male Spirit thereafter believes and presumes Chanda to be his wife. The entire story and/or plot of the said Suit Film revolve around and are surrounded

with the said event and on the aforesaid subject. The said concept conceived by the Plaintiffs is unique and novel as the main/central theme, story and screenplay as it expresses an interesting idea of altogether different story."

I am not concerned with the rest.

17. The Plaintiffs say that they learnt on 24th February 2017 from a trailer dated 6th February 2017 that the Defendants were releasing their film Phillauri a month later, i.e., this Friday, 24th March 2017. From the trailer the Plaintiffs believed that there were substantial similarities and Phillauri was a copy of Mangal Phera. In paragraph 16 of the plaint, there is a tabulation set out of the so-called similarities. There are 20 points listed. Of these several are evidently frivolous: Item 16 ("The background showing a palace"); Item 17 ("Different angles of shot of the introduction of the love interest whose body the Spirit possesses"); Item 18 ("Love scenes (various) of the person whose body is possessed with his love interest"); Item 19 ("Item song depicting celebration"); and Item 20 ("The emotions crying scene Spirit possessed person"). I will put this aside. I will look instead at what the Plaintiffs say is original and unique. Mr D'Costa has taken me through this table. He says the 'originality' lies in the narrative 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC of an accursed woman being forced to marry a tree only to discover there resides in it a spirit to which (or whom) she is then wedded. The spirit emerges from the tree, claims to be her husband and this prohibits her from marrying the male protagonist of the film. The film is some sort of horror film. Mr D'Costa readily concedes that from this point on, the treatment by the Defendants in Phillauri is entirely different and he claims no copyright in the rest of it. It is his case that the copyright resides in this narrative trajectory to the point where the spirit emerges from the tree and proclaims himself to be the female protagonist's wedded spouse. This is the original work of the Plaintiffs, one never conceived before. He does not claim originality in the concept of a woman being 'manglik' or of the ritual or tradition of her being forced to marry a tree, something that he describes as 'traditional' in our society. He says that all that the Defendants have done is to switch the gender of the characters: the protagonist in Phillauri is male, not female, and the spirit in Phillauri is female, not male. In his submission, this is a distinction without a difference because the original concept or 'kernel' has been lifted and copied in its entirety. This is the sum totality of his case. In fairness, he has not said that the whole of Phillauri is a shot-by-shot or scene-by-scene copy. According to him, the originality lies in the sequencing and narrative up to the point of the ghost or spirit emerging from the tree, in turn based on a known tradition, ritualism or religious practices in this country and their societal consequences. He does say the Defendants have copied the 'basic idea and concept' from the Plaintiffs' film of 2013, and if anyone should view the two works side-by-side (I imagine that might be difficult, and he means one after the another), he or she would inevitably conclude that the Defendants' later work Phillauri is a 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC substantially slavish imitation of the Plaintiffs' prior original work Mangal Phera.

18. I will consider these submissions momentarily after I complete the factual narrative. On 28th February 2017 the Plaintiffs sent a notice to the Defendants,¹ making substantially the claim now made in the plaint. The Advocates who then represented the Plaintiffs no longer represent them today; I only point this out because something does turn on this. The Advocates for the 1st

Defendant responded with a holding reply on 2nd March 2017.²

19. On 10th March 2017, the 1st Defendant's Advocates replied in detail. This response was admittedly sent to the attending Advocate of the Plaintiffs previous advocates.³ There is no reply to this notice and this, as we shall see, is not without consequence. In this reply, the 1st Defendant set up several distinct defences. The first, in paragraph 3 of the reply, was to dispute that the idea of a living person marrying a ghost who has taken up residence in a tree was at all original and unique. The 1st Defendant said that the idea or concept of a living person accidentally marrying a tree-ghost is not new. There is material to show that it dates back to 19th century Russian folktales and there is also an episode of a television serial telecast on 7th November 2013. The idea of a so-called 'manglik' woman being married off to a tree is not an original concept that lends itself to copyright protection; it is an unfortunate but common 1 Plaintiff, Exhibit "F", p. 117.

2 Plaintiff, Exhibit "G", p. 122.

3 Plaintiff, Exhibit "H", pp. 123-129.

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Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC practice in Indian society. That an idea itself is not amenable to copyright protection is undoubtedly well-settled and the 1st Defendant said this in its reply. Then in paragraph 6 of this reply the 1st Defendant set out 11 points of difference between the two works. Not one of these in this tabulation is trivial or superfluous. The Defendants' film Phillauri, far from being a horror film like the Plaintiffs' work Mangal Phera, is a dramatic narrative with comic elements. It does not include very many of the factors and aspects that are said to be 'central' to the Plaintiffs' film, or even its treatment such as attempted suicide, broken marriages, a consistent time-line, a conspiracy to marry off a character to a tree and so on. The Defendants' film's tree-dwelling spirit is said to be benevolent, and vastly confused about ending up married to a living person. The spirit or ghost in Phillauri has its (or her) own history or back story. This is what the film is about. This is actually pivotal to its entire case: the Defendants' film appears to be about the back story of the spirit rather than anything else, and the rest of it at the beginning is only a lead up to that back story. There is no question of the spirit in the tree being antagonistic or aggressive. The characters are different. There is no element of exorcism.

20. More importantly in paragraph 13 of this reply the 1st Defendant volunteered to the Plaintiffs' erstwhile advocates that the Plaintiffs could read a synopsis of the Defendants' film at the Defendants' offices under conditions of confidentiality at a mutually convenient time.

21. There is no dispute that this reply was delivered to the Plaintiffs' previous advocates. What is astonishing is that till the 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC date of the Suit -- and even today -- there is not even an attempt to

answer this reply in correspondence. The explanation, if it can be called that, offered by Mr D'Costa is one I must reject, and I stop short, but only just, of an actual censure. Mr D'Costa is instructed to say that a reply was 'drafted' (he cannot say when), but it "could not be served". This is not the kind of submission that ought to be made in any Court at all. It affords no explanation. Either there is a reply or there is not.

22. What the plaint does not also say is that on 14th March 2017, the Attorneys for Defendants Nos. 2 to 5 sent their own reply to the Plaintiffs' earlier Advocates. This is important because in paragraph 21 of the plaint the Plaintiffs have gone to the extent of saying that Defendants Nos. 2 to 5 never replied to the Plaintiffs' Advocates notice of 28th February 2017. This statement is false. The plaint is filed and declared on 18th March 2017. The reply from M/s Dhruv Liladhar & Co on behalf of Defendants Nos. 2 to 5 was sent several days earlier on 14th March 2017. There is no explanation at all as to why this fact is not mentioned in the plaint and a directly contrary statement is made. I am unprepared to accept the explanation attempted that the previous advocates did not inform the Plaintiffs. That is their problem.

23. Matters do not rest at this. Apart from the tabulation in paragraph 16, Mr Saboo attempted to show me colour print outs of what he described as scenes or stills from the Plaintiffs' film and those from the Defendants' film's trailer. Perhaps it would be too much to expect all of this to be in the plaint or in the Affidavit. Only because of the manner in which events unfolded this morning, have 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC I agreed to accept these documents, contrary to my invariable practice; for when documents are tendered like this, they do not form part of the Court record and this becomes difficult going forward at every stage of the proceedings. When the Plaintiffs do this, therefore, they only do themselves an enormous disservice. The compilation of the photographs from the Plaintiffs' film is marked "X1" for identification with today's date. The compilation of photographs said to be from the Defendants' film's trailer is marked "X2" for identification with today's date.

24. Again I am not at all certain why this was even attempted if the Plaintiffs' case is that the Defendants' work is not a shot-by-shot copy. There is no question that the two works are entirely different. Their look is entirely different. The approach is entirely different. Still after still shows no similarity but only differences. These rival compilations do not in any way support the Plaintiffs' case.

25. Mr D'Costa invites my attention to a decision of a learned Single Judge in Twentieth Century for Film Corporation v Sohail Maklai Entertainment Pvt Ltd & Anr.⁴ This is of no assistance to the Plaintiffs. The film in question there undoubtedly had a unique subject of a person trapped in a telephone booth (something that no 4 2010 (44) PTC 647 (Bom) : 2011 (1) Bom CR 750 : 2010 (112) Bom LR 4216 : MIPR 2011 (1) 1 : 2010 (6) ALL MR 857. Though this is a widely reported decision, Mr D'Costa, for reasons I am unable to fathom, only tendered a print out from an unofficial source, one we do not accept, and without any citations being provided. The difficulty with these unofficial sources is that they are typically error-prone. They gather this material in an automated fashion and there are frequent errors in names of parties, syntax, paragraph formatting and so on. They may be useful during research, but are never to be used in Court.

21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC longer exists in this day and age) under attack from a sniper. This is hardly a traditional, ritualistic, historical or known situation. When attempted to be copied it was this that fell for consideration. The claim was not for exclusivity in an idea but in the particular expression of that idea. There can be no copyright in a mere idea or a concept. It is in the expression of that concept or idea and the manner in which it is presented or the manner in which it is developed or portrayed that enjoys protection. The Plaintiffs have done very little in this plaint to show that they have any sort of copyright or that what they claim (a ghost emerging from a tree married to a supposedly cursed living person) is unique. The concept of an evil spirit in a tree being in a film is not new either. *I Married a Witch* is a 1942 fantasy romantic comedy film by René Clair that has two evil female spirits in a tree. Ghost marriage is a tradition in many cultures from China to Sudan. The Encyclopaedia Britannica has this entry under 'tree marriage':⁵ Tree marriage, symbolic marital union of a person with a tree that is said to be infused with supernatural life. Tree marriage may also be a form of proxy marriage. In one such practice, between a bachelor and a tree, the tree was afterward felled, thereby endowing the man with the widower status required to marry a widow. Tree marriage was once widespread in India. The term can also refer to a nuptial ceremony that takes place in, on, or around a tree or that is sanctified with some part of the tree, such as the bark or sap. The latter practice is more usually part of a religious system or cult organized around beliefs that trees contain hidden or sacred power to cure or to 5 Updated 20th July 1998.

Accessible online at: <https://www.britannica.com/topic/tree-marriage> 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC enhance fertility or that they contain the souls of ancestors or of the unborn.

(Emphasis added)

26. The next argument from Mr D'Costa that the concept of a 'manglik' man marrying a tree is unknown and that such a man must instead performing a 'yagna' to rid himself of his accursed condition. If that is so, it is surely a self-defeating argument, for it makes the Defendants' treatment and film if not unique at least sufficiently distanced from the Plaintiffs' work. In any case, this is entirely irrelevant to the Plaintiffs' cause; the fact that the Defendants have not adopted what Mr D'Costa claims is the 'traditional' ritual applicable to a male 'manglik' does not on its own make the Plaintiff's work original. To succeed in such an action, a plaintiff must first demonstrate originality in his or her own work, not merely show the lack of it in the defendant's. He must then show sufficient similarity between the defendant's work and his. Both must be shown. In this case, neither is, at least at this prima facie ad-interim stage. A 'manglik' woman being married to a tree that has a spirit in it is not unique or original; nor is the emergence of said spirit from aforesaid vegetation. Mr D'Costa's concession that his claim stops at this, and the rest of the Defendants' work is nothing like his clients' is fatal to their cause. The presentation of stills from the two works is even more unfortunate, for if this demonstrates anything it is that the Defendants' work is a wholly different one from that of the Plaintiffs', and in almost every single respect that matters in a copyright infringement action.

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27. It is impossible on this consideration to hold that there is originality of the kind Mr D'Costa claims, viz., in the emergence of a spirit from a tree to which a living being said to be cursed with bad luck is forced into marriage. Beyond this, nothing is shown as a similarity, and even this, prima facie, it is not possible to say is original. The claim, in its entirety, is in a 'central idea'. Whether or not that idea is central is irrelevant. A spirit may or may not reside in a tree. Copyright does not reside in an idea. It is not demonstrated, prima facie, that the Plaintiffs' expression of that idea has been illicitly copied by the Defendants. Such similarities as we find are not unique, nor significant, and almost all of them can be traced to something in the public domain. The differences are too acute to ignore.

28. Dr Tulzapurkar for the 1st Defendant points out that, apart from the obvious differences, the delay in bringing suit cannot be accidental. On their own showing, the Plaintiffs knew about the Defendants' film since 24th February 2017. They knew of the release date of 24th March 2017. From that date of knowledge, i.e., for the last four weeks, they have chosen to wait, and have not come to court until a mere three days before the release of the film. They have only served a copy of the plaint and Notice of Motion on the Defendants only at 7.00 p.m. last evening and have sought this morning urgent circulation. By this time 800 theatres countrywide have been booked for release. Distribution rights have been created. Third party rights have intervened. There cannot be any question of irreparable injury to the Plaintiffs in a situation such as this or of the balance of convenience favouring the Plaintiffs even assuming that a prima facie case is made out, which in his submission, it is not. He 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC submits that it is not enough to make out some prima facie case; to get an injunction of this kind, the Plaintiffs must make out so overwhelming a prima facie case that all other considerations pale into insignificance. Unless I conclude that the Plaintiffs have indeed made out a case of this strength, in his submission, no injunction can or should follow.

29. I agree with Dr Tulzapurkar on all counts. I see no vestige of a prima facie case for the grant of ad-interim relief. Certainly, the balance of convenience can in no sense be said to be favour the Plaintiffs. It is clearly with the Defendants. As to the question of irretrievable injury, I notice that at no point did Mr Saboo or Mr D'Costa offer or volunteer to provide sufficient security -- or indeed any kind of security -- should the Plaintiffs' Motion ultimately fail to secure the Defendants against loss.

30. I also have, as I said in the beginning, a far more fundamental issue with this approach and this so-called litigation strategy or courtroom gambit. I am now making it clear once and for all that these attempts at snatching last-minute injunctions, unfairly prejudicing the other side, and putting other litigants to real hardship (not mere inconvenience), let alone putting Courts and their infrastructure under pressure, will not be tolerated. Our Courts are not meant for these frivolities. They are not meant as playgrounds where any person with a fanciful notion can come at the last minute and demand as of right that all other work be set aside and all other concerns be relegated to second place. I have even today before me a courtroom packed with lawyers and litigants. Parties in

other actions are patiently waiting their turn. There are as 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC many as three separate listings today, each in double digits. While Mr D'Costa, Mr Saboo and their clients take liberties with judicial time, this comes at the cost of others who have done nothing wrong. I have no means of compensating any of the others who have waited their turn, having come to court today in the reasonable expectation that their cases will be taken up. I can only apologize to these many others; and I must do so because I hear no hint of apology or regret from Mr D'Costa or Mr Saboo. There is not much more I can do. But I can certainly make it clear to the Plaintiffs that having gambled with the court's time, and having 'taken their chances', they will also now take the consequences. I made this clear to Mr Saboo when, despite everything I told him, and told him again and again, he insisted on being given an early hearing.

31. I am refusing all ad-interim relief. The Notice of Motion will come up in its ordinary course. I set no date for it and I am not setting for any Affidavit in Reply either. The Defendants will file their Affidavit in Reply as and when they think it is appropriate. I stress this again. I do not care whether that Affidavit in Reply takes one week, one month, one year or more. The Defendants will take their time over it.

32. Now, to the question of costs. I will not and cannot permit the Plaintiffs to escape like this. This is not a question of reparations to the Defendants. This is also not a question of taking some arbitrary measure either of costs or as to the person to whom such costs must be paid. The following order is studiedly and determinedly meant to be an indicator not only to this Plaintiff but to all future litigants not to attempt to take our courts for granted. Our time is our scarcest 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC resource. We will not have it have squandered in this fashion to indulge these fanciful claims. Pragmatism makes it impossible to direct payment of costs to all those very many other litigants who were forced to wait or to have their cases postponed to another day, though that is perhaps the correct thing to do.

33. There is another reason to award costs. This is the Commercial Courts Act. This suit must compulsorily be registered in the Commercial Division of this Court. The statute says so. It is not the Plaintiffs' choice, and the monetary value is inconsequential in an intellectual property rights action. The sections quoted earlier make this clear. Now the Commercial Courts Act also made important amendments to the Code of Civil Procedure, 1908 ("the CPC"). Section 16 of the Commercial Courts Act says this:

CHAPTER VI AMENDMENTS TO THE PROVISIONS OF THE CODE OF CIVIL PROCEDURE, 1908

16.(1) The provisions of the Code of Civil Procedure, 1908 shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908, as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908, as 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.

(Emphasis added)

34. The Commercial Courts Act's amendments to the CPC and to the High Court (Original Side) Rule prevail over the CPC and the Rules. The Schedule to the Commercial Courts Act inter alia amends Section 35 of the CPC to say this:

2. For section 35 of the Code, the following section shall be substituted, namely:--

35.(1) In relation to any commercial dispute, the Court, notwithstanding anything contained in any other law for the time being in force or Rule, has the discretion to determine:

- (a) whether costs are payable by one party to another;
- (b) the quantum of those costs; and
- (c) when they are to be paid.

Explanation.--For the purpose of clause (a), the expression "costs" shall mean reasonable costs relating to--

- (i) the fees and expenses of the witnesses incurred;
- (ii) legal fees and expenses incurred;
- (iii) any other expenses incurred in connection with the proceedings.

(2) If the Court decides to make an order for

payment of costs, the general rule is that the 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC unsuccessful party shall be ordered to pay the costs of the successful party:

Provided that the Court may make an order deviating from the general rule for reasons to be recorded in writing.

Illustration The Plaintiff, in his suit, seeks a money decree for breach of contract, and damages. The Court holds that the Plaintiff is entitled to the money decree. However, it returns a finding that the claim for damages is frivolous and vexatious. In such circumstances the Court may impose costs on the Plaintiff, despite the Plaintiff being the successful party, for having raised frivolous claims for damages.

(3) In making an order for the payment of costs, the Court shall have regard to the following circumstances, including--

(a) the conduct of the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the case;

(d) whether any reasonable offer to settle is made by a party and unreasonably refused by the other party; and

(e) whether the party had made a frivolous claim and instituted a 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC vexatious proceeding wasting the time of the Court.

(4) The orders which the Court may make under this provision include an order that a party must pay--

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

3. In section 35A of the Code, sub-section (2) shall be omitted.

35. Section 35A(2), omitted by the Commercial Courts Act, says this:

35A. Compensatory costs in respect of false or vexatious claims or defences.--

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

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36. The meaning is plain. In an action under the Commercial Courts Act, costs follow the event. The losing party pays. If it is not to pay, i.e., if an order of no costs is to be made, then reasons are required. The conduct of the parties is relevant, including the gravity or frivolity of the claim, and whether or not judicial time is wasted. The earlier cap on compensatory costs is removed. The statutory intent is equally plain: no litigant in the commercial division can ordinarily escape a litigation loss without an accompanying order of costs. The amendment contemplates actual costs and compensatory costs both.

37. I must have regard to the conduct of these Plaintiffs: the manner in which they deliberately delayed coming to court, letting valuable third party rights intervene in the interregnum, wasted judicial time, suppressed material from the plaint such as the reply from the advocates for Defendants Nos. 2 to 5, failed to furnish any explanation for not responding to the 1st Defendant's advocate's reply of 10th March 2017, not caring even to lodge their Motion and then insisting on an immediate hearing only to be wholly unable to substantiate even a glimmer of a prima facie case. Not to award costs in these circumstances would be to encourage frivolity in litigation.

38. Without a word of protest, the Defendants have gathered their legal team. The costs must be considerable. Given the number of lawyers appearing, actual costs will almost certainly be higher than what I intend to award. On the other hand, the Plaintiffs claim their film was a smash hit, albeit in regional languages. They lay claim to international awards and much recognition.

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39. A look, finally, at the words of the recent Supreme Court decision of *Dnyandeo Sabaji Naik v Mrs Pradnya Prakash Khadekar & Ors*,⁶ just three weeks ago. While imposing costs of Rs. 5 lakhs, the Supreme Court said:

13. This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country,

there is no premium on the truth.

14. Courts across the legal system -- this Court not being an exception -- are choked with litigation.

Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and of how successive 6 Special Leave Petition (C) Nos 25331-33 of 2015, decided on 1 March 2017.

21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behaviour. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner.

(Emphasis added)

40. The Plaintiffs will pay the costs quantified at Rs. 5 lakhs. They will make payment of these costs within a period of two weeks from today. For reasons that suggest themselves, I will avail of the 21st March 2017 Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors P2-NMSL693-17.DOC liberty to 'deviate' from the mandate of Section 35 of the CPC as amended by the Commercial Courts Act to direct that half these costs will be paid to the Legal Aid Cell and the remaining 50% to the Tata Memorial Hospital. Both are worthy causes. The latter because it is a service for the indigent who most need access to justice, and the former for its service to society.

41. This order has been dictated from start to finish in Court beginning with the time when I first took the application for circulation. My stenographic staff is not expected to work overnight or through the night to prepare the transcript or why I should put aside all other work to attend to this matter when no prima facie case is made out so as to deliver the final order by tomorrow. This, too, I had made clear to Mr Saboo when he first asked for circulation. I therefore make it clear right now that the order copy will not be made available till the transcription and correction are complete and this is unlikely to be much before Wednesday, 29th March 2017.

42. The Registry will ensure that this Notice of Motion and Suit are correctly filed in the Commercial Division of this Court.

43. The Defendants are at liberty to take photocopies of the compilations marked "X1" and "X2" from the Court record.

(G. S. PATEL, J.) 21st March 2017