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O.A.No.451 of 2024 & A.No.3665 of 2024 in
C.S.(Comm. Div) No.115 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	30.09.2024
Order pronounced on	19.10.2024

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

C O R A M :

O.A.No.451 of 2024 & A.No.3665 of 2024
in
C.S.(Comm. Div) No.115 of 2024

O.A.No. 451 of 2024

Galatta Media Private Limited,
having its registered office at
7th Floor, Sigma Wing, Raheja Towers,
177, Anna Salai, Chennai, Tamil Nadu, India-600 002
Represented by its authorized representative
Mr.Vasanth Pyarilal R

... Applicant /Plaintiff

vs.

Nian Media Private Limited
having its registered office at
No.118-E, Building-B, Velachery Main Road,
Guindy, Chennai-600 032.

... Respondent/Defendant

A.No.3665 of 2024

Nian Media Private Limited
having its registered office at
No.118-E, Building-B, Velachery Main Road,
Guindy, Chennai-600 032.

... Applicant/Defendant



O.A.No.451 of 2024 & A.No.3665 of 2024 in
C.S.(Comm. Div) No.115 of 2024

VS.

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Galatta Media Private Limited,
having its registered office at
7th Floor, Sigma Wing, Raheja Towers,
177, Anna Salai, Chennai, Tamil nadu, India-600 002
Represented by its authorized representative ... Respondent/Plaintiff

Prayer in O.A.No.451 of 2024 in C.S.(Comm Div) No.115 of 2024: This original application has been filed under Order XIV Rule 8 of Original Side Rules, 1994 r/w. Order XXXIX Rule 1 & 2 of the Code of Civil Procedure seeking to grant an order of INTERIM INJUNCTION restraining the Respondent/Defendant by themselves or their directors, proprietors, subsidiaries, affiliates, franchisees, officers, men, partners, servants, agents, successors in interest, licensees, assignees, representatives or under any them, from in any manner, directly or indirectly infringing the Applicant's Copyrights detailed in plaint Schedule A, pending disposal of the suit.

Prayer in A.No.3665 of 2024 in C.S.(Comm. Div) No.115 of 2024: This application has been filed under Order XIV Rule 8 of Original Side Rules, High Court Madras r/w. Order XXXIX Rule 4 of Civil Procedure Code seeking to vacate the order dated 08.07.2024 passed in O.A.No.451 of 2024 in C.S.(Comm. Div.) No.115 of 2024.

In O.A.No.451 of 2024:

For Applicant/Plaintiff : M/s.M.S.Bharath &
Mr.Navod Prasannan



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O.A.No.451 of 2024 & A.No.3665 of 2024 in
C.S.(Comm. Div) No.115 of 2024

For Respondent/Defendant : Mr.S.R.Raghunathan for
M/s.P.S.Deepika

In A.No.3665 of 2024

For Applicant/Defendant : Mr.S.R.Raghunathan for
M/s.P.S.Deepika

For Respondent/Plaintiff : M/s.M.S.Bharath &
Mr.Navod Prasannan

COMMON ORDER

In a suit seeking relief in respect of alleged infringement of plaintiff's copyright in the photographs and videographs described in Schedule A of the plaint by displaying / exhibiting the same through the links specified in Schedule B thereof, the plaintiff presented O.A.No.451 of 2024 seeking interim relief to restrain such alleged infringement. By order dated 08.07.2024, an ad-interim injunction was granted until 23.07.2024. Such order was extended from time to time and remains in force as on date. By A.No.3665 of 2024, the defendant seeks to vacate the above mentioned interim order. Both these applications are disposed of by this common order.



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2. Oral arguments were advanced first by learned counsel for the defendant, Mr.S.R.Raghunathan. His first contention was that the plaintiff has failed to establish ownership of copyright in the works detailed in Schedule A to the plaint. By way of substantiation, learned counsel submitted that the plaintiff asserts that copyright in some of the works detailed in Schedule A were earlier vested in Mrs. Aruna Radhakrishnan, Proprietrix, Ritz Magazine, and that Ritz magazine was later operated and run by Abaddon Media Private Limited (Abaddon). After pointing out that Abaddon was incorporated only in the year 2018, learned counsel contended that the assignment deed for the alleged assignment of copyright by Mrs. Aruna Radhakrishnan to Abaddon is not available. Similarly, he submitted that the plaintiff asserts that some of the works detailed in Schedule A were created by or for the South Scope magazine. While the plaintiff claims that South Scope was acquired by Black Buck Entertainment Private Limited (Black Buck), proof of acquisition of South Scope by Black Buck and proof of assignment of copyright by South Scope to Black Buck is not on record.



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3. The next contention of learned counsel was that the display or exhibition of allegedly infringing material was incidental and transient in the cinematographic films of the defendant. Learned counsel contended that Section 16 of the Copyright Act, 1957 (the Copyright Act) delineates the total scope of protection of a copyright holder. He further contended that exceptions have been carved out in Section 52 of the said enactment. By relying on sub-clause [iii] of clause (a) of sub-section (1) of Section 52, learned counsel contended that the use of photographs while reporting current events or current affairs relating to a personality/celebrity, whose photograph was displayed / exhibited in order to identify the subject of such cinematographic film, falls within the exception carved out in the above mentioned provision. By also relying on sub-clause [ii] of clause (u) of sub-section (1) of Section 52, learned counsel submitted that the inclusion of photographs by way of background or incidentally in the context of the principal subject of the film does not constitute infringement of copyright. In this connection, he contended that the photographs were exhibited fleetingly, i.e. for a few seconds.



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4. In support of these contentions, learned counsel referred to and relied upon the following judgments:

(i) *Kelly v. Arriba Soft Corporation, United States Court of Appeals, 9th circuit, judgment dated 06.02.2002 (Kelly)*, for the proposition that the use of images over which copyright is owned by another person as thumbnails qualifies as fair use when such photographs are meant to be viewed by the public for information purposes.

(ii) *Suneet Varma Design Pvt. Ltd. and another v. Jas Kirat Singh Narula and another, 2006 SCC Online Delhi 1889 (Suneet Varma)*, particularly paragraph 18 thereof, for the proposition that the use of copyrighted material by way of background or incidental material for the principal subject matter would fall within the scope of Section 52(1)(u)(ii) of the Copyright Act.

(iii) *Fraser-Woodward Limited v. British Broadcasting Corporation Brighter Pictures Limited, [2005] EWHC 472(Ch) (Fraser-Woodward)*, particularly paragraphs 79 to 86 thereof, with regard to incidental use of photographs.

(iv) *Power Control Appliances and others v. Sumeet Machines Pvt.*



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Ltd. (1994) 2 SCC 448 with regard to acquiescence as a defence in respect of the alleged infringement of intellectual property rights.

5. Mr.M.S.Bharath, learned counsel, made submissions in response and to the contrary. His first submission was that the Ritz magazine was launched in the year 2004-05 as a proprietary concern of Mrs. Aruna Radhakrishnan. Subsequently, Mrs.Aruna Radhakrishnan and Mr.Muthukrishnan Sivaramakrishnan incorporated Abaddon. Pursuant thereto, the Ritz magazine was transferred to and operated by Abaddon. He also submitted that Abaddon also operates the website www.ritzmagazine.in, and that videos are hosted in the above mentioned website by Abaddon under the title 'Ritz TV'.

6. Similarly, he submitted that the South Scope magazine was initially started by Mrs. Aruna Radhakrishnan, who was the Managing Editor thereof. After the incorporation of Black Buck in 2012, South Scope was acquired by Black Buck. Later, the intellectual property of all these entities was consolidated in the plaintiff pursuant to assignments. As a result, he



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submitted that the plaintiff is the current owner of the copyright in all the works detailed in Schedule A.

7. The next contention of Mr.Bharath was that the display of infringing photographs by the defendant was not incidental to the cinematographic films. By way of substantiation, he contended that these photographs are used, in most cases, for the entire duration of the film. By referring to paragraph 5 of the counter affidavit, he submitted that the defendant has admittedly put the photographs to commercial use. Consequently, he contended that the fair use exception in Section 52 of the Copyright Act is not applicable. In this connection, he distinguished the judgments relied upon by learned counsel for the defendant. As regards *Fraser-Woodward*, he pointed out that the judgment dealt with a programme critiquing tabloid news. Likewise, he pointed out that *Kelly* pertained to a search engine and that the thumbnail photographs therein could only be viewed properly if the viewer accessed the copyright owner's website. In that context, he submitted that the use by Arriba was considered as transformative/ fair use. As regards *Suneet Varma*, he pointed out that the



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Court concluded that a trial is necessary to decide whether use is incidental and, therefore, within the exception under Section 52(1)(u)(ii) of the Copyright Act.

8. Learned counsel relied on the judgment of the Delhi High Court in *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd. and Others*, MANU/DE/1125/2010, with regard to the applicability of the exceptions in Section 52 of the Copyright Act and, particularly, to emphasise that the said exceptions are only intended to apply when copyrighted material is used for criticism or review. By relying on the judgment of the UK Court of Appeals in *Associated Newspapers Group PLC v. News Group Newspapers Limited and Others* [1986] R.P.C. 515, learned counsel submitted that it is necessary to consider the motive behind the use of copyrighted material in order to determine whether such use is fair use.

9. By way of rejoinder, Mr.Raghunathan reiterated that the flow of title in respect of material over which the plaintiff claims copyright has not



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been established. Since only a juristic entity with title can sue, he submitted that the plaintiff has failed to place on record evidence with regard to the acquisition of Ritz magazine by Abaddon as also the acquisition of South Scope by Black Buck. After further submitting that fair use is not limited to review or criticism, learned counsel contended that the plaintiff has failed to establish that the balance of convenience is in its favour or that irreparable hardship would be caused unless the interim injunction is extended. Consequently, in conclusion, learned counsel submitted that the interim order is liable to be vacated.

10. The first question that falls for consideration, on the basis of rival contentions, is whether the plaintiff has placed on record *prima facie* evidence that it has title to the material detailed in Schedule A of the plaint. In order to establish title, the plaintiff has placed on record declarations dated 20.06.2024 and 26.06.2024 from Mr.M.Gurunath Prabhu and Mr.Senthilkumar, respectively, declaring that specific photographs and videos were shot by them on being commissioned to do so by Abaddon or the plaintiff, as the case may be. Similarly, confirmatory email dated



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26.06.2024 from Mr.Kunal Daswani and Mr.R.Sunder of

Sunderphotography have also been placed on record. In addition, the plaintiff has filed the Copyright Assignment Deed dated 20.06.2024 from Black Buck to the plaintiff and Copyright Assignment Deed dated 26.06.2024 from Abaddon to the plaintiff. When these documents are examined, it appears *prima facie* that the plaintiff is the owner of the copyright in the materials detailed and described in Schedule A of the plaint. This leads to the question whether there is *prima facie* evidence that the defendant committed infringement of the plaintiff's copyright in such materials.

11. Both in the written statement and in the affidavit in support of Application No.3665 of 2024, the defendant asserts that it created channels such as BEHINDWOODS, BEHINDWOODS TV, BEHINDWOODS O2, BEHINDWOODS AIR, BEHINDWOODS HITS and BEHINDWOODS MAX. The defendant also states that these channels have a very large subscriber base, which is as large as 1.64 crore subscribers as regards BEHINDWOODS TV. Thus, the defendant asserts that it is one of the



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biggest online media channels available on platforms like *YouTube*, *facebook* and *Instagram*. The defendant also points out that the allegedly infringing data is not currently available on any of these platforms.

12. The defendant further states that the plaintiff made 35 strikes against the defendant's videos between 27.06.2024 and 28.06.2024 with the ulterior motive of targetting the sponsor of the defendant's events "Behindwoods Gold Icon 2024".

13. From the narration in the written statement and counter affidavit, it appears *prima facie* that the defendant does not deny the use of material detailed in Schedule A of the plaint. Instead, the contention of the defendant is that the defendant's use of such material falls within the exceptions provided in Section 52 of the Copyright Act and that the plaintiff has acquiesced in such use. The defendant further asserts that the balance of convenience is in favour of the defendant and that the plaintiff has failed to establish irreparable hardship.



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14. The Copyright Act stipulates that certain acts would not constitute an infringement of copyright. Such acts are set out in Section 52 of the Copyright Act. The defendant relied upon Section 52(1)(a)(iii) and Section 52(1)(u)(ii). The said provisions are set out below:

"(1) The following acts shall not constitute an infringement of copyright, namely,--

[(a) a fair dealing with any work, not being a computer programme, for the purposes of--

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public;

Explanation.-- The storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.]

(u) the inclusion in a cinematograph film of--

(ii) any other artistic work, if such inclusion is



*only by way of background or is otherwise
incidental to the principal matters represented in
the film;*

15. The question to be determined is whether the use of the material detailed in Schedule A of the plaint by the defendant falls *prima facie* within either of the two exceptions referred to above. The exception in Section 52(1)(a)(iii) is for the fair use of a work *inter alia* for reporting of current events and current affairs. By way of illustration, although the copyright for broadcast of a cricket match may be vested in a particular television channel, a news reporter who reports on such cricket match would be protected under this provision. Similar protection would be extended to a news report in respect of an award ceremony for cinema although the copyright for broadcasting such award ceremony may be vested in a particular entity.

16. In the case at hand, the defendant admits that it has created online channels which are hosted on online platforms like *YouTube, facebook and Instagram*. It also admits that it is a competitor of the plaintiff and that it has a very large viewership. *Prima facie*, the material on record does not indicate that the material was used to report on current news or current



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affairs but rather was used for discussing the career of personalities concerned. Therefore, the defendant's use of copyrighted material does not *prima facie* fall within the fair use exception under Section 52(1)(a)(iii) of the Copyright Act.

17. Sub-clause (ii) of clause (u) of sub-section (1) of the Copyright Act carves out an exception in respect of the inclusion in cinematographic films of any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film. In order to fall within this exception, it becomes necessary for the person raising the defence to establish that the inclusion is by way of background or is otherwise incidental. While learned counsel for the plaintiff contended that the photographs were exhibited fleetingly, this contention is denied by learned counsel for the plaintiff, who contends that, in most cases, the photographs are displayed for the entire duration of the film. If the subject of the film is a particular celebrity and copyrighted photographs of such celebrity are used in the film, the use may not be incidental. On the contrary, if the subject of the film is wildlife protection and a photograph of



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a celebrity in a forest is shown, the use of the photograph may qualify as incidental. Thus, it becomes necessary to examine evidence carefully in order to decide whether the use of copyrighted material is incidental or by way of background. In view of the conflicting positions taken by the contesting parties, such determination cannot be made at this juncture. The ratio of the decisions in *Suneet Varma* and *Fraser Woodward* also indicate that such determination can only be made after examining the evidence adduced by the adversaries in this regard. Hence, it follows that the exception cannot be pressed into service at this juncture.

18. The next aspect to be considered is whether the balance of convenience is in favour of the defendant on account of the channels being operational for a considerable period of time and, more importantly, on account of the relevant videos having been uploaded much earlier. Both in the written statement and in the affidavit in support of Application No.3665 of 2024, the defendant has provided the dates on which the relevant videos were uploaded. The defendant has also set out details of the number of subscribers of the different channels of the defendant. The data placed on



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record by the defendant indicates *prima facie* that the defendant's viewership is substantial. The plaintiff asserts that it became aware of the infringing use by the defendant in or about June 2024 and that it immediately initiated strikes through *facebook* and other platforms. Therefore, it appears *prima facie* that there is no acquiescence.

19. As discussed earlier, the defendant asserts that the use of the photographs is by way of background or is otherwise incidental. If the defendant were to be taken at its word, the deletion of the infringing material from the videos / cinematographic films should not detract from the object, purpose and value, including commercial value, of such videos. In effect, the balance of convenience is in favour of deletion of the infringing material since continued infringement until final disposal would cause irreparable hardship especially in view of the wide viewership claimed by the defendant. On the other hand, subject to removing the *prima facie* infringing material, the defendant would still be in a position to exhibit the videos.



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20. For reasons aforesaid, O.A.No.451 of 2024 is allowed by making the order of interim injunction absolute. As a corollary, A.No.3665 of 2024 is dismissed without any order as to costs.

19.10.2024

Index : Yes/No

Internet : Yes/No

Neutral Citation: Yes/No

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SENTHILKUMAR RAMAMOORTHY J.

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Pre-delivery order made in
O.A.No.451 of 2024 & A.No.3665 of 2024
in
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