

Atul

**REPORTABLE**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION  
INTERIM APPLICATION (L) NO. 4371 OF 2021  
IN  
COMMERCIAL IP SUIT (L) NO. 4366 OF 2021**

**TARUN WADHWA**

An Indian habitant and residing at  
Z-3, Ground Floor, West Patel  
Nagar, New Delhi 110008

...Plaintiff

**~ VERSUS ~**

**1. SAREGAMA INDIA LTD**

A company incorporated under  
the laws of India and having its  
office at 2nd Floor, Spencer  
Building, 30 Forjett Street,  
Grant Road, Mumbai 400 036

**2 MAHESH IYER**

. An Indian habitant, having his  
address C/o Saregama India  
Ltd, 2nd Floor, Spencer  
Building, 30 Forjett Street,  
Grant Road, Mumbai 400 036

...Defendants

**APPEARANCES**

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**FOR THE PLAINTIFF**     **Mr Rahul Ajatshatru**, *with Ankita Singh, & Krishma Shah, i/b A&P Partners, for the Plaintiff/Applicant.*

**FOR THE DEFENDANTS**     **Dr VV Tulzapurkar**, *Senior Advocate, with Hiren Kamod, Smriti Yadav, Shwetank Tripathi, & Bhavik Shukla, & Anees Patel, i/b Khaitan & Co., for the Defendants*

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**CORAM: G.S. PATEL, J**

**DATED: 20th October 2021**

**ORAL JUDGMENT**

1. The Plaintiff (“**Wadhwa**”) makes two claims. *First*, that the Defendants (separately, “**Saregama**” and “**Iyer**”) illicitly used Wadhwa’s material, communicated in circumstances of confidentiality, to make a Marathi film. *Second*, that the Defendants infringed Wadhwa’s copyright in one, or possibly three, published works. The two causes of action, breach of confidentiality and copyright infringement, will receive separate considerations.

2. The film in question is called “**Zombivli**”. To my very great disappointment, this is not a documentary about town planning in areas to the north of Mumbai. It is described, instead, as something called a ‘ZomCom’. This is explained to be a comedy about ‘zombies’. Though there may be some romantic elements, the film is not portrayed as a ‘ZomRomCom’. That, I am told, would be difficult to imagine.

3. Mr Kamod began addressing for the Defendants. He told me, quite authoritatively, that it is 'well-known' that a zombie is a re-animated corpse, brought back to some form of locomotion or movement. It has been described as a 'mythological undead corporeal revenant', a creature that has no will of its own.

4. The facts are few. Wadhwa is an amateur film maker. He began working on a comedy about zombies in April 2018. On 21st May 2018, he finalized a synopsis under the title '*Haila! Zombie*'. He registered this synopsis with the Screen Writers' Association ("SWA"). On the same day, he shared this synopsis with Saregama, routed through one of Saregama's divisions, Yoodle Films. Saregama does not deny that the synopsis was shared. On 17th June 2018, Saregama replied to Wadhwa with some feedback, asking him to submit a fully developed and complete screenplay when ready. Wadhwa says he did so, adding details of characters, storyline, plot, some preliminary dialogue, scenes and sequences. This is the first draft of his screenplay. Wadhwa had this, too, registered with the SWA. On 28th August 2018, Wadhwa shared this first draft with Saregama, which acknowledged receipt, said it would respond soon and that it saw some potential in it.

5. A few months later, on 18th October 2018, Saregama wrote to Wadhwa with suggestions for some revisions in the first draft of the screenplay. On 14th December 2018, Wadhwa registered a second draft of the screenplay with SWA, and, that very day, also shared this with Saregama. Again, this is undisputed. In January 2019, Wadhwa sent a reminder to Saregama, which said it would revert soon. But, on 31st January 2019, Saregama wrote to Wadhwa with a

more detailed critique but disengaging from further collaboration. Saregama said it had no interest in continuing the proposal further.

6. Nothing seems to have happened until 2nd August 2020, when Wadhwa found that the 1st Defendant had, on 30th July 2020, announced production of its forthcoming film *Zombivli*, to be released in 2021. Correspondence then followed for the rest of 2020, on which nothing much turns. Wadhwa demanded a screening. Saregama refused. Correspondence went back and forth. Ultimately, in February 2021, Wadhwa filed this suit and sought interim relief.

7. There was no reason to take up the IA with any urgency at that time because Dr Tulzapurkar said that in view of the lockdown and the closure of theatres there was no immediate prospect of the film being released. This statement was continued periodically. The hearing of the IA was scheduled only after Dr Tulzapurkar stated on instructions that the film is now to be released on Friday, 22nd October 2021.

8. By this time, under directions of the Court issued on 17th March 2021, Wadhwa and his Advocates had attended a private screening of *Zombivli*. No application for an amendment was moved after this screening.

9. I have now heard Mr Ajatshatru for Wadhwa and Dr Tulzapurkar and Mr Kamod for the Defendants.

10. As regards the Defendants, a few additional dates are necessary. Iyer was not employed by Saregama on 21st May 2018, when Wadhwa shared his synopsis with Saregama. On 24th June 2018, Iyer, even then not with Saregama, registered a concept note. This was also about zombies and also said to be a comedy. A copy of this concept note is at page 246A of the plaint. It carries *Zombivli* as the working title. It is nobody's case that the ultimate film follows Iyer's concept note exactly. On 5th September 2018, Iyer registered with the SWA a first treatment of his concept note. He registered a second treatment with the SWA on 1st December 2018. Iyer joined Saregama on 31st January 2019, the date when Saregama disengaged from Wadhwa. Iyer says in his Affidavit in Reply to the IA that in May 2019, for the first time, he shared with Saregama the treatment draft that he had developed.

11. I turn first to the prayers in the suit in paragraph 48. Prayers (a) to (e) read thus:

“(a) Pass an order declaring Wadhwa to be the author of the synopsis of Wadhwa's proposed film “**HAILA! ZOMBIE**” dated May 2018 and author and owner of copyright in First Draft of Plaintiff's screenplay dated 28<sup>th</sup> August, 2018 and the Second Draft of Plaintiff's Screenplay dated 14<sup>th</sup> December, 2018, respectively;

(b) Pass an order perpetually restraining the Defendants, jointly and severally, by themselves or acting through any other person from utilizing any elements of Wadhwa's work titled ‘**HAILA! ZOMBIE**’ in any film including the **Impugned Film “ZOMBIVLI”** that will amount to breach of confidentiality of Wadhwa;

(c) Pass an order perpetually restraining the Defendants, jointly and severally, by themselves or acting through any other person from utilizing any portion of Wadhwa's original works titled '**Haila! Zombie**' in any film including the **Impugned Film "ZOMBIVLI"** that will amount to infringement of copyright of Wadhwa;

(d) Pass an order perpetually restraining the Defendants, jointly and severally, by themselves or acting through any other person from releasing, disseminating, communicating to the public or dealing in the impugned film "**ZOMBIVLI**" without consent of Wadhwa;

(e) Pass an order directing the Defendants to give due and proper credit in the **Impugned Film 'ZOMBIVLI'** for utilizing the elements conceived and composed by Wadhwa from his film '**Haila! Zombie**'."

12. The prayers in the IA at page 14 say this:

"(a) Pending the disposal of the present suit pass interim orders restraining the Defendants, jointly and severally, by themselves or acting through any other person from utilizing any part or element of Wadhwa's synopsis / screenplay(s) in respect of film '**Haila! Zombie**' in any film including the impugned film, "**ZOMBIVLI**";

(b) Pending the disposal of the present suit, pass interim orders restraining the Defendants by themselves or acting through any other person from releasing, communicating to public and disseminating the **Impugned Film "ZOMBIVLI"** by any means."

13. About the actual sharing of the material, as a matter of fact, there is no controversy, as I have noted. The only question,

therefore, on the cause of action in breach of confidentiality is whether the plaint conforms to the necessary legal standards.

14. Paragraphs 35, 36 and 37 of the plaint read thus:

“35. **(A) ORIGIN of ‘germ of idea’ & Authorship.** Wadhwa has of his own skill and effort conceived and created the plot/synopsis for a ‘Horror-based comedy Film around Zombies in a Mumbai-Chawl’. The said plot/synopsis was confidential and was shared with the 1<sup>st</sup> Defendant under circumstances of confidentiality. Wadhwa also shared his two drafts of fully developed screenplay with the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was extremely interested in Wadhwa’s Film and engaged with Wadhwa for about seven months and made him submit two sets of screenplay(s). The germ of idea of Wadhwa’s Film originated in Wadhwa and it indeed caught the fancy of the 1<sup>st</sup> Defendant after Plaintiff had shared it with the Defendant No. 1. Plaintiff is author and composer of the Synopsis, First and Second Drafts of the Screenplay of “HAILA! ZOMBIE” and the copyright in the same vests with Wadhwa.

36. **(B) Complete, continuous and uninterrupted ACCESS of Plaintiff’s Works.** The 1<sup>st</sup> Defendant has had enjoyed continuous, uninterrupted and complete access to Wadhwa’s Film (synopsis, screenplay(s) containing character, story, plot elements, dialogue etc.) since May 2018 and has duly acknowledged the receipt of all versions of the works submitted by Wadhwa to the 1<sup>st</sup> Defendant.

37. **(C) Prima Facie proof of USAGE by the Defendants of Wadhwa’s Original Work** Further, from the publicity poster released by the 1<sup>st</sup> Defendant on 30<sup>th</sup> July, 2020, Wadhwa is clear that elements from his work has been utilized in the **Impugned Film**. The impugned poster

as contained in EXHIBIT “N” depicts the scene from Wadhwa’s original work that was conceived by Wadhwa and included in EXHIBIT “A” hereinabove. Since, Defendant No. 1 had refused to share its screenplay and as per reply made on 14<sup>th</sup> August, 2020 (Exhibit S) and has recently refused to screen the film shot by it 14<sup>th</sup> January, 2021 (Exhibit DD), Wadhwa verily believe that elements from his original works have been taken and utilized by the Defendants and thereby Plaintiff’s copyright is being infringed in the making of the **Impugned Film.**”

15. The immediate difficulty with this formulation in pleadings is that paragraph 35 restricts itself to the *synopsis*. It then goes to speak of “the germ of an idea”. Paragraph 37 speaks of “the work done by Wadhwa”. I will proceed on the footing that what the Plaintiff means by these somewhat ambiguous terms is actually all three: the synopsis, the first draft screenplay, and the second draft screenplay.

16. The synopsis itself is to be found in Exhibit “A” at page 46 of the plaint (at page 24 is the forwarding email). The synopsis is a three-page document. It begins by saying that Wadhwa’s synopsis is based on the fable “*The Boy Who Cried Wolf*”, one of Aesop’s Fables. The synopsis stages itself in one of Mumbai’s chawls, a 107-year old structure called Anandwadi. We meet here a protagonist, Bhuvan, a brilliant science graduate but unemployed by choice since his career ambition is to become something called a ‘YouTube Star’, or, as Mr Ajatshatru puts it, a ‘YouTuber’. Apparently, this is now an avocation.

17. Bhuvan has been making prank YouTube videos set in the chawl. These often feature or victimize other residents, upsetting many. Yet, the synopsis says, the YouTube exposure has raised awareness about the chawl and the need to save it from a rapacious builder, Madan Makhija. This worthy was himself once a resident of Anandwadi. He has grabbed all the surrounding land. He wants to put up a high-rise over the Anandwadi land. He also has a personal vendetta against the chawl itself because he once saw his father being victimized on an unproven accusation of theft. Behind the chawl lies a medical research institute. It is the venue, one particular evening, of a stand-up comedy event. Many YouTube ‘celebrities’ have been invited to perform. But not Bhuvan: he is apparently upset at being excluded. Many of those slated to perform are his friends. This institute has been in the news itself for its research in finding a vaccine for something called ‘the rabies-flu virus’. Bhuvan eavesdrops to hear what is happening at the institute. He hears strange growls from his chawl. He believes these to be the sounds of an inebriated neighbour. The sounds become more violent. There are screams. Bhuvan goes to the institute to investigate. He hears, on his way, growls from behind closed doors in some of the homes in the chawl. Some residents are locked in. Others are tied to furniture. The sounds grow louder. At the gates of the institute, Bhuvan sees his YouTube friends running in panic. They rush into Anandwadi and close the gate. They realize that they are being chased or haunted by zombies. A local television channel reports this as a hoax. The authorities are unresponsive. Bhuvan’s calls to the chawl go unheeded. The residents assume — the boy who cried wolf — that he is playing yet another prank. Bhuvan and his friends assemble at his house. A resident rushes in shouting, “*Haila!*”

*Zombie alai!*” Bhuvan and his friends run out to face the zombies. They find none. Instead, there is a medical student and a young intern. Between them, they deduce that food poisoning caused these persons to turn into zombies. By now, there are zombies running around inside the campus and outside Anandwadi too. Bhuvan and his group conclude that this has something to do with the rabies-flu virus. They have to find a solution. They manage to get into the institute and find that by-products of failed experiments were dumped or flushed into the locality’s water supply. This caused the zombie epidemic. Makhija, the wicked builder, is one of the trustees of the institute. He was responsible for waste management. He is suspected of using this waste to scare and even kill the residents of Anandwadi.

18. Wadhwa’s synopsis then shows that Bhuvan and the others tried to report the incidents to the chairman of the institute, but to no avail. They have no evidence against the villain. One of the characters then gets in touch with the institute’s lead researcher. He suggests a solution — an antidote ‘wash’, though this takes time to have any effect. In the climatic scene in the film, Bhuvan and his friends enter the Anandwadi gate in a fire tender and use the water cannons on everyone. Incidentally, in the screenplay (page 132 of the plaint), this is changed to a water tanker. There follows what is described as a water battle. The villain and his henchmen are there too. The villain is bitten by one of the zombies. This will ‘zombify’ him too. All the zombies are then sprayed with the antidote, which seems to work. The film ends with the villain being saved from being turned into a zombie. He is sent to jail.

19. I have before me three sets of comparisons. One chart is by Wadhwa at page 104 of the Affidavit in Rejoinder. Two charts are by the Defendants, separately tendered.

20. Wadhwa's chart seems to have been prepared after the screening. This comparison is divided into several sections. The first is in regard to the locations. Here, Mr Ajatshatru claims that the similarities between the screenplays and the synopsis by Wadhwa and the film are far too many to ignore. In Wadhwa's work we have the chawl, the medical institute and a pharmaceutical company. In the film there is a township called Janata Nagar, a charitable hospital and a water plant where many residents work. Mr Ajatshatru claims that these are crucial to both works. Section B of Wadhwa's list pertains to the feature of a potable water supply. Although this is placed in the chart, in arguments and in the written submissions, Mr Ajatshatru accepts in fairness that he cannot claim any monopoly or exclusivity over the three items in this section. He does, however, say that the ideation — i.e. the expression of the idea of an illness — and the symptoms and the picturization are very similar if not identical. In the Defendants' film, patients are brought in showing symptoms and these correspond to the ones shown in Wadhwa's script. In Wadhwa's work, this is suspected to be food poisoning. Then there is the feature of a secret project in Wadhwa's work. There is also a restricted area in the Defendants' film said to be off-limits. This secret area again is said to be crucial. The first assault on the protagonist and his rescue, described in Section F of Wadhwa's chart, is said to be identical except for the location, as is the next section where a law officer derides the protagonist and gives no credence to his report. In Section I, it is claimed that the

water antidote is a common feature to both. This is also seen in the climax scene (itemized in Section J). The fact that in the Defendants' film there is a fire truck rather than a water tanker as shown in Wadhwa's screenplay is said to be immaterial.

21. The first comparative chart by the Defendants tendered by Mr Kamod on 14th October 2021 is in two parts. Part A has a comparison between Wadhwa's synopsis and Iyer's synopsis. Dr Tulzapurkar points out that this was necessary because from the plaint it is unclear precisely what is being compared to what, and this position seems to shift constantly. The two synopses are entirely distinct. Iyer's synopsis deals with a newly married couple who have moved to Dombivli, a city in Thane District and part of the Mumbai Metropolitan Region. There is a social worker here. The action takes place primarily in an apartment complex, a mineral water bottling plant, a hospital and a slum. There is no virus in the Iyer's synopsis. Residents are affected by toxic polluted water, something that speaks to a universal problem of industrial pollution. The villain owns the mineral water-bottling plant. While trying to create a new immunity-boosting mineral water variant, he pollutes the water through a separate pipeline. That pipe ruptures. People drinking this polluted water end up with the now predicted results. The so-called villain did not intend or know of this action. There is no antidote in Iyer's synopsis. It ends with the infection being contained, a cure being found and people being returned to normalcy. Part B then shows the detail differences between Wadhwa's two draft screenplays and the Defendants' ultimate film.

22. The argument by the Defendants is that while Wadhwa's film is based on a fable ('*The Boy Who Cried Wolf*'), the Defendants' film portrays class differences between the rich and the poor. The logline (the abbreviated one- or two-line description) of Wadhwa's screenplay is entirely different from Saregama's film. There are material distinctions in the settings, characters, supporting cast and the villain. In the film, a departure from Iyer's screenplay, the villain has started diverting municipal water supply to his factory. He sells municipal water as bottled water and supplies it in private water tankers. This is a sort of water mafia. But he has no intention to harm anyone. His plan is to boost immunity using an additive tablet. It is the excess toxic waste from this process that is let out into an outfall. The outfall pipe bursts and people, deprived of municipal water supply, drink it and are immediately affected.

23. The chart also claims that while Wadhwa's approach was 'comic' in its conceptualization, this is untrue of the Defendants' film which is grim and realistic. There are no stylized fights or slow motion sequences. The humour, what little there is of it, is localized to well-known Maharashtrian culture.

24. The other chart from the Defendants, separately tendered today, expands on item 5 of the first chart. This is where Saregama points out that there are some 'tropes' common to all films in the zombie genre, and otherwise even common to cinema. These are very like the *scène à faire* or stock sequences and moments common to the art, and customary to a particular art form or a genre. No monopoly can be claimed over a *scène à faire*. These tropes include,

in the context of a film about zombies, infection through water, a cure by water, locations and so on. The villainous use of a water supply to infect the large population is by no means unknown. The locations over which Wadhwa claims some sort of monopoly are actually common to the city itself, and none can claim exclusivity by describing or using any of these. The onset of symptoms is also not unique. The fact that people do not at first believe there is such an outbreak is also common. That there is a secret laboratory or a research unit is standard fare. So is the initial attack and rescue of a protagonist, the incredulity of law enforcement agencies and so on. As to the antidote and immunity, on the face of it, Wadhwa's comparison appears to be inaccurate. In any case, according to Saregama, the concept of an antidote and immunity is itself a trope, but in Saregama's film there is no antidote at all. Therefore, to claim that there is such a similarity is, in Dr Tulzapurkar's submission, totally incorrect and wildly misleading. The use of water cannons at the end is not to administer the antidote at all but to merely temporarily neutralize the attacking zombies. This chart contains a long list of movies from across the world that have featured the zombies in one form or the other or one or more of the many common elements or tropes.

25. The assertions that Mr Ajatshatru does not make are as important as the ones he does. He does not say that his screenplays have been taken into Saregama's film. Wadhwa has not claimed originality in any one element. He does not claim that there is a shot-by-shot reproduction of his screenplays in Saregama's film. He does assert that Saregama's film 'takes large parts' of Wadhwa's synopsis, and that the film is based on essential or key elements of

the synopsis. Read with the fact that there was an admitted sharing of the synopsis and the screenplays, he submits, the irresistible conclusion to be drawn is that Saregama has substantially lifted the crucial, key, core, or kernel concepts developed by Wadhwa in his synopsis and two screenplays. The resultant film by Saregama is actually Wadhwa's synopsis and screenplays with only minor variations. If you take away Wadhwa's key components from Saregama's film, then nothing at all remains. Anybody seeing Saregama's film and reading Wadhwa's synopsis and screenplays is bound to conclude that the film is taken from the synopsis and the screenplays. The fact that the film has some additions, deviations, or variations does not, in his submission, assist the Defendants. Once it is shown that there was a sharing of the synopsis, the springboard doctrine and the kernel doctrine do not permit the Defendants to take Wadhwa's ideation without his consent. This is his case on breach of confidentiality and copyright infringement.

26. The question here is not about the illicit, substantial or slavish copying by one person of another's entirely original work. Mr Ajatshatru claims Wadhwa has copyright not in any one identified component or even in multiple identified components, but in the manner in which these have been assembled or put together: the stringing together of, as it were, known pearls. This is, therefore, not a question of 'originality' in the work *per se* but the dichotomy between an idea and its expression in copyright law (as distinct from confidentiality law). There is no copyright in an idea. It exists only in a particular expression of an idea, that is to say, how individual elements, none of which are in themselves susceptible to copyright protection, are put together.

27. Unfortunately, Mr Ajatshatru's presentation seems to me an exercise in precisely the reverse direction. Having once stated his proposition generally in the manner I have set out earlier, he then proceeds to identify *individual* elements to claim that because these are similar, there has therefore been a violation of Wadhwa's rights. At the broadest level, let us take his argument of a combination of key elements: a Mumbai chawl, a hospital, a research centre, polluted or poisoned water, villains who seek power, land and control, and of course zombies (because there would be nothing at all without the zombies). In themselves, none of these components lend themselves to any form of monopolization. If copyright is claimed in the arrangement or assembly, it must be shown that that arrangement has been substantially copied. It will not do to say that known elements have been put together in some form, and that those elements also feature in the other work. It is not the commonality of known elements in an idea/expression contest that is determinative. It is the commonality of the arrangement of known elements that must be demonstrated.

28. The problem is with the pleadings themselves because nothing of this assembly is clearly identified in the plaint. From the averments in paragraphs 35 to 37 and the prayers there are only generalities. Once it is conceded that the beginnings of the works are different, and that there can be no monopoly over the process of 'zombification', what Mr Ajatshatru is left with is a submission that the 'overall impression and especially the visual impression' in Saregama's film is so close to Wadhwa's conceptualization that an injunction must necessarily follow.

29. In cinema and in literature, zombies are not new. They feature in many films — and in at least one extremely well-known and popular music video, Michael Jackson’s ‘*Thriller*’. With a gravitas entirely appropriate for a courtroom proceeding, but incongruous to the context, Mr Kamod solemnly informs me that ‘zombies are not naturally occurring phenomena’. I cannot say I am surprised. He says that there are various methods of what he gleefully describes as ‘zombification’. I do not think it is necessary to get into the more exquisite details of these various methods. Equally, there seem to be various methods of what I will, with corresponding glee, describe as ‘de-zombification’. Water happens to be one of them. These are part of what Dr Tulzapurkar and Mr Kamod describe as the very many ‘tropes’ common to the genre., Now, whether the locating or the setting of zombies in Dombivli (thus: *Zombivli*) is merely humorous or an accident is unclear, and perhaps immaterial, because nowhere in the papers have I found anything to indicate that the choice of this particular township to the city’s north was taken by Saregama from Wadhwa’s work. Instead, Wadhwa claims that the milieu of the two works — chawls and towers — are similar. But these, too, are tropes. If a film is set in or anywhere around Mumbai, chawls, towers and slums are inescapable. Similarly, the existence of a research or medical institute is hardly the kind of thing that could sustain a claim of originality. As to toxicity and water poisoning, this city — and I imagine any city in this country — is certainly no stranger to those effects.

30. Breach of confidentiality and copyright infringement are closely tied. The former is frequently claimed for matters that cannot be the subject of copyright infringement. An idea, in

particular, cannot be the subject of a copyright infringement action;<sup>1</sup> but it may be the subject of breach of confidentiality. Either may yield a broadly similar injunction. There is no copyright in India except as provided by the Copyright Act, 1957. But this is not in derogation of a claim of breach of trust or confidence. For Section 16 of the Copyright Act says:

**16. No copyright except as provided in this Act.**— No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force, **but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.**

*(Emphasis added)*

31. There is, in this case, no reason to discuss any finer points of distinction between copyright in published works and unpublished works. In certain circumstances, a claim may fall under both causes of action — copyright infringement and breach of confidence. But Wadhwa’s case on breach of confidence is separated from his case on copyright infringement, for his claim is that the idea (in which no copyright can exist) was communicated in circumstances of confidence to Saregama, and that idea could not have been used by Saregama without Wadhwa’s permission or license.

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<sup>1</sup> *Dashrath B Rathod & Ors v Fox Star Studios India Pvt Ltd & Ors*, 2017 (70) PTC 104 (Bom); *Zee Entertainment Enterprises Ltd v Sony Pictures Pvt Ltd & Ors*, AIR 2017 Bom 221.

32. An obligation of confidence arises when confidential information is shared or communicated or otherwise is to the knowledge of a person in circumstances where he has notice, explicit or implicit, or must be held to have agreed, that the information is indeed confidential. That person would then be restrained from using or disclosing this confidential information without the permission or license, express or implied, of the person who gave or shared it. Where there is a contract — which may be written or oral, express or implied — the obligation stems from the spelt-out terms of the contract. But the obligation exists in equity too, and is rooted in the legal concept of the duty to act in good faith. The respecting of that which is confidential has been said to be a general rule in the public interest.

33. Mr Ajatshatru cites Copinger & Skone James on Copyright,<sup>2</sup> in support of his submission that to succeed in a breach of confidence action, a claimant must establish three elements: (i) that the information he seeks to protect is indeed confidential; (ii) that it was communicated in circumstances that gave rise to an obligation of confidence; and (iii) that the defendant has made, or is about to make, wrongful or unauthorised use or disclosure of that information.

34. Confidence law is perhaps wider than copyright law. It protects the substance of ideas and information, irrespective of the mode of communication. There is no copyright in an idea, but only in the form of its expression. Copyright is a right in rem, but a

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2 15th Ed., 2008.

confidence obligation is entirely in personam. Copyright has a statutorily defined term. Confidence does not. There is no copyright except as provided by the statute, and infringement is also prescribed by statute. A confidence obligation is one in contract or equity (or both). There are statutory defences to a copyright infringement action. These do not apply to a breach of confidence action. The distinction between copyright and confidence assumes importance where, say, a manuscript has been submitted for publication. An obligation not to use the submitted manuscript may be implied and enforced under confidence law, and may extend to a plot or a developed idea that may not otherwise be protected by copyright.

35. In *Zee Telefilms Ltd v Sundial Communications Pvt Ltd & Ors*,<sup>3</sup> a Division Bench of this Court held that in a breach of confidence action, the plaintiff must (i) identify clearly the information relied on; (ii) show that it was handed over in circumstances of confidence; (iii) show that it was information that had to be treated as confidential; and (iv) show that it was used or threatened to be used without consent.

36. In *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,<sup>4</sup> the Court of Appeal said that an obligation of confidence may arise outside a contractual relationship, i.e. outside defined terms of a formal contract between the parties. This does not mean, in my

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3 2003 SCC OnLine Bom 344 : (2003) 3 Mah LJ 695 : (2003) 5 Bom CR 404 : (2003) 105 (3) Bom LR 678 : (2003) 27 PTC 457 (DB).

4 (1948) 65 RPC 203.

reading of *Saltman Engineering* or *Coco v AN Clark (Engineers) Ltd*,<sup>5</sup> that there are no incidents of a contract when breach of confidentiality is claimed. A contract may or may not be written. It may be oral. It may have to be imputed. It may be implicit but no obligation can arise in law outside one or more of three things: (i) some species of contract; (ii) an equitable doctrine or some form of a trust; or (iii) a statutory provision.

37. The decision of Megarry J in *Coco v AN Clark*<sup>6</sup> seems to me to be against Mr Ajatshatru rather than for any proposition he canvasses.

First, the information must be of a confidential nature. As Lord Greene said in the *Saltman* case at page 215, “something which is public property and public knowledge” cannot per se provide any foundation for proceedings for breach of confidence, However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components. Mr. Mowbray demurs to the concept that some degree of originality is requisite. But whether it is described as originality or novelty or ingenuity or

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5 [1968] FSR 415 : 1969 RPC 41.

6 Cited in *Sundial Communications*.

otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information: and, expressed in those terms, I think that Mr. Mowbray accepts the concept.

The difficulty comes, as Lord Denning, M.R. pointed out in the *Seager* case on page 931,<sup>7</sup> **when the information used is partly public and partly private; for then the recipient must somehow segregate the two and, although free to use the former, must take no advantage of the communication of the latter.** To this subject I must in due course return. I must also return to a further point, namely, that where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public; for the recipient must not use the communication as a spring-board (see the *Seager* case, pages 931 and 933). I should add that, as shown by *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293; [1966] R.P.C. 81, the mere simplicity of an idea does not prevent it being confidential (see pages 1309 and 1310). Indeed, the simpler an idea, the more likely it is to need protection.

*(Emphasis added)*

38. This tells us, clearly, that the confidential information must be clearly identified.

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7 *Seager v Copydex Ltd*, [1967] RPC 349.

39. Megarry J in *Coco v AN Clark* also said:

Before I turn to the second main head, that of interlocutory relief, I should mention one point on the substantive law that caused me some difficulty during the argument. **This is what may be called the “spring board” doctrine.** In the *Seager* case at page 931, Lord Denning quoted a sentence from the judgment of Roxburgh, J. in the *Terrapin* case,<sup>8</sup> which was quoted and adopted as correct by Roskill, J. in the *Cranleigh* case. It runs as follows:

**“As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.”**

Salmon, L.J. in the *Seager* case on page 933 also states:

**“The law does not allow the use of such information even as a spring-board for activities detrimental to the plaintiff.”**

Quite apart from authority, I would recognise the principle enshrined in those words as being salutary.

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<sup>8</sup> *Terrapin v Builders’ Supply Co (Hayes) Ltd*, [1960] RPC 128. This citation in the original of *Coco v AN Clark* appears to be incorrect, for it refers to the decision of the Court of Appeals, delivered on 1st, 2nd, 3rd, 4th and 11th December 1959. The appeal was from the decision of Roxburgh J of 31st July 1959, which was reported and cited only as a footnote. After its ratio was affirmed in *Seager*, the original decision of Roxburgh J was reported fully in [1967] RPC 375.

Nevertheless, I am not entirely clear how it is to be put into practical effect in every case. Suppose a case where there is a confidential communication of information which is partly public and partly private; suppose that the recipient of the information adds in confidence ideas of his own, improving the initial scheme; and suppose that the parties then part, with no agreement concluded between them. How is a conscientious recipient of the ideas to comply with the requirements that equity lays upon him? For in the words of Lord Denning at page 931 in the *Seager* case, he

“must take special care to use only the, material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence.”

... ..

What puzzles me is how, as a law-abiding citizen, he is to perform that duty. He could, I suppose, commission someone else to make the discovery anew, carefully abstaining from saying anything to him about aluminium or the design and dimensions which will achieve success; but this seems to me to be artificial in the extreme. Yet until this step is taken and the discovery made anew, he cannot make use of his own added ideas for the further improvement of the design which he had already communicated in confidence to the original communicator, ideas which would perhaps make a success into a triumph. He cannot build his superstructure as long as he is forbidden to use the foundations. Nor is the original communicator in a much better case. He is free to use his

own original idea, which converted failure into success; but he cannot take advantage of the original recipient's further ideas, of which he knows, until such time as he or someone commissioned by him would, unaided by any confidence, have discovered them.

**For those who are not law-abiding and conscientious citizens there is, I suppose, a simple answer: ignore the duty, use the information, and then pay damages.** This may be the course which Lord Denning envisaged in the *Seager* case: for after stating that the recipient should not get a start over others by using the confidential information, he continued on page 932:

“At any rate, he should not get a start without paying for it. It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble.”

I also recognise that a conscientious and law-abiding citizen, having received confidential information in confidence, may accept that when negotiations break down the only honourable course is to withdraw altogether from the field in question until his informant or someone else has put the information into the public domain and he can no longer be said to have any start. **Communication thus imposes on him a unique disability. He alone of all men must for an uncertain time abjure this field of endeavour, however great his interest. I find this scarcely more reasonable than the artificiality and uncertainty of postponing the use of the information until others would have discovered it.**

The relevance of the point, I think, is this. **If the duty is a duty not to use the information without consent, then it may be the proper subject of an**

**injunction restraining its use, even if there is an offer to pay a reasonable sum for that use. If, on the other hand, the duty is merely a duty not to use the information without paying a reasonable sum for it, then no such injunction should be granted.** Despite the assistance of counsel, I feel far from assured that I have got to the bottom of this matter. **But I do feel considerable hesitation in expressing a doctrine of equity in terms that include a duty which law-abiding citizens cannot reasonably be expected to perform. In other words, the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all.** It may be that in fields other than industry and commerce (and I have in mind the Argyll case) the duty may exist in the more stringent form; but in the circumstances present in this case I think that the less stringent form is the more reasonable. No doubt this matter may be canvassed and resolved at the trial; but on motion, in a case where both the probabilities and the evidence support the view that the fruits of any confidential communication were to sound in monetary compensation to the communicator, I should be slow to hold that it was right to enjoin the defendant company from making any use of the information.

*(Emphasis added)*

40. Therefore, the ‘confidential information’ — that which is not in the public domain — must be accurately and specifically identified, and protection must be sought only in respect of that. A generalized statement is never enough. In *Beyond Dreams Entertainment Pvt Ltd v Zee Entertainment Enterprises Ltd & Ors*,<sup>9</sup> a learned Single Judge of this Court summarized the components of

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9 2015 (62) PTC 241 (Bom).

confidentiality, inter alia holding that the confidential information must be clearly identified.

41. In *Narendra Mohan Singh & Ors v Ketan Mehta & Ors*,<sup>10</sup> I followed this decision and held that the *Beyond Terms* ratio demanded precision in identifying what was or was not covered by confidentiality. Now where some of the material is mixed, this presents a great difficulty. This is the important passage from *Coco v Clark* I extracted above.

42. Essential, therefore, to any case of confidentiality are precision, originality and completeness of disclosure. The precise identification must be in the plaint. The confidential information must be proprietary. It must, in short, be original. This is not the originality of expression that is the subject of copyright law; it may be the originality of idea, and it is used here in contradistinction to whispering in alleged confidence matters that are already known. Those are never subjected to the doctrine. Any confidential information by definition must be outside the public domain. It must also be sufficiently developed to an extent that lends itself to realization. All these elements must co-exist. It is not enough for a plaintiff to say, for instance, that everything is original, or that some things are original and some things are not but not identify them. Therefore: for a cause of action in breach of confidence to succeed there must be precision, there must be originality, and there must be completeness. All the required elements of confidentiality must be shown. It is not enough to show only some of them.

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<sup>10</sup> 2015 (64) PTC 260 (Bom).

43. The springboard doctrine is really an extension or a result of the breach of confidence principle. It says that a matter communicated — and, I would add, communicable — in circumstances of confidence cannot be used by a defendant as a springboard to bring forth a rival work. Mr Ajatshatru claims that Wadhwa’s kernel or core idea and its basic expression were communicated in confidence. Saregama could not use these without Wadhwa’s permission. This argument has the same difficulties as the general argument on breach of confidence: fundamentally, a lack of precision. There is also the fact that at the time when Iyer began working on his synopsis and treatment, he was not employed with Saregama. It has not been shown to me how there can be said to be any communication in confidence as between Wadhwa and Iyer.

44. On breach of confidence, a plaintiff must satisfy all four tests set out in *Sundial Communications*. Wadhwa fails the prima facie test by failing to present a clear and unambiguous identification of the proprietary, original material other than that which was copyright-protected and said to be confidential. I am not inclined to accept Wadhwa’s submission as voiced by Mr Ajatshatru in his short written submission that Saregama’s film has utilized ‘Wadhwa’s materials and elements contained therein’ without Wadhwa’s permission. This is too generalized and ambiguous to support a grant of an injunction in equity.

45. As to copyright, Mr Ajatshatru relies on the well-known decision of the Supreme Court in *RG Anand V Delux Films & Ors.*<sup>11</sup>

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11 AIR 1978 SC 1613.

That sets out the well-known proposition that there is no copyright in an idea. When two ideas are developed, there are bound to be similarities. A sure test is to see whether a viewer or reader having seen both works unmistakably concludes that the later work is a copy of the original. Even if the two works are thematically the same, but treated and presented differently, there may be no question of copyright infringement. Incidental co-incidences are not copyright infringement. Infringement is established only by clear and cogent evidence.

46. In another manner of putting it, infringement necessarily implies similarity, but the converse is not true: mere similarity does not always imply copying or infringement.

47. In *XYZ Films LLC & Ors v UTV Motion Pictures & Ors*,<sup>12</sup> I held that the test of infringement is one of degree: how much has been copied? How much is similar? If the rival work is so extensive a replication that the copied portion is the essence of it — take out the copied portion and nothing remains — then an injunction will follow, but not otherwise. There is no copyright in any theme or concept. If the realization of that concept is not shown to be copied, there is no infringement.<sup>13</sup>

48. Mr Ajatshatru's submission is, I think, somewhat of an expansion of his pleadings when he claims an infringement of the synopsis and the two screenplays. That is not how the submissions

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12 2016 (67) PTC 81 (Bom).

13 *Shivani Tibrewala v Rajat Mukherjee & Ors*, 2020 (81) PTC 329.

and prayer reads, but for the purposes of this order, I will let that pass. His submission is that there is such a qualitative similarity that it is impossible to hold that Saregama's film is not lifted from Wadhwa's work. He invites my attention to my judgment in *Mansoor Haider v Yashraj Films Pvt Ltd*.<sup>14</sup> I do not see how this decision assists Mr Ajatshatru at all: I held that scenes customary to the genre would not support a case for infringement.

49. According to him, he says that there is a seriously arguable case placed by Wadhwa and an injunction, therefore, must follow.<sup>15</sup>

50. The balance of convenience is with Wadhwa, he submits, having regard to the facts set out above. Wadhwa would also be put to great hardship and deprived of the necessary recognition. He also submits that Wadhwa's claim to uniqueness and novelty lies not in any one component but in the combination. But we have seen that that is not how his plaint or Rejoinder proceed at all. In fact, at page 104 of the Rejoinder it is individual elements that are picked up to show alleged similarities.

51. In the written submissions, I find an unacceptable muddling of crucial concepts. For example, in item (c)(ii) at page 5, the so-called admitted similarity is said to be between Wadhwa's synopsis and the resultant film — as distinct from Iyer's synopsis; which was never the case to begin with. Also, just generally stating that Wadhwa's synopsis had a detailed setting, a protagonist, antagonist,

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14 2014 (59) PTC 292 (Bom).

15 *Dalpat Kumar v Prahlad Singh*, 1992 (1) SCC 719 : AIR 1993 SC 276.

cause of infection, cure, administration and a climatic ending are again in generalities and do not assist.

52. Once a plaintiff disclaimed exclusivity in crucial concepts, and also does not show with precision and accuracy the matters outside copyright law for which breach of confidence protection is claimed, I do not see how an injunction can be granted. Both causes of action demand exactitude. It is not possible to grant injunctions on surmises or suppositions. The pleadings must be precise and the facts must be clearly shown.

53. Having regard to these circumstances, I am not satisfied that Wadhwa has made out a sufficient prima facie case for the grant of interim relief on either of these grounds, i.e. breach of confidence or copyright protection.

54. The IA is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

55. The film is scheduled for release just 48 hours from now. I have heard the matter at the earliest possible opportunity, once the scheduled release date was known. This has not left much time between now and the release date. Therefore, it may not be possible to have this judgment pronounced in open Court, have it transcribed, corrected and uploaded before Friday, 22nd October 2021. I will, therefore, release the operative portion separately. It will be uploaded by tomorrow, 21st October 2021.

**56.** The corrected version of this order will be uploaded by 26th October 2021.

**57.** All concerned will act on production of a digitally signed copy of this order.

**(G. S. PATEL, J)**