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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
NOTICE OF MOTION (L) NO. 68 OF 2017
IN
COMMERCIAL SUIT (L) NO. 74 OF 2017

ZEE ENTERTAINMENT ENTERPRISES LTD
a company registered under the Companies Act
having its registered office at 18th Floor, A Wing,
Marathon Futurex, NM Joshi Marg, Lower Parel,
Mumbai 400 013

...Plaintiffs

~ VERSUS ~

- 1. SONY PICTURES NETWORKS INDIA PVT LTD**
a company registered under the Companies Act having its registered office at 4th Floor, Interface Building No. 7, Off Malad Link Road, Malad (W), 400 064
- 2. FRAMES PRODUCTION COMPANY PVT LTD**
a company registered under the Companies Act having its registered office at 606, 6th Floor, Morya Landmark II, Opposite Infinity Mall, New Link Road, Andheri (W), Mumbai 400 053
- 3. RANJIT THAKUR**
Adult, Hindu, Indian Inhabitant, Director of Defendant No. 2 having his office at 606, 6th

Floor, Morya Landmark II, Opposite Infinity
Mall, New Link Road, Andheri (W),
Mumbai 400 053

4. **HEMANT RUPAREL**

Adult, Hindu, Indian Inhabitant, Director of
Defendant No. 2 having his office at 606, 6th
Floor, Morya Landmark II, Opposite Infinity
Mall, New Link Road, Andheri (W),
Mumbai 400 053

5. **AJAY BHALWANKAR**

Adult, Hindu, Indian Inhabitant, having his
office at 4th Floor, Interface Building No. 7,
Off Malad Link Road, Malad (W), Mumbai
400 064

...Defendants

APPEARANCES

FOR THE PLAINTIFFS
("Zee")

MR RM KADAM,
Senior Advocate,

*with Mr Rashmin Khandekar,
Mr Rohan Kadam & Mr Kunal
Parikh, i/b Thakore Jarimala
& Associates*

FOR DEFENDANTS NOS 1
& 5
("Sony")

DR VV TULZAPURKAR,
Senior Advocate,

*with Mr Sandip Parikh, Mr
Prakash Shah, Mr Prasad P &
Jas Sanghavi, i/b PDS Legal*

FOR DEFENDANTS NOS 2
TO 4
("Frames")

MR JD DWARKADAS,
Senior Advocate,

*with Mr Ankit Lohia & Ms
Saveena Bedi, i/b Lawhive
Associates*

CORAM: G.S. PATEL, J

DATED: 4th & 5th April 2017

ORAL JUDGMENT:

1. This is a *quia timet* copyright infringement and passing off action. It relates to what is sometimes described as a reality show, but is perhaps more accurately a televised talent hunt. The Plaintiff, Zee Entertainment Enterprises Ltd (“**Zee**”) claims that its popular show *India’s Best Dramebaaz*, a televised talent hunt for child actors in the 5–12 year age group has been illicitly copied by the 1st Defendant, Sony Pictures Networks India Private Limited (“**Sony**”). Zee says Sony has infringed its copyright in its concept note and ‘production bible’. Defendant No. 2 is a production company (“**Frames**”) of which Defendants Nos. 3 and 4 are directors of Frames. Defendant No. 5 was once employed by Zee but now works for Sony as its Chief Creative Director.

2. The heart of this plaint is paragraphs 7 to 10 and it is best that I set these out at the head of this judgment:

“7. In or around 2004, the Plaintiff conceived a non-fiction television series being a talent hunt for aspiring actors. The object of this television series was to bring to the fore quality acting talent from across India, groom the said talent and showcase the same to the public at large. The name of this show was India’s Best Cinestar’s Ki Khoj. This show was very successful and therefore in the year 2006-2007, the Plaintiff also published the second season of the said show with the

title Idea Zee Cinestars. The Plaintiff was the first entity in India to conceive and/or adopt a acting talent hunt show in India.

8. In or around 2012, the Plaintiff got developed a concept for a new show which was meant to be an acting talent hunt for children in the age group of 5-12 years. This show was to be called "India's Best Dramebaaz". The following was the broad concept of the said new show prepared to be made:

(i) the show was to comprise of a series of episodes;

(ii) the first few episodes were with respect to the audition of the aspiring contestants having talent in acting. The said audition was to be taken by the eminent judges from the film and theatre fraternity;

(iii) some contestants were selected for the next round viz., the gala round;

(iv) the contestants so selected were to be eliminated one by one on the basis of their performance and a winner was to be declared at the end of the season.

9. The aforesaid concept was further fleshed out in greater detail in a Concept Note prepared and created by the Plaintiff. The said Concept Note was prepared by Ms Sunanda Jena and Mr Namesh Dubey. Ms Sunanda Jena is designated Head – Non Fiction & TV. Mr Namesh Dubey is designated Associate Creative Director. The said Concept Note was prepared by the said employees while in employment of the Plaintiff and for the Plaintiff *inter alia* also set out the format of the show including the following:

- (i) Auditions of contestants who are eligible for participation for said show would be held in different parts of the country;
- (ii) the Judges (Bollywood personalities) would identify the participants on the basis of their personality. A decision with respect to their performance would be made by considering their “acting” skills in different genres.
- (iii) the contestants so selected would execute the requisite contract with the Plaintiff;
- (iv) each contestant would be groomed as per the requirement of the script given to such contestants by the Director/Mentor of the said show. A contestant would be required to perform either solo or with a co-contestant;
- (v) the Judges would give the contestants marks for their performance and the performer with the lowest score will be eliminated.

The format also set out the manner in which the said show would be presented/telecasted. The general theme of every episode with respect to the introduction of the contestants, their interviews, visits by the contestants’ parents and/or relatives and/or friends, etc. were also set out in the said Concept Note. The Plaintiff craves leave to refer to and rely upon the documents evidencing the employment of Ms Sunanda Jena and Mr Namesh Dubey with the Plaintiff, when produced.

The Plaintiff submits that the Concept Note is an original literary work within the meaning of the Copyright Act, 1957 and the Plaintiff is a first owner

thereof. Hereto annexed and marked as **Exhibit "A"** is a copy of the said concept note.

10. The Plaintiff further submits that the Plaintiff also had a full-fledged production bible made in a respect of the said show. In addition to setting out in great detail, the exact format of the show, the said production bible also set out the various key elements added by the Plaintiff in respect of the show. For example the production bible set out that there would be several themes used in the said show such as:

(i) "Acting ka Keeda" - The selected contestants are given a uniquely designed puppet called Acting Ka Kida as a price for getting selected.

(ii) "A lie Detector Test" - The contestants to go through a lie detector test where pranks were played on the kids so as to bring out their personality.

(iii) "Phone Booth" (Call to God) - A 'hotline' between the contestants and the almighty where the anchors of the show were to play God. The contestants would express their wishes, problems, queries, etc.

(iv) "Pol Khol" - In this segment the children play pranks on their parents, where the parents were made to listen to their children from a separate room. Finally the anchor of the show brings the parents of the children to the kids room creating moments of humour and fun for the entire family.

(v) "Thank You" - In this emotional segment the contestants express their gratitude towards their parents.

(vi) "The Temptation Room" - In this segment the contestants are housed with their favourite food such as

cakes, chocolates, sweets, etc. in a room and are forbidden to indulge in them for at least 5 minutes.

(vii) “Light Play” - In order to check the spontaneity of the contestants a light play round is considered when the flast light stops at one of the judges and that judge would assign any prompt activity to the children. The performance with respect to this activity would play a key role in the selection process of the contestants.”

3. There are several difficulties with this narrative. To begin with, it gives the impression that the concept of a TV reality show or acting talent hunt — or, for that matter, any kind of talent — for children on television — emerged in full bloom for the first time in 2004 with Zee’s production of *India’s Best Cinestar’s Ki Khoj*. As we shall see, this is demonstrably incorrect. The other problem, and one that will recur throughout the discussion, is that paragraphs 7 to 9 are worded in such generalities that it is almost impossible to conceive any level of exclusivity or monopoly being afforded to any person in respect of any of them. Take the four items in paragraph 8: episodes, auditions, selections, judges drawn from film and theatres, eliminations. There can be no exclusivity in any of these. The mere fact of a show having episodes is not amenable to copyright protection. By definition, a talent hunt requires eliminations from a larger pool and the selection of a winner or winners from a much larger crowd. Obviously, there has to be some process of auditioning. Those who get past the auditions and “make the cut” move on to the next round. From this select pool, which is itself may have many contestants, the contestants continue competing, and are eliminated one by one judged on different criteria. Their ranks thin as the show progresses till finally there emerges a single winner. If

this sounds familiar, it should. The entire *Idol* series and the “*Got Talent*” series broadly follow this pattern. So does almost every other talent show — acting, dancing, mimicry, acrobatics, jugglery, mime, even cooking. It is difficult to conceive of any talent hunt that goes about its stated business in any other fashion. There cannot, therefore, be exclusivity in this; Mr Kadam and Mr Khandekar quite rightly lay no such claim.

4. Paragraph 9 of the plaint then speaks of this “concept” being fleshed out in greater detail. This is supposedly different from the preceding paragraph, where the features or aspects that I have mentioned above, all common place, all well-known and all very routine are said to have been developed in 2012 for the first time. In paragraph 9 the so-called further fleshing out includes holding auditions in different cities, having judges — all Bollywood personalities — select participants based on their acting skill in different genres, requiring the contestants to execute a contract with Zee, the grooming of contestants by a director or mentor, performances by contestants, and the elimination of the lowest scoring contestants. Again, none of this is original or falls within the frame of what Mr Kadam says lends itself to copyright protection.

5. Paragraph 10 has, as we have seen, some seven items, and it may well be true that some of this are entirely unique to Zee’s *Dramebaaz* series. But even amongst these I would venture to suggest that not all of them are necessarily original works although their labels may be so. Giving a winning contestant a gift or reward is not original. The nature of the gift or what it is called (in some shows, for instance, “immunity” or something along those lines)

may be special, unique and original, brought forth for the first time in that particular show. It is certainly not unique to have, as the Plaintiffs do, an assertion of exclusivity to an element simply call “Thank You”, where contestants are supposed to thank their parents. That is always a desirable thing and it is perhaps no more than good manners. It is difficult to understand how this can possibly be elevated to the level of monopolistic exclusivity in copyright.

6. The submission, however, and I must confess that I am unable to wholly grasp what exactly is being suggested, from Mr Kadam and Mr Khandekar is that I must read paragraphs 7 to 10 ‘as a whole’. Having attempted that, I find myself no more drawn to their cause. In my assessment, if we eliminate the uncommon features in paragraph 10, or at least those portions of paragraph 10 that can safely be said to be original, then all that we are left with are generalities in paragraphs 7, 8 and 9 and those are certainly ones that are well established in the common domain and incapable of copyright protection. I can read these paragraphs separately. I can read them as a whole. It will make no difference. It will not enlarge Zee’s claim, nor make it any stronger. What Zee needs to be able to show is that there is something in its production bible, concept note or in its show that is utterly and identifiably original and that this has been copied by Sony. As Dr Tulzapurkar says for Sony, Zee must specify what precisely it claims to monopolize. Even if it is only to be re-arrangement by its original labours of previously known elements (‘integers’ to borrow a phrase from patent and design law), this must be demonstrated.

7. In this industry, it is common to use this document called a 'production bible'. This is a sort of master document for the production in question. I do not imagine that it is overly rigid. It must surely allow for variations as and when they crop up. It is a road-map for the show and it sets out the 'kernel' of the show — the overarching thematic structure, the unique elements and so on. I imagine it goes through some changes as the show progresses through various seasons. The purpose is to give the show a defined coherence and focus. There is also no doubt that copyright can and does vest in a production bible, as it must also vest in an original concept note. These are not just ideas. These are particularized expressions of ideas. But this is not to suggest that every page of a production bible or every aspect of it enjoys the same level of protection. In a field as crowded as this there bound to be common elements and I should expect that a plaintiff claiming copyright in some aspect of a show such as this will not readily claim copyright in those matters that are demonstrably or undeniably in the public domain. Nor indeed, to his credit does Mr Kadam make any such claim. The production bible contains the ethos, the fundamental trust and the main objective of the show. It highlights the unique elements of the show as well. Zee's production bible starts at page 39. Here we see details of the format (number of weeks, number of episodes, number of contestants), the stages through the talent hung will run, a week-by-week planned schedule, general statements about audition and preliminary rounds, a graphic about the audition process and so on. It is at this stage in the production bible (at page 72 of the plaint), that we find mention of specific items that are directly relatable to the items in paragraph 10 of the plaint. These run from pages 71 to page 78 of the plaint and they correspond

exactly to the sub-paragraphs of paragraph 10. There is then a further description of what is called the character of the judges. One is a director whose primary role is that of a mentor. The second is an actress who provides maternal guidance, and the third what is described as “current heartthrob” below a pictorial of a plump red heart. This person is supposed to be the contestants’ best friend. In itself, this will present some difficulty for Zee, because even this concept of a judge who, says, provides maternal-level support or is a ‘best friend’ is not original. Finally there is a description of the qualities we should expect to find in the show’s host (page 91), again not something original.

8. On 23rd March 2016, Zee entered into a production agreement with Frames. This was a work for hire as is clear from Clause 4.1 and Frames was engaged as the producer of this show. The sets for the programme were to be designed by Frames obviously in coordination with Zee’s creative team. There are many details annexed to this production agreement. I am not concerned with these. There is much made in the amendment to the plaint about Defendant No. 5 quitting Zee and joining Sony as its Creative Director and on questions of confidentiality but this has not been the thrust of Mr Kadam’s case and I will not labour over it. This is also true of the confidentiality clause in the 23rd March 2016 agreement to which I have just referred.

9. Zee claims that its show *India’s Best Dramebaaz* was a great success. It gained very high television rating points (TRPs) for its first season in 2013 and for its subsequent Season 2 in 2016. In a separate compilation, the Plaintiffs have given me details of their

Television Viewers Rating or TVR or TVT or Television Viewers per Thousand rating. I will accept these as correct. The plaint says that on 15th November 2016 a representative of Frames emailed Zee saying that they wanted to pitch a new show called *Nautanki Ke Superstars*. It was then that Zee says it noticed that this was nothing but a copy of its *Dramebaaz* show with, as Zee puts it, some small tweaks. Zee felt this was a colourable imitation of *Dramebaaz*. It also claims that Frames told Zee it will not pursue this any further. In January 2017, Zee wanted to launch Season 3 of *Dramebaaz*. Zee's Rajesh Iyer contacted Frames' Ranjeet Thakur, Defendant No. 3. However, Thakur said that Frames had "sold" the concept to Sony. I will take this with the necessary pinch of salt. Obviously the word "sold" here is used loosely. Frames had nothing to sell. What was intended to be conveyed was that Frames would go to work at Sony as a producer for a show which, according to Zee, it believed was to be called *Nautanki Ke Superstars*. Zee wrote to Sony on 11th January 2017 and the Frames protesting. A copy of this communication is at Exhibit "F" to the plaint. In this Zee says the concept of *Nautanki Ke Superstars* is a copy of Zee's *India's Best Dramebaaz*.

10. Sony replied on 23rd January 2017. Paragraphs 4 and 5(b) of this response are crucial, again given how these things work. I will pass over Sony's protestation that it knew nothing at all of Zee's television show *India's best Dramebaaz*. There is some controversy about paragraph 5(b) where Sony says this:

"5(b) With regard to the contents of un-numbered paragraphs 9 to 11 of the said notice, we deny and dispute the contents thereof. It is denied that we are engaged and/or are in the process of engaging the

services of the production house, i.e. Frames Production Company Private Limited for developing a show titled “*Nautanki Ke Superstars*” or that the same uses the same format as that of *India’s Best Dramebaaz - Season 1 and 2*. While we are in the process of developing a non-fiction talent hung show involving kids, it is neither titled “*Nautanki Ke Superstars*” nor is the same based on the same format as that of *India’s Ke Superstars*” Season 1 and 2. We are the sole owners of the concept of the said show being developed. With regard to the contents of the said paragraphs, it is denied that you have proprietary rights in the idea or concept of highlighting talented child actors/actress. It is further denied that you have any proprietary rights in holding auditions for child artists across places in India or making the selected children go through different levels of a selection process till a final winner is announced. It is further denied that you have any proprietary rights in putting selected contestants through televised studio rounds wherein popular personalities from Bollywood judge them on their performances. It is denied that any of our shows, much less an upcoming one, is based on the format adopted and used by you and/or is identical with a format conceived by you. Please be aware of the fact that the all essential elements of our upcoming show including the concept and/or format of the same belong to us and the production house involved in the development of the same is well aware of the entire format which solely belongs to us and nothing else.”

11. Zee attempts to make capital of this and to say this shows dishonesty, for Sony and Frames denied any association. They, on the other hand, say the letter contains no such denial — they only denied working together on any show called *Nautanki ke Superstars*.

This controversy is best quickly resolved, because almost nothing turns on this, and certainly it will not aid Zee in its quest for copyright protection. In my understanding, all that Sony said was that it had not engaged Frames for any show called *Nautanki Ke Superstars* and that it did not have any show based on Zee's *Dramebaaz* shows, either seasons 1 or 2. What Sony did say was that it was developing a non-fictional children talent hunt show. That, I think, is the best that can be said of this argument.

12. Frames replied on 25th January 2017 to Zee's notice and a copy of this is at Exhibit "H" to the plaint. This was followed by a notice dated 16th February 2017 from Zee's solicitors at Exhibit "I".

13. It is not in dispute that Sony is in fact developing a children talent hunt show called *Sabse Bada Kalakar*. For this Sony has its own concept note and its own production bible.

Resumed on 5th April 2017

14. The right Zee claims, and Mr Kadam was quite clear on this, is in the literary work comprised in the concept note and production bible. Mr Kadam's submission was not that either the concept note or the production bible or even Zee's talent show was entirely novel as works never done before. While granting that there would necessarily be elements common to other shows, his submission was Zee's rights arise from its original labour and work in compositing or judiciously selecting and rearranging various elements, apart from the elements that are completely original (meaning new). To

graphically illustrate the submission, what Mr Kadam seems to suggest is that if there are, say, five common elements *A, B, C, D* and *E* taken from a larger pool of elements from *A* to *Z*, when Zee chooses these five elements (from a much larger pool) and rearranges them as *A, C, B, E* and *D*, it does so by its own original labours, thought processes and acts of creativity and this gives Zee some rights. Specifically it gives Zee copyright in the resultant work, that is to say the work that is the result of this unique or judicious selection and rearrangement.

15. The difficulty with this submission is at two levels. First, it means that Zee can succeed only if it shows that Sony copied or substantially copied Zee's so-called unique or original rearrangement in the sequence that I have described illustratively. For, by the same token, even Sony could claim an equivalent copyright in its own compositing, re-compositing or selection and rearrangement of those very standard elements common to very many shows.

16. The second problem with this formulation is, as Dr Tulzapurkar points out, that Zee does not tell us which of these so-called common elements have been so selected for this rearrangement.

17. We return again to paragraphs 7 to 10 of the plaint. If we take out the elements in paragraph 10, or at least those of the seven elements that can fairly be said to be unique (excluding expression of gratitude and giving of gifts or awards), then all that we are left with

are the generalized statements in paragraphs 8 and 9. But even here we are not told what was the re-composition or the rearrangement that was made of those common elements.

18. Mr Kadam laboured long and hard over the proposition that to have copyright the work itself need not be entirely novel or original in the sense of never having been seen before. What is required is the expenditure of original skill or labour.¹

19. His reliance on the Supreme Court decision in *Eastern Book Company & Ors v DB Modak & Anr*² is of course correct if this was in fact the point that falls for consideration. However, in my view it does not. We do not follow the American standard of requiring something entirely new, but hew more closely to the Canadian standard in such matters. Even accepting as correct, as I must, the proposition Mr Kadam canvasses, that will not substitute for an actual demonstration of the precise works in which copyright is claimed. To be clear: it is not his case that Zee's production bible is entirely or even substantially copied; nor too the concept note. His case is that even if the entirely original/new elements in paragraph 10 are taken out, Zee still has literary copyright on account of its sweat and labours in selecting and arranging in its own way features and elements commonly known. But to gain this, that selection, arrangement and sequencing must be shown, and it must be shown that while those elements may not be original, their selection and sequencing is.

1 *C Cunniah & Co v Balraj & Co*, AIR 1961 Mad 111; *V Govindan v EM Gopalakrishna Kone & Anr*, AIR 1955 Madras 391.

2 (2008) 1 SCC 1.

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 & Anr*³ 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 8th 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, 8th 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

3 (2008) 2 Bom CR 400.

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.

21. On the question of passing off, Mr Kadam grants that the settled law on this subject requires that all three elements of the classic trinity be met: reputation and goodwill, misrepresentation and damage. It is settled law that damage need not be proved. But I do not think it is possible to easily arrive at a conclusion that in a common law action in deceit, it is possible to bypass proof of misrepresentation altogether. Where a Plaintiff comes to Court after the event (i.e., after the service is rendered or after the product is sold) proof of misrepresentation is fairly straightforward. Usually, there can be no misrepresentation without a sale. But very often reliefs in passing off are also sought in anticipation in *quia timet* actions. Here perhaps slightly different standards will apply. I expect the standard must be at least a notch higher because a plaintiff claiming relief in passing off in a *quia timet* action must be able to show that the defendant's product or service is such that there is no possibility of it being anything other than a deceitful misrepresentation. That is the level to which such a plaintiff must be able to take his case on deceptive similarity (not just confusion). That similarity must not only be shown to be substantial but so deceptive that it cannot be anything but misrepresentation. Passing off, as the very phrase suggest, is deception as to source. In this case it would amount to saying that Sony leads persons to believe that its show scheduled to air from Saturday, 8th April 2017 onwards is one made by Zee or in association with Zee or is copied from the show

previously made by Zee. As I said, without seeing the show it is difficult to come to this conclusion and the standard of proof required would be much higher. Zee would be required to show that Sony could not *possibly* make a talent show of the kind that it seeks to do except by passing off its show *Sabse Bada Kalakar* as a continuation or copy of Zee's *India's Best Dramebaaz*.

22. Now Mr Kadam asks me to look at a few comparative stills from the two shows, though this can have little do with the rights claimed in the literary work. Of necessity, Mr Kadam has been restricted to using images from Sony's promotional material. I have allowed him to tender this compilation. In pages 1 to 5 of this compilation clips or stills from Zee's show are shown at the bottom and those from Sony are shown at the top of each. In both shows there are three judges. But what of that? There are any number of shows with three judges. The judges sit behind a long table or desk on a slightly elevated podium. So do many judges, both on television and off. The façade of the podium is somewhat ornate. That only speaks to the set designers' taste, or whatever passes for it. The fact that in one element there are two children apparently dressed acting as lawyers also does not tell me very much either about the shows or the children, although it does tell much about public perception of the practice of law. Perhaps not coincidentally the very next page shows two children dressed in battle fatigues; and the third shows a dance costume with jewellery. I would imagine that many of these are common when one is looking for acting talent in different roles. Play-acting a soldier, a lawyer, a doctor, an engineer or someone driving a fire engine or piloting an airplane are all fairly standard within this genre. This will not suffice to establish passing off.

Looking at this, it would not be possible to say that Sony's *Sabse Bada Kalakar* is nothing but Season 3 of Zee's *India's Best Dramebaaz*. The reliance, therefore, on *Samuelson v Producers' Distributing Co Ltd*⁴ does not much assist Mr Kadam. The assessment there was of a completely different nature in any view of the matter.

23. Mr Kadam also referred to the decision in *Hexagon Pty Ltd v Australian Broadcasting Commission*⁵ but here again, I am not satisfied that this is an argument that needs to be addressed at all. Nobody denies that Zee has earned goodwill and reputation in the first two seasons of its own show. This only speaks to prove of the first of the three elements in the passing off action. The other two still need to be addressed.

24. Lastly Mr Kadam turns to a decision of a learned Single Judge of this Court (SJ Vazifdar, as he then was)⁶ in an action by Zee seeking a restraint in respect of its very popular *Antakshari* show. The decision was reversed in part in appeal because the learned Single Judge placed considerable reliance on newspaper reports, a course of action not approved by the Appeal Court. What the learned Single Judge found was that there was material before him to not only establish the likelihood of deception but the high probability of deception (paragraph 164). The material on which Vazifdar J came to that conclusion is unimportant. What matters is

4 (1932) 1 Ch Div 201.

5 (1976) 23 RPC 628.

6 *Zee Entertainment Enterprises Ltd v Gajendra Singh & Ors*, 2008 (36) PTC 53 (Bom).

that to grant the injunction he thought it necessary that he should have before him sufficient material. If, therefore, I cannot find material to establish the likelihood of deception let alone a high probability, I do not see how I could ever grant the injunction in question. I also believe Mr Dwarkadas is correct in inviting my attention to a telling paragraph in this very judgment where Vazifdar J said:

“139. For instance, if the programme consisted of a simple music contest where the participants in each show sing songs chosen by them and the winners of each show would then participate in the next show and so on, till the final round, it would be difficult to maintain a passing off action.

On the other hand, if the musical contest were to be held in a novel manner, with additional, novel, innovative inputs, the mere fact that the participants changed from round to round may not come in the way of the Plaintiff's maintaining a passing off action. **The test in each case therefore is whether the show is sufficiently novel and original so as to create a lasting and significant impression on the viewer.** If it is, I see no reason why a passing off action cannot be maintained in respect thereof.”

(Emphasis added)

25. “Novel and original” said Vazifdar J, and I see no reason to disagree. Zee must, therefore, show this; if not, it fails.

26. Dr Tulzapurkar for the 1st Defendant makes it clear that since the Plaintiffs have not addressed the question of confidentiality or

its breach although this is pleaded in the plaint, the Defendants have not in their address dealt with this at all. Dr Tulzapurkar does point out that it is wholly unrealistic for the Plaintiffs to put it about that their show of either 2004 or their show of 2012 was unique in itself. I believe Dr Tulzapurkar is correct in saying that it is not possible to accept the submission that there can be any such monopoly in the concept of a talent hunt for children. In the Affidavit in Rejoinder at page 143, the Plaintiffs have attempted to expand somewhat the scope of what is being said. I will reproduce that paragraph in full:

“15. With reference to paragraphs 12 and 13 of the said Affidavit, I say that it is not open for the Defendant No. 1 to dissect the works of the Plaintiff. I say that the Plaintiff's claim is in respect of the literary works as a whole hence what is to be considered is the averments as made in paragraphs 8 to 10 of the Plaint in its entirety and as a whole. The Plaintiff's case cannot be broken down into a Concept Note and a Production Bible, as is sought to be done by the Defendants with a view to dilute the Plaintiff's case. It is submitted that the Defendants contention arising of breaking up the entire IPR of the Plaintiff's into a Concept Note and Production Bible separately and then contending that the steps enumerated in paragraph 13 of the said Affidavit are inherent in the production of a TV reality show is liable to be rejected since that is not the case as pleaded by the Plaintiffs. It is respectfully submitted that the Plaintiff's claim in respect of Concept Note at Exhibit “A” to the Plaint and Production Bible at Exhibit “B” should be considered as whole and not with regard to rival shows. In fact the concept of an acting based talent hunt is unique, novel and distinct and first adopted by the Plaintiff. The idea in itself is saleable and the

execution and expression of this saleable idea is capable of protection in law. I further say that many of the contestants who have participated in the Plaintiff's show are recognized and known to the public at large only on account of their association with the Plaintiff. In fact the said concept of Acting Talent Hunt for children in the age group of 5 to 12 years has been first conceived only by the Plaintiff. I say and submit that the uniqueness of the Plaintiff's concept has been set out in greater detail in paragraph 8 to 10 of the Plaint and I hence deny that the Plaintiff cannot claim to be the owner of the copyright in the said Concept Note as alleged."

27. I find it difficult to accept much of this. Indeed I would question the assertion that the concept of an acting-based talent hunt is unique, novel, distinct or that it was first adopted by Zee. That needs much more material, and I can find it nowhere in these papers. If this is proved, then undoubtedly some level of protection will follow. But merely making this assertion is not enough. This passage incidentally is with reference to paragraphs 8, 9 and 10 of the plaint and, at the cost of repetition, as we have seen those paragraphs do not set out with sufficient precision what is either unique, novel or distinct.

28. Sony has clearly stated in its Affidavit at paragraph 17 (Notice of Motion paper-book page 19) that none of the elements in paragraph 10 feature in Sony's show. Again there is the question of whether Zee was better advised to wait for the telecast; but it has chosen its path and little is gained by speculating of what might have been.

29. Dr Tulzapurkar does not rest at this. He is at some trouble to show that Sony has had talent shows of one kind or the other long before they could be said to have been the proverbial twinkle in Zee's eye. Sony's engagement with talent shows goes back to 1996. It says so in its Affidavit in a tabulation in paragraph 16 and it mentions different shows between 1996 and 2016. These include the early *Boogie Woogie* dance reality show of 1996, the later *Indian Idol* show and so on. Details of these are to be found in Exhibit "A1" from page 42 onwards. There are details of singing talent hunts, comedy shows, and at page 48 of children's acting shows. This is actually very interesting because Exhibit "D" at page 48 shows two children's talent show by other channels dating back to 2005 in India and also contains a listing of similar shows overseas. I imagine that both these are far from complete and are only meant to be illustrative. In paragraph 18 of its Affidavit in Reply, Sony points out there are elements that Zee claims to be unique — for example a contestant being awarded a prize or being asked to thank his or her parents or mentor — but these claims are fanciful. Even the question of the character of one of the judges (supposed to be someone of a maternal bent) is not unique.

30. Sony has its own production bible. Dr Tulzapurkar took me through parts of it. I do not think it is necessary to reproduce all of this at this stage. It is sufficient to say that having seen this and having seen Zee's production bible annexed to the plaint, I am satisfied that the two are entirely different works and I have yet to see from the Plaintiffs anything convincing to show that Sony's work is a substantial copy of Zee's work.

31. One of the crucial elements in Sony's work is the introduction of what is called a *guru-shishya* principle where there is a mentor to the child artist. The performances are not only by the mentored children but also by the mentored children with their mentor as a duo. There are also specialized sets of Rules, Regulations, Forms, Terms and Conditions and a completely unique set of Frequently Asked Questions or FAQ.

32. As to Mr Kadam's claim that Sony's production bible arrived with surprising despatch, Dr. Tulzapurkar says that what is not pointed out is that between October 2016 and December 2016 Sony had a dancing talent hunt show with its own format and that this show, called *Super Dancer*, also had a mentor choreographer and was in just the 4-13 age group and featured a similar time slot. Sony began working on its present show using one of its own earlier formats.

33. I believe Dr Tulzapurkar is also correct in saying that given this complexity and the manner in which these shows are put together it would be simply unthinkable to grant a monopoly in such wide, non-specific and fuzzy terms. That would stifle all creativity and put an end to all talent shows of every description. Dr Tulzapurkar is correct, I think, in his reliance on the decision of the Supreme Court in *R.G. Anand v M/s Delux Films & Others*.⁷ That contains the classical statement of law on copyright in paragraph 46.

“46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the

7 AIR 1978 SC 1613.

subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendry 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 negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.

7. Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the Plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader perspective, 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 seeking 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.” सत्यमेव जयते

34. I must test the available material, the commonalities and the broad dissimilarities, and see whether I have before me what the Supreme Court in *RG Anand* describes as clear and cogent evidence. I do not have such material before me at all. The role of judges is of course generic and Zee itself accepts this, but the individual roles assigned to the various judges in the two shows are very different. Having seen the two production bibles, in my view, the manner in which the selections are made and the trajectories of the two shows

are quite distinct. The fact that both feature children, the fact that both seek out children with acting talent, the fact that they seek out children with acting talent from different cities, and the fact that they seek out the best of these is hardly something in which anyone can claim any copyright.

35. Mr Dwarkadas for Defendants Nos. 2 to 4, apart from adopting the arguments advanced by Dr Tulzapurkar also drew my attention to an earlier Philippines show, references to which are at page 146 of the Notice of Motion paper-book. It is no answer, he says, and I think correctly, for Zee to say that the Defendants have pointed out only one previous example. In a copyright infringement action even one prior instance is enough. So far as Frames was concerned, its role was limited. It was contracted to be a producer and to develop the show and its role did not extend any further in this.

36. Having regard to all these circumstances, I do not think that I am in a position to grant Zee the injunctive reliefs it seeks. I must dismiss this Notice of Motion.

37. The Suit is filed in the Commercial Division. This automatically raises the question of costs. I propose to hear Mr Kadam on this because the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (“**Commercial Courts Act**”) have now made a radical departure from the previous law. Section 16 of this Act makes it clear that the provisions of this Act and the amendments it

makes to the Code of Civil Procedure 1908 (“CPC”) override our Rules and the CPC. The Schedule makes several changes to the CPC. These are both procedural and substantive. Most important for the present purposes are the amendments made to Sections 35 and 35A of the CPC. Broadly speaking what these provisions do is to make a complete departure from the earlier law. Undoubtedly this is restricted to cases brought in the Commercial Division. But the objective is clear and that it is to prevent speculative or frivolous filings. The cap in Section 35A(2) is removed. Section 35(1) is amended to say that costs now follow the event; the losing party must pay. In the ordinary course, costs must be awarded and these must be reasonable relating to *inter alia* legal fees and expenses incurred and any other expenses incurred in connection with the proceedings. The proviso to substituted Section 35(2) says that a Court may make an order deviating for the general rule for reasons to be recorded. In other words, I must record reasons for *not* awarding the costs, the general rule being that costs must be paid. This is of course always discretionary as Section 35(1) says and there is further discretion as to the quantum and time for such payment. More importantly we have in sub-Sections 3 and 4 the broad guidelines that set out the circumstances that the Court must bear in mind while making an order of costs and, the specific provisions for costs at various stages, from different times and the interest, if any, awarded. Section 35(2) makes it clear that the general rule is that the unsuccessful party must pay the costs of the successful party.

38. Apart from the fact that I do not have an application from the Defendants seeking an award of costs, the submission from Mr

Kadam and Mr Khandekar is that Zee was compelled to move for urgent ad-interim reliefs before the release of the show without having the fullness of the material before it. In any case, they were put to a fair amount of inconvenience even to get a disclosure of Sony's production bible. I will also grant that Mr Kadam's clients have not been able to see the show and it is also equally likely that the first few episodes of the show will not necessarily assist them in gathering the material that they need.

39. These are all considerations to be weighed in the balance and I will, therefore, and for these reasons, not make an order of costs at this stage. I will also leave it open to the Plaintiffs to file a fresh Notice of Motion if they are so advised at any subsequent stage and of course that Notice of Motion will be decided on its own merits. I do make it clear however, that these reasons for not awarding costs may not be available to the Plaintiffs then.

40. The Notice of Motion is dismissed. No costs.

(G. S. PATEL, J.)